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| Lojano v Madeira Framing Corp. |
| 2020 NY Slip Op 34835(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# 3 & 5

-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.

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

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| Notice of Motion/Affirmation/Exhibits A-N | 1-16 |
| Affirmation in Opposition/Affidavit/Exhibits A-I | 17-27 |
| Reply Affirmation/Exhibit A | 28-29 |
| Notice of Cross-Motion/Affirmation/Exhibits A-X | 30-55 |
| Affirmation in Opposition to Cross-Motion | 56 |
| Affirmation in Opposition to Cross-Motion/Exhibits A-D | 57-61 |

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 plaintiff now files the instant motion for summary judgment on the issue of liability, arguing that the defendants violated Labor Law § 241(6) by failing to provide suitable protection, thereby violating applicable law and code[s] designed to protect workers, such as the plaintiff. Specifically, the plaintiff claims that the Lofts and Highview violated 12 NYCRR 23-1.8[a].

The plaintiff asserts that the safety glasses provided to him were not suitable for the hazard involved and the defendants failed to conduct the required pre-construction assessment of risk to determine what eye protection would be suitable for the job.

The plaintiff submitted the affidavit of Frederick J. Jack ("Jack"), a construction safety instructor, who opines that, prior to determining the appropriateness of the type of eye protection for the job site, a workplace hazard assessment needs to be done, identifying the hazards on the particular job site. Jack states that in this case, such an assessment would have concluded that the glasses provided would not have been suitable eye protection for the plaintiff due to the location where he and others were to be working at the same time and the known hazards presented to worker's eyes based on the nature of the work.

Jack states that, since no assessment was done, the workers on the job were working without eye protection suitable for the job and the particular circumstances on the job and in violation of OSHA § 1910.132[d][1]. He further states that OSHA § 1910.132[d][1][iii] requires that eye protection properly fit each employee and this was not done on the job site. Jack asserts that eye protection that complies with the ANSI87.1

standard for impact resistance does not mean that the eye protection is suitable for a particular job or job site and is only a minimum requirement, but not relevant to the overall type or the design of the eye protection necessary for the job.

Jack opines with a reasonable degree of certainty, as a construction site safety expert, that the type of glasses used in this case were not suitable for the hazards involved in the job site because they failed to provide protection against known hazards to be faced by the plaintiff and did not protect him from construction material and debris, which reached his eyes after passing through the gaps between the glasses and his face, a violation of OSHA § 1910.132[d][1] and OSHA § 1910.132[d][1][I]. Jack also opines that the glasses did not have slip resistant eye pieces and were likely to slip from the plaintiff's face as work was being done, increasing the size of the gaps above and below the glasses. Jack asserts that the lack of full eye protection was the cause of the accident.

In opposition, the Lofts' attorney argues that the plaintiff's summary judgment motion should be denied because the plaintiff utilized the safety glasses provided by his employer and not those purchased by JP Safety on the Lofts' behalf and which were made available to the workers on the site. The attorney also argues that the plaintiff's co-worker, Manual Lituma, testified that the plaintiff was not wearing his safety glasses at the time of the incident and that Highview and Sala's supervisors believe that the plaintiff was injured when he struck his eye on a piece of exposed rebar, instead of being struck in the eye by a nail.

The Lofts proffers a construction expert, Martin Bruno, who determined that the safety glasses purchased by JB Safety were adequate for the project and complied with all relevant standards for eye protection. The Lofts' attorney also argues that the glasses

examined and opined on by Jack, were not the glasses worn by the plaintiff at the time of the incident. The attorney further asserts that the plaintiff and Jack make assumptions regarding Madeira's work, including that the nail guns were uninspected and may have been modified to disable safety mechanisms, that are unsupported by any evidence since Madeira defaulted and provided no discovery, documents or testimony.

In reply, the plaintiff's attorney contends that the report submitted by Bruno is unsworn and therefore, inadmissible and also contends that Bruno did not set forth his qualifications, which permits him to offer expert opinions. The plaintiff's attorney further contends that the plaintiff was wearing the glasses provided to him at the time of the incident and there is no competent proof to the contrary, since the plaintiff's co-worker admitted that he did not see the incident occur and was not looking at the plaintiff at the time that the incident occurred. The attorney also asserts that there is no competent evidence regarding the alternative cause of the accident, suggested by the Lofts.

Highview filed a cross-motion pursuant to CPLR 3211 and CPLR 3212, seeking dismissal of all claims and cross claims against it and contractual indemnification, including attorney's fees, costs and expenses with respect to its contractual indemnification, additional insured status, and insurance procurement claims against Sala.

Highview argues that the plaintiff's Labor Law §§ 240, 241-a and 241[6] claims must be dismissed because the code violations relied upon by the plaintiff are inapplicable and/or were not the proximate cause of the accident. Highview also argues that the plaintiff's Labor Law § 200/ negligence claims must be dismissed against it because there was no actual or constructive notice and because Highview did not control the work. Highview further argues that it is entitled to contractual indemnity from Sala because it was

not negligent, was to be indemnified under the subcontract, and the incident arose out of the course of Sala's work.

In opposition, the plaintiff asserts that Highview's cross-motion must be denied and the plaintiff's motion granted, because Highview failed to set forth expert proof in evidentiary form. The plaintiff asserts that Highview relies on an inadmissible report from Bruno, which was not sworn to and not in evidentiary form. Bruno also failed to submit his qualifications.

The plaintiff contends 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.

The plaintiff further contends that, with regard to Labor Law § 200 and common law negligence, Highview had the requisite control over the means and methods of the work, since the contract provided that the contractor was responsible and the authority to supervise and control the work is sufficient to impose liability. The plaintiff also alleges that the manner in which the work was done was careless and negligent, which was the cause of the incident. The plaintiff alleges that Highview had notice of the dangerous conditions on the work site, was responsible for onsite job safety and failed to protect the workers. The plaintiff contends that Highview did not decide what type of eye protection was to be used on the site and did not inspect the nail guns being used despite being aware that safety protections were routinely tampered with to allow the workers to work faster. The plaintiff further contends that Highview failed to appropriately coordinate the different

trades and maintain a safe distance from where the carpenters were working with nail guns, to the area where the plaintiff was working, which was a breach of its duty to provide a safe place to work.

Sala also filed an opposition to Highview's claims of contractual indemnification and defense coverage. Sala argues that Highview is not entitled to contractual indemnification and defense coverage because the subcontract only provides for Sala to indemnify Highview for damages resulting from the acts, omissions, breach of default of Sala in connection with its work and Highview is only entitled to a defense from Sala for claims arising from such acts, omissions, breach or default.

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]).

Section 241(6) of the Labor Law provides that:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

"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 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.

While the Court concurs with the plaintiff’s contention that the Bruno report is unsworn and therefore, inadmissible and that Bruno did not set forth his qualifications as required, the Court finds that the plaintiff 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 was suitable for the job the plaintiff 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. Further, there is an issue of fact as to whether the plaintiff was even wearing his eye protection at the time of the incident. Although he testified that he was wearing them, his co-worker, Lituma, testified that both he and the plaintiff had taken off their safety glasses prior to the incident.

The Court now considers Highview’s cross-motion for dismissal. Highview relies upon its expert report from Bruno, which was not properly submitted and therefore, is not admissible evidence in support of the motion. Nevertheless, with regard to Labor Law §

241[6], the Court may still determine the applicability of the various codes claimed in the plaintiff's bill of particulars, which sets forth multiple violations of New York's Industrial Codes and OSHA regulations.

"[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 Highview, 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 alleges claims under Labor Law § 200 / common law negligence. "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]).

"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 plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous

condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition” (*Id.*).

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.*).

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.

Here, Douglas Lorenz, the job super for Highview on the subject job site, testified that he would tell the carpenters when certain work could start, where the workers should be working and it was Highview’s job to coordinate the workers. Therefore, there is an issue of fact as to whether Highview had the authority to supervise or control the manner in which the work was performed. Pertaining to any alleged premises defect, Highview did not create the dangerous condition that caused the accident, but there is an issue of fact as to whether Highview had actual or constructive notice of the dangerous condition, by having knowledge of the nail guns being used in proximity to the plaintiff.

'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. That part of Highview's motion is, therefore, 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 Highview's motion for summary judgment is granted.

With regard to Highview's claims for contractual indemnification, including attorney's fees, costs and expenses with respect to its contractual indemnification, additional insured status, and insurance procurement against Sala, the Court finds that Highview is not entitled to contractual indemnification and defense coverage.

“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 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.

Accordingly, based on the foregoing, it is

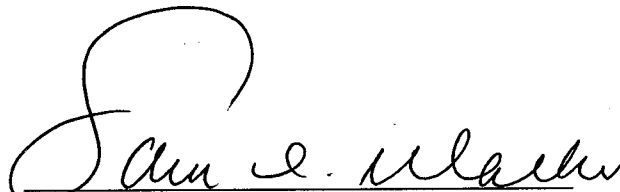
ORDERED that the plaintiff's motion for summary judgment is denied and it is further

ORDERED that Highview's motion for summary judgment is granted in part and denied in part.

The parties are directed to appear before 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.