Mora v Lawrence Exterior Restoration Corp.
2022 NY Slip Op 32776(U)
July 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 500504/2015
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

Index Number 500504/2015
Seqs. 010, 011

DECISION/ORDER

MIGUEL MORA,

Plaintiff,

against

LAWRENCE EXTERIOR RESTORATION CORP.,
210 EAST 15TH ST. TENANTS CORP.,
T.S. GENERAL RENOVATION CORP. AND
EVEREST SCAFFOLDING INC.,

Defendants.

LAWRENCE EXTERIOR RESTORATION CORP.,

Third-Party Plaintiff,

against

SLESZYNSKI CORP.,

Third-Party Defendant.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3-6
Replying Affidavits	7, 8
Exhibits	
Other	

Upon the foregoing papers, the motion for summary judgment (Mot. Seq. 010) by defendant T.S. General Renovation Corp. ("T.S. General") and third-party defendant Sleszynski Corp. ("Sleszynski") and the motion for summary judgment (Mot. Seq. 011) by defendant and third-party plaintiff Lawrence Exterior Restoration ("Lawrence Exterior") and defendant 210 East 15th St. Tenants Corp. ("210 East 15th St.") are decided as follows:

Factual Background

Plaintiff commenced this action to recover for injuries allegedly sustained at a construction project as a result of defendants' negligence and violation of New York Labor Law §§ 200, 240, 241 and 241-a, as well as a failure to cure a public nuisance or trap. Certain

defendants, including the third-party plaintiff, also assert claims for contribution, contractual and common-law indemnification, and breach of contract for failure to procure insurance.

Loomis Lindgren, vice-president of Lawrence Exterior, states in his affidavit that, in May 2013, 210 East 15th St. retained Lawrence Exterior to perform roof and façade repair work for a construction project (Lindgren Affidavit at ¶ 3). At that time, Lawrence Exterior subcontracted with T.S. General to provide the roof and façade repair work for the project (*id.* at ¶ 4).

Thomasz Sleszynski, the owner of T.S. General, states in his affidavit that T.S. General performed work on the project from about May 6, 2013 through about October 22, 2013 (Sleszynski Affidavit at ¶¶ 4, 6). Mr. Sleszynski explains that T.S. General ceased operating in October 2013, at which time he formed Sleszynski Corp., which continued work on the project pursuant to a new contract with Lawrence Exterior (*id.* at ¶¶ 7–9).

Mr. Sleszynski states that Sleszynski Corp. hired plaintiff as an employee in April 2014, and that plaintiff was not an employee of T.S. General (Sleszynski Affidavit at ¶¶ 11–12). Plaintiff testified that, on September 11, 2014, he had been working for Sleszynski Corp. on the subject project for approximately five months (plaintiff EBT at 17, 18, 21). Plaintiff testified that "Hector", the foreman, supervised him at the project (*id.* at 21, 22, 42).

With regard to his accident, plaintiff testified as follows: On September 11, 2014, plaintiff was working on a scaffold on the roof of the building (*id.* at 38, 42, 43). The platform of the scaffold was seven feet above the roof (*id.* at 43). Access between the platform and roof was provided by a set of metal stairs (*id.* 47–50). As plaintiff was walking down the stairs from the platform, the second step from the top moved, which caused him to slip (*id.* at 63–67, 71–72, 92). He then fell from the stairs because there was no handrail on the left side (*id.* at 63–67). Plaintiff claims that he previously complained to Hector that the handrail was missing and that

the stairs had moved when he previously climbed the steps (*id.* at 53–54). He also claims that a co-worker had previously fallen off the scaffold because of the missing handrail (*id.* at 55).

Hector Sanchez, the foreman at the project site, testified that, both before and after the accident on that same day, he inspected the platform and stairs and found no issues with the stairs and both handrails were present (*id.* at 8, 54–55, 77–78). Likewise, Mr. Lindgren testified that the stairs had guardrails (Lindgren EBT at 45).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, plaintiff opposes both summary judgment motions on the basis that they are untimely. The note of issue in this matter was originally filed on October 10, 2018, thus starting the 60-day period within which to move for summary judgment (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6). Thereafter, plaintiff moved to amend his bill of particulars. By order, dated October 16, 2019, the court (Vaughan, J.) granted the motion and extended the deadline for the parties to move for summary judgment to March 20, 2020. This extension was appropriate because the deadline had previously expired several months prior. Thereafter, the note of issue was vacated by order, dated December 13, 2019 (Kurtz, J.). The new note of issue was then filed on July 2, 2021, which restarted the 60-day period to move for summary judgment. The present motions were filed within this period.

Plaintiff argues that the motions are untimely because the court-ordered deadline was in

effect despite the new note of issue, and that this order triggered the court's timing for filing summary judgment motions. Plaintiff further argues that the note of issue was vacated only because there was additional discovery on damages, and the present motions relate only to liability. However, the court's order vacating the note of issue is not limited or qualified in any way. Additionally, the court's extension of the prior deadline was based on the first note of issue. When that first note of issue was vacated, the case was returned to pre-note status, and the second note of issue re-set the deadline to move for summary judgment (*Wells Fargo Bank, NA v Apt*, 179 AD3d 1145, 1146 [2d Dept 2020]).

Additionally, plaintiff argues that defendants' motion should be denied entirely as to 210 East 15th Street because, plaintiff claims, the witness produced on behalf of 210 East 15th Street was not sufficiently knowledgeable "about the building or this project." Plaintiff does not name this witness or describe the witness in any way. It does not appear from plaintiff's papers, which discuss this point only briefly, that plaintiff ever sought a further deposition of 210 East 15th Street, or otherwise sought relief to cure this claimed deficiency. Accordingly, plaintiff has not provided a sufficient basis to warrant a denial of 210 East 15th Street's motion.

Plaintiff's Claims for Negligence and Violation of Labor Law § 200

Lawrence Exterior and 210 East 15th St. seek summary judgment dismissing plaintiff's claims against them for negligence and violation of Labor Law § 200. "Labor Law § 200 is a codification of the common law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 and negligence

in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition on the premises, or had actual or constructive notice of it without remedying it within a reasonable time; or (2) if there are allegations of use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991 92 [2d Dept 2016], *lv to appeal denied*, 28 NY3d 911 [2016]). There is no allegation that there was a dangerous condition on the premises itself, and so the first circumstance does not apply.

Lawrence Exterior and 210 East 15th St. argue that they are not liable under the second circumstance because they did not supervise plaintiff. Indeed, plaintiff testified that his supervisor was Hector Sanchez (plaintiff EBT at 21–22, 42). Lawrence Exterior and 210 East 15th St. further argue that they are not liable for any defect on the scaffold because, as plaintiff testified, Sleszynski Corp. installed the scaffold and stairs and accepted responsibility for fixing defects in the stairs (*id.* at 60–62, 226–227). Mr. Lindgren also states in his affidavit that T.S. General and Sleszynski Corp. erected and maintained the scaffold and access ladder (the starirs) (Lindgren Affidavit at ¶ 8).

Plaintiff argues that Mr. Lindgren's visits to the project, and his occasional discussions with the workers and instructions to them renders Lawrence Exterior liable to plaintiff. However, general supervisory authority over the work is not enough; the defendant must control the specific means and methods of plaintiff's work in order to be liable (*Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1668 [2d Dept 2020]). Plaintiff further argues that Mr. Lindgren had the authority to rectify any dangerous situation, but this also does not create a duty of care (*Robinson v County of*

Nassau, 84 AD3d 919, 920 [2d Dept 2011]).

Finally, plaintiff argues that there are questions of fact as to whether Lawrence Exterior and/or 210 East 15th St. had notice of the condition of the scaffold stairs. However, notice is an element of liability for dangerous conditions of the premises itself, for which Lawrence Exterior and 210 East 15th St. could be held liable as the contractor and owner (*Grasso*, 159 AD3d at 678). This action does not involve a dangerous condition of the premises, but rather defective equipment (*Ortega v Puccia*, 57 AD3d 54, 61–62 [2d Dept 2008]). Accordingly, plaintiff's claims for negligence and violation of Labor Law § 200 are dismissed as against Lawrence Exterior and 210 East 15th St.

Plaintiff's Claim for Violation of Labor Law § 240(1)

No party formally moves for summary judgment on this claim. However, in his opposition to defendants' motion, plaintiff asks this court to search the record and grant summary judgment in his favor on the claim. In support, plaintiff submits his own testimony that the stairs moved when he tried to walk down them and that the lack of a handrail on the left side of the stairs caused him to fall (plaintiff EBT at 63–67, 71–72, 92). Plaintiff also submits the affidavit of Eric Heiberg, a professional engineer, who states that the failure to have a handrail on one side of the scaffold stairs and the movement of the stairs itself violates Labor Law § 240(1) (Heiberg Affidavit at ¶¶ 12–16). Plaintiff's testimony conflicts with the testimony of Mr. Lindgren and Mr. Sanchez, who claim that there was no missing handrail and that the stairs had no issue (Lindgren EBT at 45; Sanchez EBT at 54–55, 77–78). Thus, when I search the record, there are triable issues of fact that prevent summary judgment on this claim.

Plaintiff's Claim for Violation of Labor Law § 241-a

Labor Law § 241-a sets forth rules for planking under certain conditions in "elevator

shaftways, hatchways, and stairwells of buildings." The statute also requires planking to be "laid across the opening at levels not more than two stories above or one story below them." None of these circumstances are present in this case. Accordingly, plaintiff's claim for violation of Labor Law §241-a is dismissed.

Plaintiff's Claim for Violation of Labor Law § 241(6)

Labor Law § 241(6) imposes on owners and contractors a non-delegable duty 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" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Defendants seek dismissal of plaintiff's claim for violation of Labor Law § 241(6) based on Industrial Code §§ 23-1.5(c)(1), 23-1.5(c)(3), 23-2.7(e) and 23-5.1(j). As to Section 23-1.5(c)(1), defendants correctly argue that it is too general to serve as a predicate to Labor Law § 241(6) liability (*Gasques v State*, 15 NY3d 869, 870 [2010]; *Maday v Gabe's Contr., LLC*, 20 AD3d 513 [2d Dept 2005]).

Defendants do not argue that Section 23-1.5(c)(3) is too general, but rather that it does not apply here. Section 23-1.5(c)(3) requires that "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Defendants reference Mr. Sanchez's testimony that he checked the scaffold before and after the accident and found no issue (Sanchez EBT at 77–78). However, plaintiff testified that the stairs moved when he tried to walk down them and the lack of a handrail on the left side of the stairs caused him to fall (plaintiff EBT at

63-67, 71-72, 92). Accordingly, there are issues of fact about whether defendants violated this Industrial Code provision.

Likewise, defendants argue that they did not violate Section 23–2.7(e), which requires protective railings on stairways. Although Mr. Lindgren and Mr. Sanchez may have testified that there was no handrail missing from the stairs (Lindgren EBT at 45; Sanchez EBT at 54–55), plaintiff testified to the contrary (plaintiff EBT at 63–67, 71–72, 92). Thus, there are issues of fact as to whether defendants violated this Industrial Code section.

Finally, with regard to Section 23-5.1(j), defendants argue that the section does not apply because it requires safety railings for scaffolds at an elevation of more than seven feet and plaintiff testified that the scaffold was not more than seven feet high (plaintiff EBT at 43). Plaintiff does not dispute this fact. Accordingly, plaintiff's claim for violation of Labor Law § 241(6) based on this Code section is dismissed.

Lawrence Exterior's Claims Against Sleszynski Corp.

Sleszynski Corp. and Lawrence Exterior each move for summary judgment on Lawrence Exterior's third-party claim for contractual indemnification against Sleszynski Corp.[1] Sleszynski Corp.'s contract with Lawrence Exterior's states that Sleszynski Corp. will indemnify Lawrence Exterior for all claims "arising out of or in connection with or as a consequence of the performance of the Work of [Sleszynski Corp.] under [the contract]". "The right to contractual indemnification depends upon the specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA,*

[1] In their motion, Lawrence Exterior and 210 East 15th St. appear to seek summary judgment on a claim that Sleszynski Corp. is required to indemnify 210 East 15th St. pursuant to Lawrence Exterior's contract with Sleszynski Corp, and pursuant to common law. However, 210 East 15th St. does not assert claims against Sleszynski Corp. for contractual or common-law indemnification, and defendants do not provide any legal support for an attempt by Lawrence Exterior to assert such claims on behalf of 210 East 15th St.

Inc., 61 AD3d 925, 930 [2d Dept 2009]). Also, to be entitled to indemnification, the movant must prove that it was not negligent (*Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 855 [2d Dept 2019]; *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009])

Plaintiff's claim clearly arose from the work set forth in the contract. Sleszynski Corp. argues that the indemnification provision only applies to claims that arise "from something other than statute, or from operation of law or [Sleszynski Corp.'s] own negligence." It appears that Sleszynski Corp. is referencing the portion of this provision that states indemnification includes events where the indemnitees (such as Lawrence Exterior) are liable "without negligence and solely by reason of statute, operation of law or otherwise". This portion of the indemnification provision expands rather than limits the scope of indemnification, and does not otherwise affect the provision's requirement for indemnification for claims that arise from the "Work" of the contract.

Sleszynski Corp. also argues that Lawrence Exterior obtained the permit for the scaffold and was therefore liable for this accident. However, its referenced legal support for this proposition, *Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010], does not address this issue. Obtaining a permit for a project does not, in and of itself, mean that the entity named on the permit should be treated as a general contractor (*Martinez v 408-410 Greenwich St., LLC*, 83 AD3d 674, 675 [2d Dept 2011]; *Kilmetis v Creative Pool and Spa, Inc.*, 74 AD3d 1289, 1291 [2d Dept 2010]). Furthermore, the determinative factor for negligence liability in this case is not general contractor status, but rather who had direct supervisory authority over plaintiff's work (*id.*; *see also Ortega*, 57 AD3d at 61–62).

Sleszynski Corp. also argues that Lawrence Exterior was contractually responsible to 210 East 15th St. for providing the scaffold, but contractual responsibility gives rise to tort liability only in certain circumstances, none of which Sleszynski Corp. explores (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). There is no evidence that Lawrence Exterior built the scaffold or otherwise caused any dangerous condition of the scaffold. Additionally, as held above, Lawrence Exterior was not negligent. Accordingly, Lawrence Exterior is entitled to summary judgment on its contractual indemnification claim against Sleszynski Corp.

Lawrence Exterior and Sleszynski Corp. also move for summary judgment on Lawrence Exterior's third-party claim for common-law indemnification against Sleszynski Corp. To prove a claim for common-law indemnification, Lawrence Exterior Restoration and 210 East 15th St. Tenants Corp. each must show that it was not negligent, that Sleszynski Corp. was "responsible for negligence that contributed to the accident or, in the absence of any negligence, that [Sleszynski Corp.] had the authority to direct, supervise, and control the work giving rise to the injury" (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]). As explained above, there is a dispute of fact as to whether the stairs moved or the handrail was missing. Sleszynski Corp. also argues that plaintiff was the proximate cause of his own accident, based on his testimony that he tripped over his feet as he descended the stairs (plaintiff EBT at 65-66). Although he did so testify, plaintiff also testified that the stairs moved and that the handrail was missing (*id.* at 63–67, 71–72, 92). There is not sufficient evidence to find that plaintiff is solely responsible for the accident.

Sleszynski Corp. argues that Lawrence Exterior is not entitled to common-law indemnification against Sleszynski Corp. pursuant to Workers' Compensation Law § 11. This statute bars negligence actions against an employer, including claims for common-law

indemnification, unless plaintiff has suffered a "grave injury" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097 [2d Dept 2018]). Sleszynski Corp. argues that no one asserts that plaintiff suffered a grave injury, and Lawrence Exterior does not contest this. Accordingly, Lawrence Exterior's claim for common-law indemnification against Sleszynski Corp. is dismissed.

In addition, Sleszynski Corp. moves for summary judgment on Lawrence Exterior's third-party claim for breach of contract against Sleszynski Corp. Lawrence Exterior asserts that Sleszynski Corp. did not procure insurance as required by their contract, but Sleszynski Corp. contends that it complied with the contract. Sleszynski Corp. provides a copy of the commercial general liability policy it procured for Lawrence Exterior, and asserts that Lawrence Exterior never objected to the terms of the policy.

Lawrence Exterior seems to oppose the motion on the basis that the policy Sleszynski Corp. provides in its papers does not prove it was issued to Sleszynski Corp., but the policy states on page 4 of the document that it was issued to Sleszynski Corp. Additionally, Sleszynski Corp. provides copies of the Accord Certificate of Liability insurance that evidences the insurance procured and shows that Lawrence Exterior was an additional named insured.[2] Accordingly, Lawrence Exterior's claim for breach of contract against Sleszynski Corp. is dismissed.

Sleszynski Corp.'s and T.S. General's Claims Against Lawrence Exterior

Lawrence Exterior and 210 East 15th St. move for summary judgment to dismiss the T.S. General's and Sleszynski Corp.'s claims against them for contractual indemnification, common-law indemnification, and contribution. It is not disputed that Lawrence Exterior and 210 East

[2] Because this court finds that Sleszynski Corp. established it procured the required insurance, Sleszynski Corp.'s contention that Lawrence Exterior waived its right to claim breach of contract, is moot.

15th St. never contractually agreed to indemnify T.S. General or Sleszynski Corp. Contrary to Sleszynski Corp.'s argument, Lawrence Exterior's other contractual responsibilities did not create a duty to indemnify. Additionally, as explained above, neither Lawrence Exterior nor 210 East 15th St. are negligent, and so they are not liable for common-law indemnification or contribution (*Poalacin*, 155 AD3d at 909; *Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 [2d Dept 2010]). Accordingly, any claim by T.S. General and Sleszynski Corp. against Lawrence Exterior and 210 East 15th St. for contractual indemnification, common-law indemnification, and contribution is dismissed.

Claims Against T.S. General

T.S. General moves for summary judgment to dismiss plaintiff's claims. T.S. General argues that it is not liable for these claims because it ceased to be a subcontractor on the project prior to the accident, and because Workers' Compensation law preempts such claims. Plaintiff opposes the motion based solely on the timeliness of T.S. General's motion. As explained above, T.S. General's motion is not untimely. In the absence of any other opposition, this portion of T.S. General's motion is granted.

T.S. General also moves for summary judgment to dismiss Lawrence Exterior's and 210 East 15th St.'s cross-claims against it. Lawrence Exterior asserts cross-claims against T.S. General for contractual and common-law indemnification, contribution, and breach of contract. 210 East 15th St. asserts cross-claims against T.S. General for common-law indemnification. The claims that are based on the contract between T.S. General and Lawrence Exterior are dismissed. As Mr. Sleszynski states in his affidavit, T.S. General ceased to be a subcontractor on the project prior to the accident, at which time Sleszynski Corp., Mr. Sleszynski's subsequent company, took on the role as subcontractor (Sleszynski Affidavit at ¶¶ 7–9). When Lawrence

Exterior and Sleszynski Corp. entered into a contract for the same services as T.S. General had previously provided, T.S. General's contractual obligations ceased (*Kefalas v Valiotis*, 197 AD3d 698 [2d Dept 2021], *lv to appeal denied,* 37 NY3d 919 [2022]).

Lawrence Exterior's and 210 East 15th St.'s remaining claims for common-law indemnification and contribution are based on their assertion that T.S. General may be at fault for its construction of the scaffolding and stairs. According to Mr. Lindgren, T.S. General was at least partially responsible for building the stairs (Lindgren Affidavit at ¶ 8), and so it may have created a dangerous condition. T.S. General invokes the protection from suit for employers afforded by Workers' Compensation § 11. However, as T.S. General acknowledges, it was never plaintiff's employer (Sleszynski affidavit at ¶ 11). Furthermore, T.S. General references no law that extends the protection from suit to predecessor companies.

Conclusion

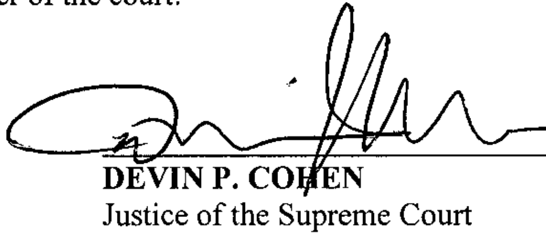
For the foregoing reasons, T.S. General's and Sleszynski Corp.'s motion for summary judgment (Seq. 010) is granted to the extent that: (a) plaintiff's claims against T.S. General are dismissed; (b) Lawrence Exterior's cross-claims against T.S. General for contractual indemnification and breach of contract are dismissed; (c) Lawrence Exterior's third-party claims against Sleszynski Corp. for common-law indemnification and breach of contract are dismissed.

In addition, Lawrence Exterior's and 210 East 15th St.'s motion for summary judgment (Seq. 011) is granted to the extent that: (a) plaintiff's claims for negligence and violation of Labor Law §§ 200 and 241-a are dismissed; (b) plaintiff's claim for violation of Labor Law § 241(b) based on Industrial Code §§ 23-1.5(c)(1) and 23-5.1(j) are dismissed; (c) T.S. General's and Sleszynski Corp.'s claims against Lawrence Exterior and 210 East 15th St. for contractual indemnification, common-law indemnification, and contribution are dismissed; and (d)

Lawrence Exterior is awarded summary judgment on its claim for contractual indemnification against Sleszynski Corp.

Lastly, plaintiff's request for this court to award it summary judgment, sua sponte, on its claim for violation of labor Law § 240(1) is denied.

This constitutes the decision and order of the court.



July 27, 2022
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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