

Rodriguez v SI Pearl Partners LLC
2022 NY Slip Op 31319(U)
April 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 17277/2013
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brookly, New York, on the 20th day of April, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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ELVIN ANTONIO RODRIGUEZ and THELMA RODRIGUEZ,

Plaintiffs,

Index No.: 17277/2013

-against-

DECISION AND ORDER
MS #14, #15, #16, and #17

SI PEARL PARTNERS LLC, ISLAND CONDO MANAGEMENT CORP., SI VENTURE HOLDINGS LLC, TONA CONSTRUCTION & MANAGEMENT LLC, and NEWMARK CONSTRUCTION SERVICES, LLC,

Defendants.

-----X
SI PEARL PARTNERS LLC and SI VENTURE HOLDINGS LLC,

Third-Party Plaintiffs,

-against-

FIRSTLINE CONTRACTING, INC., and TONA CONSTRUCTION & MANAGEMENT LLC., a/k/a TONA CONSTRUCTION and MANAGEMENT, INC.,

Third-Party Defendants.

-----X
NEWMARK CONSTRUCTION SERVICES, LLC,

Second Third-Party Plaintiff,

-against-

FIRSTLINE CONTRACTING, INC., and TONA CONSTRUCTION & MANAGEMENT LLC., a/k/a TONA CONSTRUCTION and MANAGEMENT, INC.,

Second Third-Party Defendants.

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The following papers numbered on this motion:

	<u>NYSCEF Doc Numbers</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	129-130, 147, 64-65, 91-92, 150-151, 165
Answering Affidavit (Affirmation) _____	117, 123, 124, 170
Reply Affidavit (Affirmation) _____	115, 125, 126, 127
Supplemental Affidavit (Affirmation) _____	
Pleadings – Exhibits _____	131-146, 66-90, 116, 93-114, 118, 152-164, 172-173
Stipulations – Minutes _____	
Filed Papers _____	

This action arises from a construction accident that occurred September 17, 2013 on the roof of the building located at 90 Bay Street Landing, Staten Island, New York (the Premises). Defendants SI PEARL PARTNERS LLC (Defendant SI PEARL) and SI VENTURE HOLDINGS, LLC (Defendant SI VENTURE) were the owners of the ongoing renovation project at the Premises in September of 2013. The building was owned by Defendant SI PEARL. Defendant TONA CONSTRUCTION & MANAGEMENT, LLC (Defendant TONA) was the general contractor and Defendant NEWMARK COSTRUCTION SERVICES, LLC (Defendant NEWMARK) was the construction manager for the project and designated agent of the owner.

Plaintiff ELVIN ANTONIO RODRIGUEZ was employed by Third-Party Defendant/Second Third-Party Defendant FIRSTLINE CONTRACTING, INC (Defendant FIRSTLINE). Defendant FIRSTLINE was retained by Defendants TONA and NEWMARK to perform roofing and waterproofing work at the Premises.

Plaintiff was working as a roofer for Defendant FIRSTLINE at the Premises. At the time of his accident, Plaintiff and a co-worker were measuring the roof of the staircase bulkhead. There were no railings or posts around the perimeter of the roof of the staircase bulkhead. As Plaintiff was crouched down and moving backward, he slipped and fell off the edge of the bulkhead's roof and fell approximately 26 feet to the main roof below.

Plaintiff was not wearing a safety harness at the time of his injury. On the day of his accident, Plaintiff's harness was at the jobsite he had been working on the days prior to his accident. The night before his accident, Plaintiff's supervisor called him and directed him to report to work at the Premises the following morning. Plaintiff was instructed to commence the installation of the roof, including on the staircase bulkhead. On the day of Plaintiff's accident, there were no railings or posts around the perimeter of the roof of the staircase bulkhead. Defendants assert that there were safety harnesses at the site at the time of the accident and that a foreman had gone to get Plaintiff a harness at the time of his accident.

Plaintiff's complaint alleges four causes of action: common law negligence, Labor Law § 200, Labor Law § 240(1), and Labor Law § 241(6). Plaintiff moves for summary judgment against Defendants SI PEARL and TONA on his claims pursuant to Labor Law § 240(1) and § 241(6).

Defendants SI PEARL and SI VENTURE move to dismiss the complaint and also move for summary judgment (1) against Defendant NEWMARK for contractual and common law indemnification; (2) against Defendant FIRSTLINE for contractual indemnification; and (3) against Defendant TONA for contractual and common law indemnification.

Defendant NEWMARK moves to dismiss Plaintiff's complaint as against it, or, in the alternative, granting it summary judgment against Defendant FIRSTLINE for contractual indemnification.

NEWMARK's Claim they Were No Longer at the Premises and Not an Agent

Defendant NEWMARK raises two preliminary arguments as to why it is not liable under the Labor Law, first that it was a construction manager that did not control or supervise Plaintiff's work and second that it had left the job site before the date of the accident

"A construction manager of a work site is generally not responsible for injuries under Labor Law § 200, § 240(1), or § 241(6) unless it functions as an agent of the property

owner or general contractor in circumstances where it has the ability to control the activity which brought about the injury” (*Lamar v. Hill Intern.*, 153 AD3d 685, 686 [2d Dept 2017]). “A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured” (*id.*, quoting *Linkowski v. City of New York*, 33 AD3d 971, 976 [2d Dept 2006]).

Despite the deposition testimony of NEWMARK’s managing partner, Lawrence Budabin, that NEWMARK did not supervise the work or hire contractors, the contract between NEWMARK and SI PEARL indicates otherwise.

The contract lists NEWMARK as construction manager and designated agent of the owner. The contract provides that NEWMARK will supervise the work of the subcontractors to ensure safety. Section 2(H) provides:

“Construction Manager shall at all times cause the Subcontractors to take reasonable precautions against the risk of injuries to persons or damage to property and for the safety of persons engaged in the performance of the Work. Periodic site safety inspections to be performed by a third-party consultant provided by the Owner. Construction Manager shall be responsible for cooperating with such consultant and implementing at Owner's sole cost, such consultant's recommendations (except to the extent such consultant recommends precautions to be taken by Subcontractors, in which case Construction Manager shall cause the subject Subcontractor to implement such recommendations at Subcontractor's sole cost and expense). Owner's agreement to engage a third-party consultant to conduct inspections shall in no way limit or reduce the obligations of Construction Manager to maintain the work site in a safe condition and take the reasonable precautions referenced above.”

Additionally, Section 2(A) of the contract provides:

“Owner hereby authorizes Construction Manager to provide, and Construction Manager hereby agrees to provide, administration and supervisory activities in connection with the Work and to enter into trade contracts with subcontractors and suppliers (collectively, “Subcontractors”) providing for the Work as Agent for the Owner; . . .”

In fact, NEWMARK, as the owner's designated agent, entered into the sub-contract with Plaintiff's employer FIRSTLINE.

NEWMARK also was the signatory, as the owners designated agent, on subcontracts with several subcontractors including Advanced Site Contractors Inc., Terranova Construction Co., PAL Environmental Services, and Able Island Plumbing Watermain and Sewer.

NEWMARK's contract with SI PEARL and the contracts with the subcontractors raise questions of fact as to whether NEWMARK as agent of the owner had the responsibility and authority to supervise the work which led to Plaintiff's accident.

Defendant NEWMARK also argues that it left the job before the date of the accident.

Defendant NEWMARK's managing partner, Lawrence Budabin, testified that NEWMARK was hired only as to preconstruction matters and left some time after Defendant TONA came on the job as general contractor. While Defendant NEWMARK argues that Defendant TONA took over for them, Budabin merely stated that at some point Defendant TONA became involved in the project as a general contractor. However, Budabin did not testify to either the date that TONA came on or the date that NEWMARK left the project.

The contracts between NEWMARK and various subcontractors are dated from March of 2013 through August 22, 2013. NEWMARK was a party to the contract as owners designated agent, even after TONA came on as general contractor. The date of the subcontract with Able Plumbing is less than a month before the day of Plaintiff's accident. These contracts listed both TONA as general contractor and NEWMARK as owners designated agent.

These contracts raise questions of fact as to whether NEWMARK was still on the job on the date of Plaintiff's accident.

Labor Law § 241(6)

Plaintiffs move for summary judgment on the issue of liability pursuant to Labor Law § 241(6) as against Defendants SI PEARL and TONA.

Defendants SI PEARL and SI VENTURE and Defendant NEWMARK move to dismiss Plaintiffs' Labor Law § 241(6) claim.

Plaintiffs have discontinued their Labor Law § 241(6) cause of action insofar as it was based on a violation of Industrial Code § 23-1.7(b) and withdraws that part of their motion which sought summary judgment premised on a violation of Industrial Code § 23-1.7(b).

While Plaintiff pled violations of several Industrial Code sections, Plaintiff only addresses a violation of Industrial Code § 23-1.16 in their instant motion. Defendant NEWMARK argues that Industrial Code § 23-1.16 is not applicable. Defendants SI PEARL, SI VENTURE, TONA and FIRSTLINE argue that the industrial codes cited by Plaintiff are too general or are inapplicable, but do not specifically address Industrial Code § 23-1.16.

Specifically, Section 23-1.16(b) which covers the use of safety belts or harness':

Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

Industrial Code § 23-1.16 is not applicable here as it does not require safety belts or harnesses to be provided but refers to situations in which harnesses have been provided or where other sections of the code required them to be provided. Industrial Code §23-1.16 applies it governs how safety belts and harnesses are to be attached where a safety harness has been provided.

The issue in this case is whether a safety harness was available to Plaintiff, not how it might have used or attached had he had a harness.

Based on the foregoing, Plaintiffs' motion as to Labor Law § 241(6) must be denied; Defendants' motion to dismiss Plaintiffs Labor Law § 241(6) claim must be granted.

Labor Law § 240(1)

Plaintiff moves for summary judgment against Defendants SI PEARL and TONA on his claims pursuant to Labor Law § 240(1) arguing that his accident occurred because Defendants failed to provide any safety devices, such as a safety harness, to protect him from falling and the absence of such safety devices was the proximate cause of his injury.

Defendant NEWMARK and Defendants SI PEARL and SI VENTURE move to dismiss Plaintiffs' claim as against them under Labor Law § 240(1) arguing that Plaintiff was the sole proximate cause of his accident because he chose not to wear a safety harness when one was available at the Premises.

“Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*Bascombe v. West 44th Street Hotel, LLC*, 124 AD3d 812, 813 [2d Dept 2015], quoting *Probst v. 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 711 [2d Dept 2013]). “To prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish a violation of the statute and that the violation was a proximate cause of his injuries” (*id.*). “Although contributory negligence on the part of the worker is not a defense to a Labor Law § 240(1) claim, where a plaintiff's actions are the sole proximate cause of his injuries, liability under Labor Law § 240(1) does not attach” (*id.*).

On the date of the accident, Plaintiff did not bring his harness because he had left it at another job site that he was working at the day before. The night before his accident, Mike Mourounas, President of Defendant FIRSTLINE called and directed him to report to work at the Premises the following morning. During that phone call, Plaintiff received instructions to commence the installation of the roof, including on the staircase bulkhead. Plaintiff testified that he was not told a harness was needed for the work to be performed at the Premises.

Mourounas testified that he believed that on the day of Plaintiff's accident, safety harnesses were available on the job site and that the foreman Glikakis told Mourounas that he was in the process of bringing Plaintiff a safety harness when Plaintiff fell off the bulkhead.

However, Mourounas was not present at the Premises on the morning of Plaintiff's accident and only found out about the accident after Glikakis called him. Defendants did not submit an affidavit by Glikakis.

Kennath Ukhuebor the site foreman for Defendant TONA testified that TONA had harnesses and safety lines at the project site and that if TONA saw that a worker did not have a safety device they would provide it. However, Ukhuebor was not on the site on the day of the accident and in fact testified that he was never told of Plaintiff's accident.

Here, there are questions of fact as to whether a safety harness was made available to Plaintiff or if Plaintiff knew there were safety harnesses available at the Premises on the day of his accident.

Based on the foregoing, both Plaintiff's and Defendants' motions as to Labor Law § 240(1) must be denied.

Labor Law § 200 and Common Law Negligence

Defendants SI PEARL and SI VENTURE and Defendant NEWMARK move to dismiss Plaintiff's claims pursuant to Labor Law §200 and common law negligence.

“Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work” (*Zukowski v. Powell Cove Estates Home Owners Association*, 187 AD3d 1099, 1101 [2d Dept 2020], quoting *Lombardi v. Stout*, 80 NY2d 290, 294 [1992]). Unlike sections 240(1) and 241(6), section 200 does not impose vicarious liability on owners and owner's agents.

SI PEARL and SI VENTURE

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed.

Where the manner of work is at issue, “no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed” (*Dennis v. City of New York*, 304 AD2d 611, 612 [2d Dept 2003].) Rather, when a claim is made due to alleged defects or dangers in the methods or materials of the work, it must be shown that the party to be charged has the authority to supervise or control the performance of the work. (*Zukowski v. Powell Cove Estates Home Owners Association*, 187 AD3d 1099 [2d Dept 2020]; *Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

Plaintiff's accident arose not from a dangerous condition at the premises but by the means and methods employed. As Defendants SI PEARL and SI VENTURE did not control or supervise Plaintiff's work, they cannot be held liable either under Labor Law § 200 or a claim of negligence.

NEWMARK

Defendant NEWMARK moves to dismiss Plaintiff's claims as against it pursuant to Labor Law §200 and common law negligence.

As discussed above, there is a question of fact as to whether Defendant NEWMARK had the authority and responsibility in its role as designated owners agent to supervise Plaintiff's work and whether NEWMARK was still on the job on the date of the accident.

A defendants' liability is based on whether the agent has the right to insist that proper safety practices are followed and the right to control the work, regardless of whether the agent actually exercises control (*Cabrera v. Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018] [“[t]he determinative factor is whether the defendant had 'the right to exercise control over the work, not whether it actually exercised that right’]; *Bart v. Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]).

While Plaintiff was directly supervised by his foreman, the contract between NEWMARK and SI VENTURE required NEWMARK to supervise the subcontractors. Given that responsibility, the claim that no one from NEWMARK was at the site on the day of the accident does not necessarily relieve it of liability, unless in fact they were off the job by that point.

Unlike the Defendant owners, it is possible that Defendant NEWMARK could be found liable for its own negligence in failing to supervise its subcontractors.

Based on the foregoing, Defendant NEWMARK has not shown that it is entitled to summary judgment dismissing the negligence claims against it.

Defendants SI PEARL and SI VENTURE's claims for Indemnification**Contractual indemnification against Defendant NEWMARK**

Defendants SI PEARL and SI VENTURE's motion for summary judgment against Defendant NEWMARK for contractual indemnification must be denied as the contract produced between SI PEARL and NEWMARK only requires NEWMARK to indemnify SI PEARL for liability arising from its own negligence. No contract between SI VENTURE and NEWMARK was produced.

Contractual indemnification against Defendant FIRSTLINE

Defendants SI PEARL and SI VENTURE are entitled to summary judgement on their claim for contractual indemnification against Defendant FIRSTLINE because the subcontract between Defendants NEWMARK and FIRSLTINE requires FIRSTLINE to indemnify SI VENTURE, as owner, and NEWMARK, as construction manager, from all liability arising from the work to the fullest extent permitted by law and to the extent not caused by an indemnitees sole negligence. Under the facts of this case, Defendants SI PEARL and SI VENTURE, if found liable, would only be vicariously liable based on the acts of others.

Contractual indemnification against Defendant TONA

Defendants SI PEARL and SI VENTURE are not entitled to summary judgement on their claim for contractual indemnification against Defendant TONA because they have produced no contract requiring TONA to indemnify SI PEARL and SI VENTURE.

Common law indemnification against Defendants NEWMARK and TONA

Defendants SI PEARL and SI VENTURE are not entitled to summary judgement on their claim for common law indemnification against Defendant NEWMARK or Defendant TONA because they have not established at this stage that either Defendant was negligent.

NEWMARK's Claims for Contractual Indemnification

Defendant NEWMARK is entitled to summary judgment on its claim for contractual indemnification against Defendant FIRSTLINE because, as discussed above, the subcontract between Defendants NEWMARK and FIRSTLINE requires FIRSTLINE to indemnify the owners and NEWMARK, as construction manager, from all liability arising from the work. The obligation to indemnify is not contingent on a finding of negligence on the part of FIRSTLINE, although the obligation to indemnify does not extend to liability caused by an indemnitee's sole negligence.

In this case, any liability, if any, that could attach against NEWMARK would be either vicarious liability or based on a failure on NEWMARK's part to properly supervise the work of FIRSTLINE. There is no possible scenario in which any claimed negligence by NEWMARK could be the sole proximate cause of Plaintiff's accident.

To the extent that the contract would require FIRSTLINE to indemnify NEWMARK for its own negligence the contract would not be void pursuant to the General Obligations Law because the contract also provides for the provision of insurance to cover such liability.

WHEREFORE, it is ORDERED that Plaintiff's motion for summary judgment as to Labor Law § 241(6) against Defendants SI PEARL and TONA is DENIED; and it is further

ORDERED that Defendants SI PEARL and SI VENTURE's cross-motion to dismiss Plaintiff's Labor Law § 241(6) claim as against them is GRANTED; and it is further

ORDERED that Defendant NEWMARK's motion to dismiss Plaintiff's Labor Law § 241(6) claim as against it is GRANTED; and it is further

ORDERED that Plaintiff's motion for summary judgment as to Labor Law § 240(1) against Defendants SI PEARL and TONA is DENIED; and it is further

ORDERED that Defendants SI PEARL and SI VENTURE's cross-motion to dismiss Plaintiffs Labor Law § 240(1) claim as against them is DENIED; and it is further

ORDERED that Defendant NEWMARK's motion to dismiss Plaintiffs Labor Law § 240(1) claim as against it is DENIED; and it is further

ORDERED that Defendants SI PEARL and SI VENTURE's cross-motion to dismiss Plaintiffs Labor Law §200 and common law negligence claim as against them is GRANTED; and it is further

ORDERED that Defendant NEWMARK's motion to dismiss Plaintiffs Labor Law §200 and common law negligence claim as against it is DENIED; and it is further

ORDERED that Defendants SI PEARL and SI VENTURE's cross-motion for contractual and common law indemnification against Defendant NEWMARK is DENIED; and it is further

ORDERED that Defendants SI PEARL and SI VENTURE's cross-motion for contractual indemnification against Defendant FIRSTLINE is GRANTED; and it is further

ORDERED that Defendants SI PEARL and SI VENTURE's cross-motion for contractual and common law indemnification against Defendant TONA is DENIED.

ORDERED that Defendants NEWMARKS's cross-motion for contractual indemnification against Defendant FIRSTLINE is GRANTED; and it is further

This constitutes the decision and order of the Court.

ENTER,



J.S.C.