

Scarano v Pelham Union Free Sch. Dist.
2020 NY Slip Op 35027(U)
March 19, 2020
Supreme Court, Westchester County
Docket Number: Index No. 55092/2018
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.**

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THOMAS SCARANO,

Plaintiff,

DECISION & ORDER
Index No. 55092/2018
Seq. # 3

-against-

PELHAM UNION FREE SCHOOL DISTRICT, PELHAM UNION FREE SCHOOL DISTRICT #1, PELHAM PUBLIC SCHOOLS, THE BOARD OF EDUCATION OF THE PELHAM UNION FREE SCHOOL DISTRICT, SAVIN ENGINEERS, P.C., and MACE CONTRACTING CORP.,

Defendants.

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The following papers were read on a motion by the defendant, Pelham Union Free School District (the "District"):

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FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Thomas Scarano, (the "plaintiff/Scarano") commenced this action by filing a summons and verified complaint on April 9, 2018, seeking to recover for alleged personal injuries sustained on August 9, 2017, during the course of his employment for Clean Air Quality Services ("Clean Air") as a journeyman, while working on a ladder performing duct removal work in connection with demolition and reconstruction of the boys locker room located at Pelham Memorial High School, located at 575 Colonial Avenue, Pelham, Westchester County. The plaintiff alleges that the District, Savin Engineers, P.C. ("Savin") and Mace Contracting Corp. ("Mace") are negligent as a matter of law and

violated New York Labor Law §§ 240[1] and 241[6] and that Savin and Mace violated New York Labor Law § 200.

By Stipulation and Notice of Partial Voluntary Discontinuance Without Prejudice, the parties stipulated to discontinue the action against the defendants, Pelham Union Free#1, Pelham Public Schools, and The Board of Education of the Pelham Union Free School District. The plaintiff asserts that at the time of the incident, the District was the owner of the building. Savi, was the construction manager and Mace was the general contractor. Clean Air was hired to perform the HVAC work and provided the A frame ladders the plaintiff was using to work, two of which were 10 or 12 feet and one 8 feet.

The District now files the instant motion seeking dismissal of the complaint and any cross-claims against it, arguing that the plaintiff's Labor Law § 200, common law negligence, and Labor Law § 241[6] claims against the District are meritless and that the District is entitled to contractual and/or common law indemnification from Savin and Mace.

In partial opposition, Mace argues that it is completely free from negligence and liability and therefore, the District is not entitled to common law nor contractual indemnification.

In opposition to the motion, the plaintiff states that the District has not opposed the portion of the plaintiff's motion seeking summary judgment against the District pursuant to Labor Law § 240[1] and therefore, that portion of the plaintiff's motion for summary judgment should be granted. The plaintiff also argues that the District violated specific applicable New York State Industrial Codes Section 23-1.7[e][2] and 23-3.3[c]. The plaintiff also argues that the District has the authority to control the means and methods of the plaintiff's work, so as to impose liability pursuant to Labor Law § 200 and it had actual and/or constructive notice of the dangerous condition.

In opposition, Savin argues that as the owner, the District has an undelegable, statutory duty to the plaintiff under Labor Law §§ 200, 240, and 241. Savin asserts that the District remained an active and involved owner in the project and retained all of its own contractors for the project. The District's assistant superintendent for business, James Hricay, testified that he visited the worksite daily and checked on the progress of the work and locked access to the worksite following the plaintiff's alleged accident.

Savin also argues that the District confuses Savin's authority to stop work with a duty to stop work, which it had no duty to do. Savin contends that it was not the owner of the premises; did not operate, maintain, nor control the project; it was not retained to perform any construction work; was not retained to be, and was not, a site safety consultant, or a site safety manager on the project; and Savin did not control nor direct the plaintiff's activities at the project. Savin further argues that the contractual indemnity language in its contract with the District is predicated on a finding of an actual negligent act or omission of the construction manager in the performance of the construction manager's services and since Savin is not negligent, the District is not entitled to indemnification.

In reply, the District argues that the plaintiff's argument that it should be entitled to his Labor Law § 240[1] claim because the District did not move to dismiss such claim is nonsensical and the District filed separate papers in opposition to the plaintiff's summary judgment motion, including opposition to that section of the statute. The District further argues that it did not control the work and that the industrial codes claimed by the plaintiff are inapplicable.

The District also asserts that it is entitled to indemnification from both Mace and Savin, since the plaintiff's injuries were caused, at least in part, by Mace's and Savin's negligent act or omission in the performance of its contract because the plaintiff fell on remnants of recently removed wall or pipes and Savin's construction manager confirmed that the pipes had been there for a week prior to the plaintiff's accident. The District further asserts that it is entitled to common law indemnification because Savin was negligent in allowing the plaintiff to use a ladder for his work and they both were responsible for the exposed pipes.

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]). “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’” (*Id.*). “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 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.” (*Id.*). “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.*).

“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 defect was a latent defect unbeknownst to the defendants.

Here, while the testimony and evidence may establish that any alleged defect was unbeknownst to the District and that it neither created the dangerous condition nor had actual or constructive notice of the dangerous condition on the premises, there is an issue of fact as to the extent that the District controlled or supervised the manner or method with which the contractors performed their work. The District's assistant superintendent for business, testified that he was on the site daily and checked on the work progress. Therefore, that part of the motion for summary judgment under common law negligence and Labor Law § 200 with regard to the District, is denied.

Section 240(1) of the Labor Law, entitled "Scaffolding and other devices for use of employees", states in pertinent part that:

All contractors and owners and their agents, ..., in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed (NY Labor Law § 240[1]).

"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, the Court finds that there is an issue of fact as to whether the plaintiff's injury was a result of the failure to provide adequate safety device or equipment and whether a ladder was sufficient for the plaintiff to perform the duct work he was performing when he fell.

"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.*).

The plaintiff alleges violation of industrial code provisions found at 12 NYCRR 1.7[e][2] and 23-3.3[c]. Section 23-1.7[e][2] provides that:

“[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.”

Section 23-3.3[c] provides that:

“[d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

Here, the Court finds that there are issues of fact as to whether debris (pipes) on the ground was an integral part of the work being performed, whether the debris contributed to the plaintiff’s injury, and whether the plaintiff had notice of such debris being on the ground.

With regard to contractual and common law indemnification, the Court denies that request, since it has found that Mace and Savin were not liable to the plaintiff and the indemnification is predicated upon the negligent acts or omissions of the contractor or construction manager.

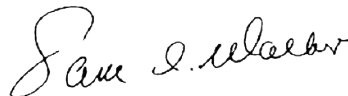
Accordingly, based on the foregoing, it is

ORDERED that the District’s motion is denied

The parties are directed to appear before the Settlement Conference Part on a date to be scheduled.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 19, 2020



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