

Ruiz v Roosevelt Terrace Coop., Inc.

2021 NY Slip Op 33835(U)

September 28, 2021

Supreme Court, Bronx County

Docket Number: Index No. 22868/2018E

Judge: Lucindo Suarez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 4, 5

HECTOR ARAGON RUIZ,

Index No.: 22868/2018E

Plaintiff,

- against -

DECISION and ORDER

ROOSEVELT TERRACE COOPERATIVE, INC.,
CENTRAL CONSTRUCTION MANAGEMENT LLC,
DJM NYC, LLC, and AFP TWENTY EIGHT CORP.

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion is whether he is entitled to judgment as to liability with respect to his Labor Law §241(6) claim.¹ In addition, the issues raised in Defendants Roosevelt Terrace Cooperative Inc.'s, DJM NYC, LLC's, (collectively "Roosevelt/DJM") and AFP Twenty Eight Corp.'s ("AFP") cross-motions are whether they are entitled to a dismissal of Plaintiff's complaint. Finally, the issue in AFP's motion is whether it should be granted leave to amend its answer.

This court holds that Plaintiff demonstrated his entitlement to judgment on liability with respect to his Labor Law §241(6) claim premised upon Industrial Code 12 NYCRR §23-1.13(b)(3)(4). Furthermore, this court holds that Defendants Roosevelt Terrace Cooperative Inc. and AFP established their entitlement to a dismissal of Plaintiff's Labor Law §200 claim. However, there were triable issues of fact with respect to Defendant DJM NYC, LLC's liability under same that precluded its request for a dismissal.

¹ Plaintiff did not oppose Defendants' application seeking the dismissal of his Labor Law §240(1) claim, therefore, same is dismissed, without opposition, and will not be addressed herein.

Further, this court holds that AFP should be allowed to amend its answer to assert a cross-claim against Defendant Roosevelt Terrace Cooperative Inc. for contractual indemnity and cross-claims against Defendant DJM NYC, LLC for common law indemnity and contribution. Nevertheless, this court holds that AFP is only entitled to contractual indemnity from Defendant Roosevelt Terrace Cooperative Inc. if AFP is exposed to a monetary judgment exceeding the limits of the subject insurance policy. Lastly, this court holds that AFP is not entitled to an order granting its cross-claims for common law indemnity or contribution against Defendant DJM NYC, LLC. until the issues of Defendant DJM NYC, LLC.'s negligence is resolved at the time of trial.

According to Plaintiff, on the day of his accident he was employed by non-party Sterling Restoration Company ("SRC") to perform demolition work. He testified that he and a coworker were instructed to demolish concrete columns/beams at an underground parking garage. He further testified that he and his coworker were provided with a Bakers Scaffold and handheld jackhammers. He alleged that the underground parking garage was unlit and dark as it was his understanding that the electrical power supplying the garage had been turned off. Therefore, SRC strung extension cords from a nearby apartment to supply electricity to illuminate the work area. He alleges that as he began to use the handheld jackhammer to demolish the concrete columns/beams he observed that an electrical conduit was fixed into same. However, he continued to demolish the concrete columns/beams since he understood that there was no electricity being supplied to the underground parking garage. Plaintiff claims that as the handheld jackhammer's chisel struck the electrical conduit it caused a flash, spark, and explosion, thereby, pushing Plaintiff backwards. He alleges that due to the electric shock he was caused to sustain injuries.

I. Labor Law §241(6)

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. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

Plaintiff cites to Industrial Code 12 NYCRR §23-1.13(b)(3)(4) to support his Labor Law §241(6) claim, therefore, he abandoned all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

A. 12 NYCRR §23-1.13(b)(3)(4)

Plaintiff alleges that Defendants violated 12 NYCRR §23-1.13(b)(3)(4), which affords protections against electrical hazards provides as follows: “Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of

the locations of such lines, the hazards involved and the protective measures to be taken.”

Further, the instant Industrial Codes requires that: “No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear.”

Plaintiff argues that Defendants violated 12 NYCRR §23-1.13(b)(3)(4) as he had no expectation that the electrical conduit that he came into contact with was “live” and being supplied with electricity. He contends that Defendants’ failure to warn him that the electrical conduit was being supplied with electricity, which was not guarded or off was the proximate cause of his injuries.

In opposition, Roosevelt/DJM contend that Plaintiff should not be awarded summary judgment with respect to his Labor Law §241(6) claim because his accident was unwitnessed and there are credibility issues that remain unresolved. Roosevelt/DJM claim that there is a question of fact as to whether Plaintiff’s injury was caused by contact with the electrical conduit or whether he came into contact with a loose electrical wire. In addition, Roosevelt/DJM argue that the instant Industrial Code does not extend to it because it was not Plaintiff’s employer. Also, Roosevelt/DJM raises issues as to the causation of Plaintiff’s accident and whether the instant accident caused Plaintiff’s injuries or whether they were feigned.

AFP contends that it is not a proper Labor Law defendant because it was not the owner of the underground parking garage, the general contractor hired to perform the injury-producing work,

nor their agents. In reply to AFP's argument Plaintiff contends that since it was undisputed that AFP was the title owner of the property where the underground parking garage was located, liability under the Labor Law could be imposed upon it irrespective of whether it exercised control over the underground parking garage.

This court finds that Plaintiff demonstrated his *prima facie* burden that Defendants violated 12 NYCRR §23-1.13(b)(3)(4), which served as the proximate cause of his accident. Roosevelt/DJM's arguments in opposition failed to raise any triable issues of fact. Contrary to Roosevelt/DJM's contention, the fact that Plaintiff's accident was unwitnessed presents no bar to summary judgment in his favor as the evidence in the record is sufficient to permit the conclusion that Plaintiff's injuries derived from being electrocuted. *See Verdon v. Port Auth. of NY & New Jersey*, 111 A.D.3d 580, 977 N.Y.S.2d 4 (1st Dep't 2013).

Likewise, even assuming, *arguendo*, that Plaintiff presented two versions of events, which led to his accident, that does not preclude summary judgment on the issue of liability under his Labor Law §241(6) claim as the instant Industrial Code was violated under either version. *See Romanczuk v. Metro. Ins. & Annuity Co.*, 72 A.D.3d 592, 899 N.Y.S.2d 228 (1st Dep't 2010).

In addition, this court finds that Roosevelt/DJM's contention that the instant Industrial Code is not applicable to them because they were not Plaintiff's employer is to no avail, as an owner and general contractor may be held liable for violation 12 NYCRR §23-1.13(b)(3)(4) even though, they impose obligations on the employer since they have a nondelegable duty to provide adequate safety protections. *See Rubino v. 330 Madison Co., LLC*, 150 A.D.3d 603, 56 N.Y.S.3d 55 (1st Dep't 2017). Moreover, Roosevelt/DJM's argument that Plaintiff may have been contributorily negligent fails to raise any issues of fact as Plaintiff neither knew nor should have known that the electrical conduit was electrified, in the absence of any warnings, caution tape, or

other such indications that workers should avoid the area. *Id.*

Finally, this court finds that AFP's argument that it could not be held liable under Plaintiff's Labor Law §241(6) claim is unpersuasive as it was undisputed that it is the titleholder of the land where the underground parking garage was located and the mere act of leasing the property to another entity does not alone allow the owner to avoid the broad reach of an owner's absolute liability under same. *See Costa v. State of NY*, 141 A.D.3d 43, 32 N.Y.S.3d 147 (1st Dep't 2016).

II. Labor Law §200

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Licata v. AB Green Gansevoort, LLC*, 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *Id.* In addition, under Labor Law §200, liability for a dangerous condition may arise from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control. *Makarius v. Port Auth. of NY & New Jersey*, 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

Roosevelt/DJM and AFP assert similar arguments namely that they did not have actual or constructive notice of the dangerous conditions that led to Plaintiff's injuries. In addition, they argue that they did not exercise supervision and/or control over Plaintiff's injury-producing work to impose liability upon them under Labor Law §200.

In opposition, Plaintiff argues that DJM NYC, LLC as the general contractor is not entitled to a dismissal of his Labor Law §200 claim based on Defendant Roosevelt Terrace

Cooperative Inc.'s, witness, Mr. Flynn, who testified that DJM NYC, LLC was responsible to ensure that the electrical power supplying the underground parking garage was turned off. Therefore, Plaintiff posits that there are triable issues of fact as to whether Defendant DJM NYC, LLC caused or created the dangerous conditions that led to his injuries and whether it had actual or constructive notice of same.

This court finds with respect to AFP's and Defendant Roosevelt Terrace Cooperative Inc.'s cross-motion they established their *prima facie* burden for a dismissal of Plaintiff's Labor Law §200 claim and Plaintiff failed to raise any triable issues of fact to preclude their dismissal. However, this court finds that there are triable issues of fact as to whether Defendant DJM NYC, LLC caused or created the dangerous conditions (i.e., by failing to turn off the electrical power supply to the underground parking garage) that led to his injuries and whether it had actual or constructive notice of same.

III. Leave to Amend Answer

Pursuant to CPLR §3025(b), a party may amend a pleading at any time by leave of court. A request to amend is determined in accordance with the general considerations applicable to such motion, including the statute's directive that leave "shall be freely given upon such terms as may be just." *See* CPLR §3025(b); *see also Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 23 N.E.3d 1008, 998 N.Y.S.2d 740 (2014). New York State Courts have consistently recognized that absent prejudice or surprise, courts are free to permit the amendment of pleadings. *Id.*

The party opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment. *See Peach Parking Corp. v. 346 W. 40th St., LLC*, 42 A.D.3d 82, 835 N.Y.S.2d 172 (1st Dep't 2007). The

determination of whether to allow such an amendment is reserved for the court's discretion. *Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 (1st Dep't 2009). Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied. *Id.*

AFP seeks leave to amend its answer to assert a cross-claim against Defendant Roosevelt Terrace Cooperative Inc. for contractual indemnification and cross-claims against Defendant DJM NYC, LLC for common law indemnification and contribution. AFP claims that it is entitled to contractual indemnity from Defendant Roosevelt Terrace Cooperative Inc. pursuant to a lease agreement between the parties that called for Defendant Roosevelt Terrace Cooperative Inc. to indemnify AFP for Defendant Roosevelt Terrace Cooperative Inc.'s negligent acts. Moreover, AFP seeks an order granting it contractual indemnity against Defendant Roosevelt Terrace Cooperative Inc. because it claims that it was free from negligence with respect to Plaintiff's accident.

In opposition, Roosevelt/DJM argue that AFP does not have a viable contractual indemnity claim against Defendant DJM NYC, LLC. as it was not a party to the lease agreement. In addition, Roosevelt/DJM contend that AFP cannot assert a contractual indemnity claim against Defendant Roosevelt Terrace Cooperative Inc. as it would violate the doctrine of anti-subrogation since Defendant Roosevelt Terrace Cooperative Inc.'s insurance company, Greater New York Mutual Insurance Company, is providing liability coverage to AFP in the amount of one million dollars with possible excess coverage. Furthermore, Roosevelt/DJM argue that AFP's application to amend its answer should be denied because they will be prejudice due to the AFP's delay in bringing the instant cross-claims.

This court finds that AFP should be allowed to amend its answer to assert a cross-claim against Defendant Roosevelt Terrace Cooperative Inc. for contractual indemnity. Nevertheless, due to the anti-subrogation rule AFP is only entitled to contractual indemnity from Defendant Roosevelt Terrace Cooperative Inc. if AFP is exposed to a monetary judgment exceeding the limits of the subject policy. *See Mitchell v. NRG Energy, Inc.*, 142 A.D.3d 1366, 38 N.Y.S.3d 860 (4th Dep't 2016).

Furthermore, this court finds that AFP should be allowed to amend its answer to include cross-claims against Defendant DJM NYC, LLC for common law indemnity and contribution as there are triable issues of fact with respect to Defendant DJM NYC, LLC's negligence. However, it is premature at this juncture to grant AFP's common law indemnity and contribution cross-claims against Defendant DJM NYC, LLC's until Defendant DJM NYC, LLC's negligence issues are resolved at the time of trial.

Accordingly, it is

ORDERED, that Plaintiff's motion for summary judgment (Mtn. Seq. # 4) seeking judgment on liability with respect to his Labor Law §241(6) claim is granted to the extent that it premised said claim on Industrial Code 12 NYCRR §23-1.13(b)(3)(4); and it is further

ORDERED, that Roosevelt/DJM's and AFP's cross-motion for summary judgment (Mtn. Seq. # 4) seeking a dismissal of Plaintiff's complaint is granted in part; and it is further

ORDERED, that Roosevelt/DJM's and AFP's application seeking a dismissal of Plaintiff's Labor Law §240(1) claim is granted, without opposition; and it is further

ORDERED, that AFP and Defendant Roosevelt Terrace Cooperative Inc.'s application seeking a dismissal of Plaintiff's Labor Law §200 claim is granted; and it is further

ORDERED, that Defendant DJM NYC, LLC's application seeking a dismissal of Plaintiff's Labor Law §200 claim is denied; and it is further

ORDERED, that AFP's motion (Mtn. Seq. # 5) seeking leave to amend its answer is granted in part; and it is further

ORDERED, that AFP's application seeking leave to amend its answer to assert a cross-claim for contractual indemnity against Defendant Roosevelt Terrace Cooperative Inc. is granted; and it is further

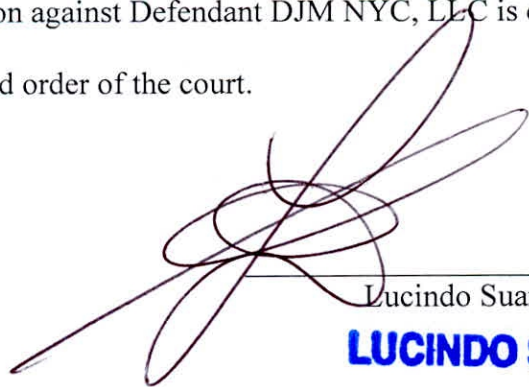
ORDERED, that AFP's application seeking an order granting its cross-claim for contractual indemnity against Defendant Roosevelt Terrace Cooperative Inc. is granted only to the extent that it is exposed to a monetary judgment exceeding the subject insurance policy limits; and it is further

ORDERED, that AFP's application seeking leave to amend its answer to assert cross-claims for common law indemnity and contribution against Defendant DJM NYC, LLC is granted; and it is further

ORDERED, that AFP's application seeking an order granting its cross-claims for common law indemnity and contribution against Defendant DJM NYC, LLC is denied.

This constitutes the decision and order of the court.

Dated: September 28, 2021



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.