Barron v City of New York
2022 NY Slip Op 31794(U)
June 6, 2022
Supreme Court, Kings County
Docket Number: Index No.13863/15
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of June, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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DON BARRON,

Plaintiff,

-against-

Index No.: 13863/15

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF WASTE WATER TREATMENT, and NORTHEAST REMSCO CONSTRUCTION, INC.,

Defendants,

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NORTHEAST REMSCO CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

SEVERN TRENT ENVIRONMENTAL SERVICES, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	6-7, 19-20, 27-28
Opposing Affidavits (Affirmations)	44, 46, 48, 50
Affidavits/ Affirmations in Reply	52, 54, 56
Other Papers	

Upon the foregoing papers, third-party defendant Severn Trent Environmental Services, Inc. (Trent) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241-a and 241 (6) causes of action and dismissing the third-party complaint as against it (M.S. 9). Defendant the City of New York (City), New York City Department of Environmental Protection, Bureau of Waste Water Treatment (DEP), and defendant/third-party plaintiff Northeast Remsco Construction, Inc. (Remsco) (collectively referred to as defendants) move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint, or, in the alternative, for an order granting Remsco summary judgment in its favor on its contractual indemnification claim against Trent (M.S. 10).

Trent's motion (M.S. 9) is granted to the extent that: (1) plaintiff's Labor Law §§ 240 (1), 241-a and 241 (6) causes of action are dismissed; and (2) Remsco's third-party claims for contribution, common-law indemnification, and breach of the contract to procure insurance are dismissed. Trent's motion is otherwise denied.

Defendants' motion (M.S. 10) is granted to the extent that the complaint is dismissed.

BACKGROUND

In this action, premised on common-law negligence and violations of Labor Law §§ 200, 240 (1), 241-a and 241 (6), plaintiff alleges that he suffered injuries on March 15, 2015, when he fell approximately three to four feet to the ground from a wall that

bordered the edge of the Gowanus Canal. In or around 2009, the City, through the DEP,[1] hired Remsco as a prime contractor to act as general contractor for a portion of the work involved in the rehabilitation of the Gowanus Canal's flushing tunnel and the reconstruction of the Gowanus Waste Water Pumping Station, which is located at the end of the Gowanus Canal. This contract required that Remsco operate the water flushing and pumping services during the course of the project. These water flushing and pumping services were initially performed at temporary interim facilities and later, at the permanent facility once it became operational. Remsco, in turn, hired Trent to monitor and inspect the pumping and flushing equipment and to perform scheduled preventative maintenance of the equipment during the course of the project. Notably, Trent's monitoring and preventative maintenance obligations did not commence until after Remsco had installed the equipment and checked to ensure that it was operable and working correctly.

Plaintiff was employed by Trent to monitor the equipment. Plaintiff concedes that he performed no construction himself, and that, other than assisting with the preventative maintenance of a pump on one occasion, his tasks were primarily limited to observing and recording meter readings from the pumps and other equipment that were in operation. If this equipment showed any possibility that wastewater was overflowing into the Canal as a result of rain or melting snow, plaintiff would also be required to go outside and look into the Canal to observe if there was, in fact, sewage overflowing into the canal.

[1] The DEP is a department of the City and is not a separate legal entity (*see Khela v City of New York*, 91 AD3d 912, 913-914 [2d Dept 2012]).

It is undisputed that on the date of the accident, a significant amount of snow fell, and that Remsco halted its construction activities during that morning. According to plaintiff's deposition testimony, at around 12:00 p.m., after notification from the monitors that there was a possible overflow of wastewater into the canal, he went outside to check to see if he could view any overflow. When he went outside, it was snowing heavily. Plaintiff asserts that he walked up to the wall surrounding the canal, climbed up onto it to view the overflow, and that, when he started to step down with one foot, he fell to the ground and landed on his side.

According to plaintiff, because the ground in the area of the wall had potholes and other obstructions, he regularly used the wall as a sidewalk. Plaintiff, however, does not know if anyone ever observed him walking on the wall. In contrast, Dan Giganto, Remsco's project manager, testified that he had never observed anyone walking on the wall during the project, and that there was no reason for a Trent worker to climb up onto the wall to view the overflow given that the wall was only two and one-half feet to three feet high. As such, Giganto also asserted that there was no reason for Remsco, which had assumed the responsibility to clear snow and ice from walkways and roadways at the project site, to clear snow and ice from the top of the wall. Sean Brennan, employed by non-party Hazen & Sawyer as the resident engineer for the project, similarly testified at his deposition that he had never seen anyone from Trent walking on the wall, and that there was no reason for a Trent employee to walk on the wall, since, given the height of the wall, the same view of the canal could be obtained from the ground. Likewise, Robert Crisdell, one of plaintiff's direct supervisors, testified at his deposition that he was

not aware of anyone standing on the wall prior to plaintiff's accident, and that there was no reason to stand on the wall to view the overflow because there were many locations located on the ground from which the overflow could be readily observed.

DISCUSSION

Labor Law §§ 240 (1), 241 (6), and 241-a

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with elevation differentials proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Trent and defendants assert that plaintiff is not entitled to the protection afforded to workers under Labor Law § 240 (1) because he was not engaged in any of the enumerated activities considered to constitute construction work under the statute.[2] "It is apparent from the text of Labor Law § 240 (1), and its history confirms, that its central concern is the dangers that beset workers in the construction industry" (*Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 525 [2012]; *see Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). "While the reach of section 240 (1) is not limited to work performed on actual construction sites" (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *see Dahar*, 18 NY3d at 525; *Joblon v Solow*, 91

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[2] Labor Law § 240 (1), provides, as relevant here, that, "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

NY2d 457, 464 [1998]), the sections protection only extends to "workers 'employed' in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Dahar*, 18 NY3d 524-525; *see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003]).

In analyzing the nature of a plaintiff's work, a court should not "isolate the moment of injury and ignore the general context of the work" (*Prats*, 100 NY3d at 882; *see Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 746 [2d Dept 2016]). Additionally, the protections of Labor Law § 240 (1) extend to workers, such as inspectors and supervisors, if their work is ancillary to or related to the construction work being performed even if their work does not necessarily involve physical construction work (*see Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 948 [2d Dept 2021]; *Channer v ABAX Inc.*, 169 AD3d 758, 759-760 [2d Dept 2019]; *DeSimone v City of New York*, 121 AD3d 420, 421 [1st Dept 2014]). Nevertheless, if a plaintiff's work is not ancillary or related to the construction work at issue, the fact that it is performed contemporaneously with construction work is insufficient, in and of itself, to bring a plaintiff's work within section 240 (1)'s coverage (*see Bosconi v Thomas R. Stachecki Gen. Contr., LLC*, 186 AD3d 1600, 1601 [2d Dept 2020]; *Solecki v Oakwood Cemetery Assn.*, 158 AD3d 1088, 2089 [4th Dept 2018]; *Kuffour v Whitestone Constr. Corp.*, 94 AD3d 706, 707 [2d Dept 2012]; *Martinez v City of New York*, 73 AD3d 993, 996 [2d Dept 2010]; *Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468, 468-469 [1st Dept 2008]; *Spaulding v S.H.S. Bay Ridge LLC*, 305 AD2d 400, 401 [2d Dept 2003], *lv denied* 100 NY2d 514 [2003]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 711-712 [2d Dept 2000]).

Here, Trent's work in monitoring the meter readings and checking to see if there was sewage overflow bore no relation to the construction work conducted in the rehabilitation project. At most, plaintiff's own testimony shows that he might, on occasion, have assisted with the scheduled maintenance of the monitoring equipment, which work, even it was being performed at the time of the accident, would constitute routine maintenance that does not fall within the coverage of Labor Law § 240 (1) (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Deangelis v Franklin Plaza Apts., Inc.*, 189 AD3d 772, 773 [2d Dept 2020]; *cf. Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 814-815 [2d Dept 2018]; *Montalvo v New York & Presbyt. Hosp.*, 82 AD3d 580, 581 [1st 2011]). Moreover, all of the equipment monitored by Trent had been fully installed and tested before Trent employees began their monitoring of that equipment (*see Adair v Bestek Lighting & Staging Corp.*, 298 AD2d 153, 154 [1st Dept 2002]). Although plaintiff emphasizes that the City required this monitoring work as part of its contract with Remsco, it is evident that there is nothing in the record to suggest that Trent's monitoring work was any different from the monitoring work that would be performed upon the completion of the project.

As such, defendants' have demonstrated, prima facie, that plaintiff was not engaged in any of the enumerated activities under Labor Law § 240 (1) and thus, that they are entitled to dismissal of his section 240 (1) cause of action. Given that plaintiff has failed to submit evidentiary material demonstrating a factual issue in this respect, defendants are entitled to dismissal of the section 240 (1) cause of action.

For the same reasons, plaintiff's work for Trent on the project does not constitute construction, excavation or demolition work within the meaning of Labor Law § 241 (6), and defendants are thus entitled to dismissal of the section 241 (6) cause of action (*see Hernandez v 601 W. Assoc.*, 172 AD3d 548, 549 [1st 2019]; *Calvert v Duggan & Duggan Gen. Contr., Inc.*, 159 AD3d 1490, 1492 [4th Dept 2018], *lv denied* 31 NY3d 912 [2018]; *Kuffour*, 94 AD3d at 707; *Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 323 [1st Dept 2005], *lv denied* 6 NY3d 770 [2006]; *Spaulding*, 305 AD2d at 401; *Yong Ju Kim*, 275 AD2d at 711-712).

Defendants are also entitled to dismissal of the Labor Law § 241-a cause of action, as that section does not apply to plaintiff's work here since he was not working in or at an elevator shaftway, hatchway or stairwell of a building (*see Desena v North Shore Hebrew Academy*, 119 AD3d 631, 635 [2d Dept 2014]; *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264, 265 [1st Dept 2008]).[3]

Common-law negligence and Labor Law § 200

With respect to plaintiff's Labor Law § 200 and common-law negligence claims, plaintiff alleges that the accident occurred because of a dangerous property condition based on a failure to clear snow and ice from the wall.[4] Where a premises condition is at

[3] Although plaintiff only raised a violation of Labor Law § 241-a in his bill of particulars, and did not plead such a violation in the complaint, the court has addressed the claim as if the complaint had been de facto amended to add a section 241-a claim (*see Sebring v Wheatfield Props. Co.*, 255 AD2d 927, 928 [1998]; *Napoli v Wright*, 2003 WL 25669387 [U] [Sup Ct Queens County 2003], *affd* 21 AD3d 1071 [2005]; *cf. Fusca v A & S Constr., LLC*, 84 AD3d 1155, 1157 [2d Dept 2011]; *Castleton v Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2007]).

[4] Unlike Labor Law §§ 240 (1) and 241 (6), Labor Law § 200 is not limited to construction work or particular enumerated activities (*see Jock v Fine*, 80 NY2d 965, 967 [1992]; *Rocha v GRT Constr. of N.Y.*, 145 AD3d 926, 927-928 [2d Dept 2016]).

issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Defendants, in moving, assert that they are entitled to dismissal of these claims based on the storm in progress rule, which is applicable in the context of Labor Law § 200 and common-law negligence work related claims (*see Stewart v ALCOA, Inc.*, 184 AD3d 1057, 1059-1060 [3d Dept 2021]; *Simon v Granite Building 2, LLC*, 170 AD3d 1227, 1231 [2d Dept 2019]; *Rothschild v Faber Homes, Inc.*, 247 AD2d 889, 890 [4th Dept 1998]) "Under the storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Johnson v Pawling Cent. Sch. Dist.*, 196 AD3d 686, 687 [2d Dept 2021]; *Amato v Brookhaven Professional Park L.P.*, 162 AD3d 620, 620 [2d Dept 2018]; *see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]).

Here, plaintiff's deposition testimony is sufficient to demonstrate, prima facie, that the snowstorm was still in progress at the time of his fall (*see Keeney v Hempsted Turnpike, LLC*, ___ AD3d ___, 2022 NY Slip Op 03235, *1 [2d Dept 2022]; *Gadonniex v Lombardi*, 277 AD2d 281, 281 [2d Dept 2000]; *Rothschild*, 247 AD2d at 890), shifting

the burden to plaintiff to demonstrate a factual issue as to "whether the precipitation from the storm in progress was not the cause of his accident" (*see Colon v New York City Tr. Auth.*, 201 AD3d 867, 869 [2d Dept 2022]). While plaintiff argues that a factual issue exists in view of his own testimony that he believed that there was old ice under the snow, such vague testimony is insufficient to demonstrate a factual issue regarding a preexisting ice condition (*see Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741, 742 [2d Dept 2006], *lv dismissed* 7 NY3d 887 [2006]). In addition, the court notes that, although plaintiff provides a website address for National Weather Service records, which records plaintiff asserts show that there were other snowstorms earlier in the week of the accident, the link provided did not directly lead to relevant weather records. Accordingly, the court finds that plaintiff has failed to demonstrate a factual issue warranting denial of the portion of the defendants' motion relating to the section 200 and common-law negligence claims.

Third-party claims

Initially, Trent has demonstrated its prima facie entitlement to dismissal of Remsco's third-party contribution and common-law indemnification claims through evidence showing that plaintiff was one of its employees, that plaintiff received Workers' Compensation benefits, and that plaintiff did not suffer a grave injury within the meaning of Workers' Compensation Law § 11. Trent has also demonstrated that it is entitled to dismissal of Remsco's insurance procurement breach of contract claim by demonstrating, prima facie, that Remsco's contract with Trent contained no provision requiring that Trent name Remsco as an additional insured under its insurance policy. As Remsco has

not opposed these aspects of Trent's motion, Trent's motion is granted to the extent that Remsco's third-party contribution, common-law indemnification, and breach of contract claims are dismissed.

Turning to the contractual indemnification claim, the contract provides, as is relevant here, that:

> "Each party (the 'Indemnifying Party') shall defend, indemnify and hold harmless the other party, its shareholders, officers, directors, agents and employees, and their respective successors and assigns (each is referred to herein as an 'Indemnified Party') against any and all liability for damages, costs, losses, penalties and expenses, including reasonable attorney's fees, resulting from any claim asserted by a third-party for wrongful death, bodily injury and/or property damage which are caused solely by the willful or negligent acts or omissions of the Indemnifying Party. However, to the extent that both Owner and Contractor are determined to be negligent and the negligence of both is the proximate cause of a claim against either party for any of the damages subject to indemnity as set forth above, then in such event, Owner and Contractor shall each be responsible for the portion of the liability equal to its comparative share of the total negligence."

Here, given the dismissal of the plaintiff's common-law negligence claim as against the defendants, the contractual indemnification claim is not barred by Remsco's own negligence (*see Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747, 751 [2d Dept 2007]). Contrary to Trent's argument, the dismissal of the plaintiff's claims against Remsco does not eliminate Remsco's right to indemnification, since the plain terms of the provision include not just recovery of damages, but also extends to recovery of costs, expenses and attorney's fees (*see id*; *Bashant v Mid-Weschester Realty Assoc., LLC*, 31

AD3d 680, 680 [2d Dept 2006]; *Hennard v Boyce*, 6 AD3d 1132, 1133 [4th Dept 2004]). Finally, while Trent could not be held responsible for the snow storm and had no snow removal obligations, it could be found liable if plaintiff's own actions in performing Trent's work by climbing up on the wall were found to be negligent (*see Orellana v Standard Microsystems Corp.*, 18 Misc 3d 1124 [A], 2008 NY Slip Op 50190, *2 [U] [Sup Ct, Queens County 2008]).[5] As Trent has failed to demonstrate as a matter of law that the indemnification provision is inapplicable under the facts here, Trent's motion is denied to the extent that it seeks dismissal of Remsco's contractual indemnification claim.

This constitutes the decision and order of the court.

E N T E R

J.S.C.

[5] Relevant in reading the indemnification provision are other provisions in the contract that provide that "Any reference to actions taken or not taken by the Contractor [defined as Trent] shall include those actions taken or not taken on Contractor's behalf" and that "Contractor shall be responsible for the safety, efficiency and adequacy of its employees and any vehicles and/or machinery, equipment or materials furnished or utilized by the Contractor during the performance of Services. Contractor, however, shall not assume any obligation or incur any liability for personal injury or property damage caused by (i) unsafe site conditions-not created by the Contractor or by any of its agents, employees and subcontractors, (ii) work being performed by other parties not related to the Contractor, (iii) the negligence of the Owner, and/or (iv) the negligence of any third party not related to the Contractor."