

Rivera v BSL Smithtown LLC
2022 NY Slip Op 31564(U)
May 13, 2022
Supreme Court, New York County
Docket Number: Index No. 155221/2018
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

JONATHAN RIVERA,

Plaintiff,

- v -

BSL SMITHTOWN LLC, E.W. HOWELL CO., LLC, E.W.
HOWELL CONSTRUCTION GROUP,

Defendant.

-----X

BSL SMITHTOWN LLC, E.W. HOWELL CO., LLC, E.W.
HOWELL CONSTRUCTION GROUP

Plaintiff,

-against-

DML INTERIORS, INC, STATEWIDE RESTORATION OF NY,
INC

Defendant.

-----X

INDEX NO. 155221/2018
MOTION DATE N/A, N/A
MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595417/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 56, 65, 67, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 102, 103, 104, 113, 126, 127

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 66, 68, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 105, 106, 107, 108, 109, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128

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

BACKGROUND

On the morning of January 22, 2018, Jonathan Rivera (Rivera), a laborer employed by third-party defendant Statewide Restoration of New York. Inc. (Statewide) was performing

construction work at 71 Route 25A, Smithtown, New York. Rivera alleges he was seriously injured when he fell off of a bucket he was using while working.

Defendant/third-party plaintiff BSL Smithtown LLC (BSL) owned the Premises. Defendant/third-party plaintiff E.W. Howell Co. LLC (Howell), the project's general contractor, hired third-party defendant DML Interiors. Inc. (DML) as a subcontractor. DML, in turn, hired Statewide as a second-tier subcontractor.

PENDING MOTIONS

On January 4, 2021, plaintiff moved for partial summary judgment as to liability.

On February 26, 2021, Statewide moved for an order dismissing the Third-Party Complaint as against it.

On August 30, 2021, BSL and Howell moved for summary judgment and dismissal of plaintiff's complaint, and summary judgment as against DML on their claim for contractual indemnification.

Recently the motions were assigned to this court for determination.

The motions are consolidated herein for determination and granted to the extent set forth below.

ALLEGED FACTS

Plaintiff alleges the following facts. On the morning of January 22, 2018, Rivera was working for Statewide performing construction work at 71 Route 25A, Smithtown, New York. Statewide kept on-site three Bakers scaffolds and some four-foot, six-foot, and eight-foot A-frame ladders. When not in use, they were stored in a room on the second floor. They were chained together each night to prevent theft. On the morning of the Accident, Rivera was assigned to spackle and sand the walls in a large room on the second floor. Elevation devices

were required for the performance of the work. as it included spackling and sanding at the tops of the walls, which were approximately eight to ten feet tall. Rivera's co-workers, including his supervisor, Claudio Garcia (Garcia), endeavored to retrieve the scaffolds and ladders, but could not do so because the equipment remained chained and they could not unlock the combination lock. Garcia told Rivera that he would retrieve from his car a "grinder" to cut the lock. Rather than allow Rivera to await his return and retrieval of the scaffolds and ladders, Garcia instead instructed him to immediately get to work, saying that if he were to delay, the boss, who would be coming by, would become angered. In compliance with Garcia's instructions, Rivera found in the room with the chained scaffolds and ladders an empty live-gallon spackle container (two-feet high), placed the lid on it, and used it to stand on to perform his work at an elevation. At about 8:30 a.m., while he was standing on the top of the empty bucket in order to sand a wall, it moved, causing him to fall and become injured.

DML asserts very different facts. Rivera had worked at the job at Benchmark for about a week before the incident and was a sander. Statewide had ladders and Baker's scaffolds on the worksite. This equipment was usually stored on the same floor that they were working on. The ladders and scaffolds would be locked with a combination lock, but all the workers knew the combination including Rivera. There was no problem with the lock on the date of the accident. Rivera was present when the ladders and scaffolds were unlocked that morning. The ladders and scaffolds were next to the work area. If Rivera needed a ladder or scaffold, he could go and retrieve them himself and did not have to ask permission. The ladders and scaffolds were about 30 feet away from where Rivera was assigned to work. The only tools Rivera needed to do his job that day of his accident was a sponge for sanding and a sanding pole. He was told to start at the bottom or lower part of the 8' foot wall. Rivera would have been able to reach the upper part

with the sanding pole. The sanding pole is about 4 feet. Rivera was about is 5'9". William Perez reported to Garcia that Rivera was hurt. When Garcia entered the room where Rivera had been working, Rivera was somewhat bent over and leaning up against and hugging one of the columns. Rivera said that he was bent over to sand the lower portion of the column and when he tried to get up, he could not. There were buckets of spackle in the area of the column where he was found. No one ever reported to Garcia that plaintiff fell from any height at the time of this accident.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]). “On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court's role, in

passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff’s Motion for Summary Judgment is Denied

The genesis of plaintiff’s claim under Labor Law §240 is that he did not have appropriate equipment such as ladders or scaffolding available to him on the morning of his alleged fall from a height as the ladders and scaffolding was locked from the previous workday. However, as set forth above, there are many discrepancies about the nature of the work plaintiff was assigned to do the morning of the incident and whether that work would have necessitated any particular height related safety devices, and if so whether said devices were readily available. Additionally, various documents, including Rivera’s Workers Compensation file set forth conflicting versions as to how his injury occurred.

In cases with facts similar to the one at bar, Appellate Courts have found questions of fact requiring a trial. *See eg Miro v. Plaza Construction Corp.*, 38 AD3d 454 (1st Dept. 2007) *affirmed as modified* 9 NY3d 948 (2007)(issue of fact precluding the dismissal of the strict liability claim where it was “not clear from the record how easily a replacement ladder could have been procured); *Masullo v. 1199 Hous. Corp.*, 63 AD3d 430 (1st Dept., 2009) (neither party was entitled to summary judgement because there was sparse testimony as to the general procedure to obtain the ladder to establish that it was readily available to defeat plaintiff’s claim under Labor Law 240); *Rice v. West 37th Street*, 78 AD3d 492 (1st Dept., 2010)(court denied motions for summary judgment highlighting that there was insufficient evidence to warrant a determination as a matter of law).

Based on the contested facts and applicable case law, plaintiff's motion for summary judgment is denied as there are material questions of fact as to whether plaintiff's injury is height related and if so whether appropriate safety devices were readily available.

Defendants' Motion for Summary Judgment and Dismissal of the Complaint

Plaintiff asserts claims against BSL and Howell under Labor Law Sections 240(1), 241(6), 200 and for general negligence arising out of his version of the accident.

Plaintiff's claims against BSL and Howell under Labor Law §241(6) must be dismissed as plaintiff has failed to plead and prove the violation of a factually applicable concrete directive of the New York State Industrial Code that proximately caused his alleged accident. Although plaintiff alleges that a laundry list of Industrial Code regulations were violated, none of those sections are factually applicable to the task plaintiff was performing at the time he was allegedly injured.

Plaintiff's Labor Law Section §200 and common law negligence claims against BSL and Howell must also be dismissed as it is undisputed that BSL and Howell did not direct or control the manner, means, and methods of plaintiff's work, and plaintiff's alleged accident, no matter which version is adopted, arose out of those means and methods.

Plaintiff does not oppose and has therefore conceded that his claims against BSL and Howell under Labor Law 241(6), 200 and for common law negligence should be dismissed.

As to the claim under Labor Law Section 240(1) there are, as discussed above vastly different alleged factual scenarios which preclude judgment as a matter of law.

Labor Law Section 240(1) provides:

All contractors and owners and their agents...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.

If plaintiff's version of the facts is accepted by the jury, then plaintiff may establish a violation of this provision at trial.

As held by the Court of Appeals:

Recently, this court held in *Zimmer v Chemung County Performing Arts* (65 NY2d 513) that Labor Law § 240 (1)¹ imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. It was noted that the legislative purpose of Labor Law §§ 240 and 241 was to place “ ‘ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor’ ” (*id.*, at p 520, quoting 1969 NY Legis Ann, at 407), and that the statutory provisions were “ ‘to be construed as liberally as may be for the accomplishment of the purpose for which [they were] thus framed’ ” (*id.*, at p 521, quoting *Quigley v Thatcher*, 207 NY 66, 68). Finally, the majority in *Zimmer* explained that once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker “proper protection”, absolute liability is “unavoidable” under section 240 (1), as well as under the first five subdivisions of section 241, regardless of the injured worker's own negligence in contributing to his accident (*id.*, at pp 521-522). This interpretation of the statutory provisions is now binding precedent upon the entire court. (*Foss v City of Rochester*, 66 NY2d 872[.]

Bland v. Manocherian, 66 N.Y.2d 452, 459, 488 N.E.2d 810 (1985). Based on the foregoing, defendants' motion to dismiss this cause of action is denied.

BSL and Howell are also entitled to summary judgment on their claim of contractual indemnity against third-party defendant DML. It is undisputed that DML agreed to defend and indemnify BSL and Howell with respect to all claims for personal injury “arising out of” DML's work, including the work of any of DML's sub-subcontractors. It is also undisputed that the wall sanding work being performed by plaintiff at the time of his alleged injury had been subcontracted by Howell to DML, and therefore plaintiff's alleged accident “arose out of” DML's work.

To obtain contractual indemnification under the terms of an indemnity agreement, the party seeking indemnity must establish that it was free from negligence and was held liable

solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant unless the contractual indemnity provision requires otherwise.

Keena v. Gucci Shops, Inc., 300 A.D.2d 82 (1st Dept. 2002); *De La Rosa v Philip Morris Mgt. Corp.*, 303 A.D.2d 190, 193 (1st Dept. 2003).

Here, the contractual indemnity provision in the subcontract between Howell and DML provides in pertinent part as follows:

To the maximum and fullest extent permitted by law, Subcontractor hereby assumes entire responsibility and liability (which includes the indemnification of Contractor and all indemnities) for any and all damages and expenses or injury of any kind or nature whatsoever (including death resulting therefrom) to all persons, whether employees of the Subcontractor whose injuries occurred while being on the jobsite, working at the jobsite or otherwise, and to all property, caused by, resulting from, arising out of, or in any way occurring directly or indirectly or in any manner connected with Subcontractors Work or while being on the project site and that of its sub-subcontractors, vendors, suppliers and materialmen, the design and execution of the Work, or the Subcontractor's failure to perform any of his obligations under the Subcontract Documents provided for in this Subcontract, including delegable or nondelegable duties imposed by law.

DML argues in opposition that BSL and Howell have not established entitlement to summary judgment on their contractual cross claims. DML admits it entered into a contract to perform work at the Benchmark project, but asserts the conflicting factual scenarios preclude summary judgment on this claim.

The court disagrees. The indemnity agreement applies, by its plain language, to all liability for claims “arising out of the work” including the work of DML’s sub-subcontractors such as Statewide. It does not require any proof of negligence on the part of DML or Statewide to be triggered. DML concedes that it retained Statewide as a subcontractor to perform part of DML’s contracted scope of work. DML concedes that plaintiff was injured in the course of his employment for its subcontractor Statewide while performing wall sanding work for DML. These facts establish the right to contractual indemnity, and they are all undisputed.

Issues as to how plaintiff was actually injured – while bending over to sand a wall or after falling off a bucket – are immaterial to whether he was injured during the course of his work for Statewide, DML’s subcontractor. Whether or not Statewide owes indemnity to DML also does not affect DML’s indemnity obligations under its subcontract with Howell. DML’s indemnity obligation is not contingent on it obtaining indemnity from Statewide. Thus, there is no material issue of fact precluding summary judgment as to indemnity.

There is abundant precedent for full contractual indemnity to the owner and general contractor under these circumstances. *See Keena v. Gucci Shops, Inc.*, 300 A.D.2d 82 (1st Dept. 2002); *De La Rosa v Philip Morris Mgt. Corp.*, 303 A.D.2d 190, 193 (1st Dept. 2003); *Reisman v. Bay Shore Union Free School Dist.*, 74 A.D.3d 772 (2d Dept. 2010); *Mohan v. Atlantic Court, LLC*, 134 A.D.3d 1075 (2d Dept. 2015); *Montour v. City of New York*, 270 A.D.2d 236 (2d Dept. 2000); *Cunningham v. Alexander's King Plaza, LLC* 22 A.D.3d 703 (2d Dept. 2005).

Based on the foregoing, summary judgment is awarded to BSL and Howell as against DML on their claim for contractual indemnity.

Statewide’s Motion for Summary Judgment

Statewide argues the evidence unequivocally establishes Rivera was its employee at the time of the accident and that he only suffered soft tissue injuries to the spine. Since Rivera did not suffer a grave injury, Statewide asserts all claims for common law indemnification and contribution must be dismissed against it pursuant to the exclusivity provisions of the Workers’ Compensation Law.

Statewide further argues that there was no contract in place between Statewide and any party, including third-party plaintiffs, at the time of the accident and, as such, all claims for contractual indemnification against it must also be dismissed.

New York State Workers' Compensation Law § 19(6) provides in pertinent part:

The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee...when such employee is injured or killed in the negligence or wrong of another in the same employ... The limitation of liability of an employer set forth in section eleven of this article for the injury or death of an employee shall be applicable to another in the same employ...

New York State Workers' Compensation Law § 11 provides in pertinent part:

The liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee... or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom...

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

The Court of Appeals held that when Workers' Compensation Law §§ 29(6) and 11 are “[r]ead together, these statutes render workers' compensation benefits the exclusive remedy of an injured employee, thereby barring the employee from recovering against a negligent co-employee or employer. These statutes further preclude third parties from seeking contribution or indemnification from the co-employee or employer unless the employee sustained a qualifying grave injury as defined by the statute.” *Isabella v. Hallock*, 22 N.Y.3d 788, 792 (2014).

Plaintiff allegedly suffered soft tissue injuries to the spine, including a disc herniation at L4-L5, lumbar radiculopathy and a thoracic spine sprain.

In order to make a *prima facie* showing of contractual indemnification, the defendants/third-party plaintiffs must show that Statewide contractually agreed to indemnify

them. *Miranti v. Brightwaters Racket & Spa, Inc.*, 246 A.D.2d 518 (2nd Dept. 1998). The Court of Appeals has held that “a party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.” *Drzewinski v. Atlanta Scaffold & Ladder Co. Inc.*, 70 N.Y.2D 774 (1987). “A contract should be construed in accordance with the intent of the parties.” *Buccini v. 1568 Broadway Associates*, 250 A.D.2d 466 (1st Dept. 1998). Sophisticated parties who have negotiated at arm’s length are free to shift liability from one party to another. *Desrosiers v. Barry, Bette & Led Duke, Inc.*, 189 A.D.2d 947 (1993); *Schumacher v. Lutheran Community Services, Inc.*, 177 A.D.2d 568 (2nd Dept. 1991).

A court can freely determine whether the language of an indemnity clause is explicit and thus, whether it is applicable to an occurrence. *Nasser v. Port Authority*, 155 A.D.2d 250 (1st Dept. 1989). Accordingly, the issue of whether one party is liable to indemnify another, pursuant to a contract, can properly be determined on summary judgment. *Id.*

In the case herein, Statewide alleges it was hired as a subcontractor pursuant to an oral agreement, and that though there are invoices detailing the work performed by Statewide, none of said invoices contain indemnification provisions. As such, with no written contracts containing favorable indemnification provisions, neither third-party plaintiffs nor any other party can sustain a claim for contractual indemnification against movant.

In opposition DML argues it retained Statewide pursuant to a Master Agreement containing express written indemnity terms in favor of DML dated February 1, 2017. DML’s written agreement with Statewide was executed prior to date of loss and DML alleges it covered the work Statewide was performing as a sub-contractor of DML at this location and at other

locations, including the date of loss where Plaintiff was performing finishing work on the drywall on the interior at Benchmark.

Gary Giustiniani, owner and president of DML testified at a deposition on June 24, 2021. Mr. Giustiniani testified that DML and Statewide entered into an agreement on February 1, 2017, with the intention for it to cover all work performed by Statewide at the project on Benchmark in or about January 22, 2018, the site of this alleged accident and other work performed Statewide as a subcontractor to DML.

DML argues it has raised a triable issue of fact as to whether the parties intended to be bound by an indemnification agreement. The court agrees. The February 1, 2017 agreement executed by DML and Statewide contains an indemnification provision requiring Statewide to indemnify DML. This Agreement along with the testimony of DML's principal Giustiniani that this Agreement governed the work at the location of the accident on the date of the accident is sufficient to raise an issue of fact as to whether the parties agreed to be bound by the indemnification terms and therefore is sufficient to defeat Statewide's request for summary judgment as to DML.

Workers Compensation, Section 11 precludes third party indemnification claims against an employer unless the claim is based "upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

The Court notes that DML is only a third-party defendant herein, and the Master Agreement, even if deemed applicable herein by the trier of fact, only governs DML's cross-claims for contractual indemnification against Statewide. Third-party plaintiffs' BSL and Howell have not opposed the instant motion. There is no evidence of a contract in place between

Statewide and third-party plaintiffs BSL and Howell, so the claims of Thirs-Party plaintiffs against Statewide for contractual indemnification must be dismissed.

Similarly, there is no evidence plaintiff suffered a grave injury, so claims against Statewide for common law indemnification and contribution in the third-party complaint must be dismissed pursuant to the exclusivity provisions of the Workers' Compensation Law. As such, the third-party complaint against Statewide is dismissed except for DML's cross-claim for contractual indemnification.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's claims under Labor Law Sections 241(6), 200 and for general negligence are dismissed; and it is further

ORDERED that the motion of BSL and Howell for summary judgment as to liability on their contractual indemnity claim as against DML is granted; and it is further

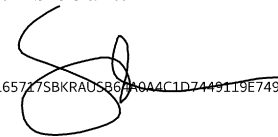
ORDERED that Statewide's motion to dismiss all claims against it is granted, with the exception of DML's cross-claims against Statewide; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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5/13/2022

DATE

SABRINA KRAUS, 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