Demera v Brooklyn Kings Plaza LLC
2022 NY Slip Op 30144(U)
January 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 500787/2018
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
NICHOLAS DEMERA and JENNIFER N. DEMERA,

Plaintiff(s),

Index No: 500787/2018

-against-

DECISION AND ORDER

BROOKLYN KINGS PLAZA LLC, AURORA CONTRACTORS, INC. THE MACERICH COMPANY, and ISLAND DIVERSIFIED,

Defendant(s).
x

BROOKLYN KINGS PLAZA LLC, AURORA CONTRACTORS, INC. and THE MACERICH COMPANY,

Third-party plaintiff(s),

-against-

CERTIFIED INTRIORS, INC. and ISLAND DIVERSIFIED,

Third-Party Defendant(s).
x

Recitation as required by CPLR 2219(a), of the papers considered in these motions for summary judgment.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	99-148, 160-163
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	151, 164-165, 170, 172
Reply Papers.....	173-174, 178
Memorandum of law.....	

Upon the foregoing cited papers, the Decision/Order on these motions:

In this action to recover damages for personal injuries, plaintiffs Nicholas Demera and Jennifer Demera [collectively the Demeras] move [seq. no. 3] for (1) an order

pursuant to CPLR 3212 for partial summary judgment against defendants Aurora Contractors Inc. [Aurora] and Island Diversified [Island] on the causes of action alleging a violation of Labor Law § 200 and common law negligence, and against all defendants on the cause of action alleging a violation of Labor Law § 241(6); (2) pursuant to CPLR 3211(b) dismissing the defendants' affirmative defenses as to culpable conduct and assumption of risk; and (3) entering judgment against the defendants and setting the matter down for an assessment of damages. Defendants Brooklyn Kings Plaza LLC and the Macerich Company [collectively the BKP defendants], together with Aurora, move [seq. no. 4] for an order (1) pursuant to CPLR 3212 for summary judgment dismissing the Demeras' causes of action under Labor Law § 200 and common law negligence[1] as well as all cross-claims, and (2) awarding them contractual indemnification against third-party defendants Certified Interiors, Inc. [Certified] and Island. Certified separately moves [seq. no. 5] for an order pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and any cross-claims asserted against it.

On October 13, 2017, Nicolas Demera, a union affiliated carpenter employed by third-party defendant Certified, allegedly was injured when he slipped and fell on a thin, clear coat of fireproofing material, known as Monokote, while walking on the third floor of a construction site located inside the Sears store at the Kings Plaza Mall. At some point prior to his accident, employees from Island, a separate trade, sprayed the Monokote onto the ceilings and walls on the third floor. An overspray of the Monokote fell onto the surface of the floor creating a wet and slippery condition that had not been cleaned up by the time Demera walked through the area. Although required for the work, a 'controlled access zone' was not in place to prevent workers from other trades, like Demera, from accessing the location. On the date of the accident, the BKP defendants owned and operated the Kings Plaza Mall, Aurora was the general contractor hired by the BKP defendants for the renovation project at the Sears store, Island was the subcontractor hired by Aurora to perform fireproofing services at the site, and Certified was the subcontractor hired by Aurora to perform the carpentry work for the project.

The Demeras commenced this action against the BKP defendants, Aurora, and Island, alleging violations of Labor Law §§ 200, 240(1), and 241(6) and common-law negligence. The BKP defendants and Aurora commenced a third-party action against Certified and Island for common law and contractual indemnification, contribution, and breach of the agreements to procure insurance. Island cross-claimed against the BKP defendants, Aurora and Certified for contribution, and Certified cross-claimed against Island for both common-law indemnification and contribution.

[1] Although Aurora and the BKP defendants' notice of motion seeks dismissal of the Demeras' entire complaint, the affirmation in support only addresses the Labor Law § 200 and common law negligence claims. As such, the court will consider the motion as one seeking partial summary judgment dismissing the Labor Law § 200 and common law negligence claims only.

Witness testimonies

Nicholas Demera

Nicholas Demera testified that he had been framing exterior columns at the Sears' construction project for about two weeks prior to his accident. On the day of his accident, he was directed by his foreman to move materials on a pallet jack from the interior of the third floor of the building to the ledge of the building where the columns were located. Demera had performed the task four times earlier that day without incident, walking in the same general path through the third floor of the site. Demera was in the process of returning an empty pallet jack from the building's ledge to the interior area of the third floor of the building when he slipped on the Monokote. The third floor where he had been walking was not blocked off with any type of caution tape, boxes or cones, and no tradesmen were working in the area. Demera did not observe any Monokote on the floor before he fell but noticed that his clothes were wet with the material afterwards. Demera, who was familiar with Monokote, having observed it being applied at other jobs, described it as wet, transparent, and slick, which turns white when dry. Demera was shown photographs of the accident site that had been taken by one of his coworkers. Demera indicated that the area where he fell was depicted in the photographs but that the piles of Monokote and caution tape that were shown in the photographs were not there at the time of his fall.

Wayne Murphy

Wayne Murphy testified that he was the site safety manager employed by non-party CRSG, the safety contractor retained by the BKP defendants for the construction project. Aurora's safety manager Jonathan McManus and Murphy held weekly safety meetings with all the contractors and subcontractors working at the site. During those meetings 'controlled access zones' were discussed. Contractors/subcontractors were responsible for setting up their own 'controlled access zones', which would then be approved by Aurora before the work would commence. Each contractor/subcontractor was also required to submit a specific site safety plan and job hazard analysis to Aurora for approval, and it was Murphy's responsibility to make sure that each contractor/subcontractor complied with the plans and job hazard analysis. If a contractor failed to set up a 'controlled 'access zone', Murphy would stop the work until one was set up.

Murphy remembered that he was working on the roof of the building when he received a call at about 9:15 or 9:20 A.M. and was told that an accident had occurred. Murphy proceeded to the accident site and observed that there was no 'controlled access zone' in place and that there was a wet coating of Monokote on the floor. Murphy testified that there were piles of Monokote spray on the floor but did not remember if he the saw piles of scraped up Monokote at the site.

Murphy then went to his office and had a conversation with Demera and his foreman, Frank Hoffman. Based on Murphy's conversation with Demera, Hoffman, and his own observations of the area, Murphy determined that wet Monokote on the floor in the absence of a 'controlled access zone' was the cause of Demera's slip and fall accident. Murphy's testimony also indicates that it was Island's responsibility to clean up their site, including the overspray of Monokote.

Frank Hoffman

Frank Hoffman testified that he was Demera's foreman at the Sears' construction project. At the time of his accident, Demera was assigned to move materials inside the building. Hoffman does not remember how he learned of Demera's accident but recalled meeting Demera at the onsite safety office. After Demera was taken to the hospital, Hoffman went to the accident site to see what happened. Hoffman does not remember if there was a 'controlled access zone' in place, he just remembered making a stink as to why Demera was in that area if the work going on was dangerous. Hoffman was shown an incident report written in his handwriting that stated that Demera was "walking across the third floor with a pallet jack (empty) avoided piles of monocoat but slipped on thin coat of wet monocoat on terrazzo floor." Nothing in the report indicated that a 'controlled access zone' was in place at the site. Hoffman indicated that if a 'controlled access zone' had been in place and Demera went through it, he would have put that in his report.

Peter Mulhall

Peter Mulhall testified that he was employed by Aurora, the general contractor for the Sears' project, as their senior project manager responsible for the overall construction team including overseeing the coordination of the subcontractors at the site. Part of Aurora's responsibilities as the general contractor included conducting regular inspections of the job site to make sure that work was performed in a safe manner. Aurora had the ability to stop any work that was not being performed safely. 'Controlled access zones', which should consist of barricades, ropes, wires, tapes or equivalent material, are put in place to prevent unauthorized access to a work area. If a contractor/subcontractor's work required a 'controlled access zone', the foreman of that trade would communicate that information at the weekly safety meetings, and it would be Aurora's expectations that the trade would use proper materials in creating the zone. Since Aurora was responsible for overseeing the work, if they saw that a 'controlled access zone' was not safely created, they would address it. When Island was spraying Monokote, they usually would work alone on the entire floor. When Monokote was applied, an overspray of material would naturally fall to the floor, which would take a while to dry. Pursuant to their contract with Aurora, Island was obligated to scrape up the overspray and put it into piles. The scraping usually occurred when the Monokote was still wet to avoid issues with it drying on the floor. Monokote spraying required a

'controlled access zone', and that zone was to remain in place until all the Monokote was cleaned from the floor as it is slippery and presents a potential slipping hazard. On this project, only Island was doing fireproofing spraying. Island was responsible for creating their own 'controlled access zone'. No one from Aurora would have to approve the 'controlled access zone' or inspect its adequacy before the work was permitted to begin.

Sean Boehle

Sean Boehle testified that he was Aurora's assistant super for the Sears' project whose responsibilities included, among other things, site safety. Subcontractors were responsible for setting up their own 'controlled access zone' when the work being performed was hazardous to other trades. It was Boehle's responsibility to check if 'controlled access zones' were set up correctly by the subcontractors. If one was not set up properly, Boehle would stop the work and make sure it was set up correctly. The use of Monokote required a 'controlled access zone'. As long as the Monokote remained on the floor, the 'controlled access zone' needed to stay in place. Boehle does not remember this accident but confirmed that he prepared an incident report that stated that Demera "lost his footing when walking over a floor that had a thin coat of fireproofing". Nothing in the handwritten report indicated that there was a 'controlled access zone' in place and Boehle did not remember whether one had been set up.

Matt Stevens

Matt Stevens testified that he is the owner of Island, the subcontractor that was to perform the fireproofing and insulation work for the Sears'project. Island had a foreman on site, John Urban, who was responsible for supervising Island's workers and to make sure the job was done safely. Stevens did not know whether Urban ever conducted an investigation of the accident or whether he created an incident report. Stevens did not know whose responsibility it was to create a 'controlled access zone' forthe work, although he agreed that wet overspray on the ground is slippery and the reasonwhy a 'controlled access zone' is recommended for the fireproofing work. Overspray that falls to the ground is wet and takes approximately 1 to 3 hours to dry. Island's workers would typically scrape up the overspray during the work or immediately afterwards but he had no personal knowledge regarding the manner in which the overspray was removed from the floors of this site. Stevens confirmed that Island's contract with Aurora required Island to clean up its work area, including scraping up thefireproofing overspray into piles for disposal.

Labor Law § 200 and Common-law Negligence

Labor Law § 200 codifies the common-law duty of owners, general contractors and their agents to provide workers with a reasonably safe place to work (*see Pacheco v Smith*, 128 AD3d 926 [2d Dept 2015]; *Everitt v Nozkowski*, 285 AD2d 442 [2d Dept

2001). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*see Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). When the manner and method of work is at issue, a defendant must have 'authority to exercise supervision and control over the work' (*see Rojas v. Schwartz*, 74 AD3d 1046 [2d Dept 2010]). Where a plaintiff's injuries arise from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 and common law negligence if it had control over the worksite and either created the dangerous condition or failed to remedy the dangerous condition while having actual or constructive notice of same (*see Abelleira v City of New York*, 120 AD3d 1163 [2d Dept 2014]). In this matter, the Demeras argue that the injuries were caused by both a dangerous condition on the premises and the manner and method of the work (*see Benscher v Actus Lend Lease, LLC*, 132 AD3d 707 [2d Dept 2015]).

First, it is noted that the Demeras do not oppose that portion of the motion brought by the BKP defendants for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and for common-law negligence insofar as asserted against these defendants. Rather, the Demeras "concede" the issue of liability on these causes of action as to the BKP defendants and only oppose that part of the motion as brought by Aurora.

With respect to Aurora, its submissions in support of its motion fails to establish itsprima facie entitlement to summary judgment dismissing the causes of actions alleging a violation of Labor Law § 200 and common law negligence. Here, there is conflicting witness testimony as to whether Aurora had the authority to direct or control the safety measures employed by Island for its fireproofing work (*see Rizzuto v L.A. Wenger Contracting Co*., Inc., 91 NY2d 342 [1998]); *cf. Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732 [2d Dept 2007]); *cf. Dennis v City of New York*, 304 AD2d 611 [2d Dept 2003]). William Murphy's testimony indicates that while Island was responsible for creating a 'controlled access zone' for its work, Aurora was responsible for inspecting and approving the zone's adequacy before the work could commence. Whereas Peter Mulhall's testimony indicates that Island was authorized to create its own 'controlled access zone' and begin its work without any approval from Aurora. The testimonies also reflect that Aurora had the ability to coordinate the work activity of the various trades and required that Island submit for approval a site-specific safety plan and a task hazard analysis (*see Moscati v Consolidated Edison Company of New York, Inc*., 168 AD3d 717 [2d Dept 2019]). Thus, triable issues of fact exist as to whether Aurora had the ability to prevent the unsafe condition. Moreover, as there is further testimony that Aurora had superintendents on the project who conducted regular site walk-throughs and safety inspections, triable issues of fact exist as to whether Aurora had notice of the allegedly dangerous condition (*see Mott v Tromel Const. Corp*., 79 AD3d 829 [2d Dept 2010]).

In view of the conflicting testimony concerning Aurora's control over the safety measures at the worksite, and as the record fails to establish as a matter of law that Aurora had actual or constructive notice of the dangerous conditions that resulted in the accident, the Demeras are not entitled to summary judgment on their causes of action under Labor Law § 200 and common law negligence as against Aurora.

The Demeras, however, establish their prima facie entitlement to summary judgment as a matter of law on the causes of action alleging a violation of Labor Law § 200 and common law negligence insofar as asserted against Island. The relevant deposition testimonies demonstrate that Island had the authority to supervise and control the area of the work and the worksite where Demera was injured, and that the overspray of its fireproofing material created a slippery condition that should have been cleaned up but remained on the surface of the floor at the time Demera walked through the unrestricted area (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519 [2d Dept 2010]). As noted above, Wayne Murphy, the on-site safety manager, testified that Island was required to create a 'controlled access zone' for its work and to keep it in place until it cleaned up including the overspray. Murphy inspected the accident site within 15-20 minutes of the event and observed wet fireproofing material on the floor and no 'controlled access zone' in place. Aurora's senior project manager, Peter Mulhall, also testified that Island was required to create a 'controlled access zone' for its work and was responsible for scraping up the overspray. In opposition, Island fails to raise a triable issue of fact. Island fails to submit any evidence indicating that it did not possess the authority to supervise and control its work area, and that it did not create the dangerous condition that allegedly caused the injury (*see generally Van Nostrand v Race & Rally Const. Co., Inc.*, 114 AD3d 664 [2d Dept 2014]).

Labor Law § 241(6)

Labor Law § 241(6) imposes on owners and contractors a nondelegable 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" (*see Lopez v. New York City Dept. of Envtl. Protection*, 123 AD2d 982, 983 [2d Dept 2015]). "[A] subcontractor may be liable for a violation of [this] provisionif the owner or general contractor delegates to the subcontractor the duty to conform to the requirements of the [Labor Law] by granting the subcontractor the authority to supervise the work which brought about the injury" (*see Eliassian v G.F. Construction, Inc*. 190 AD3d 947, 949 [2d Dept 2021]. In order to establish liability under Labor Law § 241(6), "a plaintiff or claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*see Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). The predicate Industrial Code provision must "set[ ] forth specific safety standards" (*see Hricus v. Aurora Contrs., Inc*., 63 AD3d 1004, 1005 [2d Dept 2009] [internal quotation marks omitted]). Here, the Demeras move for

summary judgment under Labor Law § 241(6) arguing that the overspray of fireproofing material that remained on the floor of the worksite created a slippery condition in violation of Industrial Code (12 NYCRR) § 23-1.7(d), and that such violation was a proximate causeof the injuries.

Industrial Code § 23–1.7(d), in pertinent part, "unequivocally directs employers 'not to suffer or permit any employee' to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that any 'foreign substance which may cause slippery footing shall be removed…to provide safe footing' " (*Rizzuto* at 350-351, *quoting* 12 NYCRR 23-1.7[d]). Demera's testimony establishes that he slipped and fell as a result of the fireproofing material overspray that remained on the floor in the unsecured area where he was performing the task assigned to him (*see Reynoso v Bovis Lend Lease LMB, Inc*. 125 AD3d 740 [2d Dept 2015]; *Velasquez v 795 Columbus LLC*, 103 AD3d 541 [2d Dept 2013]). Demera's testimony also demonstrates his freedom from comparative fault, as it indicates that he did not observe any fireproofing work taking place in the area, did not observe any wet overspray on the floor before the accident, and did not enter an area that was blocked off or otherwise restricted to him (*Reynoso* at 742). In opposition, the defendants fail to raise a triable issue of fact as to their allegation that the overspray of fireproofing material was an integral part of the work, or that Demera's own negligence contributed to the accident (*Lopez* at 984). Furthermore, as it has already been established that Island had the authority to supervise and control the work which brought about the injury, Island fails to raise a triable issue of fact as to whether it was a statutory agent of Aurora for the purposes of Labor Law § 241(6).

Contractual Indemnification

"The right to contractual indemnification depends upon the specific language of the contract," and "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*see Roldan v New York University*, 81 AD3d 625, 628 [2d Dept 2011]). In addition "a party seeking contractual indemnification must establishthat it was free from negligence and that it may be held liable solely by virtue of statutoryor vicarious liability" (*see Arriola v. City of New York*, 128 AD3d 747, 749 [2d Dept 2015]), because to the extent its negligence contributed to the accident, it cannot be indemnified therefore" (*see Cava Constr. Co., Inc. v Geltec Remodeling Corp*., 58 AD3d 660, 662 [2d Dept 2009]; *see* General Obligations Law § 5-322.1). Here, the express language of the subcontractor agreements entered into by Aurora with both Island and Certified, obligate Island and Certified to indemnify Aurora and the BKP defendants "[t]o the fullest extent permitted by law…from any and all claims, suits, damages, … including attorneys' fees, costs, … expenses and disbursements, related to … personal injuries... brought against any of the indemnities by any person … arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor … whether or notcaused in whole or in party by the Subcontractor …"

As triable issues of fact exist as to whether Aurora was negligent with regard to the underlying accident, summary judgment on Aurora's third-party action for contractual indemnification is not warranted *(see Robles v Taconic Management Co., LLC*, 173 AD3d 1089 [2d Dept 2019]).

The BKP defendants establish their entitlement to summary judgment as a matter of law on their claims for contractual indemnification and defense costs as against both Island and Certified. There is no evidence in the record that the BKP defendants had control over the worksite or notice of the allegedly dangerous conditions. Therefore, since the BKP defendants are free from negligence, enforcement of the indemnity provisions against Certified and Island do not run afoul of General Obligations Law § 5–322.1(1) (*see Tarpey v Kolanu Partners, LLC*, 68 AD3d 1097 [2d Dept 2009]). Further, the broad indemnification provision in the contracts provide indemnification even if the subcontractors have not been negligent. Therefore, although there is no negligence on Certified's part, the indemnification agreement requires Certified to indemnify the BKP defendants and to reimburse it for its defense costs.

Contrary to the arguments set forth by Certified both in opposition to the BKP defendants' motion and in support of its own motion for summary judgment dismissing the third-party complaint, Demera's claim for personal injuries is one "arising out of or in connection with or as a result or consequence of the performance" of Certified's work (*see Tarpey v Kolanu Partners*, LLC, 68 AD3d 1099 [2d Dept 2009]). Therefore, dismissal of the third-party claims for contractual indemnification is not warranted. However, as Certified demonstrates that it procured the required insurance for Aurora and the BKP defendants'benefit, it establishes its entitlement to dismissal of the third-party claims against it for the failure to procure insurance.

Certified is entitled to summary judgment dismissing Island's cross-claim for contribution. The record is devoid of any evidence as to Certified's negligence in connection with the occurrence, or as to its authority to direct, supervise, or control Island's worksite (*see Pereira v Hunt/Bovis Lend Lease Alliance II*, 193 AD3d 1085 [2d Dept 2021]).

In view of the foregoing, it is hereby

ORDERED that the BKP defendants' motion for summary judgment dismissing the Demeras' Labor Law § 200 and common law negligence causes of action as well as all cross-claims insofar as asserted against it is granted; and it is further

ORDERED that Auroras' motion for summary judgment dismissing the Demeras' Labor Law § 200 and common law negligence causes of action and all cross-claims is denied; and it is further

ORDERED that the Demeras' motion for summary judgment against the BKP defendants and Aurora on the causes of action alleging a violation of Labor Law § 200 and common law negligence is denied; and it is further

ORDERED that the Demeras' motion for summary judgment against Island on the causes of action alleging a violation of Labor Law § 200 and common law negligence is granted; and it is further

ORDERED that the Demeras' motion for summary judgment against the BKP defendants, Aurora, and Island on the cause of action alleging a violation of Labor Law § 241(6) as predicated on Industrial Code § 23–1.7(d) is granted; and it is further

ORDERED that the affirmative defenses raised in the defendants' answers as to culpable conduct and assumption of risk are dismissed; and it is further

ORDERED that the BKP defendants' motion for summary judgment on their third-party claims for contractual indemnification and defense costs against Certified and Island is granted; and it is further

ORDERED that Aurora's motion for summary judgment on its third-party claims for contractual indemnification against Certified and Island is denied; and it is further

ORDERED that Certified's motion for summary judgment dismissing the third-party-claims asserted against it is denied as to the contractual indemnification claims and granted as to the failure to procure insurance claims. The portion of Certified's motion seeking to dismiss the cross-claim asserted by Island against it is also granted.

This constitutes the decision and order of the court.

Dated: January 18, 2022

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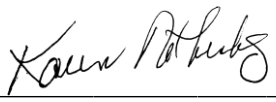

Hon. Karen B. Rothenberg
J.S.C.