

Rogers v 4 Third Ave. Leasehold LLC

2020 NY Slip Op 34918(U)

July 1, 2020

Supreme Court, New York County

Docket Number: Index No. 150318/2016

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

WILLIAM ROGERS and RENEE ROGERS,

Plaintiffs,

- v -

4 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE FEE LLC, and TRISTAR CONSTRUCTION CORP.,

Defendants.

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INDEX NO. 150318/2016
MOTION DATE
MOTION SEQ. NO. 005, 006, 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104-124, 132, 233-265, 269; (Motion 006) 163-184, 223-226, 271, 277; (Motion 007) 185-201, 227-229, 266-68, 273, 279 were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff William Rogers, who was employed as a steamfitter by third-party defendants Par Fire Protection Company, Par Plumbing Protection Company and The Par Group (together "Par"), commenced this action against the owner and tenant, defendants/third-party plaintiffs 4 Third Avenue Leasehold LLC and 4 Third Avenue Fee LLC (Owners), and general contractor, defendant/third-party defendant Tristar Construction Corporation (Tristar), to recover for injuries he allegedly suffered on November 12, 2015, when, during the course of installing a pipe into the ceiling, the ladder he was standing on shifted and twisted, causing him to lose his balance and bang his neck into the ceiling grid. In motion #005, plaintiff moves pursuant to CPLR 3212 for partial summary judgment on his Labor Law § 240 and § 241(6) claims. In motion #006, defendant Owners move for summary judgment seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claims, and the Labor Law § 241(6) claims insofar as they are premised on inapplicable Industrial Code provisions. Defendant Owners also seek summary judgment on their contractual and common law indemnification claims against third-party

defendants Tristar and Par. In motion #007, defendant/third-party defendant Tristar moves for summary judgment seeking dismissal of all of plaintiff's claims as well as all counter and cross-claims asserted against it. Tristar also seeks summary judgment on its claim for contractual indemnification against third-party defendant Par, as well as reimbursement of attorneys' fees. The motions are consolidated for purposes of this decision.

With respect to plaintiff's motion, Labor Law § 240(1) imposes liability on contractors and owners for exposing workers to certain elevation-related hazards and failing to provide adequate safety devices for these risks. *Keenan v. Simon Property Group, Inc.*, 106 A.D.3d 586, 587 (1st Dep't 2013). "In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240(1), he must establish that there was a violation of the statute, which was the proximate cause of the workers' injuries." *Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 236 (1st Dep't 2009) (internal citations omitted). Here, plaintiff testified that he was injured when the ladder he was standing on suddenly shifted and twisted, causing plaintiff to bang his neck against the ceiling grid. Affirmation of Andrew Diamond dated October 31, 2019, Exh. 2 (Plf. Dep. Tr. 56-59). Although plaintiff was able to catch the ladder with his foot and did not actually fall to the ground, his injuries were caused as a result of the application of gravity to an object or person and thus fall within the scope of the protections of Labor Law § 240. *Reavely v. Yonkers Raceway Programs Inc.*, 88 A.D.3d 561 (1st Dep't 2011) (analyzing cases and holding that statute applies where a worker was injured while in the process of preventing himself from falling). Further, it is undisputed that the ladder upon which he was working was unsecured and that defendants failed to provide him with any safety equipment, such as a safety harness or a scaffold, to perform the work. This is sufficient to satisfy his prima facie burden on summary judgment. *Caceres v. Standard Realty Assoc.*, 131 A.D.3d 433, 434 (1st Dep't 2015) ("we find

that plaintiff's testimony that he fell from the ladder while performing drilling work established prima facie entitlement to summary judgment"); see also *Messina v. City of New York*, 148 A.D.3d 493, 494 (1st Dep't 2017).

In opposition, defendants first argue that plaintiff has failed to meet his prima facie burden because there is a question of fact as to whether the ladder provided adequate protection to the plaintiff. However, where plaintiff submits evidence that the ladder collapsed, slipped, or was otherwise defective, this is sufficient to meet the prima facie burden on summary judgment. See *Caceres*, 131 A.D.3d at 434. Here, plaintiff testified that the unsecured ladder suddenly shifted and twisted while he was working on it and has thus met his prima facie burden. *Diamond Aff.*, Exh. 2 (Plf. Dep. Tr. 56-59). In any event, plaintiff also testified that when he examined the ladder after his accident, he noticed that it did not have rubber feet on it. *Diamond Aff.*, Exh. 2 (Plf Dep. Tr. 60). Thus, he has met his prima facie burden under Labor Law § 240.

Defendants also argue that they cannot be held liable because plaintiff was the sole proximate cause of the accident. 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, defendants failed to submit any evidence that they provided plaintiff with adequate safety devices to perform the work. Defendants argue that plaintiff was instructed by his foreman, Matthew Matdes, not to install the pipe by himself but he nevertheless attempted to do so. Affirmation of Courtney Scharpf dated February 11, 2020, Exh. E (Kinney Dep. Tr. 49-50). However, the testimony on which defendants rely, Tristar's employee recounting what she allegedly overheard Matdes say to plaintiff, is inadmissible hearsay. *Casasola v. State*, 129 A.D.3d 758, 759-760 (2d Dep't 2015). Further, even if this

testimony is considered, there is no evidence as to what Matdes would have done, if anything, to prevent the fall. In any event, it is well-established that a co-worker is not a safety device contemplated by the statute. *Kaminski v. Carlyle One*, 51 A.D.3d 473, 474 (1st Dep't 2008). Thus, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident because they failed to show that adequate safety devices were provided or were readily available to plaintiff. *Pena v. Jane H. Goldman Residuary Trust No. 1*, 158 A.D.3d 565 (1st Dep't 2018). Finally, to the extent defendants argue that plaintiff contributed to the accident by failing to wait for Matdes before installing the pipe, such conduct amounts to comparative negligence which is not a defense to absolute liability under the statute. *Blake v. Neighborhood Hous. Services*, 1 N.Y.3d 280, 289-90 (2003). Accordingly, plaintiff is entitled to summary judgment on his Labor Law 240(1) claim. In light of this holding, the court need not address the parties' arguments concerning plaintiff's negligence and Labor Law §§ 200 & 241(6) claims. *Henningham v. Highbridge Comm. Hous. Dev.*, 91 A.D.3d 521, 522 (1st Dep't 2012).

Turning to motion #006, in light of the ruling above, the only remaining issue in this motion is whether defendants/third-party plaintiffs Owners are entitled to summary judgment on their claims for contractual and common law indemnification against third-party defendants Par, the employer, and Tristar, the general contractor. With respect to Par, Owners have withdrawn their claim for common law indemnification against Par in response to Par's opposition to the motion. Owners argue that they are entitled to summary judgment on their claim for contractual indemnification against Par pursuant to Tristar's contract with Par, which contains a broad indemnification provision. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire

agreement and the surrounding facts and circumstances.” *Campos v. 68 East 86th Street Owners*, 117 A.D.3d 593, 595 (1st Dep’t 2014). Further, “[c]ourts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an ‘unmistakable intent’ to indemnify.” *Great Northern Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417 (2006).

Here, the indemnification provision in Par’s contract with Tristar provides that Par is obligated to indemnify Tristar and the Owners from all liability resulting from its work, excluding only liability due to the sole negligence of Tristar and Owners. Affirmation of Jonathan Walsh dated November 25, 2019, Exh. S. This broad language is sufficient to trigger Par’s obligation to indemnify defendant Owners for the claims in this action. Third-party defendant Par does not dispute that the claims in this action fall within the broad indemnification provision in the contract. However, Par argues that granting indemnification to the Owners is premature as their liability has not yet been determined and there is evidence showing that the ladder in question belonged to Owners, thus rendering them potentially liable for the accident.

It is well-established that where an injury was caused by the manner and means of the work, such as here, the owner may only be held liable if it actually exercised supervisory control over the work. *Cappabianca v. Skanska USA Bldg.* 99 A.D.3d 139, 144 (1st Dep’t 2012). Here, defendant Owners have submitted the uncontroverted testimony from their management company which made clear that no one from the Owners or their management company was present at the worksite or ever gave equipment or instructions to the workers. Walsh Aff., Exh. K (DiBase Dep. Tr. 42-43). Under these circumstances, the mere fact that plaintiff may have used one of the ladders that defendant Owners had on site, even if proven, is insufficient to show that defendant Owners exercised any control over the plaintiff’s work. Accordingly, defendant

Owners are entitled to summary judgment on their claim for contractual indemnification against third-party defendant Par.

With respect to defendant/third-party defendant Tristar, defendant Owners argue that they are entitled to summary judgment on their claim for contractual indemnification against Tristar pursuant to the broad indemnification agreement in the parties' Hold Harmless Agreement. The relevant provision in this agreement provides that Tristar agrees to indemnify Sage Realty (the Owner's management company) on its behalf of all entities having an ownership interest in the property from all claims arising from the negligence of the contractor or in connection with the contractor's work. Walsh Aff., Exh. Q. Defendant Tristar's argument that the Owners are not entitled to indemnification under this agreement because this is a contract between Sage Management and Tristar, lacks merit as Sage Management was acting on behalf of Owners when it entered into this agreement and the indemnification provision clearly provides that it is on behalf of all entities having an ownership interest in the property. Tristar also argues that the indemnification is invalid because it violates General Obligations Law 5-322.1 because it requires Tristar to indemnify Owners for their own negligence. However, as discussed above, there is no evidence to show that Owners were negligent as they did not exercise any supervision or control over plaintiff's work, and thus General Obligations Law 5-322.1 is inapplicable. *Davis v. All State Associates*, 23 A.D.3d 607 (2d Dep't 2005) (absent finding of negligence on part of indemnitee, prohibition against indemnifying party for its own negligence is inapplicable). Accordingly, defendant Owners are also entitled to summary judgment on their claim for contractual indemnification against Tristar. In light of this ruling, the court need not address the parties' argument regarding common law indemnification.

With respect to motion #007, the remaining issue is whether defendant/third-party defendant Tristar is entitled to contractual indemnification from third-party defendant Par. In support of its motion, Tristar, like Owners, also submits its contract with Par which contains the broad indemnification provision discussed above. Affirmation of Courtney Scharpf dated November 29, 2019, Exh. M. However, there is a question of fact as to whether Tristar can be found negligent for plaintiff's accident as plaintiff testified that Tristar's supervisor at the site, Dermot O'Sullivan, directed plaintiff to install the pipe before his foreman, Matdes arrived, and that O'Sullivan set up the ladder for plaintiff. Scharpf Aff., Exh. D (Plf. Dep. Tr. 38, 85). Although O'Sullivan denied this, plaintiff's testimony is sufficient to create an issue of fact regarding whether Tristar supervised or controlled plaintiff's work, thus potentially rendering it negligent for plaintiff's accident. To the extent Tristar seeks summary judgment on its claim for common law indemnification from Par, this relief must also be denied for the same reason and because plaintiff did not suffer a "grave injury" as defined by the Workers' Compensation Law. *Martins v. Little 40 Worth Associates*, 72 A.D.3d 483, 484 (1st Dep't 2010). Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (#005) is granted to the extent that it is entitled to summary judgment on liability on its Labor Law § 240 claim against all defendants, and is otherwise denied as moot; and it is further

ORDERED that defendant/third-party plaintiff's Owner's motion for summary judgment (#006) is granted to the extent that it is entitled to summary judgment on its claims for contractual indemnification from third-party defendants Par and Tristar, and is otherwise denied; and it is further

ORDERED that defendant/third-party defendant Tristar's motion for summary judgment (#007) is denied.

7/1/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE