Healy v BOP One N. End LLC
2020 NY Slip Op 33416(U)
October 16, 2020
Supreme Court, New York County
Docket Number: 150945/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** ***Justice*** **PART** **IAS MOTION 47EFM**

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MATTHEW S. HEALY AND MARISOL E. HEALY,

Plaintiffs,

- v -

BOP ONE NORTH END LLC, KCG HOLDINGS INC., AND JT MAGEN & COMPANY, INC.,

Defendants.

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INDEX NO. 150945/2017

MOTION DATE

MOTION SEQ. NO. 001, 002, 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55-76, 145, 148, 150-52, 155-59; (Motion 002) 77-99, 137-39, 146, 149; (Motion 003) 100-129, 133-35, 147, 154

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Matthew S. Healy commenced this Labor Law action to recover for personal injuries he suffered on July 22, 2016 during the course of his employment at a construction project located at 300 Vesey Street, New York, New York. Defendant BOP One North End LLC was the owner of the premises, defendant KCG Holdings Inc. was the lessee, and defendant JT Magen & Company was the general contractor which hired plaintiff's employer, third-party defendant Blackbird Iron Works Inc., to perform structural steel work at the project. On the day of the accident, plaintiff was tasked with reinforcing a horizontal floor beam on the tenth floor of the project. Plaintiff used a manlift in order to reach the beam and then stood on the rails of the manlift while his partner, who was standing on a ladder on the other side of the wall, attempted to modify the piece of metal ("channel") plaintiff brought to reinforce the beam. As his partner started to weld the channel, plaintiff felt an electric shock go through his body, causing him to fall off the rail and onto the platform of the manlift.

Plaintiff now moves pursuant to CPLR 3212 for summary judgment on his Labor Law 240(1) claim (motion #001). Defendants BOP North, the owner of the premises, and KCG Holding, the lessee, (together "Owner Defendants") also move for summary judgment on their cross-claims for contractual indemnification and failure to procure insurance against co-defendant J.T. Magen, the general contractor, and third-party defendant Blackbird, plaintiff's employer. The Owner Defendants also seek dismissal of plaintiff's complaint and all cross-claims asserted against them (motion #002). Defendant JT Magen, the general contractor, also moves for summary judgment seeking dismissal of plaintiff's Labor Law 200 and common law negligence claims; granting summary judgment on its contractual indemnity and failure to procure insurance claims against third-party defendant Blackbird; granting co-defendants BOP and KCG summary judgment on their contractual indemnity claims against Blackbird; and granting summary judgment dismissing all common law contribution and indemnity claims asserted against it (motion #003). These motions are consolidated for purposes of this decision.

With respect to plaintiff's motion on his Labor Law 240(1) claim, summary judgment is precluded by an issue of fact as to whether the manlift, which was correctly set up and to which plaintiff was secured by a six-foot long harness, provided plaintiff with proper protection and whether plaintiff should have been provided with additional safety devices. *Nazario v. 222 Broadway LLC*, 28 N.Y.3d 1054 (2016); *Higgins v. TST 375 Hudson LLC*, 179 A.D.3d 508, 510 (1st Dep't 2020). Although plaintiff testified that he had to stand on the rails of the manlift in order to reach the channel and assist with the modification because the HVAC system was in the way, plaintiff conceded that there was nothing wrong with the manlift he was provided and the only thing that could have prevented the accident was if the HVAC system was not in the way. Affirmation of Robert M. Fiala dated January 30, 2020, Exh. M, (Plaintiff Dep. Tr. 33-36, 49-50).

Thus, unlike *Cutaia v. Bd. of Mgrs. of the Varick St. Condo.*, 172 A.D.3d 424, 426 (1st Dep't 2019), plaintiff has not offered any evidence that the equipment that he was provided was inadequate or that another safety device was needed. Rather, plaintiff concedes that his fall was due to the impediment caused by the HVAC equipment, and not the manlift. Accordingly, plaintiff's motion must be denied.

Turning to the Owner Defendants' motion, the Owner Defendants first seek summary judgment on their cross-claims against co-defendant JT Magen and third-party defendant Blackbird for contractual indemnification and failure to procure insurance. In support, the Owner Defendants cite to the relevant contracts between the parties. Affirmation of Richard C. Prezioso dated January 31, 2020, Exhs. Q and R. However, the contracts are merely attached to an attorney affirmation, and are not authenticated as required by CPLR 4518(a). Thus, the contracts are inadmissible and cannot form the basis on which to grant summary judgment. *Clarke v. American Truck & Trailer Inc.*, 171 A.D.3d 405, 406 (1st Dep't 2019).

Next, the Owner Defendants argue that the Labor Law 200 and common law negligence claims asserted against them must be dismissed because they were not involved in supervising plaintiff's work. However, as plaintiff points out in his opposition, the accident occurred not just due to the means and method of the work being performed, but also due to dangerous conditions on the property, namely the location of the HVAC which impeded plaintiff's access to the beam and the extremely hot conditions on the floor, which caused plaintiff to sweat and made him vulnerable to an electric shock. When a plaintiff's injuries are caused not only by the manner in which the work is being performed but also from a dangerous condition on the premises, an owner or general contractor moving for summary judgment with respect to a violation of Labor Law 200 must address the proof applicable to both liability standards. *Dasilva v. Nussdorf*, 146 A.D.3d 859

(2d Dep't 2017). Here, Owner Defendants failed to submit any evidence to show that they lacked notice of the allegedly dangerous conditions at the premises. *Bessa v. Anflo Indus. Inc.*, 148 A.D.3d 974 (2d Dep't 2017). Accordingly, summary judgment on these claims must be denied.

Next, the Owner Defendants seek dismissal of plaintiff's Labor Law 241(6) claim which is premised on violations of 12 NYCRR 23: 1.13(b)(4), 1.13(c)(1)(ii), 1.16, 1.25(d). In support, the Owner Defendants establish that the first three Industrial Code sections are inapplicable to this accident. However, contrary to the Owner Defendants' contention, the last section, 23-1.25(d), is applicable as it pertains to protective gear generally, not just protective eye gear. Thus, the Labor Law 241(6) claim predicated on the violation of 23-1.25(d) will not be dismissed.

The Owner Defendants also seek dismissal of plaintiff's Labor Law 240(1) claim on the theory that plaintiff was the sole proximate cause of his accident because he chose to climb up on the rails of the manlift. In determining whether a worker is the sole proximate cause of his injuries, "the issue to be addressed first is whether adequate safety devices were provided, furnished or placed for the worker's use on the work site." *Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 236 (1st Dep't 2009). Here, the Owner Defendants failed to submit any evidence that they provided plaintiff with adequate safety devices to perform the work. Accordingly, summary judgment on this ground must be denied.

Finally, although the Owner Defendants seek dismissal of all cross-claims asserted against them, they fail to articulate their arguments with specificity as to any of these claims. Thus, this branch of the motion must also be denied.

Turning next to defendant JT Magen's motion for summary judgment, JT Magen first argues that the Labor Law 200 and common law negligence claims must be dismissed because it did not control or supervise plaintiff's work. However, like the Owner Defendants, defendant JT

Magen fails to address in its moving papers plaintiff's allegations that the accident arose due to the placement of the HVAC system and the excessive heat on the floor. In their reply, defendant JT Magen attempts to address these arguments by claiming that it is pure speculation that either the excessive heat on the floor or the HVAC system caused plaintiff's accident. However, these are issues of fact which cannot be resolved on summary judgment and thus defendant JT Magen's motion on these claims must be denied. Likewise, defendant JT Magen's argument that the common law contribution and indemnification claims against it must be dismissed because it was not negligent is unavailing and this branch of the motion must also be denied.

Next, defendant JT Magen seeks summary judgment on its contractual indemnification and failure to procure insurance claims against third-party defendant Blackbird. In support, defendant JT Magen submits an admissible copy of its purchase order with Blackbird. Affirmation of Kevin B. Pollack dated February 3, 2020, paras. 12, 35, 58 and Exh. H. The terms of the purchase order obligate Blackbird to indemnify JT Magen for all damages arising out or connected to its work and to obtain commercial general liability insurance for $2 million primary and $10 million excess, naming JT Magen as an additional insured.

With respect to the issue of indemnification, the purchase order requires Blackbird to indemnify JT Magen fully in the event liability is imposed without JT Magen's negligence and partially in the event of actual negligence on the part of JT Magen (in which case indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault of the indemnitees). Pollack Aff., Exh. H, para. 17. Although there remain issues of fact with respect to defendant JT Magen's negligence, it is undisputed that the indemnification provision in the parties' contract has been triggered as this action arises out of Blackbird's work, and thus JT Magen is entitled to conditional indemnification under the contract to the extent the accident was

not caused by its own negligence. *Gonzalez v. G. Fazio Construction*, 176 A.D.3d 610, 611 (1st Dep't 2019). Likewise, defendant JT Magen is entitled to summary judgment on its failure to procure insurance claim as it has demonstrated that Blackbird failed to procure a $2 million primary insurance coverage, as required by the purchase order. Pollack Aff., Exhs. X, Y.

Defendant JT Magen also seeks summary judgment on behalf of co-defendants BOP and KCG on their contractual indemnification claims against Blackbird. However, these arguments are inappropriate as these claims have not been asserted by JT Magen, but rather by the Owner Defendants, and JT Magen cannot use its own motion to compensate for the deficiencies in the Owner Defendants moving papers. Finally, defendant JT Magen is entitled to summary judgment dismissing the failure to procure insurance claims asserted against it by the Owner Defendants as it has demonstrated that it complied with its contractual obligation to obtain at least $36 million in coverage and the policies it obtained afforded the Owner Defendants with additional insured status. Pollack Aff., paras. 62-74. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (motion #001) is denied; and it is further

ORDERED that the motion by defendants BOP North and KCG for summary judgment (motion #002) is granted only to the extent that plaintiff's Labor Law 241(6) claim is dismissed insofar as it is predicated on violations of 12 NYCRR 23: 1.13(b)(4), 1.13(c)(1)(ii) and 1.16, and is otherwise denied; and it is further

ORDERED that defendant JT Magen's motion for summary judgment (motion #003) is granted only to the extent that the failure to procure insurance claims asserted against it are dismissed, JT Magen is entitled to summary judgment on its contractual indemnification claim against Blackbird to the extent the accident was not caused by its own negligence, and JT Magen

is entitled to summary judgment on its failure to procure insurance claim against Blackbird, and it is otherwise denied.

10/16/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[x] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[x] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	