

Lojano v Madeira Framing Corp.
2020 NY Slip Op 34834(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# 6

-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:

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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.

The Lofts now files the instant motion for an order, pursuant to CPLR 3212: (1) granting summary judgment on the issue of liability and dismissing the plaintiff's claims under New York Law §§ 200, 240[1], 241-a, and 241[6]; (2) granting summary judgment on its cross-claims for contractual indemnification and breach of contract against Highview; (3) granting summary judgment on its contractual indemnification claim against Sala; and (4) granting summary judgment and dismissing the cross-claims asserted by Sala for contractual indemnification and failure to procure insurance.

The Lofts argues that it is not liable under Labor Law § 200 because it did not supervise or control the work; Labor Law 240[1] is inapplicable because the plaintiff's injury does not involve an elevation related injury; Labor Law § 241-a is inapplicable because injury was not caused by planking; and Lofts is not liable under Labor Law § 241[6] because the safety glasses worn by the plaintiff were proper. Lofts further argues that it is entitled to summary judgment on its contractual indemnification claims against both Highview and Sala, since the contract intended that Highview would indemnify the Lofts for claims like the plaintiff's, when the injury was secondary to Highview's actions or non-actions and the Sala agreement requires Sala to indemnify and hold Lofts harmless on the project for any claims caused in whole or in part by Sala or its employees. The Lofts also argues that Highview breached its contract and that there is no contract between it and Sala requiring it to indemnify Sala or requiring it to procure insurance on behalf of Sala.

In opposition, Highview argues that it is entitled to contractual indemnification and a complete defense from Sala because the parties signed an indemnity agreement and that the Lofts is not entitled to contractual indemnification from Highview because Highview

was not negligent. Highview also contends that the Lofts' breach of contract claims are not supported by any evidence and must be dismissed.

The plaintiff opposes the Lofts' motion asserting that the report submitted by Bruno is unsworn and therefore, inadmissible and also contends that Bruno did not set forth his entire curriculum vitae. The plaintiff argues that if the Court considers the report, Highview's motion for dismissal must still be denied, since issues of fact exists, specifically with regard to violations of Labor Law § 241[6] and 12 NYCRR § 23-1.8[a], in that, the plaintiff has offered Jack's opinions that the eye protection provided to the plaintiff was not suitable for the hazard involved in the plaintiff's work and there was testimony by the plaintiff and others that the plaintiff was wearing his safety glasses at the time of the accident. The plaintiff further argues that Bruno's determination that the glasses issued were common ANSI Z87.1 safety glasses, is speculative, since the actual glasses have never been identified.

Sala opposes the motion and argues that neither Highview, nor Sala are entitled to contractual indemnification because the subcontract only provides for Sala to indemnify Highview and the Lofts for damages resulting from the acts, omissions, breach of default of Sala in connection with its work and Highview and the Lofts are only entitled to a defense from Sala for claims arising from such acts, omissions, breach or default. Sala further asserts that Highview and the Lofts must establish that they are free from negligence because they are indemnified.

In reply, the Lofts argues the Highview indemnification provision includes not just Highview's negligent act, but also the acts of its subcontractors, such as Sala and its

employees. The Lofts further asserts that the indemnity provision is also triggered by Highview's multiple contract breaches.

The Lofts argues that its report from Martin Bruno is admissible evidence and there is no requirement that the report be sworn and even if the Court determines that a sworn statement is required, the Lofts has attached to the reply, an affidavit swearing to the previously disclosed expert report. The Lofts also asserts that attachment of a partial curriculum vitae was simply a minor error, in that the first page was unintentionally omitted and a complete version is attached to the reply.

The Lofts argues that it is entitled to summary judgment on the Labor Law § 200, 240 and 241-a claims, since they were unopposed and on the Labor Law § 241[6] claim because the testimony of Highview's job super, Doug Lorenz, that the plaintiff was wearing his glasses at the time of the incident, is not based on his personal knowledge and the testimony of the plaintiff's co-worker, Lituma, confirms that the plaintiff was not wearing his glasses. The Lofts also argues that the plaintiff's glasses were proper and he was not engaged in the type of work that 12 NYCRR § 23-1.8[a] was intended to protect. The Lofts argues that if the glasses have not been identified, then the plaintiff's expert, Frederic Jack, also cannot opine on the glasses.

The Lofts also replies to Sala's opposition, arguing that Sala fails to raise any material issue of fact that Lofts is entitled to full contractual indemnification. The Lofts asserts that a determination of fault is not required to trigger the indemnity provision; there may be more than one proximate cause of the plaintiff's injuries; and it is not required to prove it is free of any negligence to trigger the indemnity provision. The Lofts also asserts that it is entitled to dismissal of Sala's cross-claims for contractual indemnification and

failure to procure insurance, since Sala failed to set forth any arguments in opposition to the Loft's motion.

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]).

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*see DiMaggio v Cataletto*, 117 AD3d 984, 986 [2d Dept 2014]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed." (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where the injury involves defects in both the premises and the equipment or manner in which the work was performed, a defendant moving for summary judgment with respect to alleged violation of Labor Law § 200 and common law negligence, must proffer evidence to cover both bases of liability (*Id.*).

"To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work" (*see DiMaggio v Cataletto*, 117 AD3d @ 986). "Where a premises

condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). “By contrast, when the manner of work is at issue, “no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed” (*Id.*). It has to be “shown that the party to be charged had the authority to supervise or control the performance of the work” (*Id.*). “A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*Id.*).

With regard to authority to exercise supervision and control over the work, “mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (*Pulia v Ultimate Homes, Inc.*, 166 AD3d 667, 669 [2d Dept 2018]). Further, “the right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulation and contract specifications is insufficient to impose liability under Labor Law § 200.

“Irrespective of the absence of a statutory obligation, the owner and possessor of the property have a continuing common-law duty to maintain their premises safe from foreseeable harm” (*Kimen v False Alarm, Ltd.*, 69 AD3d 579 [2d Dept 2010]). Additionally, the owner or possessor of property “may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition or had

actual or constructive notice of it and a reasonable time within which to remedy it” (*Patrick v Bally’s Total Fitness*, 292 AD2d 433, 434 [2d Dept.2002]). “To establish constructive notice, the plaintiff must show that the defect was visible and apparent, and existed for a sufficient length of time prior to the accident for the owner to discover and remedy it.” (*Id.*). If the premises is unsafe because of some hidden defect, the owner will not be held liable (see *Monroe v City of New York*, 67 AD2d 89, 96 [2d Dept 1979]).

Here, the Court finds that the Loft is not liable under Labor Law § 200 because it did not supervise or control the work at the job site and did not have any actual or constructive notice of any defect. Further, the plaintiff did not specifically oppose that part of the Lofts’ motion.

‘Labor Law § 241-a provides, in pertinent part, that “[a]ny men working in or at elevator shaftways***shall be protected by sound planking ***laid across the opening at levels not more than two stories above and not more than one story below such men” (*Santos v Sure Iron Works*, 166 AD2d 571 [2d Dept 1990]). Here, there is no evidence that there was a lack of planking and any lack of planking in the shaft was not the proximate cause of the plaintiff’s injuries and therefore, the law is inapplicable in this case. Therefore, that part of the Lofts’ motion is granted.

“Labor Law § 240[1] imposes upon owners and general contractors a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (see *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 15 [2d Dept 2015]). “Absolute liability is imposed upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers

exposed to elevation related hazards, and where such failure is a proximate cause of the accident (*Id.*). In this case, there is no evidence of an absence of the safety devices necessary in elevated work sites and the lack of such devices was not the proximate cause of the plaintiff's alleged injuries. Therefore, that part of the Lofts' motion for summary judgment is granted.

"Labor Law § 241[6] imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (see *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 983 [2d Dept 2014]). "The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Law" (*Id.*).

In this case, Lojano alleges that the Lofts and Highview violated OSHA regulations and New York Industrial Codes. However, "[I]t has been held that violations of OSHA standards do not provide a basis for liability under Labor Law § 241[6]" (*Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995]) and "a cause of action predicated on the alleged violation of OSHA regulations can only be maintained against a plaintiff's employer" (*Gallagher v 109-02 Dev., LLC*, 137 AD3d 1073 [2d Dept 2016]). Therefore, any alleged violations of OSHA regulations as against the Lofts, are dismissed. Additionally Industrial Codes §§ 23-1.7[e][2]; 23-1.10[b][1]; 23-1.11[a-c]; 23-2.5[b][2]; 23-2.5[b][5]; and 23-2.5[b][6] and all inapplicable to this case.

The plaintiff also claims a violation of 12 NYCRR 23-1.8[a], which provides in pertinent part that:

(a) Eye Protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

The Lofts claims, as per its expert Bruno, that the safety glasses provided to the plaintiff were the proper eye protection to his task at hand, as they were in compliance with the eye protection standards set forth by ANSI Z87.1 and with OSHA standards. However, the Court finds the Bruno unsworn report submitted in support of its motion, to not be in admissible form and therefore, of no probative value (*Gao v City of New York*, 145 AD3d 939, 940 [2d Dept 2016]; *Hoffman v Mucci*, 124 AD 3d 723, 724 [2d Dept 2015]; *Mazzola v City of New York*, 32 AD3d 906, 907 [2d Dept 2006]). Further, this defect is not cured by the submission of an affidavit in the Lofts' reply (*Accardo v Metro-North R.R.*, 103 AD3d 589 [2d Dept 2013]).

In light of this, the Court finds that the Lofts failed to make a prima facie showing of entitlement to judgment as a matter of law, in that, triable issues of fact exist as to whether the eye protection provided to the plaintiff was suitable for the job he was performing and whether the possibility of injury to the plaintiff's eye by the MFC workers was sufficiently foreseeable so as to require safety goggles instead of safety glasses.

With regard to the Lofts' claims for contractual indemnification against Highview and Sala, the Court finds that the Lofts is entitled to contractual indemnification and defense coverage against both Highview and Sala.

“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 contract between Highview and the Lofts states in pertinent part that:

To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, 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 Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, diseased or death, or 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 Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Here, the Court has previously granted the plaintiff’s motion for default judgment against MFC, a subcontractor under Highview. Further, Bruno’s report was not considered by the Court and therefore, has no basis to determine the root cause of the incident to be the plaintiff not wearing his safety glasses. Therefore, even if Highview was not negligent, the acts of its subcontractor entitles the Lofts to indemnification against it.

The Lofts alleges that Highview breached its contract, in that, it failed to implement a site safety program; failed to review the terms of the contract, inspect the construction site, and implement the terms of the contract during the duration of the project; and failed to evaluate the job site safety and make recommendations to the Lofts if it determined any practices were unsafe. To the extent that the Lofts seeks a breach of contract finding against Highview outside of the indemnification¹, the Court finds that there are issues of fact as to whether Lorenz's safety procedures and inspections fulfilled the requirements of the contract.

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.

In this case, it cannot be yet said that the claims, damage, losses and expenses were "caused" in whole or in part by the subcontractor, Sala and the Court has not found the Lofts' entirely free of any negligence (*Giangarra v Pav-Lak Contracting, Inc.*, 55 AD3d 869 [2d Dept 2008] ["[a]n indemnification clause is enforceable where the party to be indemnified is found to be free of any negligence"]). Further, although, there need not be a finding of negligence against Sala, as in Sala's agreement with Highview, the cause of the incident has not yet been determined and therefore, the Court now denies the Lofts' request for indemnification against Sala at this time.

¹The Lofts' cross-claim with regard to breach of contract against Highview, only claimed that Highview failed to defend the Lofts against the plaintiff's claims in the action.

The Court grants the Lofts' motion with regard to dismissal of Sala's cross-claims for contractual indemnification and failure to procure insurance, since the Lofts established and Sala failed to show that there was any contract between the Lofts and Sala requiring the Lofts to indemnify Sala or to procure insurance on behalf of Sala.

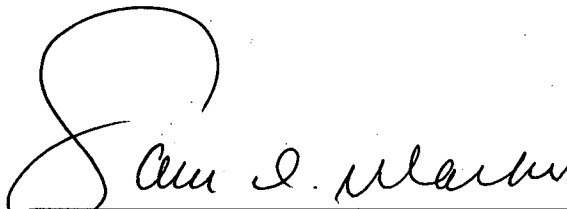
Accordingly, based on the foregoing, it is

ORDERED that the Lofts' motion for summary judgment is granted in part and denied in part.

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.