Moscinski v Quadrum 38, LLC
2022 NY Slip Op 33378(U)
October 7, 2022
Supreme Court, New York County
Docket Number: Index No. 160030/2019
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

---X

PAWEL MOSCINSKI,

Plaintiff,

- v -

QUADRUM 38, LLC, LEEDING BUILDERS GROUP, LLC,

Defendant.

---X

INDEX NO. 160030/2019

MOTION DATE 09/15/2022, 09/15/2022

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

QUADRUM 38, LLC, LEEDING BUILDERS GROUP, LLC

Plaintiff,

-against-

FORWARD MECHANICAL CORP.

Defendant.

---X

Third-Party
Index No. 596073/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 73, 74, 75, 76, 77, 78, 86, 87, 88

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries he alleges were incurred when he was struck by a fire extinguisher at a construction site in the course of his employment. Plaintiff asserts causes of action for violations of Labor Law §§ 200, 240(1), and 241(6) against defendants/third-party plaintiffs Quadrum 38, LLC (Quadrum), and Leeding Builders Group, LLC (Leeding).

On December 10, 2019, Quadrum and Leeding commenced a third-party action against third-party defendant Forward Mechanical Corp. (Forward) asserting causes of action for common law indemnification and contribution, contractual indemnification, and failure to procure insurance.

On March 10, 2022, the Court granted plaintiff's motion to impose spoilation sanctions on defendants/third-party plaintiffs, precluding them from offering any evidence at trial as to the condition of the fire extinguisher and stand that caused plaintiff's accident and granting plaintiff a negative inference charge at trial as to the condition of the fire extinguisher and the stand.

PENDING MOTIONS

On July 25, 2022, plaintiff moved for an order granting him summary judgment pursuant to CPLR 3212, Labor Law § 200, and Labor Law § 241(6) on the issue of liability against defendants/third-party plaintiffs.[1]

On July 28, 2022, third-party defendant Forward Mechanical Corp. (Forward) moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing the third-party action.

The motions are consolidated herein for determination as set forth below.

ALLEGED FACTS

Based on plaintiff and Forward's respective statements of material fact, and defendants/third-party plaintiffs' responses thereto, the following facts are undisputed:

1. Plaintiff, an employee of Forward, was working as a plumber/mechanic on the seventh floor of a construction project located at 351 West 38th Street in Manhattan (Premises) when at approximately 11:00 a.m., he was injured by a fire extinguisher that fell on his left foot.

2. Quadrum is the owner of the Premises; Leeding was the general contractor for the project.

[1] Plaintiff's Labor Law § 240(1) claim is not subject to this motion

3. During construction, there were various methods in which fire extinguishers were kept in the building during construction. The fire extinguisher at issue was hanging on a 2 x 4, which was embedded in a bucket filled with concrete.

4. At the time of his accident, Plaintiff was pushing a cart, moving between rooms, when while walking by the subject fire extinguisher stand, the fire extinguisher fell on his left big toe.

5. Plaintiff's co-worker Jerzy Cylo (Cylo) was the only other person with plaintiff at the time of the accident, but as he was walking in front of plaintiff at the time, he did not see the accident occur.

6. Christopher Gleckler (Gleckler), a superintendent for Leeding and fire safety manager for the project, was responsible for selecting the location for fire extinguishers at the construction site and inspecting them.

The exact cause of the accident is disputed. Plaintiff contends that he did not contact the fire extinguisher or stand prior to the accident, citing deposition testimony of Cylo and plaintiff. Defendants/third-party plaintiffs contend that Plaintiff struck the fire extinguisher or stand, causing it to fall, relying on several accident reports generated after the accident and the testimony of plaintiff's foreman, who testified that plaintiff told him after the accident that he hit the stand.

Additionally, Forward's expert report alleges that the fire extinguisher stand was not constructed in a manner conforming to applicable codes, and that whether plaintiff contacted the stand is a moot point as incidental contact between elements in this space should be anticipated and accounted for. Defendants/third-party plaintiffs submit their own expert affidavit in opposition, which disputes Forward's expert's conclusions and alleges that the accident was due solely to plaintiff's actions.

DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the

absence of any triable issues of fact. CPLR §3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Plaintiff's Motion for Summary Judgment on His Labor Law §241(6) Claim Is Denied, And the Claim Is Dismissed Sua Sponte

Labor Law §241 sets forth in relevant part that:

> All contractors and owners and their agents… when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements… [subsection] (6) All 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors '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." *Rizzuto v LA Wenger Contr. Co.*, 91 NY2d 343, 348 (1998); *see also, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 (1978). The owners and contractors' duty under Labor Law § 241(6) is nondelegable, "regardless

of their control or supervision of the jobsite." *Whalen v City of New York*, 270 AD2d 340, 342 (2d Dept 2000); *see also Allen*, 44 NY2d at 300.

To support a cause of action pursuant to Labor Law §241(6), plaintiff must demonstrate that a specific, applicable Industrial Code was violated, and the violation was the proximate cause of his or her injuries. *Cappabianca v Skanska USA Building Inc.*, 99 AD3d 139 (1st Dept 2012); *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 (2d Dept 2006).

Plaintiff asserts violations of Industrial Code §§ 23-1.7(e)(1), 23-1.7(e)(2), and 23-1.11.

Industrial Code § 23-1.7(e) states:

(e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

As plaintiff's injury here was caused by a falling object, rather than a tripping hazard, Industrial Code § 23-1.7(e) is inapplicable. *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 635 (2d Dept 2014) (*section inapplicable where heavy stone block toppled off a pallet and struck plaintiff's foot*); *Urbano v Rockefeller Center North, Inc.*, 91 AD3d 549 (1st Dept 2012) (*section inapplicable where plaintiff was struck by piece of masonry that broke apart while he was placing it in a disposal container; presence of debris in work area irrelevant as he did not slip or trip on it*).

Industrial Code § 23-1.11, titled "Lumber and nail fastenings" states:

(a) The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used. (b) The lumber dimensions specified in this Part (rule) are nominal or trade size except as otherwise specifically stated with the words "full size" and except in the case of ladders. (c) All nails shall be driven full length and shall be of

the proper size, type, length and number to provide the required strength at all joints. Only double-headed or screw-type nails shall be used in the construction of scaffolds.

Industrial Code § 23-1.11 "applies only to a device required to be constructed by another provision of Part 23." *DePaul v N.Y. Brush LLC*, 120 AD3d 1046 (1st Dept 2014). Defendants/third-party plaintiffs assert in opposition that Part 23 makes no reference to fire extinguisher stands, and plaintiff fails to address the assertion in reply. Thus, Industrial Code § 23-1.11 is also inapplicable here.

As plaintiff fails to cite an applicable provision of the Industrial Code that was violated, he cannot sustain his *prima facie* burden to support summary judgment on his Labor Law §241 claim. Additionally, "the Supreme Court has the power to award summary judgment to a nonmoving party, predicated upon a motion for that relief by another party." (*Rainbow Hill Homeowners Ass'n, Inc. v Gigante, Inc.*, 32 AD3d 533 (2d Dept 2006). As each of the Industrial Code provisions cited by plaintiff are inapplicable, his Labor Law §241 claim is dismissed.

Plaintiff's Motion for Summary Judgment As To Liability on His Labor Law §200 Claim Is Granted

The duty to provide a safe worksite imposed upon owners, general contractor and their agents are based upon supervision and control. "The purpose of the [Labor Law] is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor instead of the workers themselves." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). Labor Law § 200 is the codification of the common-law duty of owners, general contractors and their agents to protect the health and safety "of all persons employed therein or lawfully frequenting such places." *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 299 (1978). An implicit precondition of

this duty "is that the party charged with that responsibility has the authority to control the activity bringing about the injury." *Russin v Picciano & Son*, 54 NY2d 311, 317 (1981).

Labor Law § 200 applies where workers are injured as a result of dangerous or defective premises conditions at a worksite or where a worker is injured due to the way the work is performed. When a premises condition is at issue, the owner or general contractor may be held liable for a violation of the statute if they created the condition that caused the accident or had actual or constructive notice of the dangerous condition. *See Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.*, 104 AD3d 446 (1st Dept 2013); *Singh v Black Diamonds LLC*, 24 AD3d 138 (1st Dept 2005).

It is uncontroverted that defendants/third-party plaintiffs created the condition that caused plaintiffs accident, and that they had actual or constructive notice of the condition. Plaintiff relies on Forward's expert report to establish that the fire extinguisher stand was a dangerous and defective condition. Defendants/third-party plaintiffs contend that the fire extinguisher stand was not dangerous or defective, arguing that their expert's affidavit in opposition establishes a triable issue of fact. However, as defendants/third-party plaintiffs are precluded from offering evidence as to the condition of the fire extinguisher, their expert affidavit is insufficient to create a triable issue of fact as to whether the fire extinguisher stand was dangerous and defective.

Defendants/third-party plaintiffs additionally contend that there remain issues of fact as to whether they proximately caused plaintiff's injuries, as there is conflicting evidence as to whether plaintiff collided with the fire extinguisher stand. While the accident reports and testimony of plaintiff's foreman are sufficient to raise a triable issue of fact as to plaintiff's comparative negligence, "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of

his or her own comparative fault." *Rodriguez v City of New York*, 31 NY3d 312, 324-25 (2018); *see Benedetto v Hyatt Corp.*, 203 AD3d 505 (1st Dept 2022). Thus, plaintiff is entitled to partial summary judgment on his Labor Law § 200 claim.

Forward's Motion to Dismiss the Third-Party Complaint Is Granted in Part and Denied in Part

Defendants/third-party plaintiffs contend that Forward's motion is untimely, as it was filed three days after the court ordered deadline to file dispositive motions after the court granted it two extensions, without excuse. Forward states in its reply papers that this was due to a calendar mistake by its counsel, who was recovering from an illness at the time. As Forward's delay was minimal, and defendants/third-party plaintiffs fail to demonstrate prejudice, the Court will consider the motion on the merits.

Absent opposition by defendants/third-party plaintiffs to the portion of Forward's motion seeking to dismiss their third-party claims for common law indemnity and contribution and for failure to procure insurance, those portions of their motion are granted.

As there remain triable issues of fact as to plaintiff's comparative negligence, Forward's motion to dismiss defendants/third party plaintiffs' claim for contractual indemnity is denied, as plaintiff's negligence may be imputed on his employer for purposes of contractual indemnity. *Mercado v Caithness Long Island LLC*, 104 AD3d 576, 578 (1st Dept 2013); *Guiga v JLS Constr. Co.*, 255 AD2d 244 (1st Dept 1998).

CONCLUSION

Wherefore it is hereby:

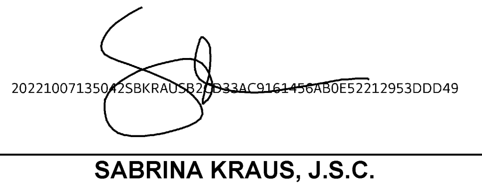
ORDERED that plaintiff's motion for summary judgment as to the issue of liability is granted as to plaintiff's Labor Law § 200 claim, and is otherwise denied; and it is further

ORDERED that plaintiff's Labor Law § 241(6) claim is severed and dismissed, and the balance of the claims are continued; and it is further

ORDERED that defendant's motion for summary judgment dismissing the third-party complaint is granted, to the extent that the third-party claims against it for common law indemnification and contribution and for failure to procure insurance are severed and dismissed, and is otherwise denied; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].



10/7/2022						
DATE				SABRINA KRAUS, J.S.C.		
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE