

Weiss v 56th & Park (NY) Owner, LLC

2022 NY Slip Op 30199(U)

January 24, 2022

Supreme Court, New York County

Docket Number: Index No. 151767/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

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NICHOLAS WEISS, JEAN WEISS,
Plaintiff,

INDEX NO. 151767/2017

MOTION DATE 11/13/2020

MOTION SEQ. NO. 001

- v -

56TH AND PARK (NY) OWNER, LLC, NORSEL REALTIES
LLC, 575 ASSOCIATES L.L.C., ICON INTERIORS, INC., JTC
PAINTING GROUP, INC., JTC PAINTING & DECORATING
CORP., DOUGLAS ELLIMAN REALTY, LLC,

DECISION + ORDER ON
MOTION

Defendant.

-----X

NORSEL REALTIES LLC, 575 ASSOCIATES L.L.C.
Plaintiff,

Third-Party
Index No. 595404/2017

-against-

DOUGLAS ELLIMAN REALTY, LLC

Defendant.

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ICON INTERIORS, INC.

Second Third-Party
Index No. 595672/2017

Plaintiff,

-against-

ESS & VEE ACOUSTICAL CONTRACTORS, INC, JTC
PAINTING & DECORATING CORP

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 82, 83, 84, 85, 86,
87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110,
111, 112, 113, 114, 115, 116, 133, 135, 137, 138, 139, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152,
160, 162, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for JUDGMENT - SUMMARY

Defendants/third-parties Norsel Realties, 575 Associates, Icon Interiors and Douglas Elliman (hereinafter “movants”) seek an order, inter alia, dismissing plaintiffs’ complaint, granting indemnification against JTC Painting, granting indemnification against ESS & VEE Acoustical (hereinafter “E & V”), and granting summary judgment on breach of contract claims against JTC Painting and E & V.

As an initial matter, plaintiffs concede dismissal of the Labor Law § 240(i) claim is proper (NYSCEF Doc. No. 146 at ¶ 7). Accordingly, such claim is dismissed.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d

302 [1st Dept 2006]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

LABOR LAW

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” (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). It provides, in pertinent part:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons

(Labor Law § 200).

The party responsible under Labor Law § 200 must, therefore, have the control over the activity bringing about the injury (*Russin v. Picciano & Son*, 54 NY2d 311 [1981]). Accordingly, a breach of Labor Law § 200 is, effectively, a

breach of the common law duty to maintain a safe work site (*Allen v. Cloutier Constr. Corp.*, 44 NY2d at 299). If the dangerous condition or defect arises from the contractor's methods, the owner will not be liable under § 200 or the common law, absent a showing the owner exercised some control or supervision over the operation (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 877; *see also Lombardi v. Stout*, 80 NY2d 290, 295 [1992]). However, where the plaintiff's injuries arise from a dangerous condition on the premises not caused by the contractor's methods, liability will attach if the property owner had control over the work site and notice of the dangerous condition (*Bradley v. HWA 1290 III LLC*, 157 AD3d 627 [1st Dept 2018]; *Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Labor Law § 241(6) requires contractors, owners, and their agents to “provide reasonable and adequate protection and safety’ for workers” as well as comply with the rules and regulations as promulgated by the Department of Labor (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d at 501-02; *see Labor Law § 241*). The duty imposed by Labor Law § 241(6) is nondelegable as it relates to compliance with the Industrial Code. However, to the extent Labor Law § 241(6) relates to general safety standards, it does not give rise to the same non-delegable duty (*id.*).

As relevant here, Industrial Code § 23-1.7(d) relates to slipping hazards, and prohibits the use of floors upon which there exists a slippery condition. Industrial Code § 23-1.7(e)(2) likewise provides that floors shall be kept free of debris, including materials. Finally, Industrial Code §23-2.1 provides that materials and equipment shall be stored in an orderly manner.

Here, plaintiff alleges, essentially, that while working as a contractor performing framing and sheetrocking for E & V, he was caused to slip and fall when he stepped on a piece of cardboard covering what he believed to be spilled wet paint at a construction site located at 575 Madison Avenue (*see e.g.* plaintiff's deposition at p. 65, 72, and 75-77). Employees from JTC Painting were contemporaneously performing painting work at the construction site. The accident report, created by the general contractor, defendant Icon, refers to JTC Painting's employee's admission, Giuseppe DiLorenzo, that he covered the paint spill with a piece of cardboard. Approximately eight months later, Giuseppe DiLorenzo averred that he was unaware of the paint spill or how same came to be covered with cardboard. Thereafter, at his deposition three years following the accident, Giuseppe DiLorenzo, testified that he covered an open paint container with a drop cloth before taking a coffee break, but did not spill the paint.

Icon's field superintendent, Jonathan Foster, testified that his job duties entailed "Running the day-to-day operation of the whole project from top to bottom" (Foster Deposition at p.11). He further testified that, as Icon's field superintendent, he was "in charge of all the subcontractors that we hire... I supervise everyone on site" (*id.* at p. 11-12). Likewise, Douglas Elliman's facilities director, Denise Cannavina, testified that Foster instructed the construction workers on-site during their various walkthroughs of the site (Cannavina Deposition at p. 32-33). Cannavina further testified that Douglas Elliman held weekly on-site meetings with Icon, among others, regarding the construction project (*id.* at p. 24-31).

William Figueroa, another construction worker at the accident site, testified that he witnessed the accident, and noted that the floor was wet, there was debris on the floor, and a piece of cardboard was present at the location where plaintiff fell (Figueroa Deposition at p. 28-46).

Consequently, the testimony of Icon's own field superintendent establishes that Icon was responsible for control over the activity at the construction site. Likewise, the evidence establishes that the floor was wet with other debris, a violation of the aforementioned Industrial Codes. On this issue,

there is no question of fact. As the obligations imposed by the Industrial Code are nondelegable, defendants' violation of same amounts to a violation of Labor Law § 241(6). Consequently, movants having raised the issue of summary judgment on Labor Law § 241(6), and upon searching the record on this issue, the Court finds summary judgment appropriate in favor of plaintiff on Labor Law § 241(6) and against Norsel Realties, 575 Associates, Icon Interiors and Douglas Elliman (*Dunham v. Hilco Constr. Co.*, 89 NY2d 425, 429 [1996], "A court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court"; *see also* CPLR § 3212[b]). Douglas Elliman's status as lessee does not preclude summary judgment against it under § 241(6), "[a] lessee of property under construction is deemed to be an 'owner' for purposes of liability under article 10 of New York's Labor Law" (*Karwowski v. 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018] [Kapnick, J.] quoting *Kane v. Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]).

As to Labor Law § 200, it is beyond cavil, as discussed *supra*, that a defendant's liability under § 200 turns on, in part, whether the defendant had control over the activity bringing about the injury. Defendants', Norsel Realties, 575 Associates, Icon Interiors, and Douglas Elliman, decision to

collectively bring this motion without differentiating their individual roles as owner, manager, general contractor, landlord, and tenant precludes granting summary judgment in their favor (*see* NYSCEF Doc. No. 83, *passim*). Norsel Realities, 575 Associates, Icon Interiors and Douglas Elliman refer to themselves as “Moving Defendants” throughout their papers and proffer proof and argument in terms of this collective unit, without regard to their individual roles and spheres of control over the project. Having chosen to move collectively, their motion must fail as the evidence establishes at least one of these “moving defendants” exercised control over the project - Icon’s employee’s own testimony establishes that Icon exercised control over the entire project and all subcontractors working therein, including directing JTC Painting (*id.* at ¶ 94). Furthermore, as to notice, no proof has been proffered evincing a recent inspection or otherwise eliminating the issue of constructive notice (*see Dylan P. v. Webster Place Assoc., L.P.*, 132 AD3d 537 [1st Dept 2015] *aff’d* 27 NY3d 1055 [2016]).

BREACH OF CONTRACT

“Moving defendants” next contend that E & V and JTC Painting breached a contract requiring it to procure insurance naming the “moving defendants” as an additional insured. Again, as with movants’ claims related to

Labor Law § 200, movants' decision to proceed as the collective "moving defendants" fails to account for these individual defendants' contractual privity, or lack thereof, and the individual pleadings submitted by each entity.

However, unlike with the Labor Law § 200 claims, here, the evidence plainly establishes that only Icon has asserted claims for breach of contract against E & V and JTC Painting (see Second Third-Party Summons and Complaint). Consequently, Norsel Realties, 575 Associates, and Douglas Elliman may not now seek summary judgment for breach of contract claims which were not pled in the first instance (*McDonnell v. Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018] "The Supreme Court also should have denied summary judgment... based on ... alleged failure to procure insurance. As an initial matter, [defendant] failed to assert any such cause of action in its pleadings").

As to the merits of Icon's claim for breach of contract, the contract at issue provides that Icon shall be "named as an additional insured on a primary basis, along with any other additional insured which may be required for a specific location" (see Blanket Insurance Indemnity Agreement).

Here, Icon's claim of breach of contract is, once again, belied by its own evidence, to wit, the E & V policy providing that additional insureds include

“as required by written contract executed prior to the date of an occurrence” (Allied World Policy, at p. 50). Likewise, JTC painting procured insurance naming, as additional insureds, those required by contract or agreement (see Affidavit of Lee Costelloe, annexing Merchant’s Policy, at p. 26).

Accordingly, E & V and JTC Painting have established they procured insurance in compliance with the parties’ contract, and therefore, E & V and JTC Painting are entitled to summary judgment dismissing claims of breach of contract by Icon (see e.g. *Sullivan v. New York Athletic Club of City of New York*, 162 AD3d 950, 955 [2d Dept 2018]). The Court, having found that E & V and JTC Painting are entitled to summary judgment dismissing these claims, and given the Court’s decision on indemnification and contribution below, need not reach those arguments related to whether the Blanket Insurance Indemnity Agreement is violative of General Obligations Law § 5-322.1 to the extent that the agreement seeks to indemnify Icon for its own negligence.

INDEMNIFICATION
&
CONTRIBUTION

As to indemnification, while the Court has determined certain defendants are liable under Labor Law § 241(6) for plaintiff’s injuries, it has not

determined the causation of same; the issue of how the floor was caused to become slippery with paint and covered with debris is a question for the trier of fact. Furthermore, questions of fact preclude a determination on plaintiff's Labor Law § 200 claim. As such, motions seeking indemnification or contribution, whether by contract or otherwise, are premature, and shall be resolved after trial, if necessary.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' Labor Law § 240(1) claims are dismissed, on consent; and it is further

ORDERED that to the extent the motion seeks to dismiss the complaint alleging Labor Law §§ 200 and 241(6) violations as against defendants Norsel Realities, 575 Associates, Icon Interiors and Douglas Elliman it is denied; and it is further

ORDERED and ADJUDGED that summary judgment is granted to plaintiffs as against defendants Norsel Realities, 575 Associates, Icon Interiors and Douglas Elliman on the Labor Law § 241(6) claim; and it is further

ORDERED that to the extent that the motion seeks indemnification it is denied as premature and shall be resolved, if necessary, following trial; and it is further

ORDERED that to the extent the motion seeks summary judgment against ESS & VEE Acoustical and JTC Painting for breach of contract, it is denied; and it is further

ORDERED and ADJUDGED that ESS & VEE Acoustical and JTC Painting are awarded summary judgment dismissing Icon Interior's claims of breach of contract.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

1/24/2022
DATE


FRANK NERVO, J.S.C.

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|-----------------------|--------------------------|----------------------------|-------------------------------------|-----------------------|---|
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input checked="" type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |