Ortiz v National Grid Servs. Inc.
2021 NY Slip Op 33875(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: Index No. 503394/2019
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

Index Number 503394/2019
SEQ#004, 007

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	3-6
Replying Affidavits	7-8
Exhibits	
Other	

RUBEN ORTIZ,

Plaintiff,

against

NATIONAL GRID SERVICES INC., NATIONAL GRID USA SERVICE COMPANY, INC., AND KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID,

Defendants.

KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID,

Third-Party Plaintiff,

against

ACCUWELD TECHNOLOGIES, INC.,

Third-Party Defendant.

ACCUWELD TECHNOLOGIES, INC.,

Second Third-Party Plaintiff,

against

GRACE INDUSTRIES LLC,

Second Third-Party Defendant.

KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID,

Third Third-Party Plaintiff,

against

GRACE INDUSTRIES LLC,

Third Third-Party Defendant.

Upon the foregoing papers, third-party defendant Accuweld Technologies, Inc.'s ("Accuweld") motion to dismiss or sever the third-party action, or to vacate the note of issue

(Seq. 004) and plaintiff's motion for partial summary judgment (Seq. 007), are decided as follows:

Introduction

Plaintiff commenced this action against defendants National Grid Services, Inc., National Grid USA Service Company, Inc., and Keyspan Gas East Corporation d/b/a National Grid (collectively, "defendants") for injuries he claims to have sustained as a result of an accident on February 13, 2019, allegedly caused by defendants' negligence and violations of New York Labor Law §§ 200, 240(1) and 241(6). Defendants assert third-party claims for common-law and contractual indemnification, contribution, and breach of contract against Accuweld Technologies, Inc. ("Accuweld"). Accuweld asserts third-party claims for negligence, contribution, and contractual indemnification against Grace Industries ("Grace") in a second third-party action. Defendants recently commenced a third third-party action against Grace, asserting claims for contractual and common-law indemnification, as well as for contribution.

Factual Background

Thomas Buckleman, a construction manager for National Grid[1], testified that National Grid hired plaintiff's employer, Grace Industries, to install a gas main (Bucklman EBT at 33). This work involved digging a trench in a roadway, installing the gas main, placing steel plates over the trench as needed, and filling in the trench (*id.* at 27-33). He explained that, when the plates were not being used, they were stacked to the side of the trench, but not too close to the trench, as that would not be safe (*id.* at 45-46).

[1] Defendants refer to themselves as "Keyspan", but Mr. Buckleman testified that, at the time of the accident, he worked for National Grid and National Grid performed the construction project (Buckleman EBT at 17-20, and 27)

Plaintiff testified at his deposition that he was an employee of Grace Industries (plaintiff EBT at 40), who National Grid hired as part of a project to install gas lines in a roadway (*id.* at 47). As part of that project, a team from Grace dug out the road and laid down pipe (*id.* at 57-60). Plaintiff was part of the crew that filled the trench after the pipes were installed (*id.* at 56-57). When the day's work was done, steel plates were placed over the trench to allow cars to travel on the road (*id.* at 69-70). The plates were 12 feet by 6 feet, about 1 inch to 1.5 inches thick, and weighed 3500 pounds each (*id.* at 74-75). One side of the plates was "rough", which plaintiff believed was used as traction for cars (*id.* at 75).

When the plates were not being used to cover the trench, they were placed off to the side and stacked on top of one another (*id.* at 74-76). The plates were stacked about 2 to 3 feet from the edge of the trench where plaintiff and coworkers were working (*id.* at 78-80, 129). On the day of the accident, February 13, 2019, snow and ice had accumulated on the plates that had covered the trench from the night before (*id.* at 115). The plates were stacked flat on top of each other in groups of three (*id.* at 135-138). Approximately 13 to 15 plates were stacked on top of each other, with each group of three separated by a layer of wood (*id.*). The stack was approximately three feet high (*id.* at 129).

Plaintiff testified that he does not remember how the accident occurred (*id.* at 142-43). Plaintiff's co-workers told him how the accident occurred, but those statements are hearsay, and therefore not admissible (*Viviane Etienne Med. Care, P.C. v Country Wide Ins. Co.*, 114 AD3d 33, 53 [2d Dept 2013], *affd*, 25 NY3d 498 [2015]).

In addition, plaintiff submits the affidavit of Joan Alfonso Blanco, an employee of Grace. Mr. Blanco states that he was a Grace employee on the date of, and at the site of, the accident.

He confirmed that, on February 12, 2019, the night before the accident, it was cold with "snowy and icy conditions" (Blanco affidavit at ¶ 7). He described the work similarly to plaintiff: that the trench was dug in the roadway and that steel plates covered the trench when the work was paused (*id.* at ¶¶ 8-10). He explained that the plates were stacked on top of each other, with every third plate separated by wood (*id.* at ¶¶ 17-21). The stack of plates was four feet from the trench, and "[t]here was nothing to secure the stack of plates and no one was given any type of device to secure the stack of plates" (*id.* at ¶ 25). Plaintiff was standing at the side of the trench when the stack of plates fell and made contact with plaintiff, causing him to fall into the trench (*id.* at ¶¶ 27-29). Mr. Buckleman testified that the plates were stacked on ground that sloped in some measure toward the trench (Buckleman EBT at 72).

Third-party defendant Grace submits the affidavit of John L. Spooner, Jr., plaintiff's foreman. In addition to the description offered by plaintiff and Mr. Blanco, Mr. Spooner states that the stack of plates was two-and-a-half feet tall at the time of the accident, stable, and level (Spooner affidavit at ¶ 6). He also opines that the stack of plates was safe and not too close to the trench (*id.* at ¶¶ 7-8). However, Mr. Spooner acknowledges that the plates did fall and admits that he does not know what caused them to fall (*id.* at ¶ 11).

Plaintiff submits National Grid's incident report, which was discussed at Mr. Buckleman's deposition. Mr. Buckleman identified it as National Grid's incident report but stated he did not prepare the report (Buckleman EBT at 59-60). He explained that Neil Troudman, a vice-president, John Dooney, a manager, and Phil Echevarria prepared it and that he (Mr. Bucklman) reviewed it (*id.* at 60). Although Grace objects to this report as hearsay, plaintiff contends that it is presumed authentic and therefore admissible because defendants produced the

report (CPLR 4540-a). The report is Bates stamped with a prefix of "KGE", indicating it came from defendants. It states, in relevant part:

> The incident occurred at 8.10am [sic] during the preparation to backfill a section of newly installed 24" steel pipe. Steel road plates stacked near to the excavation became unstable and slid from the top of the stack striking Grace employee Reuben Ortiz below the knee and severing both legs.
>
> The subsequent force resulted in Mr[.] Ortiz being lodged to the far side of the excavation before being released and falling into the trench. First aid was immediately rendered by a colleague and tourniquets applied to both legs.

Defendants also offer an incident report apparently created by Grace but which is not authenticated by anyone. The court also will consider neither that document nor the uncertified police report (*Yassin v Blackman*, 188 AD3d 62, 65 [2d Dept 2020]).

Plaintiff also submits photographs of the site of the accident on the day of the accident. Mr. Buckleman testified that the photographs accurately represent what the site looked like just following the accident (Buckleman EBT at 84). The photographs show that the plates fell from the top, toward the trench, and fanned out like a deck of cards as they fell. The plates appear to have snow and ice on them.

Analysis

Accuweld's Motion to Sever the Third-Party Action

Accuweld moves to sever the first third-party action and, alternatively, to dismiss the action or vacate of the note of issue. At the time Accuweld filed this motion, the second and third third-party actions had not been filed.

Pursuant to CPLR 1010, a court may dismiss or sever a third-party claim. Severance is not appropriate "where there are common factual and legal issues and the interests of judicial

economy and consistency of verdicts will be served by having a single trial" (*Zili v City of New York*, 105 AD3d 949, 950 [2d Dept 2013]; *see also Pescatore v Am. Export Lines, Inc.*, 131 AD2d 739 [2d Dept 1987] [denying a motion to dismiss or sever where there were common factual and legal issues, and where there was adequate time to conduct discovery]).

In short, Accuweld point out that defendants commenced the third-party action shortly before the note of issue was due. They argue that they will be prejudiced if discovery is closed before any the parties can conduct discovery related to the third-party action. By order, dated August 17, 2020, the court (Knipel, J.) vacated the note of issue and permitted further discovery. Accordingly, any potential prejudice has been resolved, and the motion is denied.

Plaintiff's Partial Summary Judgment Motion

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]).

Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from "gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]).

To prevail on his Labor Law § 240(1) claim, plaintiff must 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]). "With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-68 [2001], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991] [alteration in original]). In that regard "[A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking" (*Banscher v Actus Lend Lease*, LLC, 103 AD3d 823, 824 [2d Dept 2013]).

As an initial matter, defendants and Grace argue that the motion is premature and discovery is ongoing. Defendants refer primarily to discovery related to the third-party actions. The liability of third-parties is not relevant to defendants' liability as owners because the duties imposed by Labor Law §§ 240(1) and 241(6) are non-delegable (*Carlton v City of New York*, 161 AD3d 930, 931 [2d Dept 2018]; *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). Defendants also argue that they require discovery from the people who witnessed the accident. However, defendants do not state why they were unable to depose such employees prior to the filing of the note of issue.

Grace also contends that plaintiff's motion is premature. Grace argues that it should be entitled to depose Frank Reilly, Bob Medford and Mohammed Ahsan, who are defendants' employees, about the accident. However, Mr. Buckleman testified that none of these persons saw the accident (Buckleman EBT at 56). Moreover, Grace has already provided the affidavit of

at least one employee, Mr. Spooner, who was present at the accident, saw it occur, and offers his recollection of the events.

Turning to the merits of this case, the parties do not dispute that the steel plates fell on plaintiff. Rather, they seem to dispute whether it was foreseeable that the steel plates presented an elevation-related risk, such that they needed to be secured (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1095 [2d Dept 2012]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 [1st Dept 2007], *lv. denied*, 10 NY3d 710 [2008]).

As described above, plaintiff and Mr. Blanco, a Grace employee and plaintiff's co-worker, explained that they were working between a stack of large, heavy metal plates, and an open trench (plaintiff EBT at 56-60, 74-76, 78-80, 129, and 135-138; Blanco affidavit at ¶¶ 8-10, 17-21). It is clear from plaintiff's testimony, Mr. Blanco's affidavit, and the photographs of the area, which Mr. Buckleman confirmed were accurate, that snow and ice had accumulated on the plates the night before the accident (plaintiff EBT at 115; Blanco Affidavit at ¶ 7; Buckleman EBT at 84). Mr. Buckleman further admitted that the plates were stacked on ground that sloped toward the trench (Buckleman EBT at 72). Mr. Blanco admitted that the plates were not secured, and that the plates fell and hit plaintiff (Blanco affidavit at ¶¶ 25, 27-29). Based on this testimonial and documentary evidence, it was foreseeable that the plates would need to be secured to keep from falling. Accordingly, plaintiff has made a prima facie case that defendants violated Labor Law § 240(1).

In opposition, Mr. Spooner alleges in his affidavit that the plates were level when stacked, and that the stack of plates was stable (Spooner affidavit at ¶ 6). However, Mr. Spooner does not explain the basis for his conclusion that the stack was stable. Certainly, defendants, Grace, and

Mr. Spooner do not dispute that the plates fell, and Mr. Spooner admits that he does not know what caused the plates to fall (*id.* at ¶ 11).

Additionally, Grace submits the affidavit of Martin Bruno, CHST, a construction site safety expert. Mr. Bruno opines that, if Mr. Spooner is correct that the plates were stacked level and in a stable fashion, then they did not need to be secured in accordance with Labor Law § 240(1) (Bruno affidavit at ¶¶ 24, 25, 36, 39-41).[2] However, Mr. Bruno does not reference any sort of safety standard on which he bases this opinion. Mr. Bruno asserts that Mr. Buckleman did not testify that the plates were stacked on an incline (*id.* at ¶ 24), but this assertion is simply not true. Mr. Buckleman's testimony is as follows:

> Q. When you got to the scene, okay, and you observed the terrain, did you notice anything in terms of the pitch of the terrain; in other words, whether it was on a decline where the plates were being stacked?
>
> A. Yes.
>
> Q. What did you notice?
>
> A. There was a slight incline going up to the property line.
>
> Q. Which means in the converse there was a decline from where the plates were stacked towards the trench?
>
> A. Yes.

(Bucklemen EBT at 72).

Mr. Bruno also does not dispute that ice and snow had accumulated on the plates (Bruno

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[2] Mr. Bruno appears to offer improper legal conclusions, rather than expert safety or science-based opinions, throughout his report (*Episcopal Diocese of Long Is. v St. Matthias Nondenominational Ministries, Inc.*, 157 AD3d 769, 771 [2d Dept 2018] ["Expert opinion as to a legal conclusion is impermissible"]). When he does offer a rare safety opinion, it is an admission that the accident was foreseeable.

affidavit at ¶¶ 19, 39). Instead, Mr. Bruno contends that ice and snow "does not mean that the stacked plates, which had a non-skid surface, presented a hazard that required securing" (*id.* at ¶ 39). Again, Mr. Bruno does not cite any sort of safety standard, and his assertion is mere speculation. Second, Mr. Bruno does not appear to draw upon any technical knowledge or professional expertise to make this assertion. For example, there is no analysis of the coefficient of friction created by the plates' non-skid surface, and how that friction might or might not be overcome by ice and snow.

At best, Grace attempts to contradict plaintiff's assertion, and defendants' own admission, that the plates were stacked on an incline. Neither defendants nor Grace rebut the accumulation of snow and ice on the plates, and they admit the plates fell. Most significantly, neither defendants nor Grace offer any alternative explanation of how plates, which were purportedly stacked stable and level, could have fallen. Indeed, Mr. Spooner admits he does not know how the plates fell, and both he and Mr. Bruno acknowledge that the excavator, which was used to remove the plates, "was on the other side of the trench standing at idle, not moving, with its bucket on the ground" (Spooner Affidavit at ¶ 10; *see also* Bruno affidavit at ¶ 33). Furthermore, Mr. Bruno opines that "[o]ne or more of the stacked plates moving and striking the plaintiff was an ordinary hazard of the construction work that was taking place at the Roslyn Heights jobsite" (Bruno affidavit at ¶ 36). Thus, Mr. Bruno admits that it was foreseeable that the plates would fall. Accordingly, defendants and Grace have failed to rebut plaintiff's prima facie showing.

Defendants' and Grace's remaining arguments are without merit. It does not matter that the plates were stationary just prior to the occurrence (*Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]). It is also irrelevant that the base of this tower of plates rested at ground level

(*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011] [declining to adopt the "same level" rule, "which ignores the nuances of an appropriate section 240 (1) analysis"]). This case is distinct from *Cruz v Neil Hosp., LLC* (50 AD3d 619, 620 [2d Dept 2008]), relied upon by defendants. The height differential, whether three feet or two-and-a-half feet, combined with the weight of the plates, created a significant danger should the plates fall (*see, e.g.*, *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-29 [2d Dept 2012] ["Although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis."]).

Defendants argue that this action was similar to *Lombardi v City of New York* (175 AD3d 1521, 1522 [2d Dept 2019]) and *Jacome v State*, 266 AD2d 345, 346 [2d Dept 1999], where the plaintiff in each case was struck by a steel plate. Neither case appears to involve the application of gravity to the plate, which is required for a Labor Law § 240(1) claim (*Flossos v Waterside Redevelopment Co., L.P.*, 108 AD3d 647, 649 [2d Dept 2013]). Accordingly, the applicability of *Lombardi* and *Jacome* is not clear.

Labor Law § 241(6)

Plaintiff also seeks summary judgment on his 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 12 NYCRR § 23-2.l[a][1], which provides: "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." As set forth above, plaintiff established, and defendants and Grace failed to rebut, that the stack of plates was unstable and obstructed the roadway on which the parties were working, which is by definition a thoroughfare. Accordingly, plaintiff has established that defendants violated Section 2.1(a)(1) and, with it, Labor Law § 241(6).

Conclusion

For the reasons stated above, third-party defendant Accuweld's motion to dismiss or sever the third-party action, or to vacate the note of issue (Seq. 004) is denied. Plaintiff's motion for partial summary judgment (Seq. 007) is granted.

This constitutes the decision and order of the court.

March 1, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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