

| |
|--|
| Rahman v Moklam Enters., Inc. |
| 2022 NY Slip Op 32779(U) |
| August 16, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 514177/2017 |
| Judge: Wayne P. Saitta |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brookly, New York, 16th on the day of August, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

-----X

FARHADUR RAHMAN, MOHAMMED A BHUIYAN, and
SHAHIN AKTHER,

Plaintiffs,

Index No.: 514177/2017

-against-

DECISION AND ORDER
MS #12, #13, #14, and #15

MOKLAM ENTERPRISES, INC., YUCO BUILDERS, LLC.,
YUCO CONSTRUCTION CORP., YUCO MANAGEMENT, INC.,
and NAVICO B & S CONSTRUCTION CORP,

Defendants.

-----X
YUCO CONSTRUCTION CORP. and YUCO MANAGEMENT, INC.,

Third-Party Plaintiffs,

-against-

DAFFODIL GENERAL CONTRACTING, INC.,

Third-Party Defendants.

-----X
DAFFODIL GENERAL CONTRACTING, INC.,

Second Third-Party Plaintiff,

-against-

BONG YU PROFESSIONAL CORPORATION,

Second Third-Party Defendants.

-----X

The following papers numbered on this motion:

NYSCEF Doc Numbers

| | |
|---|--|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | 216-217, 255-258, 291-293, 327, 351-352 |
| Answering Affidavit (Affirmation) _____ | 296-297, 299, 355, 277, 304, 309-310, 300-301, 318-319, 353, 356-357, 360-361 |
| Reply Affidavit (Affirmation) _____ | 284, 303, 307, 362, 363 |
| Supplemental Affidavit (Affirmation) _____ | |
| Pleadings – Exhibits _____ | 218-238, 259-275, 305, 311-317, 294, 320-326, 328-350, 358 |
| Stipulations – Minutes _____ | |
| Filed Papers _____ | |

This action arises from a construction accident that occurred on July 25, 2014 at 158 Crosby Street, New York, NY 10012 (the Premises).

Defendant MOKLAM ENTERPRISES, INC. (MOKLAM) owned the Premises. Defendant YUCO MANAGEMENT, INC. (YUCO MANAGEMENT) was the property manager for the Premises.

Defendant MOKLAM contracted Defendant/Third-Party Plaintiff YUCO CONSTRUCTION CORP. (YUCO CONSTRUCTION) for masonry work at the Premises. Defendant YUCO CONSTRUCTION in turn contracted Third-Party Defendant/Second Third-Party Plaintiff DAFFODIL GENERAL CONTRACTING, INC. (DAFFODIL) to point and repair the façade of the Premises.

Defendant DAFFODIL was general contractor for the project at the Premises, and employed Plaintiffs FARHADUR RAHMAN and MOHAMMED BHUIYAN .

DAFFODIL’s contract was subsequently assigned to Defendant/Third-Party Plaintiff YUCO BUILDERS, LLC. (YUCO BUILDERS).

Defendant DAFFODIL retained Defendant NAVICO B&S CONSTRUCTION CORP (NAVICO) to erect a sidewalk shed/bridge for DAFFODIL’s use during the project at the Premises.

At the time of their accident, Plaintiffs were lowering a stone cutting machine from the sidewalk shed to the bed of a truck using a rope tied to the machine. As the Plaintiffs were lowering the machine, they were pulled over the side of the shed and fell onto the truck along with the machine and one of the sidewalk shed's guardrail panels that was detached. The truck was owned by Mohammed K. Alam, the owner of Defendant DAFFODIL and Plaintiffs' supervisor.

Plaintiffs' complaint alleges five causes of action: Labor Law § 240(1), Labor Law § 241(6), Labor Law § 200 and common law negligence, and loss of consortium. Plaintiff BHUIYAN moves for partial summary judgment against Defendants MOKLAM, YUCO BUILDERS, YUCO CONSTRUCTION, YUCO MANAGEMENT, and NAVICO on his claim pursuant to Labor Law § 240(1). Plaintiff RAHMAN has settled out of the case.

Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-move to dismiss Plaintiffs' complaint and all third-party claims, counter-claims, and cross-claims as against them.

Defendant NAVICO moves to dismiss Plaintiffs' claims and all cross-claims as against it.

Defendants MOKLAM and YUCO MANAGEMENT cross-move to dismiss Plaintiffs' claims and any and all cross-claims as against them. Defendants MOKLAM and YUCO MANAGEMENT also move for summary judgment against Defendants YUCO CONSTRUCTION, YUCO BUILDERS, and DAFFODIL for contractual indemnification.

Labor Law § 240(1)

Plaintiff BHUIYAN moves for summary judgment against Defendants MOKLAM, YUCO BUILDERS, YUCO CONSTRUCTION, YUCO MANAGEMENT, and NAVICO on his claims

pursuant to Labor Law § 240(1) arguing that his accident occurred because the safety device that Defendants had provided, the sidewalk shed panel, collapsed causing Plaintiff to fall.

Defendants oppose and cross-move to dismiss Plaintiff's Labor Law § 240(1) claim as against them, arguing that Plaintiff was the sole proximate cause of the accident and allege that he removed a panel of the sidewalk shed to lower the machine rather than lowering the machine through an opening in the deck of the shed and that he was not wearing his safety harness at the time of the accident.

On the day of the accident, Plaintiff had finished his daily work on the electric scaffold and lowered the scaffold to the sidewalk shed surface. He detached his lifeline, removed his harness, and stepped off the scaffold onto the deck of the sidewalk shed. Plaintiff was awaiting Alam, his supervisor, who had informed him that he would need to help in lowering a stone cutting machine from the sidewalk shed.

The safety device at issue here is the sidewalk shed guard-rail, not the safety harness. Plaintiffs were not required to wear a safety harness when they were on the sidewalk shed. They were required to wear the harness while on the scaffold. Further, Mohan Singh of Defendant NAVICO testified that the plywood panels on the sidewalk shed were guard-rails meant to keep people from falling.

Although Defendants have argued that there is a question of fact as to whether Plaintiffs removed a plywood panel, they have presented no admissible evidence to support that contention. The only evidence offered is a hearsay statement by Singh of NAVCO that he was told by Alam that Plaintiff removed a panel. However, Alam never stated in his deposition (or affidavit) that Plaintiffs removed a panel.

What Alam did testify to was that he did not instruct Plaintiffs to lower the saw over the front edge of the sidewalk shed and that he had expected the Plaintiffs to lower the machine through an opening in the deck of the sidewalk shed. He testified that material, tools and debris were brought up or down using the opening in the deck of the sidewalk shed and that the saw had been brought on top of the sidewalk shed through the opening in the deck.

Here, there are questions of fact as to whether there was an opening in the deck of the sidewalk shed which would have allowed Plaintiffs to lower the machine without putting it over the side of the panel and whether the rope and shed constituted adequate safety devices for lowering the machine.

However, Defendant YUCO MANAGEMENT and Defendant NAVICO correctly argue that they are not proper Defendants to Plaintiff's Labor Law § 240(1) claim as they neither had the authority to supervise or control the work site or Plaintiff's work.

YUCO MANAGEMENT was MOKLAM's managing agent for the building but did not contract for or oversee the pointing and façade repair. Its role in managing day-to-day building functions was outside the scope of the construction project and therefore it is not a proper Labor Law § 240(1) Defendant.

Defendant NAVICO as a subcontractor of DAFFODIL, who simply erected the sidewalk shed and did not have authority to supervise or control Plaintiffs' work, was not an agent of the owner or general contractor. After supplying and erecting the sidewalk shed, Defendant NAVICO was no longer on the Premises and, pursuant to the contract, Defendant DAFFODIL was required to maintain the sidewalk shed. Defendant NAVICO was not at the Premises on the day of Plaintiff's accident. Therefore, Defendant NAVICO did not control or supervise Plaintiff's work and is not a proper Labor Law § 240(1) Defendant (*see Kehoe v Segal*, 272 AD2d 583 [2d Dept 2000]).

Defendant MOKLAM as owner of the premises is a proper Labor Law § 240(1) Defendant.

“To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240(1) and 241(6), there must be a showing that it had the authority to supervise and control the work (*Van Blerkom v. America Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]). “The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right” (*id.*, quoting *Bakhtadze v. Riddle*, 56 AD3d 589, 590 [2d Dept 2008]). “Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor (*Van Blerkom v. America Painting, LLC*, 120 AD3d at 661-662). “The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed” (*Lopes v. Interstate Concrete*, 293 AD2d 579, 580 [2d Dept 2002], quoting *Everitt v. Nozkowski*, 285 AD2d 442, 443-444]).

Based on the foregoing, Plaintiff’s motion for summary judgment as to Labor Law § 240(1) must be denied; Defendants’ motions to dismiss the Labor Law § 240(1) claim must be denied except that Defendant YUCO MANAGEMENT and DEFENDANT NAVICO are entitled to have the Labor Law § 240(1) claim dismissed as against them only.

Labor Law § 241(6)

Defendants YUCO CONSTRUCTION and YUCO BUILDERS, Defendants MOKLAM and YUCO MANAGEMENT, and Defendant NAVICO cross-move to dismiss Plaintiff’s claim pursuant to Labor Law § 241(6) claim. Plaintiff does not oppose.

Labor Law § 200 and Common Law Negligence

Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-move to dismiss Plaintiff's claim pursuant to Labor Law § 200 and common law negligence.

Defendant NAVICO cross-moves to dismiss Plaintiff's claim pursuant to Labor Law § 200 and common law negligence.

Defendants MOKLAM and YUCO MANAGEMENT cross-move to dismiss Plaintiff's claim pursuant to Labor Law § 200 and common law negligence.

“Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work” (*Zukowski v. Powell Cove Estates Home Owners Association*, 187 AD3d 1099, 1101 [2d Dept 2020], quoting *Lombardi v. Stout*, 80 NY2d 290, 294 [1992]). Unlike sections 240(1) and 241(6), section 200 does not impose vicarious liability on owners and owner's agents.

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed.

Where the manner of work is at issue, “no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed” (*Dennis v. City of New York*, 304 AD2d 611, 612 [2d Dept 2003].) Rather, when a claim is made due to alleged defects or dangers in the methods or materials of the work, it must be shown that the party to be charged has the authority to supervise or control the performance of the work. (*Zukowski v. Powell Cove Estates Home Owners Association*, 187 AD3d 1099 [2d Dept 2020]; *Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

Plaintiff's accident arose not from a dangerous condition at the premises or on the sidewalk shed but by the means and methods employed. Plaintiff does not demonstrate that any

of the moving Defendants controlled or supervised Plaintiff's work. Plaintiff's own testimony is that all instructions and directions came from Alam of DAFFODIL.

As the moving Defendants did not control or supervise Plaintiff's work, they cannot be held liable either under Labor Law § 200 or a claim of negligence and their cross-motions to dismiss Plaintiff's claim pursuant to Labor Law § 200 and common law negligence must be granted.

Defendants YUCO CONSTRUCTION and YUCO BUILDERS claims for Indemnification

Contractual indemnification against Defendant DAFFODIL

Defendant DAFFODIL does not oppose this portion of Defendants YUCO CONSTRUCTION and YUCO BUILDERS motion because Defendant DAFFODIL's carrier has already accepted the tender demands and agreed to indemnify YUCO CONSTRUCTION, YUCO BUILDERS, MOKLAM and YUCO MANAGEMENT pursuant to its contractual indemnification obligations. Therefore, Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-motion for contractual indemnification against Defendant DAFFODIL is GRANTED only to the extent that any award exceeds DAFFODIL's policy limits.

Common law indemnification against Defendant NAVICO

Defendants YUCO CONSTRUCTION and YUCO BUILDERS move for summary judgment on their claim for common law indemnification against Defendant NAVICO. Defendants YUCO CONSTRUCTION and YUCO BUILDERS motion must be denied because, as discussed above, NAVICO was not negligent as it did not control or supervise Plaintiff's work.

Defendants MOKLAM and YUCO MANAGEMENT's claims for Indemnification**Contractual Indemnification against Defendants YUCO BUILDERS and YUCO CONSTRUCTION**

Defendants MOKLAM and YUCO MANAGEMENT's cross-motion as to contractual indemnification against Defendants YUCO CONSTRUCTION and YUCO BUILDERS must be denied as they did not append the contract between MOKLAM and YUCO CONSTRUCTION or the subsequent assignment of that contract from YUCO CONSTRUCTION to YUCO BUILDERS.

Contractual Indemnification against Defendant DAFFODIL

Defendants MOKLAM and YUCO MANAGEMENT's cross-motion as to contractual indemnification against Defendant DAFFODIL must be denied as they never plead a claim for contractual indemnification against DAFFODIL. In any event, Defendant DAFFODIL's carrier has already accepted the tender demands and agreed to indemnify them up to DAFFODIL's policy limits.

Motions to Dismiss Cross-Claims for Common Law Indemnification

As discussed above, Defendants MOKLAM, YUCO MANAGEMENT, YUCO CONSTRUCTION, YUCO BUILDERS and NAVICO did not supervise or control Plaintiffs and thus were not negligent. Therefore, the cross claims against these Defendants for common law indemnification and contribution must be dismissed.

WHEREFORE, it is ORDERED that Plaintiff's motion for summary judgment as to Labor Law § 240(1) is DENIED; and it is further

ORDERED that Defendants MOKLAM and YUCO MANAGEMENT's cross-motion to dismiss Plaintiffs Labor Law § 240(1) claim as against them is DENIED as to Defendant MOKLAM and GRANTED as to Defendant YUCO MANAGMENT; and it is further

ORDERED that Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-motion to dismiss Plaintiffs Labor Law § 240(1) claim as against them is DENIED; and it is further

ORDERED that Defendant NAVICO's cross-motion to dismiss Plaintiffs Labor Law §240(1) claim as against it is GRANTED; and it is further

ORDERED that that Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-motion to dismiss Plaintiffs Labor Law § 241(6) claim as against them is GRANTED; and it is further

ORDERED that Defendant NAVICO's cross-motion to dismiss Plaintiffs Labor Law §241(6) claim as against it is GRANTED; and it is further

ORDERED that Defendants MOKLAM and YUCO MANAGEMENT's cross-motion to dismiss Plaintiffs Labor Law § 241(6) claim as against them is GRANTED; and it is further

ORDERED that that Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-motion to dismiss Plaintiffs Labor Law § 200 and common law negligence claim as against them is GRANTED; and it is further

ORDERED that that Defendant NAVICO's cross-motion to dismiss Plaintiffs Labor Law § 200 and common law negligence claim as against it is GRANTED; and it is further

ORDERED that Defendants MOKLAM and YUCO MANAGEMENT's cross-motion to dismiss Plaintiffs Labor Law § 200 and common law negligence claim as against them is GRANTED; and it is further

ORDERED that Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-motion for contractual indemnification against Defendant DAFFODIL is GRANTED only to the extent that any award exceeds DAFFODIL's policy limits; and it is further

ORDERED that Defendants YUCO CONSTRUCTION and YUCO BUILDERS cross-motion for common law indemnification against Defendant NAVICO is DENIED; and it is further

ORDERED that Defendants MOKLAM and YUCO MANAGEMENT's cross-motion for contractual indemnification against Defendants YUCO CONSTRUCTION and YUCO BUILDERS is DENIED; and it is further

ORDERED that Defendants MOKLAM and YUCO MANAGEMENT's cross-motion for contractual indemnification against Defendant DAFFODIL is DENIED; and it is further

ORDERED that Defendants MOKLAM's and YUCO MANAGEMENT's cross-motion to dismiss the cross-claims for common law indemnification and contribution against them is GRANTED; and it is further

ORDERED that Defendants YUCO CONSTRUCTION's and YUCO BUILDER's cross-motion to dismiss the cross-claims for common law indemnification and contribution against them is GRANTED; and it is further

ORDERED that Defendant NAVICO's cross-motion to dismiss the cross claims for common law indemnification and contribution against them is GRANTED.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.