Ventura v Un Lee
2020 NY Slip Op 33949(U)
October 15, 2020
Supreme Court, Queens County
Docket Number: 715549/2017
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

EDGAR VENTURA,

Plaintiff,

- against -

UN LEE, YUN LEE-ITO, DISANO DEMOLITION CO., INC., and CELATECH CONSTRUCTION CORP.,

Defendants.

- x

Index No.: 715549/2017

Motion Date: 10/8/2020

Motion No.: 46 & 47

Motion Seqs.: **4 & 5**

The following electronically filed documents read on this motion by defendant DISANO DEMOLITION CO., INC. (**seq. no. 4**) for an Order pursuant to CPLR § 3212, dismissing plaintiff's claims seeking relief under Labor Law §§ 240(1), 241(6) and 200 and common law negligence and dismissing any and all cross-claims asserted against defendant DISANO DEMOLITION CO., INC. for contractual and/or common law indemnification and contribution and breach of contract; and on this cross-motion by plaintiff EDGAR VENTURA (**seq. no. 4**) for an Order pursuant to CPLR § 3212, granting summary judgment on the issue of liability in favor of plaintiff and against defendants Un Lee, Yun Lee-Ito and Disano Demolition Co., Inc. pursuant to Labor Law §§ 240(1) and 241(6); and on this motion by defendants UN LEE and YUN LEE-ITO (**seq. no. 5**) for an Order pursuant to CPLR § 3212, dismissing the plaintiff's complaint in its entirety and all cross-claims against defendants Un Lee and Yun Lee-Ito and granting summary judgment to defendants Un Lee and Yun Lee-Ito on their cross-claims for contractual indemnification and breach of contract against defendant Disano Demolition Co., Inc., and setting this matter down for a hearing on the issue of fees and expenses:

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Notice of Cross-Motion(**seq. no. 4**)-Affirmation-
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This personal injury action arises out of an incident that occurred on October 27, 2017 at the jobsite located at 25-30/32 22nd Street, Queens County, New York. Plaintiff alleges that he fell from a height while performing construction work. O.K. Employment Agency Inc.'s certified records indicate that plaintiff was employed by A&S Contractor at the time of the incident. Additionally, the Workers' Compensation Board's Decision indicates that Yun Lee d/b/a A&S Contractor was plaintiff's employer, and Disano Demolition Co., Inc. was the general contractor.

Plaintiff commenced this action by filing a summons and complaint on November 7, 2017. Defendant Disano Demolition Co., Inc. (Disano) joined issue by serving an answer on May 2, 2018. Defendants Un Lee and Yun Lee-Ito (collectively hereinafter the Lee defendants) joined issue by service of a verified answer on March 1, 2018. Disano, the Lee defendants, and plaintiff each move for summary judgment.

Plaintiff appeared for an examination before trial on January 10, 2019. He testified that a week before the incident, he went to O.K. Employment for work. O.K. Employment gave him a receipt with a work address on it. He worked for Disano. When he first reported to the jobsite, construction was already ongoing. He met with a person named Mr. Lee. Mr. Lee was the only person he spoke to before working. Mr. Lee was his supervisor. Plaintiff only followed directions from Mr. Lee. If there were things he did not know how to do, he would ask Mr. Lee. After the incident, Mr. Lee gave him cash for the job. On the date of the incident, the basement was under construction. The beams for the first floor were being put in. The beams were located below ground level, from the basement up, while the tops of the same beams were at ground level. During his time at the jobsite, he was not provided with a lifeline or harness or any other fall protection. He did not receive any training or safety training at the jobsite. He did not receive any written or safety materials. On

the day of the incident, he was working on an I-beam, approximately ten to fifteen feet off the ground, without a harness or lifeline. He and his coworker were pulling sheets of metal from one area to the other. He got to the tip of the I-beams by using a ladder. As he was pulling the sheet metal, his foot slipped from the I-beam, he fell toward the ladder, and to the ground at basement level.

Defendant Yun Lee-Ito appeared for an examination before trial on July 29, 2019. She testified that she and her sister Un Lee are 50/50 owners of the subject premises, which was purchased as an investment property. She never spoke to plaintiff, any worker onsite, or Anna from Disano. Neither she nor her sister were onsite when the incident occurred.

Defendant Un Lee appeared for an examination before trial on September 24, 2019 and testified that the only contractor she paid between the time she entered into the Disano contract and the subject incident was Disano. She negotiated and signed the contract. She saw Ms. Oppedisano sign the contract that she exchanged during discovery. Disano was the general contractor for the subject premises. Disano's work included pouring the foundation and erecting the superstructure. Disano was to provide all necessary labor, equipment, and subcontractors. Neither she nor her sister Yun Lee-Ito ever entered into any contract with A&S Contracting. Disano hired a safety contractor and that entity erected the sidewalk shed. Neither she nor her sister received any OSHA violations or fines as a result of the subject incident.

Anna Maria Oppedisano appeared for an examination before trial on behalf of defendant Disano on February 10, 2020 and testified that she is the owner of Disano. She prepared the contract with the Lee defendants, which outlines the scope of Disano's work. The signature on the contract that the Lee defendants exchanged during discovery is not hers. She further testified that she has never seen or agreed to the terms of that contract. Disano did not hire A&S Contracting to perform work at the subject jobsite. Disano never employed anyone with the name Mr. Lee and/or any workers of Korean or Asian descent. Disano was not the general contractor for any work being performed at the subject jobsite. Disano was not responsible for site safety. Disano was not hired to perform the work that plaintiff claims to have been doing at the time of the incident. The Lee defendants were acting as their own general contractor and hiring all of the contractors to perform work at the jobsite. Disano was not onsite at the time of the incident. Disano took out permits for the jobsite. Based on the licenses Disano holds with the Buildings Department, Disano routinely gets classified as a general

contractor. Disano was issued violations and fines after the subject incident.

Two OSHA citations are also submitted and indicate that Disano was issued a monetary penalty of $9,959. OSHA found that Disano failed to protect plaintiff from fall hazards despite the fact that plaintiff had been engaged in laying steel decking work on a surface with an unprotected side or edge more than fifteen feet above a lower level. OSHA also found that Disano failed to train plaintiff on the use of fall protection.

Peter Oppedisano appeared for an examination before trial on February 5, 2020 and testified that after the incident, Ms. Un Lee told him that the steel contractor was someone she was either dating or one of her employees. He had no involvement with the subject project. He never worked for Disano and had no authority to act on Disano's behalf.

Two contracts between Disano and the Lee defendants are submitted. The first contract, submitted by Disano, is dated April 3, 2017 and executed by Un Lee and Anna Maria Oppedisano. The contract indicates that Disano will perform the foundation work at the subject premises. Of note, the contract does not include decking work, does not identify Disano as the general contractor, does not outline any responsibilities regarding site safety, and does not contain an indemnification clause or require Disano to list the Lee defendants as additional insureds. A second contract, exchanged by the Lee defendants, is also dated April 3, 2017 and executed by Un Lee and Anna Maria Oppedisano. The second contract indicates that Disano will perform steel decking and foundation work. Of note, the second contract includes an indemnification clause and a requirement to obtain Commercial General Liability Insurance.

Initially, plaintiff does not oppose those branches of the motions seeking to dismiss the Labor Law § 200 and common law negligence claims. Accordingly, plaintiff's Labor Law § 200 and common law negligence claims shall be dismissed as abandoned.

To support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation that is both concrete and applicable given the circumstances surrounding the incident (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]). Although plaintiff failed to allege any New York Industrial Code violations in his Bill of Particulars, a plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241(6) claim for the first time in opposition to a motion for summary judgment if the allegation, as

here, does not involve new factual allegations, raise a new theory of liability, or prejudice the defendants (see Kowalik v Lipschutz, 81 AD3d 782 [2d Dept. 2011]). Plaintiff alleges that defendants violated Industrial Code § 23-1.7(b)(1), which applies to hazardous openings and requires that such an opening be guarded by a cover, or a barrier or safety railing guarding the opening, while work is in progress. Here, it is undisputed that none of these measures were taken by defendants. Defendants contend, however, that plaintiff did not fall into a "hazardous opening" within the meaning of the subject Industrial Code violation. This Court finds that issues of fact as to whether plaintiff fell through a "hazardous opening" within the meaning of Industrial Code § 23-1.7(b)(1) preclude summary judgment in favor of any party (see Becker v AND Design Corp., 51 AD3d 834 [2d Dept. 2008]).

Disano also contends that since it was neither a contractor nor an owner under the Labor Law, it bears no liability to plaintiff under any Labor Law sections (see Aranda v Park East Const., 4 AD3d 315 [2d Dept. 2014]). In support of such contention, Disano submits Ms. Oppedisano's testimony that she did not hire plaintiff's employer and was not responsible for site safety. Additionally, Disano contends that the mere fact that it was listed as the general contractor on work permits is insufficient to establish that Disano was the general contractor (see Huerta v Three Star Constr. Co., Inc., 56 AD3d 613 [2d Dept. 2008]). However, Disano is collaterally estopped from relitigating this issue as the Workers' Compensation Board previously determined that Disano was the general contractor (see Singh v Congregation Bais Avrohom K'Krula, 300 AD2d 567 [2d Dept. 200]). Accordingly, Disano is not entitled to summary judgment, dismissing the Labor Law claims against it.

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute, a claim under Labor Law § 240(1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (see Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]; Plass v Solotoff, 5 AD3d 365 [2d Dept. 2004]).

Here, plaintiff testified that he fell from am I-beam approximately fifteen to twenty feet off the ground while pulling sheets of metal. Plaintiff also testified that he was not provided a harness or lifeline. Thus, plaintiff established, prima facie, that his fall was the result of an elevation-related hazard within the meaning of Labor Law § 240(1)(see Zhou v 828 Hamilton, Inc., 173 AD3d 943 [2d Dept. 2019]; Munzon v Victor at Fifth, LLC, 161 AD3d 1183 [2d Dept. 2018]; Garzon v Viola, 124 AD3d 715 [2d Dept. 2015]).

Defendants contend that the Labor Law § 240(1) cause of action must be dismissed because plaintiff testified that he slipped. However, plaintiff's own actions could not, as a matter of law, have been the sole proximate cause of the incident since no safety devices were provided (see Canas v Harbour at Blue Point Home Owners Assn., Inc., 99 AD3d 962 [2d Dept. 2012]). Therefore, plaintiff is entitled to summary judgment on his Labor Law § 240(1) cause of action.

Regarding those branches of the motions seeking common law indemnification and contribution, to be entitled to common-law indemnification, a party must establish that it has been vicariously liable without proof of any negligence or actual supervision on its part and the proposed indemnnitor was either negligent or exercised actual supervision or control over the injury-producing work (see McCarthy v Turner Constr., Inc. 17 NY3d 369 [2011]; Perri v Gilbert Johnson Enters., Ltd. 14 AD3d 681 [2d Dept. 2005]; McNair v Morris Ave. Assoc., 203 AD2d 433 [2d Dept. 1994]). Here, the Lee defendants failed to establish that Disano provided actual supervision over the work that caused plaintiff's injury or that Disano was negligent. Ms. Oppedisano specifically testified that, inter alia, Disano was not responsible for site safety, was not hired to perform the work that plaintiff claims to have been doing at the time of the incident, and was not onsite at the time of the incident. Likewise, Disano failed to establish that the Lee defendants provided actual supervision over the work that caused plaintiff's injury or that the Lee defendants were negligent. Un Lee specifically testified that, inter alia, Disano was to provide all necessary labor, equipment, and subcontractors. Yun Lee-Ito testified that, inter alia, neither she nor her sister were onsite when the incident occurred. Thus, issues of fact and credibility preclude summary judgment (see Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007["A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned").

Regarding those branches of the motions for summary judgment on the contractual indemnification and breach of contract claims, the right to contractual indemnification depends upon the specific language of the contract (see George v Marshalls of MA, Inc., 61 AD3d 925 [2d Dept. 2009]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (Cava Constr. Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662 [2d Dept. 2009]; see Bellefleur v Newark Beth Israel Med. Ctr., 66 AD3d 807 [2d Dept. 2009]). Here, two contracts governing the relationship between Disano and the Lee defendants have been submitted. Yet, only one contract includes a indemnification clause. Accordingly, as issues regarding the authenticity of Ms. Oppedisano's signature remain, summary judgment must be denied.

All additional arguments not specifically addressed herein were considered and rejected by this Court.

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that the motion by defendant DISANO DEMOLITION CO., INC. (**seq. no. 4**) is granted only to the extent that plaintiff's Labor Law § 200 and common law negligence claim is dismissed; and it is further

ORDERED, that the cross-motion by plaintiff EDGAR VENTURA (**seq. no. 4**) is granted only to the extent that plaintiff shall have summary judgment against defendants DISANO DEMOLITION CO., UN LEE and YUN LEE-ITO on his Labor Law § 240(1) claim; and it is further

ORDERED, that the motion by defendants UN LEE and YUN LEE-ITO (**seq. no. 5**) is granted only to the extent that plaintiff's Labor Law § 200 and common law negligence claim is dismissed.

Dated: October 15, 2020
Long Island City, NY

ROBERT J. McDONALD
J.S.C.

FILED
10/16/2020
10:50 AM
COUNTY CLERK
QUEENS COUNTY