Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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SEBASTOAM ARIZA,

Plaintiff,

-against-

Index No: 715497/17
Motion Date: 7/23/2020
Motion Cal. No: 5
Motion Seq. No: 5

FIRST CLASS MANAGEMENT CONTRACTING CORP., REALTY 163 LLC AND REALTY 163 LLC,

Defendants.

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The following papers numbered E70 to E 126 read on this motion for an order pursuant to CPLR §3212, granting Plaintiff summary judgment against the Defendant/Third-Party Plaintiff, FIRST CLASS MANAGEMENT CONTRACTING CORP., and the Defendants, REALTY 163 LLC AND REALTY 163 LLC on the cause of action under Labor Law §240(1) on the basis that as a matter of law, their violation of this labor law constituted their negligence and failure to use reasonable care under the circumstances, and was a substantial factor and proximate cause of the Plaintiff's injuries; and; 2) pursuant to CPLR §3212, granting Plaintiff summary judgment against the Defendant/Third-Party Plaintiff, FIRST CLASS MANAGEMENT CONTRACTING CORP., and the Defendants, REALTY 163 LLC AND REALTY 163 LLC on the cause of action under Labor Law §241 through violations of Industrial Code Rules 12 NYCRR §§ 23-1.7(f), 23-1.23(a), (b), (d), and 23-4.3 on the basis that as a matter of law, their violation of this labor law constituted their negligence and failure to use reasonable care under the circumstances, and was a substantial factor and proximate cause of the Plaintiff's injuries; and; 3) Pursuant to CPLR §3212, granting Plaintiff summary judgment against the Defendant/Third-Party Plaintiff, FIRST CLASS MANAGEMENT CONTRACTING CORP., and the Defendants, REALTY 163 LLC AND REALTY 163 LLC on the cause of action under Labor Law§ 200 and common law negligence on the basis that as a matter of law, their violation of this labor law constituted their negligence and failure to use reasonable care under the circumstances, and was a substantial factor and proximate cause of the Plaintiff's injuries.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	EF 70-84
Cross Motions-Affidavits-Exhibits	EF 95-102, 108

Answering Affidavits-Exhibits.....EF 86-93, 105-106
109-116, 119-121
Reply Affidavits-Exhibits.....EF 103-104,117-118
122-126

Upon the foregoing papers, it is ordered that the motion and cross motions are determined as follows:

On October 6, 2017, plaintiff allegedly sustained personal injuries while building the foundation for a new construction located at 43-13 163rd Street in Flushing, New York, owned by Realty. Plaintiff was employed as a construction assistant by third-party defendant, Triboro Concrete Corp. (Triboro), which had been subcontracted by First Class to perform the excavation and foundation work.

Plaintiff testified that at the time of the accident, he fell as he descended a dirt ramp, while transporting a wood beam at the aforesaid premises. The ramp, which plaintiff described as approximately eight feet in length and having a slope of more than 45 degrees, led to the bottom of a large excavated dirt hole, six feet deep. The beams had to be placed along the perimeter of the hole. He stated that upon taking two steps onto the ramp, "since the dirt was not compacted, the dirt like gave out from underneath my foot. My foot slid, and then, I fell in the hole".

Fabian Ramirez (Ramirez) testified on behalf of First Class as its sole owner. In April 2017, Realty hired First Class to construct two three story two-family homes with a basement. As the general contractor of the project, First Class hired Triboro to perform the excavation and foundation work of the project. Ramirez testified that First Class was responsible for the overall worksite safety and had the authority to tell subcontractors to fix unsafe conditions as well as to control the manner and methods in which the subcontractors performed their work. Ramirez was not at the job site at the time of the accident, but arrived shortly thereafter. Upon his arrival, he observed plaintiff laying down at the bottom of the excavation, which was four feet below street level. According to Ramirez, the ramp was approximately four feet wide and had a slope of "45 degrees... maybe less than 45". At some point prior to the date of the accident, he had inspected the ramps, but had not tested them to check that they were tightly compacted, nor had he tested them for any soft spots or holes.
Xuxin Chen a/k/a "Sunny" testified on behalf of Realty as one of its two shareholders. Realty was the owner of the property known as 43-13 163rd Street in Queens County. Realty hired First Class to construct two two-family homes on the property. Sunny testified that she "drove through" the site once a week. First Class was responsible for site safety. Realty did not inspect the ramps nor give any direction to the subcontractors as to how to perform their work.

Plaintiff seeks summary judgment on his claim, pursuant to Labor Law § 240(1), on the basis that defendants' failure to provide adequate safety devices, such as a safety railing, proximately caused his injuries. First Class cross moves, seeking dismissal of plaintiff's claims, pursuant to Labor Law § 240(1), contending that plaintiff's accident was not a result of an elevation-related risk. It resulted from the type of ordinary and usual peril a worker is commonly exposed to at a construction site. Initially, the court shall consider the causes of action based on Labor Law §§ 240(1) and

241(6).

Pursuant to Labor Law § 240(1): "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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) imposes a non-delegable duty upon owners and contractors to provide workers with appropriate safety devices to protect workers from risks inherent in elevated work sites. (See Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Simmons v City of New York, 165 AD3d 725 [2d Dept 2018]; Probst v 11 W. 42 Realty Invs., LLC, 106 AD3d 711 [2d Dept 2013].) In order to prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish that the defendant violated the statute and that such violation was the proximate cause of his injuries. (See Melchor v Singh, 90 AD3d 866 [2d Dept 2011]; Chlebowski v Esber, 58 AD3d 662 [2d Dept 2009].) Owners and contractors are liable under the statute regardless of whether they supervised or controlled the work. (See Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35 [2004]; Blake v Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280 [2d Dept 2003].)

In determining whether Labor Law § 240(1) is applicable, the single decisive question is "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential". (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]; see Davies v Simon Prop. Group, Inc., 174 AD3d 850 [2d Dept 2019]; Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043 [2d Dept 2012].)

Here, although a dirt ramp is not enumerated in the statute as a safety device, at the time of the accident, it was being used by the plaintiff as "the functional equivalent of a ladder", in order to reach the bottom of the excavation site, where he was tasked with placing the wood planks around its perimeter. (See Ventimiglia, 96 AD3d 1043 [2d Dept 2012]; Beharry v Public Stor., Inc., 36 AD3d 574 [2d Dept 2007].) The plaintiff was subject to an elevated related risk as his job was to cut the wood planks, at ground level, and then carry them to the bottom of the excavation. (See Runner, 13 NY3d 599; Jara v New York Racing Assn., Inc., 85 AD3d 1121 [2d Dept 2011].) As such, the court finds that plaintiff has demonstrated his entitlement to summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

In opposition, defendants fail to raise a triable issue of fact. Plaintiff's accounting that he was in the process of using the dirt ramp for the performance of his work, when the dirt gave out from under him is not refuted. (See Ventimiglia v Thatch, Ripley & Co., LLC, 96 AD3d 1043 [2d Dept 2012].) Defendants "failed to demonstrate that the plaintiff's alleged injuries were not the direct consequence of a failure to provide adequate protection against a risk arising from a physically

significant elevation differential." (Davies v Simon Prop. Group, Inc., 174 AD3d 850, 853.) Contrary to defendant's contention, there is no evidence to support that plaintiff fell or slid into the excavation from ground level. (Cf. Scarso v M.G. Gen. Constr. Corp., 16 AD3d 660 [2d Dept 2005]; Edwards v C & D Unlimited, Inc., 289 AD2d 370 [2d Dept 2001]; Magnuson v Syosset Cnty. Hosp., 283 AD2d 404 [2d Dept 2001].)

As a predicate to liability pursuant to Labor Law § 241(6), plaintiff must allege that defendants violated a specific safety rule or regulation promulgated by the Commissioner of the Department of Labor and that such violation was a proximate cause of his accident. (See Misicki v Caradonna, 12 NY3d 511 [2009]; Simmons, 165 AD3d 725.) Here, plaintiff makes a prima facie showing of his entitlement to summary judgment on his Labor Law § 241(6) claim, predicated upon violations of 12 NYCRR §§ 23-1.7(f), 23-1.23(a), (b) and (d). 12 NYCRR § 23-1.7(f) requires that stairways, ramps, runways, ladders, or other safe means be provided to access work levels above or below ground level. 12 NYCRR § 23-1.23 (a) requires that dirt ramps be properly compacted; (b) limits the maximum grade of the slope of such ramps to 25%; and (d) requires safety railings, in instances where the ramp is more than four feet above the adjacent ground. Plaintiff alleged that his accident occurred due to the unsafe means provided to him to access the bottom of the excavation site. According to plaintiff, his foot slipped due to the "very loose" nature of the dirt ramp, which was "very sloped". He described the ramp as six feet high and having a slope of over 45 degrees. With regard to 12 NYCRR § 23-4.3, plaintiff has not demonstrated his entitlement to summary judgment on this regulation, as it is not alleged that a lack of a ladder, stairway or ramp caused plaintiff's accident.

In opposition, First Class raises a triable issue of fact regarding the height of the ramp and thus, the necessity of safety railings, as set forth in 12 NYCRR § 23-1.23(d). Defendants fail to raise a triable issue of fact regarding the applicability of 12 NYCRR §§ 23-1.7(f), 23-1.23(a) and (b). (See Miano v Skyline New Homes Corp., 37 AD3d 563 [2d Dept 2007]; Gonzalez v Pon Lin Realty Corp., 34 AD3d 638 [2d Dept 2006].) Ramirez testified that he had not tested the slope to determine whether the dirt was compacted at any time. Additionally, defendants were unable to demonstrate that the maximum grade of the ramp was no more than 25%. However, First Class demonstrates his entitlement to summary judgment on plaintiff's Labor Law § 241(6) claim to the extent that it is based upon an alleged violation of 12 NYCRR § 23-4.3.

The court shall now consider the branch of plaintiff's motion and First Class' cross motion seeking summary judgment on the causes of action based on Labor Law § 200 and common-law negligence. Labor Law § 200 is essentially a codification of the common-law duty of an owner or general contractor to provide workers with a reasonably safe place to work. (See Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]; Chowdhury v Rodriguez, 57 AD3d 121 [2d Dept 2008].) Liability pursuant to Labor Law § 200 includes claims involving the manner in which the work is performed, as well as claims involving a dangerous or defective premises' condition at the work site. (See Abelleira v City of New York, 120 AD3d 1163 [2d Dept 2014]; Ortega v Puccia, 57 AD3d 54 [2d Dept 2008].) In the instant matter, plaintiff's claims include both the manner in which the work was performed as well as an allegation of a defective and dangerous condition of the ramp. As such,

parties moving for summary judgment with respect to an alleged violation of Labor Law § 200 must address the proof applicable to both liability standards. (See Dasilva v Nussdorf, 146 AD3d 859 [2d Dept 2017]; DiMaggio v Cataletto, 117 AD3d 984 [2d Dept 2014].) Here, there are triable issues of fact surrounding defendants' authority to control the means and methods of plaintiff's work as well as their actual or constructive notice of the alleged dangerous condition of the ramp, precluding the granting of summary judgment to any party.

Finally, Realty seeks conditional contractual indemnification from First Class, pursuant to section 3.18.1 of the contract, dated April 17, 2017, which provides as follows: "To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's Consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the work, provided that such claim, damages, loss or expense is attributable to bodily injury, sickness disease or death, but only to the extent caused by the negligent acts or omissions of the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage loss or expense is caused in party by a party indemnified hereunder."

It is well settled that any construction contract purporting to indemnify a party for its own negligence is void and unenforceable. (See General Obligations Law § 5-322.1; Kinney v Lisk Co., 76 NY2d 215 [1990]; Armentano v Broadway Mall Properties, Inc., 70 AD3d 614, 616 [2d Dept 2010]; Cava Constr. Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662 [2d Dept 2009]; Reynolds v County of Westchester, 270 AD2d 473, 474 [2d Dept 2000].) A party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence. To the extent that the negligence of a party who is the beneficiary of an indemnification provision contributed to the accident, such party cannot be indemnified therefrom. (See Armentano, 70 AD3d at 616; Cava Constr. Co., Inc., 58 AD3d at 662; Reynolds, 270 AD2d at 474; Kennelty v Darlind Constr., 260 AD2d 443, 446 [1999]; cf. Brooks v Judlau Contr., Inc., 11 NY3d 204 [2008].) Here, as Realty has not established its freedom from negligence, as its application for conditional contractual indemnification from First Class is premature.

Accordingly, plaintiff's motion for summary judgment pursuant to Labor Law §§ 240(1) and 241(6), to the extent that it is predicated upon violations of 12 NYCRR §§ 23-1.7(f), 23-1.23(a) and (b), is granted. First Class' cross motion to dismiss plaintiff's Labor Law § 241(6) claim, to the extent that it is predicated upon a violation of 12 NYCRR § 23-4.3, is granted. The motion and cross motions are otherwise denied.

Dated: January 28, 2021

J.S.C.

FILED

1/28/2021
4:05 PM

COUNTY CLERK
QUEENS COUNTY