

D'Amato v Clifford Group, Inc.
2022 NY Slip Op 31368(U)
April 27, 2022
Supreme Court, New York County
Docket Number: Index No. 154592/2017
Judge: Frank Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

Justice

-----X

ANTHONY D'AMATO,

Plaintiff,

- v -

CLIFFORD GROUP, INC., ERST 112 WEST 34TH STREET,
LP,

Defendant.

-----X

CLIFFORD GROUP, INC.

Plaintiff,

-against-

DFNY ACOUSTICS & DRYWALL, INC., TRI-STATE
DISMANTLING SERVICES, INC.

Defendant.

-----X

CLIFFORD GROUP, INC., ERST 112 WEST 34TH STREET,
LP

Plaintiff,

-against-

PRISTINE SERVICES INC.

Defendant.

-----X

[continued on following page]

INDEX NO. 154592/2017

MOTION DATE 12/02/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595924/2017

Second Third-Party
Index No. 595920/2019

ERST 112 WEST 34TH STREET, LP

Third Third-Party
Index No. 595147/2021

Plaintiff,

-against-

DFNY DRYWALL & ACOUSTICS, INC., TRI-STATE
DISMANTLING CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 190, 199, 212, 213, 220, 221, 229, 230, 231, 232, 233, 234

were read on this motion to/for

JUDGMENT - SUMMARY

This matter was transferred to Part IV.

DFNY Drywall & Acoustics (hereinafter “DFNY”) moves for summary judgment dismissing the third-party complaint, cross-claims, and counter-claims against it. Clifford Group (hereinafter “Clifford”) and ESRT 112 West 34th Street (hereinafter “ESRT”) oppose contending: that DFNY must indemnify them pursuant to the parties’ agreement; DFNY’s failure to provide insurance coverage to Clifford and ESRT is in breach of their agreement; and issues of fact preclude summary judgment. Tri State Dismantling Corp (hereinafter “Tristate”) also opposes contending: DFNY is statutorily liable, as plaintiff’s employer, for plaintiff’s injuries and DFNY is not free from negligence in causing plaintiff’s injuries.

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]). “When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). “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]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). 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]).

While working as a carpenter for DFNY, plaintiff alleges he was caused to slip on a piece of sheetrock and protrusion from a partially demolished floor, resulting in injuries to his knee. Plaintiff brought suit alleging violations of Labor Law §§ 200 and 241, and a third-party action was brought against movant.

DFNY's motion seeking dismissal of claims against it for indemnification necessarily implicates plaintiff's Labor Law claims. As relevant here, 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). As with Labor Law § 240(1), 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.*). Thus, § 241(6) is best described as

a “hybrid” between the common law duty of Labor Law § 200 and the specific duties imposed by § 240(1) (*id.*).

Clifford and ESRT contend that their contract with DFNY requires DFNY to indemnify Clifford and ESRT from claims arising from DFNY’s construction work; however, in reviewing such claim it is necessary to determine whether Clifford/ESRT are free from negligence, as it is well established that a party may not seek indemnification for its own negligence. “Implied indemnification has permitted a vicariously liable building owner and contractor to shift all liability to a subcontractor whose negligence actually caused the loss. However, ‘a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of indemnification’” (*17 Vista Fee Assoc. v. Teacher Ins. & Annuity Assn. of Am.*, 259 AD2d 75 [1st Dept 1999] [internal citations omitted]; see *Rogers v. Dorchester Assocs.*, 32 NY2d 553, 556 [1973]; see also *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 100 AD2d 449, 453 [1st Dept 1985]).

Here, plaintiff was employed by movant DFNY and was supervised and received directions regarding his daily tasks from a DFNY foreman (NYSCEF Doc. No. 111, Plaintiff’s EBT at p. 60-62, 83, 85, 88, 156). Plaintiff alleges he was

caused to fall by an approximately two-inch piece of drywall, and noted that employees of other parties, including Clifford, were performing work at or near the accident site, contemporaneously with plaintiff (*see e.g.* NYSCEF Doc. No. III at p. 76, 78, 133-134). Plaintiff testified that an employee of Clifford was performing drywall work at the window, including the windowsill, where plaintiff laid/propped his construction materials (*id.* at p. 134-136). Notably, movant DFNY does not dispute that it also performed drywall work at the construction site where plaintiff alleges he was injured (*see* NYSCEF Doc. 229 at ¶11). Consequently, there is an issue of fact as to which party is responsible, for the purposes of Labor Law §§ 200 and 241(6), for creating the drywall piece – the alleged hazardous condition plaintiff alleges caused his fall – as well as which party(ies) exercised control over the accident site. Under these circumstances, summary judgment is inappropriate.


Likewise, the issues of fact preclude a determination as to indemnification. Put simply, without a determination as to which party(ies) is/are responsible for creating a hazardous condition(s), it cannot be determined whether a party is being indemnified for its own negligence.

Turning to the claims that DFNY breached the parties' contract by failing provide insurance coverage, the contract provides that DFNY shall procure and maintain insurance coverage (see NYSCEF Doc. No. 110 at Article 10 § 10.1 and Exhibit A). Here, movant secured the requisite insurance policies from Westco Ins. Co. and Mt. Hawley Ins. Co. (NYSCEF Doc. Nos. 121 & 122). That coverage was not provided by the insurance company(ies) or that the insurance company(ies) otherwise disclaimed coverage to Clifford and/or ESRT, does not equate to a violation of the contract by DFNY and may well form the basis for further litigation between Clifford/ESRT and the insurance providers.

Accordingly, it is

ORDERED the motion is granted to the extent of dismissing those claims by Clifford and ESRT for breach of contract by DFNY and is otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<p><u>4/27/2022</u> DATE</p>			 FRANK NERVO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE