

Lojano v Madeira Framing Corp.
2020 NY Slip Op 34833(U)
February 28, 2020
Supreme Court, Westchester County
Docket Number: Index No. 69696/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
MANUEL DELEG LOJANO,
Plaintiff,

DECISION AND ORDER
Index No. 69696/2017
Seq# 7

-against-

MADEIRA FRAMING CORPORATION,
THE LOFTS @ BEACON FALLS, LLC.,
HIGHVIEW DEVELOPMENT CORPORATION,
and J & M HOME BUILDING SYSTEMS INC.,

Defendants.

-----X
HIGHVIEW DEVELOPMENT CORPORATION,
Third-Party Plaintiff,

-against-

SALA & SONS CONSTRUCTION COMPANY INC.,

Third-Party Defendant.

-----X
THE LOTS @ BEACON FALLS, LLC.,
Second Third-Party Plaintiff,

-against-

SALA & SONS CONSTRUCTION COMPANY INC.,

Second Third-Party Defendant.

-----X
HIGHVIEW DEVELOPMENT CORPORATION,
Third Third-Party Plaintiff,

-against-

JB SAFETY SERVICES CORPORATION,

Third Third-Party Defendant.
-----X

The following papers were read on the plaintiff's motion for summary judgment:

Notice of Motion/Affirmation/Exhibits A-L	1-14
Affirmation in Opposition/Exhibit 1	15-16
Affirmation in Opposition/Exhibits A-E	17-22
Reply Affirmations	23

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Manuel Deleg Lojano ("Lojano/ the plaintiff") commenced this action by filing a summons and complaint on November 30, 2017, to recover for alleged injuries he sustained on October 31, 2016 at the construction site located at 50/52/54 Leonard Street, Beacon, New York, known as The Lofts @ Beacon Falls, when Lojano, while working as a mason for Sala & Sons Construction Company, Inc. ("Sala & Sons"), got struck in his eye by a nail that was shot out of a nail gun. The framing contractor on the site was Madeira Framing Corporation ("MFC"). The plaintiff alleges that the nail that struck his eye, was improperly shot from the nail gun by an MFC employee and alleges negligence and violation of Labor Law §§ 200, 240 and 241[6].

At the time of the accident, The Lofts @ Beacon Falls, LLC (the "Lofts") was the owner of the premises and Highview Development Corporation ("Highview") was the general contractor. Highview filed a third-party action, the Lofts filed a second third-party action and J&M Home Building Systems, Inc. ("J&M"), filed a third third-party action against the plaintiff's employer, Sala & Sons Highview also filed a fourth third-party action against JB Safety Services Corporation. The parties executed a Stipulation of Discontinuance Without Prejudice as to J&M Home Building Systems, Inc., discontinuing all claims against that defendant. MFC failed to appear in the action and on June 29, 2018, this Court granted the plaintiff's motion for a default judgment.

Sala now files the instant motion for an order, pursuant to CPLR 3211 and 3212, granting Sala summary judgment and dismissing Highview's and the Lofts' claims against it.

Sala argues that the claims for common-law indemnification and contribution must be dismissed because the plaintiff did not suffer a grave injury. Sala also argues that the claims for contractual indemnification must be dismissed because Sala did not cause the plaintiff's alleged injuries and the plaintiff's safety glasses were adequate and not the proximate cause of the plaintiff's injuries.

The Lofts opposes the motion arguing that Sala's motion should be denied and the Lofts' motion on its contractual indemnification claim against Sala, should be granted. Highview also opposes the motion arguing that it is entitled to contractual indemnification and a complete defense from Sala and that Sala's summary judgment motion should be denied.

In reply, Sala argues that Highview is not entitled to contractual indemnification because Sala was not negligent, as required by the indemnification clause. Sala also argues that the Lofts is not entitled to contractual indemnification because the plaintiff's alleged injury did not arise out of or resulting from the work Sala subcontracted to perform as stated in the indemnification clause. Sala also argues that it is not liable, since the MFC employee was using the nail gun and Sala did not hire, supervise nor direct MFC.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

[1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof in admissible form, establishing the existence of a material issue of fact (see e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Employers who provide Workers' Compensation coverage are not liable for common law indemnification and/or contribution, except in limited cases in which the plaintiff has sustained a grave injury (*Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715 [2d Dept 2006]). The plaintiff claims in his bill of particulars, that he suffered complete blindness in his right eye, which does not constitute a grave injury, as contemplated by the statute (*Ibarra v Equipment Control, Inc.*, 268 AD2d 13 [2d Dept 2000]).

With regard to the contractual indemnification claims against Sala, the Court denies the motion as against both Highview and the Loft. "The right to contractual indemnification depends upon the specific language of the contract" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772 [2d Dept 2010] quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Id.*). "In addition, "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...." (*Id.*; see also *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662; General Obligations Law § 5-322.1). The Court has made its determination in deciding the other motions, but will repeat its reasoning here.

The contract between Highview and Sala states in pertinent part that:

the Subcontract shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them

from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damages, loss or expense is caused in part by a party identified hereunder.

Here, Highview has not established that Sala or its employees were negligent or was the cause of the plaintiff's injuries, which is a requirement of the indemnification clause. The plaintiff alleged that he was hit in the eye by a nail from a nail gun used by an employee of one of Highview's other subcontractors, MFC. There is an issue of fact as to whether the plaintiff was wearing his protective glasses and whether there was comparative negligence on the part of Lojano, Sala's employee.

The Lofts' agreement with Sala provides that:

To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Contractor and owner as aforesaid, against any claims, damage, losses and expenses, including legal fees, arising out of or resulting from performance of subcontracted work to the extent caused in whole or in part by the Subcontractor.

The proximate cause of the incident has not yet been determined and it also has not been determined that the protection glasses provided to the plaintiff were adequate. Therefore, the Court now denies the Sala's request to dismiss the Lofts' indemnification claim against it.

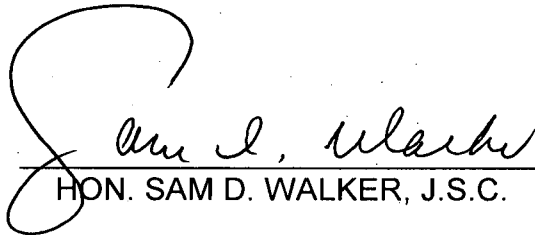
Accordingly, based on the foregoing, it is

ORDERED that Sala's motion for summary judgment is denied.

The parties are directed to appear in the Settlement Conference Part in Courtroom
1600 on March 31, 2020 at 9:15 a.m.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
February 28, 2020



HON. SAM D. WALKER, J.S.C.