Posiko v Talmud Torah Ohel Yochanan
2022 NY Slip Op 31645(U)
May 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 509109/2017
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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ROMAN POSIKO,

Plaintiff(s),

Index No.:509109/2017
Motion Seq. Nos.: 09, 10, & 11

-against-

TALMUD TORAH OHEL YOCHANAN, BNEI TORAH TRUST, AG GREEN INCORPORATED and RAINBOW FENCING, INC.,

DECISION AND ORDER

Defendant(s).

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AG GREEN INCORPORATED,

Third-party plaintiff,

-against-

KB RESTORATION NY CORP.,

Third-party defendant.

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AG GREEN INCORPORATED,

Second third-party plaintiff,

-against-

RAINBOW FENCING, INC.,

Second third-party defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motions for summary judgment.

The following e-filed documents, listed by NYSCEF document numbers (Motion 09) 194-210, 259-262, 276, 277, 279-283; (Motion 10) 216-241, 256-258, 263, 284; (Motion 11) 242-255, 269-275 and 278, were read on the summary judgment motions.

The plaintiff moves for summary judgment, pursuant to CPLR § 3212, against defendants Talmud Torah Ohel Yochanan (Talmud), AG Green Incorporated (AG Green), and Rainbow Fencing, Inc. (Rainbow) based on the defendants' violation of Labor Law §§ 240(1) and 241(6)

(Motion 09). AG Green cross-moves, seeking summary judgment and dismissal of the plaintiff's Labor Law §§ 240(1) and 246(1) claims (Motion 10). Talmud also cross-moves, seeking summary judgment and dismissal of the plaintiff's Labor Law claims under §§ 240(1) and 246(1), and granting Talmud summary judgment on its contractual indemnification claim against AG Green (Motion 11). After oral argument, and upon careful consideration of the parties' submissions, the motions are decided as set forth below.

This action arises from an accident which occurred on March 8, 2017, at a school located at 1327 38th Street, in the County of Kings, City and State of New York. The plaintiff alleges that he fell from the roof of the premises, on which he was performing work, when he grabbed onto the metal railing that was standing at the perimeter of the roof, which collapsed, causing the plaintiff to fall approximately one floor to the street below. At the time of the accident, the plaintiff was the President of KB Restoration NY Corp. (KB), a subcontractor, who was hired by AG Green to renovate the façade of the building and apply stucco on the exterior of the building. AG Green was the general contractor of the project, and was hired by the owner of the premises, Talmud. Talmud did not perform any construction work on the premises.

Second third-party defendant, Rainbow Fencing, Inc. (Rainbow), was hired as a subcontractor by AG Green to install a 10-foot chain link fence on the rooftop area. The metal railing that the plaintiff held onto was installed by Rainbow, but the fence had not yet been completed. According to the deposition testimony of Rainbow's witness, Lawson Burge (Burge), he did not know whether the fence was installed prior to the plaintiff's accident or when it was started or completed. However, upon reviewing the photograph of the fence, he stated that at the time of the plaintiff's accident the fence had not yet been completed. AG Green's witness, Gabriel Grunblatt (Grunblatt) testified that Rainbow was hired by AG Green to perform specific jobs relating to fence installation on the premises and decided when Rainbow would be needed. He testified that there were periods of time between four to eight weeks when Rainbow would not be present at the worksite. Grunblatt stated that AG Green was responsible for performing walk-throughs and inspections of the subcontractors' work at the construction site and did not provide safety equipment to the workers, including employees of KB.

The plaintiff, and at least two other workers, Andriy Marchak (Marchak) and Vasyl Kordomskyy (Kordomskyy), who were working under his direction, were present at the worksite at the time of the accident. One of the KB employees was performing stucco work approximately one floor below beneath a metal exterior staircase. The roof was flat, and the plaintiff testified that he was not wearing a safety harness. While working on the roof, the plaintiff walked over to the metal railing, and was approximately two to three feet from the edge of the roof, attempting to verbally communicate with the employee, who was working below. According to the plaintiff's testimony, he grabbed onto the middle horizontal bar of the metal railing with both hands when it gave way, causing him to fall. The metal bar that the plaintiff attempted to hold onto remained in his hand as he fell.

The plaintiff argues that he is entitled to summary judgment on his Labor Law §240(1) claims because the defendants failed to provide him with proper protection, and failed to provide an anchor or securement system on the rooftop where he was working in order to secure a safety harness. Plaintiff alleges that Rainbow is liable as the contractor who provided and installed the railing which failed to provide proper protection to the plaintiff as he performed his work on the roof.

The plaintiff also contends that he is entitled to summary judgment pursuant to Labor Law § 241(6), based on the defendants' violation of Industrial Code § 23-1.7(B)(1)(I) concerning fallings hazards and hazardous openings; Industrial Code § 23-1.15(a)(b)(c)(e), requiring proper safety railings; Industrial Code § 23-1.16(b) concerning the proper attachment and/or securement of a safety belt or harness to prevent falls above five feet; and Industrial Code § 23-1.22(c)(2) requiring platforms that are more than seven feet above the ground to have a safety railing. AG Green argues in opposition that the Industrial Codes relied upon by the plaintiff are too general and/or not sufficiently specific, and therefore inapplicable to the law and facts of the instant case. It further contends that if the plaintiff's conduct was the sole proximate cause of the accident there can be no Industrial Code violation responsible for his injuries.

AG Green and Talmud oppose the plaintiff's motion, and in support of their respective summary judgment motions they argue that the plaintiff was the sole proximate cause of his injuries. They argue that the plaintiff had access to two staircases that would have allowed him to safely walk down to where the employee was working to speak with him, and that the plaintiff was responsible for providing his own safety equipment, and that a harness was in the plaintiff's vehicle, but he chose not to wear a safety harness while working on the roof because it was flat. AG Green further argues that the plaintiff could have simply called the worker using a cell phone instead of leaning over and grabbing onto the railing to yell down to him. AG Green asserts that the plaintiff was also at fault because prior to touching the railing he did not ensure that the railing was secured. AG Green contends that the plaintiff's testimony makes clear that he understood, based on OSHA safety training, that a safety harness should be worn while working at a height such as on a roof. AG Green also asserts that the plaintiff had the sole responsibility for providing fall protection equipment, including installing an anchor point onto the roof for attachment of a safety harness "or devising another appropriate fall protection system" to protect against fall hazards. In the alternative, AG Green argues that there are issues of fact as to whether the plaintiff was the sole proximate cause of the accident and/or a recalcitrant worker.

Talmud seeks summary judgment against AG Green on its contractual indemnification claim, arguing that pursuant to the contract entered between the two defendants on October 21, 2013, AG Green agreed to indemnify and hold Talmud harmless from personal injury claims. Further, Talmud argues that a Standard Form Agreement dated December 4, 2013 was also entered between Talmud and AG Green, which, according to Article 1.0, entitled Talmud to

indemnification. Talmud argues the parties negotiated the contracts in good faith and at arm's length, and that the language is clear and unambiguous. Talmud admits that at the time of the plaintiff's accident it owned the building, and that it hired AG Green as the general contractor, which was responsible for overseeing the project and had a representative present on the project every day. Talmud asserts that based on AG Green's role on the project, and its subcontracting of the roof fence installation to Rainbow, the indemnification clauses contained in the contracts entitle it to partial summary judgment against AG Green based on contractual indemnification.

AG Green opposes that branch of Talmud's motion seeking contractual indemnification, arguing that the cross-motion is untimely, as the motion was filed nearly six months after the plaintiff filed the note of issue, and that it is not a proper cross-motion because AG Green is not the original moving party and does not seek nearly identical grounds for summary judgment. AG Green also argues that Talmud's motion must fail because it did not assert that it was free from negligence, and has not established a prima facie entitlement to summary judgment on its contractual indemnification claim.

Second third-party defendant, Rainbow, opposes the plaintiff's motion, and joins in and adopts the arguments raised by AG Green in its cross-motion and opposition to the plaintiff's summary judgment motion. Rainbow further asserts that it was not the general contractor and was not responsible for site safety conditions or hired to provide protection for the area where the plaintiff was performing his work. Rainbow argues that it was hired by Talmud and AG Green for the installation of a ten-foot chain link fence to enclose a roof-top children's play area. There was no written contract between Rainbow and Talmud or AG Green, and Rainbow contends that it was not hired to provide site safety protections for open elevations on the roof. Rainbow also argues that it was not the statutory agent of Talmud or AG Green because it had no supervisory control and authority over the plaintiff's work, and did not control the activity which brought about the plaintiff's injury.

Pursuant to Labor Law § 240(1), all contractors and owners engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, except certain owners of one and two-family dwellings, 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 statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

To prevail under Labor Law § 240(1), a plaintiff must prove a violation of the statute, i.e. that the owner or general contractor failed to provide adequate safety devices, and that the

absence of that protection was the proximate cause of the injuries. *Allan v DHL Express (USA), Inc*., 99 AD3d 828 (2d Dept 2012); *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003).

The Court of Appeals has held that Labor Law § 240(1) must be construed liberally. *See Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494. However, this principle is to be applied only after a violation of the statute has been established. *See Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 (2001). In order to impose absolute liability under Labor Law § 240(1), the plaintiff must show that the owner or general contractor's failure to provide proper protection to workers employed on a construction site proximately caused injury to a worker. *See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 (2011). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." *Id.* at 7.

Moreover, the duty under the statute is nondelegable, and imposes absolute liability for a breach which has proximately caused an injury, even though the work was performed by an independent contractor over which it exercised no supervision or control. *See Aversano v JWH Contr., LLC*, 37 AD3d 745 (2d Dept 2007). Contributory negligence is not a defense to a violation of Labor Law § 240(1). *See Castillo v 62-25 30th Ave. Realty, LLC*, 47 AD3d 865 (2d Dept 2008).

Labor Law § 240(1) "imposes liability only on contractors, owners or their agents." *See Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 945 (2d Dept 2019), quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (internal quotation marks omitted). In *Valdez v Turner Constr.Co.*, 171 AD3d 836 (2d Dept 2019), the owner retained the defendant (Skidmore) to provide architectural, engineering and construction management services at the project, who in turn retained a co-defendant (Turner) as construction manager. Both defendants' motions for summary judgment were denied. Skidmore's motion was denied because as a contractor it remained responsible for coordinating and supervising the project, and was vested with concomitant powers to enforce safety standards and to hire responsible subcontractors. Turner was found to also be subject to Labor Law liability as an agent of the owner since "it functioned as the eyes, ears and voice of the owner" and had broad safety responsibilities, including the ability to control the work. *Id*., 171 AD3d at 839, quoting *Walls v Turner Constr. Co*., 4 NY3d 861 (2005) (internal quotation marks omitted). However, a subcontractor may only be considered an agent of the owner or general contractor if it is given the authority to supervise and control the plaintiff's work. *See Eliassian v G.F. Constr., Inc*., 190 AD3d 947, 949 (2d Dept 2021) (holding that "a subcontractor may be liable for violations of those provisions [of Labor Law §§ 240(1) and 241(6)] if the owner or general contractor…[grants] the subcontractor the authority to supervise and control the work which brought about the injury."); *Fiore v Westerman Constr. Co., Inc*., 186 AD3d 570, 571-572 (2d Dept 2020) (dismissing the Labor

Law claims against the subcontractor because it demonstrated that "it was not an agent of the general contractor or the owner with regard to the plaintiff's work…[t]here was no evidence that the [subcontractor] had any authority to supervise or control the work of the plaintiff…")

In the instant action, the plaintiff has demonstrated his prima facie entitlement to summary judgment against Talmud and AG Green on his Labor Law § 240(1). In opposition to the plaintiff's motion, Talmud and AG Green have failed to raise a triable issue of fact as to whether there was a statutory violation; whether the plaintiff's actions were the sole proximate cause of the accident; and whether the recalcitrant worker defense applies based on the facts and circumstances of this case. The defendants, Talmud and AG Green, seek to shift their nondelegable statutory duty under Labor Law § 240(1) to the plaintiff, arguing that he was the sole proximate cause of the accident by grabbing hold of the unsecured railing, and by failing to wear a safety harness, which they claim was available to him on the day of the accident and that he was responsible for his safety and that of his employees. However, according to the testimony of AG Green's witness, Moses Weisberg, he performed inspections of the worksite daily, and had responsibility for safety on the site, including ensuring that the workers were using safety equipment. Further, AG Green and Talmud's argument that the plaintiff should have been wearing a safety harness is unavailing, since KB employee Kordomskyy testified that, there was no place on the roof to hook a safety harness onto. The plaintiff also testified that he would wear a safety harness if it were capable of being attached to an area in which he was working. As such, the plaintiff's motion for summary judgment on his Labor Law § 240(1) claim against Talmud and AG Green must be granted.

However, the plaintiff has failed to demonstrate his entitlement to summary judgment on § 240(1) as to second third-party defendant Rainbow, as the evidence submitted does not establish that Rainbow was an owner, general contractor, or a statutory agent of the general contractor, AG Green. According to the deposition testimony of Rainbow's witness, Burge, the railing at issue was installed by Rainbow, however he was not aware of precisely when it was installed or completed, and that it was likely installed prior to the plaintiff's accident. Rainbow had no written contract with either AG Green or Talmud, and Burge's involvement with the installation was to visit the site to inspect Rainbow's employees' work, sometimes on a daily basis, and would visit different locations where Rainbow employees were working on a daily basis as well. The employees were general workers, and not foremen. He was not familiar with KB in particular, or the work KB was performing on the worksite, and Burge testified that Rainbow had performed many fencing jobs for Talmud in the past in different areas of the school property. Burge testified that the rooftop fence and railing at issue was to be installed to enclose a play area on the roof for the students of the school. Moreover, AG Green's witness, Grunblatt, testified that he determined when Rainbow would work on the project, and that there were periods of time of four to eight weeks where Rainbow would not be present at the worksite.

Accordingly, plaintiff has presented no evidence that Rainbow had authority to supervise or control the plaintiff's work and was a statutory agent of the owner or general contractor.

The plaintiff has failed to meet his prima facie burden establishing his entitlement to summary judgment on his Labor Law § 241(6) claim. Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *See Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983 (2d Dept 2014); *see also Perez v 286 Scholes St. Corp*., 134 AD3d 1085, 1086 (2d Dept 2015). To prevail on a Labor Law § 241(6) cause of action, a plaintiff must allege and prove a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. *See Misicki v Caradonna*, 12 NY3d 511 (2009); *Ross v Curtis-Palmer Hydro-Elec*. Co., 81 NY2d 494. However, even if a plaintiff establishes as a matter of law that the defendant violated a concrete specification of the Industrial Code, granting summary judgment on that claim is not appropriate. In *Rizzuto v L.A. Wenger Contr. Co*., 91 NY2d 343, 351 (1998), the Court of Appeals held that a violation of the Industrial Code is not conclusive with respect to defendant's liability, and merely constitutes "some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances." *See also Seaman v Bellmore Fire Dist.*, 59 AD3d 515 (2d Dept 2009); *Chrisman v Syracuse SOMA Project, LLC*, 192 AD3d 1594 (4th Dept 2021). Therefore, that branch of the plaintiff's summary judgment motion based on a violation of Labor Law § 241(6) must be denied.

Talmud also seeks summary judgment against AG Green for contractual indemnification based on the contract dated October 21, 2013, and the Standard Form of Agreement dated December 4, 2013. The October 21, 2013 contract entered into between the two entities provides, inter alia, that:

> "[t]o the maximum extent permitted by law, [AG Green] shall indemnify, defend and hold harmless [Talmud]…from any and all claims, suits, demands, actions, losses, damages, costs and expenses…(i) relating to or arising out of this agreement…(ii) relating to or arising out of any act or omission of AG GREEN or any of its agents or employees, and (iii) by or relating to any of AG GREEN's employees or agents; provided, that AG Green shall not indemnify Company for any claims, suits…arising solely out of any acts of [Talmud] that are found to be grossly negligent or criminal by applicable authorities…

Likewise, Article 1.0 of the Standard Form of Agreement states, in pertinent part, that:

> [t]o the fullest extent permitted by law, the contractor shall indemnify and

> hold harmless the Owners… against claims, damages, losses and expenses…arising out of or resulting from performance of the contractors and Subcontractor's Work, provided that such claim…is attributable to bodily injury… cause [sic] in whole or in party by negligent acts or omissions of the contractor or Subcontractor…

AG Green argues that Talmud's motion must be denied as untimely, however CPLR § 3212(b) provides that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." *See Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.,* 84 AD3d 737, 739 (2d Dept 2011) (a court…may search the record and award summary judgment to a nonmoving party"); see *also Dunham v Hilco Constr. Co*., 89 NY2d 425 (1996). In searching the record, Talmud has asserted a cross-claim against AG Green for contractual indemnification, and the plaintiff's moving papers attached the subject contracts between AG Green and Talmud as exhibits to its motion (NYSCEF Doc. No. 205). Here, a search of the record demonstrates that the facts and documentary evidence were presented to the Court, and that Talmud's cross-motion should be considered as timely.

Turning to the merits of Talmud's claim, the indemnification provisions at issue here include the phrase "arising out of," which has been interpreted by the Court of Appeals as meaning "originating from, incident to, or having connection with" and requires "only that there be some causal relationship between the injury and the risk for which coverage is provided." *See Worth Constr. Co., Inc. v Admiral Ins. Co.,* 10 NY3d 411, 415 (2008), quoting *Maroney v New York Cent. Mut. Fire Ins. Co.,* 5 NY3d 467 (2005) (internal quotation marks omitted). "[A]n indemnification clause is enforceable where the party to be indemnified is found to be free of any negligence." *See Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 871 (2d Dept 2008). However, in order to obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability." *See Correia v Professional Data Mgt.,* 259 AD2d 60, 65 (1st Dept 1999) (internal quotation marks omitted).

The proponent of a summary judgment motion must make a prima facie showing of entitlement as a matter of law, and submit sufficient admissible evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Talmud failed to meet its prima facie burden establishing its entitlement to summary judgment as a matter of law on its contractual indemnification claim, as it did not eliminate all triable issues of fact regarding its alleged negligence. "The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability." *See Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931 (2d Dept 2016); *see also Rodriguez v Tribeca 105, LLC*, 93 AD3d 655, 657-658 (2d Dept 2012)

(holding that a grant of conditional judgment on the issue of contractual indemnification is appropriate "provided there are no issues of fact concerning the indemnitee's active negligence"). Here, Talmud raised the issue of its lack of negligence, as it relates to the plaintiff's accident, for the first time in its reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief." *See Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826 (2d Dept 2008). As such, the prong of Talmud's motion seeking a grant of contractual indemnification against AG Green must be denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion for summary judgment based on Labor Law § 240(1) (Motion 09) against defendants Talmud and AG Green is **GRANTED**, and the balance of the motion is **DENIED**; and it is further

ORDERED, that the summary judgment motion of defendant AG Green (Motion 10) is **DENIED**; and it is further

ORDERED, that the summary judgment motion of defendant Talmud (Motion 11) is **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 18, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.