D'Amato v Clifford Group, Inc.
2022 NY Slip Op 31369(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** ***Justice*** **PART** **04**

INDEX NO. 154592/2017

MOTION DATE 12/03/2020

MOTION SEQ. NO. 003

---X

ANTHONY D'AMATO,

Plaintiff,

- v -

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

Defendant.

---X

DECISION + ORDER ON MOTION

CLIFFORD GROUP, INC.

Plaintiff,

-against-

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

Defendant.

---X

Third-Party
Index No. 595924/2017

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

Plaintiff,

-against-

PRISTINE SERVICES INC.

Defendant.

---X

Second Third-Party
Index No. 595920/2019

[continued on following page]

ERST 112 WEST 34TH STREET, LP Plaintiff, -against- DFNY DRYWALL & ACOUSTICS, INC., TRI-STATE DISMANTLING CORP. Defendant.	Third Third-Party Index No. 595147/2021

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 191, 193, 194, 195, 196, 197, 198, 200, 207, 208, 209, 210, 211, 214, 215, 222, 223, 224, 225, 226, 227, 228, 236, 237, 238, 239, 240, 241, 242, 243, 247

were read on this motion to/for JUDGMENT - SUMMARY.

This matter was transferred to Part IV.

Clifford Group (hereinafter "Clifford") and ESRT 112 West 34th Street (hereinafter "ESRT") seek summary judgment: dismissing plaintiff's Labor Law claims, and granting summary judgment against DFNY Acoustics & Drywall (hereinafter "DFNY") and Tri State Dismantling Services (hereinafter "Tristate") for movants' contractual and common law indemnification claims.

Pristine Services, Inc. (hereinafter "Pristine Services" or "Pristine") cross-moves for summary judgment "dismissing the second third-party complaint and any and all cross-claims" (NYSCEF Doc. No. 146).

Plaintiff cross-moves for summary judgment as against Clifford and ESRT on his Labor Law § 241(6) claim.

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 (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324

[1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

As an initial matter, and as discussed in motion sequence 002, issues of fact preclude determination of any of the indemnification claims. Until such time as it is determined which party(ies) are responsible for creating the hazardous condition(s) plaintiff alleges caused his fall, it cannot be determined whether a party is seeking indemnification for its own negligence. Accordingly, to the extent that summary judgment is sought on any indemnification claims, same is denied until after a determination has been reached on liability.

As to Clifford/ESRT's motion seeking summary judgment on plaintiff's Labor Law §§ 200 and 241(6) claims, issues of fact likewise preclude summary judgment. As discussed, *supra* and in motion sequence 002, it is unknown which party(ies) are responsible for creating the hazardous conditions alleged to have caused plaintiff's injury – namely the sheetrock debris and epoxy-type lip on the floor. The parties involved here had agreements with the building owner and general contractor to provide subcontracting work; these agreements overlapped in that multiple subcontractors worked in the same or adjoining

areas contemporaneously and each subcontractor was responsible to clean the debris from these overlapping areas. Furthermore, Pristine Services was engaged to provide site-wide general organizing and clean-up services at the site during the construction process (*see e.g.* NYSCEF Doc. No. 156 & 157 at p. 89-90 and 149). Notwithstanding that subcontractors exercised control over the means and methods of their own employees, during the construction several Clifford supervising employees remained on-site on a daily basis and performed regular inspections of the construction work (NYSCEF Doc. No. 159 at p. 21-26). These Clifford employees had authority to stop work for unsafe or incorrect practices (*id.*). Consequently, there exist issues of fact regarding the creation of the alleged tripping hazards and the responsibility for removal of same. As such, summary judgment is inappropriate.

Likewise, Pristine Service's cross-motion for summary judgment must be denied as the same issues of fact regarding the causation of the alleged hazardous conditions preclude dismissal of plaintiff's claims. Plaintiff testified that he saw an employee of Pristine Service performing demolition type work, involving removal of drywall, at the windowsill upon which he placed construction materials immediately before his accident (NYSCEF Doc. No. 153

at p. 132-142). The employee did not recall performing such work but did not contradict plaintiff's testimony (NYSCEF Doc. No. 164 at p. 37-38). The employee further testified that if asked to perform such demolition work, he would have completed same (*id.*).

To the extent that summary judgment is sought by or against Tristate, same is denied. Plaintiff alleges that after slipping on the drywall debris he tripped on an epoxy lip, a remnant from a demolished wall, completing his accident. The parties have submitted two demolition plans for the subject construction project, with the removal of the wall at issue differing between the two plans. Furthermore, there is conflicting testimony by Clifford and Tristate as to the parties' knowledge of the second plan and their responsibility related to same (NYSCEF Doc. No. 156 & 157 at p. 99-100, 142 and NYSCEF Doc. No. 162 at p. 102). Finally, as discussed, *passim*, the parties in this action were performing various construction work contemporaneously and in overlapping areas, as construction progressed. Consequently, summary judgment is inappropriate as there exist issues of fact as to which parties are responsible for creating the drywall debris and failing to remove the epoxy lip.

Notwithstanding, Labor Law §240(1) requires the injury occur because of elevation-related risks. Labor Law § 240(1) provides, in pertinent part:

> all contractors and owners ... 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.

The duty imposed by Labor Law § 240(1) is nondelegable; an owner or contractor may be held liable regardless of whether such party actually exercised supervision or control over the work (*Haimes v. New York Tel. Co.*, 46 NY2d 132 [1978]; *compare Russin v. Picciano & Son*, 54 NY2d 311 [1981], Labor Law § 200). Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed" (*Koenig v. Patrick Constr. Corp.*, 298 NY 313 [1948] quoting *Quigley v. Thatcher*, 207 NY 66 [1912]). However, the injury claimed under § 240(1) must result from elevation-related hazards, "injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device" (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d 494 [1993] Back strain alleged because platform was placed in

manner requiring worker to contort not within class of hazards contemplated by Labor Law § 240[1]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]). That an accident occurred at an elevated height, without more, is insufficient to trigger the protections of Labor Law § 240(1) (*Reyes v. Magnetic Constr., Inc.*, 83 AD3d 512 [1st Dept 2011]; *see also Auchampaugh v. Syracuse Univ.*, 57 AD3d 1291 [3d Dept 2008]).

Here, plaintiff alleges he was caused to slip on a piece of drywall, stumbled, and then fell over an epoxy-type lip – a remnant from a demolished wall. This is not the type of injury contemplated by Labor Law § 240(1) (*see Ross v. Curtis-Palmer Hydro-Electric Co.*, *supra*). “Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety devise of the kind enumerated therein” (*Narducci v. Manhasset Bay Assoc.*, 727 NY2d 37 [2001]). Plaintiff tripped and fell along the same height that he was walking, and in so doing was not engaged in the type of activity which would ordinarily require the use of a safety device (*Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999], fall caused by concealed object on floor the result of ordinary and usual

dangers at construction site not afforded extraordinary Labor Law § 240[1] protection). Accordingly, the protections of Labor Law § 240(1) are inapplicable here, and plaintiff's Labor Law § 240(1) claim must be dismissed.

Finally, turning to plaintiff's motion for summary judgment on his Labor Law § 241(6) claim against Clifford and ESRT, 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.*). As relevant here, Industrial Code § 23-1.7(d) provides that floors shall remain free from foreign substances which may create unsafe footing. Likewise, Industrial Code § 23-1.7(e) provides that floors shall be free from debris and other tripping hazards.

Here, plaintiff alleges he was caused to fall by both a piece of drywall debris and an epoxy lip remaining on the floor following demolition of a wall. Defendants have not refuted that either hazard existed. Consequently, the aforementioned industrial codes impart a non-delegable duty upon Clifford and ESRT, and plaintiff has established same were violated. Plaintiff is therefore entitled to summary judgment on his Labor Law § 241(6) claims against Clifford and ESRT.

CONCLUSION

Accordingly, it is

ORDERED that Clifford Group's and ESRT 112 West 34th Street's motion is granted to the extent of dismissing plaintiff's Labor Law § 240(1) claims and otherwise denied, and such denial is without prejudice to renew as to indemnification claims following trial; and it is further

ORDERED that Pristine Service's cross-motion is denied, and such denial is without prejudice to renew as to indemnification claims following trial; and it is further

ORDERED that plaintiff's motion for summary judgment on his Labor Law § 241(6) claim against Clifford Group's and ESRT 112 West 34th Street is granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

4/27/2022
DATE

FRANK NERVO, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE