Brennan v Roseland Dev. Assoc., LLC
2021 NY Slip Op 33171(U)
September 20, 2021
Supreme Court, New York County
Docket Number: Index Number 151395/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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DAMIEN BRENNAN,

Plaintiff,

-against-

ROSELAND DEVELOPMENT ASSOCIATES, LLC, and PAVARINI MCGOVERN, LLC,

Defendants.

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ROSELAND DEVELOPMENT ASSOCIATES, LLC, and PAVARINI MCGOVERN, LLC,

Third-party Plaintiffs

-against-

ALL SAFE LLC,

Third-party Defendants

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DECISION AND ORDER

Index Number

151395/2017

FRANK P. NERVO, J.S.C.

The Court consolidates motion sequences 002 and 003 for disposition.

In this action for personal injuries asserting violations of the Labor Law, plaintiff Damien Brennan (plaintiff) moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) (motion sequence number 002). Third-party defendant All-Safe, LLC (All-Safe) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims. Defendants/third-party plaintiffs Roseland Development Associates, LLC (Roseland) and Pavarini McGovern, LLC (Pavarini) move, pursuant to CPLR 3212, for: (1) summary

judgment dismissing the complaint and any counterclaims against them; and (2) summary judgment on their contractual indemnification claim against All-Safe (motion sequence number 003). All-Safe cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

This action arises out of an accident that occurred on January 31, 2017, at 242 West 53rd Street in Manhattan (the premises). It is undisputed that Roseland was the owner of the project, and that Pavarini was the general contractor hired to construct a new 63-story residential building. Pavarini retained All-Safe as a subcontractor to install, repair, and maintain the exterior hoists on the project. Plaintiff was employed as an elevator mechanic by All-Safe.

Plaintiff testified at his deposition that, on January 31, 2017, he was employed as an elevator mechanic by All-Safe (NYSCEF Doc No. 76, plaintiff tr at 12-13). His supervisor was Nicholas Garcia (Garcia), a head mechanic at All-Safe (*id.* at 31). On the morning of the accident, Garcia told plaintiff that they were going to perform safety checks on the elevators at multiple locations, including at the subject premises (*id.* at 57). After the safety check was completed, it was determined that a safety plate for the right elevator cab

needed to be replaced because it was making a knocking noise at around the third or fourth floor (*id.* at 61-62, 72). The elevator had to be moved up and down so measurements could be taken from inside and outside the cab (*id.* at 67-69). Garcia brought the cab to a stop somewhere between the second and fourth floors and instructed plaintiff to secure his safety harness so he could stand on one of the ties to take measurements (*id.* at 74-75).

Plaintiff alleges he had an accident while "[r]epairing an elevator" (*id.* at 33). He secured his lanyard to the tie that he was going to stand on (*id.* at 81). Plaintiff testified that he "was standing on either the second or third tie between the two elevators approximately three-foot space between both elevators" (*id.* at 33). Plaintiff testified that he was giving Garcia "the measurement that he needed to adjust the plate and the counterweight came down, hit [him] on the right side of the head" and "[d]ragged [him] down on top of the tie" (*id.* at 34). "[The] next thing that [he] felt was . . . the counterweight of the other elevator and it came back up, it hit [him] in the back, pushed him out over the edge of the tie and [he] fell two or three feet" (*id.*). He stated that "[t]he elevator counterweight brought [him] down and at some [5,000] pounds pulls into another piece of metal," the counterweight "came back up" and "hit him in the back and pushed [him] out over the edge of

the tie" (*id.* at 92-93). At some point, the counterweight from the other car came into contact with his lower back, and pushed plaintiff off the tie (*id.* at 194-195). Plaintiff's lanyard became disengaged from the tie because the lanyard hook "got severed or destroyed" when the counterweight fell (*id.* at 93). Plaintiff could not explain how he was being held up or what prevented him from falling to the ground (*id.* at 98, 197). Eventually, plaintiff was able to pull himself back by climbing up to the tie (*id.* at 96).

Garcia testified that he was also employed as an elevator mechanic by All-Safe (NYSCEF Doc No. 77, Garcia tr at 24-25, 45). On the day of the accident, there was a scheduled "90-day drop test" of the three hoists that a third-party inspector oversaw (*id.* at 71-72). All three hoists at the project passed the load test (*id.* at 73). After the inspections were completed, an operating engineer called him to report a problem with one of the hoists making a noise (*id.* at 76-77, 137). Garcia did not inform the operator of the other car that they were investigating the cause of the noise: he stated "they don't need to know that because the car is just moving like at the regular operation. I don't do anything unusual at this point" (*id.* at 79, 85, 138). Garcia testified that the other elevator was not taken out of service because it was quicker to do the job without asking permission to shut down both elevators (*id.* at 85-86). However,

Garcia testified that it was always safer to stop both cars; "[i]f nothing is moving, it is always safer" (*id.* at 86). After Garcia determined the location of the noise, he brought the car back down and retrieved a grease gun (*id.* at 80-81). Garcia did not observe plaintiff's accident because he was standing inside the elevator cab while plaintiff was standing on the tie, but he knew that there was something wrong when he heard plaintiff scream; "Immediately I hear him screaming, I run to the roof of the car, I saw him hanging out of his harness" (*id.* at 93-94, 153).

Garcia further testified that the safety plate would have been greased pursuant to a schedule within one or two weeks (*id.* at 170-171). Garcia stated that the hoist would have functioned properly if they had not gone back to grease the safety plate (*id.* at 171). He further explained that the work was a "two man job" "[b]ecause to spread the grease into the bushing you had to pump a little bit of grease, move the pinion a little bit and so pump another little grease and then spin a little bit so the grease go all around the shaft" (*id.* at 163-164).

Bryan Fredrick (Fredrick), Pavarini's assistant superintendent, supervised the construction of the building (NYSCEF Doc No. 78, Fredrick tr at 8-9, 11).

Fredrick was on the concrete deck supervising the "forming, stripping deck, pouring floors" and generally "watching the complete operation" (*id.* at 9). He did not observe the accident (*id.* at 21).

Edward Lydon (Lydon) testified that he was Pavarini's general superintendent working on the project (NYSCEF Doc No. 79, Lydon tr at 10, 12). All-Safe was the subcontractor that was retained to install, maintain, and repair the hoists (*id.* at 15-16). According to Lydon, the City of New York conducts routine safety inspections every 90 days, and All-Safe participates in the inspections (*id.* at 31-32). All-Safe made the decision whether to take cars out of service (*id.* at 62, 73).

Daniel O'Brien (O'Brien) testified that he was a part owner of All-Safe Height Contracting, which changed its name to All-Safe (NYSCEF Doc No. 80, O'Brien tr at 14, 16). He testified that the All-Safe mechanics would decide whether it was safe to have a car in operation while the other car was being worked on (*id.* at 67-68). O'Brien stated that greasing of the hoist was part of routine maintenance, which occurred once a month (*id.* at 73).

Plaintiff commenced this action asserting causes of action stemming from common-law negligence and violations of Labor Law §§ 200, 240, 241-a, and 241 (6) (NYSCEF Doc No. 71, verified complaint ¶¶ 1-29, 30-36). [1]

Roseland and Pavarini subsequently impleaded All-Safe, asserting the following claims: (1) contractual defense and indemnification; (2) common-law negligence; (3) attorneys' fees; and (4) damages for failure to procure insurance (NYSCEF Doc No. 74, verified third-party complaint ¶¶ 11-16, 17-19, 20-22, 23-28). All Safe asserted a counterclaim against Roseland and Pavarini for contribution and/or indemnification (NYSCEF Doc No. 75, verified answer to verified third-party complaint at 7).

SUMMARY JUDGMENT

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept

[1] To the extent that plaintiff claims violations of Labor Law § 255, no party alleges the accident occurred in a factory and therefore § 255, related to factory use of elevators, is inapplicable and that claim is dismissed.

2013]). "When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

LABOR LAW § 240[1]

Labor Law § 240(1) provides, in pertinent part:

> all contractors and owners ... 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.

(Labor Law § 240[1]).

The duty imposed by Labor Law § 240(1) is nondelegable; an owner or contractor may be held liable regardless of whether such party actually exercised supervision or control over the work (*Haimes v. New York Tel. Co.*, 46 NY2d 132 [1978]; *compare Russin v. Picciano & Son*, 54 NY2d 311 [1981], Labor Law § 200). Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed" (*Koenig v. Patrick Constr. Corp.*, 298 NY 313 [1948] quoting *Quigley v. Thatcher*, 207 NY 66 [1912]). However, the injury claimed under § 240(1) must result from elevation-related hazards, "injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device" (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d 494 [1993] Back strain alleged because platform was placed in manner requiring worker to contort not within class of hazards contemplated by Labor Law § 240[1]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]). That an accident occurred at an elevated height, without more, is insufficient to trigger the protections of Labor Law § 240(1) (*Reyes v. Magnetic Constr., Inc.*, 83

AD3d 512 [1st Dept 2011]; *see also Auchampaugh v. Syracuse Univ.*, 57 AD3d 1291 [3d Dept 2008]). [2]

Plaintiff was performing inspection, maintenance, and repair type work to an elevator when he was struck, or otherwise caused to fall, by an elevator counterweight weighing approximately 2.5 to 3.5 tons. At the time of injury, plaintiff was inspecting a steel plate suspected of causing noise during the elevator's operation. Whether the noise was indicative of damage to the elevator, normal wear, or an unknown condition was not determined before plaintiff's injury. However, the First Department has recently found elevator work occasioned by noises stemming from the mechanical components inappropriately contacting each other sufficient to trigger the protections of § 24(1) (*Kehoe v. 61 B'way Owner LLC*, 186 AD3d 1143). Furthermore, the work performed by plaintiff occurred at a construction site for a residential tower in

[2] Plaintiff's papers are entirely silent on his Labor Law § 241-a claim, and the Court therefore deems the claim abandoned. Notwithstanding, and assuming arguendo that the claim was not abandoned, the Court would find plaintiff has note established his entitlement to judgment under § 241-a. § 241-a provides: "Any [person] working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such [person], or by other means specified in the rules of the board." The clear intent of Labor Law § 241-a is to prevent falls and height related hazards from injuring workers surrounding elevators. Given the requirement that Labor Law § 240[1] be construed liberally for the purposes of protecting against elevated risks, that plaintiff was injured in an external elevator, as opposed to an elevator shaft, is a distinction without difference. However, no evidence has been submitted related to the presence or absence of planking surrounding the elevator.

excess of 60 stories, and the elevators were a necessary component in this construction work.

Defendants' argument that plaintiff's work is not the type contemplated by the Labor Law, or otherwise not subject to the Labor Law's concerns regarding elevated risks, is without merit and would gut the protection afforded by the Labor Law. The Labor Law does not, as defendants contend, cease to apply because the work to be performed was quick in nature. To the extent that defendants contend plaintiff's work amounted to routine maintenance, this Court does not so find. It is uncontroverted that routine maintenance was scheduled to occur shortly after plaintiff's accident, and that such work was not scheduled to occur on the day of the accident. If the work performed by plaintiff was routine maintenance, as defendants contend, the evidence supports that the work would have occurred as regularly scheduled, not separately.

Plaintiff's work involved at least two distinct elevation related risks. First, the risk of falling from an elevated height and second, the risk of being struck from above by the elevator's counterweight. It is undisputed that the protection afforded plaintiff, a lanyard/harness, was insufficient to protect against being struck by the elevator's counterweight. "It is [defendants']

complete failure to provide any safety device to plaintiff to protect him from this second risk ... that leads to liability under Labor Law § 240[1]" (*Felker v. Corning Inc.*, 90 NY2d 219 [1997]). Further, defendants do not dispute that no safety device related to the counterweight was provided. Thus, there is no issue of fact on liability as to plaintiff's Labor Law § 240[1] claim, and summary judgement in plaintiff's favor is appropriate.

LABOR LAW § 241[6]

As to plaintiff's Labor Law § 241[6] claims, such claim is academic in light of granting summary judgment under § 240[1]. Notwithstanding, to the extent that such claim forms the basis of any cross-claims or third-party claims, it shall remain. Were the Court to address the § 241[6] claim, it would find as follows.

Labor Law § 241(6) requires contractors, owners, and their agents to "'provide reasonable and adequate protection and safety' for workers" as well as comply with the rules and regulations as promulgated by the Department of Labor (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d at 501-02; *see* Labor Law § 241). As with Labor Law § 240(1), the duty imposed by Labor Law § 241(6) is nondelegable as it relates to compliance with the Industrial Code. However, to

the extent Labor Law § 241(6) relates to general safety standards, it does not give rise to the same non-delegable duty (*id.*). Thus, § 241(6) is best described as a "hybrid" between the common law duty of Labor Law § 200 and the specific duties imposed by § 240(1) (*id.*).

The Industrial Code defines construction work, for the purposes of Labor Law § 241[6] as:

> All work of the type performed in the construction, erection alternation, repair, maintenance, painting or moving of buildings ... whether or not such work is performed in proximate relation to a specific building

(12 NYCRR § 23-1.4[b][13]).

Accordingly, and consistent with its findings on Labor Law § 240[1] above, plaintiff was engaged in the type of work contemplated by Labor Law § 241[6].

There is no dispute that a partition, as contemplated by Industrial Code § 23-2.5[b][3], to protect against contacting adjacent operative elevators was not utilized, and it is likewise undisputed that plaintiff came into contact with the counterweight of the adjacent elevator (*Franco v. Jay Cee of New York Corp.*, 36 AD3d 445 [1st Dept 2007]; Industrial Code § 23-25[b][3] [wire mesh or solid partition provided where necessary]).

Furthermore, Industrial Code § 23-7.2[c][3][ii] provides that a partition must be erected where a moving elevator car or counterweight passes within eight feet from a work surface. It is undisputed that the counterweight of the adjoining elevator car passed within eight feet of plaintiff's work surface, the counterweight came into contact with his person or harness while he was on said surface. It is further undisputed that no partition of any kind was erected surrounding plaintiff's work area. Accordingly, defendants' violation of § 23[c][3][ii] constitutes a further violation of Labor Law § 241[6].

Similarly, there is no dispute that the adjacent elevator car was not at rest during plaintiff's work on the north elevator car, in violation of Industrial Code § 23-6.1[k] which provides, in relevant part, "No repairing, cleaning or lubrication of machinery shall be done unless such machinery is at rest." Consequently, the failure to remove the adjoining elevator car from service while plaintiff performed work therein, constitutes a violation of § 23-6.01[k] and Labor Law § 241[6].

Consequently, plaintiff has established a prima facie entitlement to summary judgment on his Labor Law § 241[6] claim, and defendants have failed to rebut same or raise a triable issue of fact.

LABOR LAW § 200 & COMMON LAW DUTY

To the extent that plaintiff also alleges violation of Labor Law § 200, such claim is also academic in light of summary judgment in plaintiff's favor on his § 240[1] and 241[6] claims. Notwithstanding, to the extent that such claim forms the basis of any cross-claims or third-party claims, it shall remain.

Were the Court to address plaintiff's § 200 claim against defendants, it would find plaintiff was a person who "lawfully frequents" the site, and was afforded the protection of Labor Law § 200. However, the Court would find the defendant owner Roseland did not have control over the activity brining about the injury, and therefore is entitled to summary judgment dismissing § 200 as against it (*Russin v. Picciano & Son*, 54 NY2d 311 [1981]; *Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 877; *see also Lombardi v. Stout*, 80 NY2d 290, 295 [1992]). The evidence establishes that plaintiff received all of his instructions related to his work on this project from All-Safe and was supervised by other All-Safe employees. Therefore, as to defendant Pavarini, the Court would find there is no evidence submitted on these motions that Pavarini had control or supervision over the work being performed by All-Safe and, consequently, grant summary judgment in Pavarini's favor dismiss the Labor Law § 200 claim against it.

As Labor Law § 200 represents a codification of the common law duty, summary judgment on the common law negligence claims in favor of Roseland and Pavarini is appropriate, given that the Court has already awarded them same on the § 200 claims.

INDEMNITY

It is well settled that parties may contract to provide indemnity, and such agreements are enforceable where same can be "clearly implied form the language and purposes of the entire agreement and the surround facts and circumstances" (*Drewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] quoting *Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). However, a party is strictly prohibited from seeking indemnification of its own negligence (GOL § 5-322.1; *see also Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]). Where an agreement provides for indemnity to the fullest extent permitted by law, such agreement is deemed to seek partial indemnity and will not provide indemnity for a party's own negligence (*Brooks v. Judlau Contr. Inc.*, 11 NY3d 204 [2008]). Likewise, indemnification under the common-law is appropriate where a party is held "vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v. Turner Const., Inc.*, 17 NY3d 369, 378 [2011]). Indemnification is appropriate against those parties who exercise actual supervision (*id.*).

Here, Article 9 of third-party All-Safe's contract provides that All-Safe shall indemnify defendants Roseland and Pavarini for All-Safe's negligence (NYSCEF Doc. No. 106 at p. 99). Furthermore, to the extent that Roseland and Pavarini are held vicariously liable for the injuries herein, without proof of negligence or control, indemnification is appropriate to the extent they did not exercise same. Accordingly, All-Safe shall indemnify Roseland and Pavarini for damages associated with All-Safe's own negligence and to the extent that defendants are held vicariously liable for All-Safe's actions. However, to the extent that Roseland and Pavarini seek indemnification for their own negligence, summary judgment is denied.

Finally, All-Safe has not opposed defendants Roseland and Pavarini's motion for summary judgment dismissing All-Safe's counter-claim for contribution and indemnification. Roseland and Pavarini contend that the anti-subrogation rule prohibits All-Safe's counter-claims because the parties are insured under the same policy and All-Safe's claim, in essence, seeks recompense from Roseland and Pavarini's additional insurer for the very risk All-Safe's insurer covered (*see generally Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 NY2d 465 [1986]). All-Safe's failure to raise an argument in opposition fails to raise a triable issue of fact, and in any event constitutes

waiver of argument in opposition (*Raia v. Potoschnig*, 170 AD3d 433 [1st Dept 2019]; *Wilmington Trust v. Sukhu*, 155 AD3d 591 [1st Dept 2017]). Accordingly, Roseland and Pavarini have met their prima facie burden.

CONCLUSION

It is ORDERED that plaintiff's motion is granted to the extent of awarding plaintiff summary judgment in his favor on his Labor Law § 240[1] and § 241[6] claims and otherwise denied; and it is further

ORDERED that defendants Roseland and Pavarini's motion is granted to the extent of award them summary judgment dismissing plaintiff's Labor Law § 200 and common law claims, dismissing third-party All-Safe's counter-claims for indemnification and contribution, and is otherwise denied; and it is further

ORDERED that All-Safe shall indemnify Roseland and Pavarini in accordance with this decision and order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: September 20, 2021

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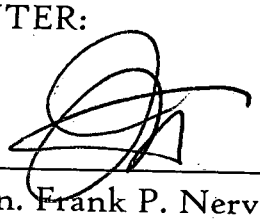

Hon. Frank P. Nervo, J.S.C.