Perko v RCPI Landmark Props., LLC
2021 NY Slip Op 30776(U)
February 18, 2021
Supreme Court, Kings County
Docket Number: 524885/2017
Judge: Devin P. Cohen

Supreme Court of the State of New York
County of Kings

Part 91

TADEUSZ PERKO,

Plaintiff,

against

RCPI LANDMARK PROPERTIES, LLC, TISHMAN SPEYER PROPERTIES, L.P., AND RFA HUDSON, INC.,

Defendants.

RCPI LANDMARK PROPERTIES, LLC, TISHMAN SPEYER PROPERTIES, L.P. ,

Third-Party Plaintiffs,

against

PAR ENVIRONMENTAL CORPORATION,

Third-Party Defendant.

Index Number 524885/2017
SEQ # 003 & 004

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1, 2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2-3
Replying Affidavits.....	3
Exhibits.....	
Other	

Upon the foregoing papers, defendants and third-party plaintiffs RCPI Landmark Properties, L.L.C. ("RCPI") and Tishman Speyer Properties, L.P.'s ("Tishman") motion for summary judgment (Seq. 003), and plaintiff's motion for partial summary judgment (Seq. 004), are decided as follows:

Introduction

Plaintiff commenced this action against defendants RCPI, Tishman, and RFA Hudson, Inc., for injuries he claims to have sustained as a result of an accident on December 8, 2017, allegedly caused by defendants' negligence and violations of New York Labor Law §§ 200, 240(1) and 241(6). RCPI and Tishman assert third-party claims for common-law and contractual

indemnification, contribution and breach of contract against PAR Environmental Corp. ("PAR").

Factual Background

Heidi Amar, an employee of Tishman, testified at her deposition that RCPI owned 45 Rockefeller Plaza, New York, New York, and Tishman was its managing agent (Amar EBT at 17, 25). Ms. Amar was the property manager for that property (*id.* at 9-10). Tishman, as agent for RCPI, hired PAR to perform asbestos abatement work to be done in December 2017 (*id.* at 16 and 20-22; *see also* the contract provided by defendants). Ms. Amar contends that neither RCPI nor Tishman supplied any equipment or materials, including ladders, to PAR (*id.* at 25-26 and 34).

Pursuant to the contract, a copy of which defendants provide, PAR agreed to provide supervision by licensed personnel, as well as all labor and materials (Schedule A, paragraph 8, and Exhibit A, Art. 2.1). The contract also required PAR to indemnify RCPI and Tishman for any claims that arose due to PAR's "negligent acts, errors, omissions or willful misconduct in the performance of Services under this Agreement" (Exhibit A, Art. 5.2). The agreement further required PAR to procure $10 million in insurance that named RCPI and Tishman as additional insureds and that covered certain enumerated items (Exhibit B).

Plaintiff testified that, as an employee of PAR, he was working on the construction project at 45 Rockefeller Plaza (plaintiff's EBT at 14-16). Plaintiff was supervised by PAR employees and received his supplies and tools, including his ladder, from PAR (*id.* at 16-22). On the day of the accident, plaintiff was installing foil (*id.* at 23). He used that ladder on that day and did not have trouble until the time of the accident (*id.* at 25-26). At the time of his accident, plaintiff was standing on the fourth step of a six-foot, A-frame, aluminum ladder (*id.* at 23-24).

The floor on which the ladder stood was level and there was no debris in the area (*id.* at 45). The ladder was fully opened, and the braces were locked (*id.* at 24). As plaintiff was hanging a piece of foil, the foil became stuck on "metal elements" and plaintiff attempted to pull the foil off (*id.* at 34-35). When he pulled the foil from left to right, the ladder began to shake, and he fell back with the ladder, which fell with him (*id.* at 34-35 and 41-42).

Emile Mayo, a senior project manager with PAR, identified at his deposition a copy of PAR's incident report for the accident (Mayo EBT at 17). The report includes statements from other people who claimed to have witnessed the accident. Without knowing more about the people who reported to Mr. Mayo what they saw, the incident report is inadmissible hearsay (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 114 AD3d 33, 53 [2d Dept 2013], *affd*, 25 NY3d 498 [2015]).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Negligence and violation of Labor Law § 200

"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" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121,

128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 and negligence in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991-92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]).

The accident here allegedly occurred due to dangerous equipment, not due to a dangerous condition of the premises, and so only the second theory of liability applies (*Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]; *compare DeFelice v Seakco Const. Co.*, LLC, 150 AD3d 677, 678 [2d Dept 2017]). There is no dispute that neither RCPI nor Tishman supervised plaintiff, and plaintiff does not oppose this portion of defendants' motion. Accordingly, RCPI and Tishman are not liable to plaintiff in negligence or for violation of Labor Law § 200.

Violation of Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners[1] and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). In order to receive protection under Labor Law § 240(1), plaintiff must prove that: (1) he was permitted or suffered to work on the construction project; and (2) he was hired by the owner, contractor or their agent to work at

[1] Tishman's papers argue that it cannot be held liable because it is neither the owner nor general contractor. However, at oral argument, Tishman withdrew that contention.

the site (*Gallagher v Resnick*, 107 AD3d 942, 944 [2d Dept 2013]). Plaintiff must also prove that defendants violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082-83 [2d Dept 2017]). Defendants are liable under Labor Law § 240(1) if the injured worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*id.*, quoting *Broggy v Rockefeller Group*, Inc., 8 NY3d 675, 681 [2007]).

To establish a violation under Labor Law § 240(1), "[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (Hugo v. Sarantakos, 108 A.D.3d at 745, 970 N.Y.S.2d 245). The Second Department has held that a ladder must be secured to something stable or chocked/wedged in place (*Gonzalez v AMCC Corp.*, 88 AD3d 945, 946 [2d Dept 2011]).

Defendants argue that the ladder was suitable for the task and properly secured, as stated in the affidavit of its expert, Terrence J. Fearon. Mr. Fearon, a professional engineer, determined that, given plaintiff's height and likely reach, he was able to perform his task from the fourth step of the ladder where he stood at the time of the accident (Fearon affidavit at ¶¶ 16-17). He opined that, if plaintiff was using the ladder properly, it did not require another person or equipment to secure it (*id.* at ¶ 18).

Mr. Fearon's opinion is contrary to the governing law in this department (*Gonzalez*, 88 AD3d at 946). It is undisputed that defendants did not provide plaintiff with a stabilized or secured ladder for his work. Furthermore, there is no evidence that defendants offered plaintiff any other equipment or device that would have prevented this accident, or that he refused to use

such equipment. Accordingly, plaintiff was not the sole proximate cause of his injuries (*Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 887 [2d Dept 2019]; *Cruz v R.C. Church of St. Gerard Magella*, 174 AD3d 782, 783-84 [2d Dept 2019] [rejecting defendant's contention that, had plaintiff used the scaffold property, the accident would not have occurred]).

Mr. Fearon also asserts that Industrial Code Part 23 requires a ladder to be secured or steadied only when the person on the ladder is standing on a step that is 10 feet or more above the floor (Fearon affidavit at ¶ 18). Mr. Fearon does not cite a specific provision from the Industrial Code for this contention. "Part 23" is, in fact, the entire code as it relates to "Protection in Construction, Demolition and Excavation Operations". In the absence of a specific reference to the Industrial Code, there is not sufficient support for Mr. Fearon's contention.

Violation of Labor Law § 241(6)

Defendants also seek summary judgment to dismiss plaintiff's claim for violation of Labor Law § 241(6). Labor Law § 241(6) imposes on owners and contractors a non-delegable duty 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" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Plaintiff contends that defendants violated Labor Law § 241(6) by violating Industrial Code §§ 23-1.7, 23-1.16, 23-1.21, 23-1.30, 23-1.32, 23-2.1, and 23-3.3, as well as OSHA

regulations. There is no slipping or tripping hazard because of debris, and so Section 23-1.7 was not violated. There are no safety belts, harnesses, tail lines and lifelines, and so Section 23-1.16 was not violated. Section 23-1.21 describes requirements for ladders, which could apply in this case. However, plaintiff presents no evidence of any infraction of these requirements. Section 23-1.30 was not violated because there was no evidence of a problem with illumination. Section 23-1.31 was not violated because there was no issue with approval of a piece of equipment or device. Section 23-1.32 was not violated because there was no issue with a warning sign. Section 23-2.1 was not violated because there are no assertions concerning storage of materials or debris. Section 23-3.3 is a large code provision that addresses various aspects of demolition, which plaintiff was not performing here. Finally, OSHA regulations cannot support a claim for violation of Labor Law § 241(6) (*Shaw v RPA Assoc., LLC*, 75 AD3d 634, 637 [2d Dept 2010]). In any event, plaintiff does not oppose this portion of defendants' motion.

Third-Party Claims

RCPI and Tishman seek summary judgment on their claim for contractual indemnification. "The right to contractual indemnification depends upon the specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). Also, to be entitled to indemnification, a defendant must prove they were not negligent (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]; *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). The contract between Tishman and PAR states that PAR must indemnify Tishman for claims that arise from PAR's negligent acts or omissions. There is not sufficient evidence in this record to find that PAR was negligent here.

RCPI and Tishman also seek summary judgment on their claim that PAR breached their agreement to secure insurance for Tishman and RCPI Landmark that covers claims against them which arise from PAR's work. PAR obtained general commercial liability insurance from Zurich American Insurance Company, and named RCPI and Tishman as additional insureds. In breach of its agreement with RCPI and Tishman, PAR obtained only $2 million in coverage, with $5 million in excess coverage, when the agreement required PAR to obtain $10 million in coverage. While a breach, it is unclear if RCPI and Tishman will suffer any damages because there has been no judgment in plaintiff's favor.

In addition, defendants argue that PAR breached the agreement because Zurich disclaimed coverage. In a letter, which defendants submit, Zurich states that it cannot assume coverage because it has not yet determined whether the claim arises from PAR's acts or omissions, as required for coverage by the policy.[2] The agreement states that PAR will name RCPI and Tishman as additional insureds on a policy that insures "against all of the categories of claims/losses which are described in Paragraph 10.12 hereof" (contract, Exhibit B, ¶ 2). There is no paragraph 10.12 in Exhibit B, and that paragraph in the main body of the contract does not enumerate any claims. Thus, there is no evidence that the policy PAR obtained breaches the contract in this regard.

For the reasons stated above, defendants and third-party plaintiffs' motion for summary judgment (Seq. 003) is granted to the extent that plaintiff's claims against RCPI and Tishman for

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[2] The scope of indemnification in the contract between Tishman and PAR differs from the scope of coverage in PAR's insurance policy with Zurich. The contract between Tishman and PAR provides that PAR will indemnify Tishman and RCPI for claims that arise from PAR's negligence. In contrast, the policy states that coverage is triggered by PAR's acts or omissions generally.

negligence and violation of Labor Law §§ 200 and 241(6), based on violations of Industrial Code §§ 23-1.7, 23-1.16, 23-1.21, 23-1.30, 23-1.32, 23-2.1, and 23-3.3, as well as those based on violations of OSHA regulations, are dismissed. In addition, RCPI and Tishman are awarded summary judgment on their breach of contract third-party claim to the extent that this court holds PAR breached the contract. The remainder of the motion is denied. Plaintiff's motion for partial summary judgment regarding violation of Labor Law § 240(1) (Seq. 004) is granted.

This constitutes the decision and order of the court.

February 18, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court