

Martinez v La Rochelle 75 I LLC
2022 NY Slip Op 32583(U)
August 1, 2022
Supreme Court, New York County
Docket Number: Index No. 151581-2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

BENITO GONZALEZ MARTINEZ

INDEX NO. 151581-2018

- v -

MOT. DATE

LA ROCHELLE 75 I LLC et al

MOT. SEQ. NO. 3&4

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS Doc. No(s).
ECFS Doc. No(s).
ECFS Doc. No(s).

There are two pending summary judgment motions in this action for personal injuries arising from alleged violations of the labor law. In motion sequence 3, plaintiff moves pursuant to CPLR § 3212 for partial summary judgment in his favor against the defendants, La Rochelle 75 I LLC ("La Rochelle") and TP Interiors LLC ("TP Interiors") on the issue of liability pursuant to Labor Law § 240(1) and Labor Law 241(6). TP Interiors cross-moves for summary judgment dismissing plaintiff's complaint and all cross-claims against it. In motion sequence 4, La Rochelle moves for summary judgment dismissing plaintiff's complaint and the crossclaims asserted by TP Interior against it as well as for summary judgment on its crossclaim for contractual indemnification against TP Interiors. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The court will first consider the parties' arguments as to plaintiff's direct claims against the defendants. The relevant facts are as follows. Plaintiff claims that on January 2, 2018, while working at 57 West 75th Street, Apartment 7F, New York, New York (the "premises"), he fell from a 6-foot-high scaffold platform while plastering the ceiling of Apartment 7F. He testified at his deposition that he stepped back off of the platform and fell to the floor. Plaintiff testified that the scaffold did not malfunction, move, or fail in any manner prior to his fall but the scaffold did not have handrails. Plaintiff claims that he complained the scaffold needed a handrail and a safety harness. At the time of his accident, the premises was owned by La Rochelle and TP Interiors served as the general contractor for the renovation work performed at the premises.

Plaintiff has asserted claims pursuant to Labor Law §§ 240[1], 241[6], 200 and for common law negligence. The sole Industrial Code violation asserted in plaintiff's original bill of particulars is Section 23-5.1[j]. After note of issue was filed, plaintiff served a supplemental bill of particulars alleging a different violation, Section 23-5.18(b). Plaintiff argues that the defendants violated Labor Law § 240[1] because the scaffold was inadequate for the work being performed. Plaintiff further argues that Labor Law

Dated: 8/1/22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

§ 241[6] was violated because the scaffold lacked rails in violation of Section 23-5.18(b).

Defendants contend that Labor Law § 240 (1) does not apply to the facts of plaintiff's fall because there is no indication that the scaffold failed to provide him adequate protection from a gravity related hazard. Specifically, La Rochelle asserts "the scaffold protected plaintiff during his work by supporting him and elevating him to access his work without incident until he, for no reason at all, stepped off the platform." La Rochelle otherwise maintains that at least issues of fact preclude summary judgment in plaintiff's favor. TP Interiors additionally argues that the proximate cause of the accident was plaintiff stepping backwards and off the scaffold and since neither the scaffold nor the lack of handrails was a proximate cause of this accident, plaintiff's Labor Law § 240(1) claim should be dismissed. La Rochelle further asserts that the only alleged Industrial Code violation, namely Section 23-5.1 (j), explicitly exempts "[a]ny scaffold platform with an elevation of not more than seven feet." TP Interiors argues that the court should not consider the newly asserted Industrial Code violation whereas La Rochelle claims that this provision is equally inapplicable. Defendants maintain that plaintiff's Labor Law § 200/common-law negligence claim should be dismissed.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Section 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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.

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "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)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation

level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Defendants are not entitled to dismissal of the Section 240[1] claim because plaintiff fell from a scaffold due to the application of gravity. The court agrees with La Rochelle that plaintiff is not entitled to partial summary judgment on the Section 240[1] claim. Generally, where a plaintiff's fall is caused by another event other than the failure of a scaffold or ladder, questions of fact exist as to whether the safety device provided proper protection and whether the plaintiff should have been provided with additional safety devices (*Morera v New York City Tr. Auth.*, 182 AD3d 509, 510 [1st Dept 2020] citing *Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 1055 [2016]; see also *Zeitner v Heramax Sharon Assoc.*, 194 AD2d 414 [1st Dept 1993]). There are questions of fact as to whether the scaffold was sufficiently safe and whether plaintiff should have been provided a harness. Accordingly, the motions and cross-motion as to plaintiff's Section 240[1] claim are denied.

Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]).

Plaintiff's Section 241[6] claim must be dismissed. The Industrial Code violation asserted in plaintiff's original bill of particulars, Section 23-5.1[j], is deemed abandoned by plaintiff. As for Section 23-5.18, entitled "Manually-propelled mobile scaffolds", the exception contained in Section 23-5.1 applies to all scaffolds and thus "[a]ny scaffold platform with an elevation of not more than seven feet", such as the scaffold from which plaintiff fell, is excepted from application of the Industrial Code provisions requiring railings. Accordingly, plaintiff's motion as to his Section 241[6] claim is denied and defendants' motion as to this claim are granted to the extent that plaintiff's Section 241[6] claim is severed and dismissed.

Section 200 and common law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Plaintiff's accident arose from the manner or means in which the work was performed. Here, there is no dispute that plaintiff received instructions on how to perform his work solely from the owner of his employer SF Quality, Fernando Lopez, or other workers in his employ. Neither La Rochelle nor TP Inte-

riors supervised or controlled plaintiff's injury-producing work. Therefore, defendants are also entitled to dismissal of plaintiff's Section 200 and common law negligence claim.

Counterclaims/Crossclaims

La Rochelle seeks dismissal of TP Interiors' common-law indemnification and contribution claim. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Meanwhile, "[c]ontribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citations omitted]).

Plaintiff's accident arose solely out of the means and methods of and equipment for his work, which La Rochelle had no control over. Thus, La Rochelle is entitled to dismissal of TP Interiors' common-law indemnification and contribution claim against it as it was free from negligence in the happening of plaintiff's accident.

La Rochelle next seeks summary judgment on its crossclaim for contractual indemnification against TP Interiors. La Rochelle's contract with TP Interiors provides in pertinent part as follows:

[T]o the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless, the Owner, La Rochelle 75 1 LLC . . . from and against all liability or claimed liability including attorney fees, disbursements and related costs for bodily injury or death to any person(s) . . . arising out of or in connection with the performance of the Work by Contractor, its Subcontractors or anyone directly or indirectly employed by anyone of them or anyone for whose acts they may be liable excluding only liability created by the sole and exclusive negligence of the Indemnified Parties

"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 Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

Pursuant to the contract, TP Interiors is required to indemnify La Rochelle since plaintiff's injuries arose out of the performance of work by plaintiff's employer which TP subcontracted the plaster and painting work to. Since the only exclusion is for the event where La Rochelle is exclusively negligent, and La Rochelle has otherwise demonstrated freedom from negligence, La Rochelle is entitled to contractual indemnification from TP Interiors.

TP Interiors' arguments in opposition to La Rochelle's motion on this point are unavailing. It is of no moment whether La Rochelle's witness knew if there was any employee of La Rochelle whose job it was to be on site Monday through Friday or who was responsible for general site safety under the terms of the contract between the parties. Contrary to TP Interiors' contention, its promise to indemnify is clearly implied from the language and the purpose of its agreement with La Rochelle and the circumstances surrounding plaintiff's accident. Accordingly, La Rochelle's motion is granted on its crossclaim for contractual indemnification against TP Interiors and TP Interiors' motion on this crossclaim is denied.

CONCLUSION

In accordance herewith, it is hereby:

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

ORDERED that La Rochelle's motion for summary judgment is granted to the extent that plaintiff's Labor Law § 241[6] claim and Labor Law § 200/common law negligence claims against it are severed and dismissed, TP Interiors' counterclaim for common-law indemnification and contribution claim against La Rochelle is dismissed and La Rochelle is granted summary judgment on its crossclaim for contractual indemnification against TP Interiors; and it is further

ORDERED that the issues of what amount TP Interiors should reimburse La Rochelle for defense costs incurred to date, with statutory interest is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and determine; and it is further

ORDERED that La Rochelle's counsel shall, within 90 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that La Rochelle's motion is otherwise denied; and it is further

ORDERED that TP Interiors cross-motion for summary judgment is granted to the extent that that plaintiff's Labor Law § 241[6] claim and Labor Law § 200/common law negligence claims against it are severed and dismissed; and it is further

ORDERED that TP Interiors' cross-motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

8/1/22
New York, New York

So Ordered:

[Signature]
Hon. Lynn R. Kotler, J.S.C.