SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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MARK MONTANA and LISA MONTANA,

Plaintiffs,

-against-

THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, NATIONAL ENVIRONMENTAL SAFETY, NATIONAL ENVIRONMENTAL SAFETY, INC., DIERKS HEATING CO., INC., TDX CONSTERUCTION CORP., CHAMPION COMBUSTION CORP., "JOHN DOE" COMPANIES, et. al.,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 153365/2018

Mot. Seq. No. 002

Recitation of the papers as required by 2219(a) of the following papers numbered "1" through "4" were marked fully submitted on July 28, 2021.

	Papers Numbered
Notice of Motion for Partial Summary Judgment by Defendants, The New York City School Construction Authority, National Environmental Safety Company, Inc., Dierks Heating Co., Inc. and TDX Construction Corp, Affirmation, Exhibits and Memorandum of Law (NYSCEF)	1, 2
Plaintiffs' Affirmation, Memorandum of Law in Opposition and Exhibits (NYSCEF)	3
Defendants' Reply Affirmation (NYSCEF)	4

Upon the foregoing papers, the motion for partial summary judgment of defendants the New York City School Construction Authority, National Environmental Safety Company, Inc.,

Dierks Heating Co., and TDX Construction Corp. (hereinafter, collectively "movants") dismissing plaintiffs' Labor Law §§200, 240(1) and 241(6) causes of action is granted. The balance of the motion is denied.

This matter arises out of an accident that occurred on January 10, 2018, when plaintiff, a steamfitter employed by non-party Department of Education[1] (hereinafter "DOE"), fell from the last two rungs of an allegedly "wet" and "shaky" extension ladder (*see* Plaintiff's deposition transcript [NYSCEF 56], page and lines 59:8-12) while performing emergency repair work to a boiler at P.S. 37 in Staten Island, New York. At the time of the accident, the movants were engaged in "prep work" for the construction of a free-standing building in the parking lot adjacent to the school. Plaintiff acknowledges that he used a ladder found at the premises but does not know who owned it. All parties agree that plaintiff's boiler repair was *unrelated* to the construction work being performed by and on behalf of movants[2].

Plaintiffs commenced this action to recover damages for personal injuries, alleging common-law negligence ("First Cause of Action") and violations of Labor Law §200 ("Second Cause of Action"), §240 ("Third Cause of Action"), and §241(6) ("Fourth Cause of Action"). At the time of service of this motion, discovery has been exchanged and several depositions were completed. The City of New York's motion for summary judgment was granted upon proof that

[1] At his deposition plaintiff testified that on the date of the accident he was employed by the New York City Department of Education and assigned to the Department of School Facilities.

[2] Plaintiff received a telephone call from his Department of Education supervisor, early in the morning of the accident, directing plaintiff to report to P.S. 37 because the school was without heat.

the school was owned by the Board of Education and not the City of New York (*see* Decision and Order dated October 21, 2020; NYSCEF 43).

Movants now seek partial summary judgment dismissing the Labor Law causes of action on the basis that plaintiff is not a protected person under the Labor Law, since he was not employed by movants and was not working at the construction site. Plaintiff agrees that movants were not involved in nor participants in the work he was doing (NYSCEF 56, 55:3-5). In support of their motion, movants submit, *inter alia*, the deposition transcripts of the plaintiff and TDX Construction Corp.'s Henry Vela (*see* NYSCEF 56 and 57).

The duties imposed by Labor Law §§240(1) and 241(6) are imposed upon "contractors, agents and owners". Movants have demonstrated *prima facie* that the work they performed in connection with the P. S. 37 expansion project "was entirely distinct from, and unrelated to, the injury-producing [emergency boiler repair] work" being performed by plaintiff (*Haidhaqi v. Metropolitan Transp. Authority*, 153 AD3d 1328, 1329 [2d Dept. 2017]). Movants have accordingly met their burden on the motion by presenting *prima facie* proof that they (1) were not "owners, contractors, or agents" with regard to plaintiff's work; (2) had no authority to supervise or control plaintiff's work; (3) did not supply plaintiff with the ladder, and (4) had no control over the plaintiff's work and plaintiff's particular work site (*see Cusumano v. AM & G Waterproofing, LLC* 160 AD3d 922 [2d Dept. 2018]; [*internal citations omitted*]).

In opposition, plaintiffs have failed to raise a triable issue of fact. Plaintiff's "belief"[3] that the ladder may have belonged to one of the trades at the site is speculative, irrelevant in terms of invoking the protections of the Labor Law, and insufficient to defeat summary judgment.

Accordingly, the motion for partial summary judgment to sever and dismiss plaintiffs' Second, Third and Fourth causes of action is granted.

This Court denies movants' counsel request for costs, fees and sanctions associated with this motion.

Frivolous conduct is defined as conduct that is "completely without merit" (22 NYCRR §130-1.1(c) [1]), and "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another" (22 NYCRR §130-1.1(c) [2]). A frivolous claim has been defined as one "...without any reasonable basis in law or fact and not supported by a good faith argument for an extension, modification, or reversal of existing law" (*Zysk v. Kaufman*, 53 AD3d 482 [2d Dept. 2008]). Sanctions are within the sound discretion of the Court and are reserved for serious transgressions.

Plaintiffs' counsel's reluctance to discontinue three of four causes of action on behalf of his clients cannot be deemed "completely without merit" or unreasonable in law and fact, particularly in view of plaintiffs' arguments in opposition to the motion.

Accordingly, it is

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[3] Plaintiff testified that he did not bring his own ladder to the site and that he used one that was already present which, to "[his] understanding," was left there by movant(s). Plaintiff "believes it wasn't" P.S. 37's ladder (*see* NYSCEF Doc. No. 56, pp 56-57).

ORDERED, that defendants' motion for partial summary judgment dismissing plaintiffs' causes of action for violation of the Labor Law § 200, § 240 (1) and § 241 (6) is granted; and it is further

ORDERED, that the Second, Third and Fourth causes of action are severed and dismissed as against defendants; and it is further

ORDERED, that the balance of the motion seeking an order pursuant to CPLR § 8303-a is denied in its entirety

This constitutes the decision and order of the Court.

ENTER,

Dated: September 30, 2021

HON. THOMAS P. ALIOTTA, J. S. C.