

Walker v Bank of China
2022 NY Slip Op 32245(U)
June 30, 2022
Supreme Court, Kings County
Docket Number: Index No. 505816/17
Judge: Karen B. Rothenberg
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Reply papers.....	140-142; 163
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Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

In this action to recover damages for personal injuries, defendants/third-party plaintiffs Bank of China [BOC] and Structure Tone LLC f/k/a and as successor to Structure Tone, Inc.'s [Structure Tone] moves [seq. no. 4]] for an order (a) pursuant to CPLR 3211 and/or 3212 dismissing the plaintiff's complaint alleging common-law negligence and violations of Labor Law §§ 200, 240(1), 241(6); (b) for summary judgment on the third-party complaints against third-party defendants Jacobson & Co., Inc. [Jacobson], Hi Tech Data Floors, Inc. [Hi Tech] and Agility Cable, Inc. [Agility] for indemnification, defense, and for insurance procurement; and (c) dismissing any and all cross-claims asserted against them. Plaintiff opposes the motion and cross-moves [seq. no. 5] for leave to supplement the bill of particulars to allege a violation of Industrial Code (NYCRR) §23-5.22 relating to the use of stilts.

On July 21, 2016, plaintiff Peter Walker, a dry-wall finisher employed by Jacobson, allegedly was injured when in the process of using stilts to perform his work on a raised floor in the building located at 7 Bryant Park, New York, he stepped into a 6-to-8-inch hole where a tile of the raised floor had been removed. Plaintiff commenced this action against the owner of the premises, BOC, and the general contractor for the project, Structure Tone, alleging violations of Labor Law §§200, 240(1) and 241(6) and common-law negligence. Thereafter, BOC and Structure Tone commenced a third-party against Jacobson alleging causes of action for defense and indemnity, contribution, and attorney's fees. BOC and Structure Tone later commenced a second-third party action against Hi Tech, the subcontractor who performed the installation of the raised flooring, and Agility, the subcontractor who performed the installation of cabling for the project alleging causes of action for contractual and common-law indemnification, contribution, failure to procure insurance, and attorney's fees.

Addressing the plaintiff's cross-motion first, "leave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" (*Palaguachi v Idlewild 228th Street, LLC*, 197 AD3d 1321, 1322 [2d Dept 2021] quoting *Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047 [2d Dept 2012]). Here, plaintiff demonstrates that the proposed amendment to include Industrial Code (NYCRR) §23-5.22 will not prejudice the defendants and does not involve new factual allegations or raise new theories of liability (*id.*). BOC and Structure Tones' argument as to the lateness of the amendment is unavailing. Moreover, BOC and Structure Tone fail to demonstrate any real prejudice since the complaint, the bill of particulars and plaintiff's testimony all reflect that the

accident occurred while plaintiff was using stilts. As such, leave to amend the bill of particulars to allege a violation of Industrial Code §23-5.22 is warranted. BOC and Structure Tone, however, will be allowed to conduct post-note discovery on the limited issue of whether notification was made to the commissioner of plaintiff's use of stilts on this project as required under §23-5.22 (b). Such discovery to be concluded within 30 days of the date of entry of this order.

Turning to BOC and Structure Tone's motion for summary judgment against plaintiff, it is noted that plaintiff does not oppose the portions of the motion seeking dismissal of his causes of action alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) insofar as predicated upon Industrial Code §§ 23-1.7(b), 23-1.16, and 23-5.1. Instead, plaintiff only opposes dismissal of his cause of action under Labor Law § 241(6) insofar as it is now predicated upon Industrial Code §23-5.22. Plaintiff, therefore, is deemed to have abandoned those causes of action he has not opposed (*see Elam v Ryder Systems, Inc.*, 176 AD3d 675 [2d Dept 2019]). As such, summary judgment dismissal of plaintiff's causes of action alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) to the extent predicated upon Industrial Code §§ 23-1.7(b), 23-1.16, and 23-5.1 is warranted. After completion of the limited post-note discovery, BOC and Structure Tone may renew its motion for summary judgment to dismiss the plaintiff's Labor Law § 241(6) claim.

As to the third-party claims, BOC and Structure Tone demonstrate, *prima facie*, entitlement to summary judgment on its contractual indemnification claims against Jacobson. The indemnification agreement between Structure Tone and Jacobson provides for the subcontractor to indemnify BOC and Structure Tone for liability, "from and against any and claims, suits ... damages, losses and expenses including reasonable legal fees and costs arising in whole or in part any in any manner from the acts, omissions, breach or default of subcontractor. ... in connection with the performance of any work by subcontractor, [or] its employees...pursuant to this Subcontract..." The indemnification agreement further provides that the "[s]ubcontractor will defend and bear all costs of defending any action or proceedings brought against Structure Tone, Inc., and or Owner ..., arising in whole or in part out of such acts, omissions, breach or defaults." The indemnification clause, does not, by its terms, limit indemnification only to claims arising out of the negligence of the subcontractor or their employees in the performance of their work (*see Bermejo v New York City Health and Hospitals Corp.*, 119 AD3d 500 [2d Dept 2014]). Based on the indemnification agreement, and because there is no evidence showing that BOC and Structure Tone were themselves negligent, summary judgment on the third-party causes of action against Jacobson for contractual defense and indemnification, is warranted (*see Tobio v Boston Properties, Inc.*, 54 AD3d 1022 [2d Dept 2008]).

However, in light of the parties' conflicting testimonies as to whether Agility or Hi Tech performed any work involving the floor tiles on the 11th floor on or near the date of

the accident, BOC and Structure Tone fail to eliminate all triable issues of fact as to whether the accident arose out of or was connected to the performance of their work, pursuant to the terms of their indemnification agreements (*see Caban v Plaza Constr. Corp.*, 153 AD3d 488 [2d Dept 2017]). Therefore, summary judgment on the second third-party causes of action against Hi Tech and Agility for contractual defense and indemnification is not warranted. BOC and Structure Tone are also not entitled to summary judgment on their claims for common-law indemnification against Hi Tech or Agility at this time, as issues of fact exist as to whether these parties were negligent in this matter (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090 [2d Dept 2018]).

As to the breach of contract claims, BOC and Structure Tone establish, *prima facie*, their entitlement to summary judgment against Agility for failure to procure insurance. In opposition, Agility fails to raise a triable issue of fact that it complied with its contractual obligation to procure the requisite insurance (*see Cardozo v Mayflower Center, Inc.*, 16 AD3d 536 [2d Dept 2005]). BOC and Structure Tone, however, are not entitled to summary judgment on their breach of contract claim against Jacobson and Hi Tech for the failure to procure insurance. Both Jacobson and Hi Tech provide proof that they procured the required insurance for BOC and Structure Tone's benefit.

In view of the foregoing, it is

Ordered, that plaintiff's cross-motion for leave to supplement the bill of particulars to allege a violation of Industrial Code (NYCRR) §23-5.22 relating to the use of stilts is granted, and the supplemental bill of particulars is deemed served, and it is further

Ordered, that BOC and Structure Tone's motion for summary judgment dismissing the plaintiff's causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) to the extent predicated upon Industrial Code §§ 23-1.7(b), 23-1.16, and 23-5.1 is granted, and it is further

Ordered, that BOC and Structure Tone's motion for summary judgment on the third-party complaint against Jacobson for contractual defense and indemnification is granted, and it is further

Ordered, that BOC and Structure Tone's motion for summary judgment on the second third-party complaint against Hi Tech and Agility for contractual defense and indemnification is denied, and it is further

Ordered, that BOC and Structure Tone's motion for summary judgment on the second third-party complaint against Hi Tech and Agility for common-law indemnification is denied, and it is further

Ordered, that BOC and Structure Tone's motion for summary judgment on the third-party complaint against Jacobson and on the second third-party complaint against Hi Tech for their breach of contract for failure to procure insurance is denied, and it is further

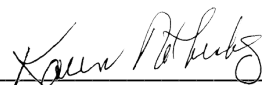
Ordered, that BOC and Structure Tone's motion for summary judgment on the second third-party complaint against Agility for its breach of contract for failure to procure insurance is granted, and it is further

Ordered, that BOC and Structure Tone's motion seeking dismissal of any and all cross-claims asserted against them is granted.

This constitutes the decision/order of the Court

Dated: June 30, 2022

Enter,



Karen B. Rothenberg, J.S.C.