Dul v 63rd & 3rd NYC LLC
2022 NY Slip Op 33472(U)
October 12, 2022
Supreme Court, New York County
Docket Number: Index No. 158312-2018
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CZESLAW DUL

INDEX NO. 158312-2018

MOT. DATE

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MOT. SEQ. NO. 4&5

63rd & 3rd NYC LLC et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is an action for personal injuries sustained at a construction site. There are two summary judgment motions pending, which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 4, plaintiff moves for summary judgment on the issue of liability as to his Labor Law §§ 200, 240[1] and 241[6] claim against defendants 63rd & 3rd NYC LLC ("63rd") and Hudson Meridian Construction Group LLC ("Hudson" and together with 63rd herein, "defendants"). 63rd and Hudson oppose the motion. In motion sequence 5, third-party defendant Ecosafety Consultant Inc. ("Eco") moves for summary judgment dismissing all claims against it. The third-party plaintiffs oppose Eco's motion. Issue has been joined and both motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff was injured on March 8, 2018 at a construction site located at 1059 3rd Avenue, New York, New York (the "premises") in the E-1 staircase on the basement/cellar floor. On the date of the accident, the premises was owned by 63rd, which in turn retained Hudson as the general contractor for the subject construction project. Hudson then retained Trident General Contracting LLC ("Trident'), as a subcontractor to do excavation and concrete work at the premises. Plaintiff's employer, RSC Group LLC ("RSC"), was subcontracted by Hudson to perform mason work. 63rd also hired Iverlad USA Management, LLC ("Inverlad") to manage, maintain and supervise the premises. Finally, Eco was hired by Hudson to provide site safety management services at the site.

At the time of his accident, plaintiff was working in the E-1 staircase laying concrete masonry unit ("CMU") within that area. Meanwhile, another employee named Bertilio Nunez, who worked for Trident, dropped a metal gorilla clamp which struck plaintiff's left hand causing personal injuries to plaintiff. Before he dropped the clamp, Nunez was using the E-1 staircase, a scissor staircase with gaps between

Dated: 10/12/22

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

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

steps, to access the upper floor from the 3rd floor and was hand-carrying a few clamps. It is undisputed that there was no netting or other overhead safety devices installed to prevent falling objects within the E-1 staircase.

Plaintiff reported his injury in a form as follows: "I was laying CMU at staircase and piece of metal clamp (about 20lb) felt (sic) from above (3 floor)". Hudson produced an incident report that contains a statement with corrective action about the incident as well as a handwritten statement by Nunez. In a sworn affidavit dated August 7, 2019, Nunez, claims that after he dropped the clamp, he went down the stairs "to see if anyone was hurt." He further claims that "[t]here was nobody down there so [he] picked up the clamp and brought it back upstairs and placed it with the other clamps." Later that day, Nunez states that a site supervisor informed him that the clamp that fell had hurt a mason worker. Nunez was told to bring the clamp back downstairs, but was unsure which one had fallen, so brought one of the clamps he had been carrying. Nunez then wrote a statement about what happened. The incident reports are consistent with plaintiff's and Nunez' version of events.

DISCUSSION

The court will first consider plaintiff's motion. 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]).

Plaintiff argues that he is entitled to summary judgment because he was struck by a falling object and the accident was caused by the absence of overhead protection. Thus, plaintiff seeks summary judgment on his Labor Law § 240[1] claim, Labor Law § 241[6] claim predicated upon a violation of Industrial Code § 23-1.7(a) entitled "Overhead hazards" as well as Labor Law § 200. 63rd and Hudson argue that plaintiff has not met his burden on this motion because "there is insufficient admissible proof of how that clamp managed to descend four floors to strike plaintiff, where he was working on the stairs in the same staircase." Defendants further argue that plaintiff has not shown that the absence of safety devices was a substantial factor in his accident. As for Section 241[6], defendants argue that plaintiff has not shown that he was "normally exposed" to falling objects. Finally, they maintain that plaintiff has not shown that the defendants exercised supervisory control in order to obtain summary judgment on the Section 200 and common law negligence claim.

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]).

Contrary to defendants' contention, plaintiff has met his prima facie burden in that he has established that he was a protected worker struck by a falling object and that no overhead protection was provided to him which would have prevented his accident. In turn, defendants have failed to raise a triable issue of fact. They argue that there is insufficient proof as to how the clamp fell from approximately the third level to the area where plaintiff was working. The court disagrees. Nunez has repeatedly stated both on the date of the accident and in his sworn affidavit that he dropped one of the clamps that he was carrying and that afterwards he retrieved it from the area where plaintiff was working. Meanwhile, plaintiff has testified under oath that he was struck by a clamp and did in fact receive medical attention after the accident.

This testimony and proof is sufficient to demonstrate that the accident occurred as plaintiff testified. Moreover, there are no triable issues of fact as to the sufficiency of safety devices designed to protect workers inside the staircase since there is no dispute that none were provided. There was no overhead protection such as netting in the staircase and Nunez was not provided with a means to safely secure and transport the clamps which could reasonable fall down the staircase through the railing and strike workers below. Thus, "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Narducci v. Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). Accordingly, plaintiff's motion for summary judgment on the issue of defendants' liability on the Labor Law § 240[1] claim is granted and defendant's motion on this claim is 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]).

Industrial Code § 23-1.7(a) states in pertinent part as follows:

> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

Plaintiff has established a prima facie case on his Section 241[6] claim predicated upon Industrial Code § 23-1.7(a)(1). Thereis no dispute that plaintiff was a worker installing CMU in the stairwell and there was no overhead protection. The only element which defendants can seriously attempt to raise a dispute with respect to is whether the stairwell was normally exposed to falling material or objects. However, there is no dispute that workers were working on the floors above where plaintiff was working and that workers were transporting materials via the staircase from one floor to another. Therefore, the court finds that plaintiff has established that the staircase was normally exposed to falling material or objects. Since defendants have failed to raise a triable issue of fact on this claim as well, plaintiff's motion on the Section 241[6] claim is also granted.

Section 200 and common law negligence

Finally, the court considers plaintiff's Labor Law § 200 claim. Section 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 Asoc., 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]).

On this claim, the court agrees with the defendants that plaintiff has not met his burden on this motion. The accident occurred not because of a dangerous or defective premises condition but because of the manner or means in which the work was performed. Therefore, plaintiff must show that the defendants exercised supervisory control over the work performed. Having failed to do so, plaintiff's motion on the Section 200 and common law negligence claim must be denied.

Eco's motion

The court now turns to Eco's motion. According to Hudson's contract with Eco, Eco scope of work was as follows:

> Description of services provided – as per DOB ["Department of Buildings"] - BEST rules and Chapter 33 of NYC Buildings code." Ex. A, p. 6. Pursuant to Chapter 33 of the NYC Buildings Code, Section 3308.9.3, Ecosafety's role is limited to inspection and a written record of such inspection: "Where the job requires a site safety manager or coordinator in accordance with Section 3310, the inspection shall be performed by the site safety manager or coordinator, and a written record of such inspection maintained as part of the site safety log.

The Eco contract further provides in relevant part:

> EcoSafety Consultants will diligently perform the duties of the Site Safety Manager and advise Contractor of all subcontractors/trades who fail to comply with the safety program for this project. EcoSafety Consultants assumes no responsi-

> bility for management or control of the safety practices of the "Contractor" or for the implementation of proposed recommendations.
>
> Neither the making of consultations or reports constitutes any warrant by Eco-Safety Consultants that the workplace, operations, work environment, processes, machinery, equipment, or work tasks are safe or healthful or in compliance with any regulatory requirements. "Contractor" acknowledges that EcoSafety Consultants has no control or supervision over the means or methods utilized by "Contractor" or any subcontractors, any general contractor, any construction manager or owner at the work site to maintain a safe work site or to correct any safety hazards. EcoSafety Consultants has no STOP WORK ORDER Authority. In case of imminent danger, EcoSafety Consultants will call DOB to investigate hazardous situation.

Finally, the Eco contract contains the following indemnity provisions:

> To the fullest extent permitted by law, Subcontractor will defend, indemnify, and hold harmless HM and Owner, their officers, directors, agents and employees from and against any and all claims, liens, judgments, damages, losses and expenses including reasonable attorneys' fees and legal costs, arising in whole or in part and in any manner from the act, failure to act, omission, breach or default by Subcontractor and/or its officers, directors, agents, employees. Sub-subcontractors and suppliers in connection with the performance of this Agreement.
>
> "Contractor" agrees that unless and until EcoSafety Consultants is adjudicated negligent, "Contractor" agrees to hold EcoSafety Consultants (and its employees and/or agents) harmless from and against, as well as defend and indemnify Eco-Safety Consultants for, any and all claims, disputes, suits, losses, liabilities, and /or costs including, but not limited to, attorneys 'fees) that result in any alleged and/or actual damages to any person or property that occur at "Contractor" worksites. It is expressly understood that the obligations hereunder shall survive the term of this agreement."

Third-Party Plaintiffs allege six causes of action against Eco: (1) carelessness, recklessness, and/or negligence of Eco; (2) failure to exercise care and due diligence at the location of the incident; (3) vicarious liability; (4) contractual and common law indemnity and contribution; (5) failure to procure insurance; and (6) failure to procure insurance. Eco argues that it is entitled to summary judgment dismissing these claims because there is no evidence that it was negligent or that its alleged negligence caused plaintiff's accident. It further maintains that the contract-based claims by 63rd, Inverlad and Trident must be dismissed because they did not have a contract with Eco. As for their common-law claims, Eco maintains that the lack of supervision or control warrants dismissal of same. Finally, Eco maintains that Hudson's claims fail because neither indemnity provision was triggered and Eco maintained the required insurance coverage. Meanwhile, counsel for the third-party plaintiffs contends that Eco's motion should be denied because "the terms of the Contract are ambiguous and present material questions of fact…"

Eco has established, based upon the subject contract and the sworn affidavit of its principal, that its role at the project was purely advisory and it did not supervise or control plaintiff or any other workers at the site (*see i.e. Doherty v. City of New York*, 16 AD3d 124 [1st Dept 2005]). Further, there is no dispute on this record that Eco did not owe plaintiff a duty and that its acts or inactions were not a proximate cause of plaintiff's accident. Eco has also established that there was no contract between it and 63rd, Inverlad or Trident, warranting dismissal of the latter's contract-based claims against Eco. And Eco has demonstrated, without opposition, that it did not breach its contract with Hudson by failing to procure insurance.

As for Hudson's claim for contractual indemnification against Eco, the court rejects the argument that the subject indemnity provision is ambiguous. Both provisions can be read together to provide that Eco will indemnify Hudson in the event it is held negligent and for claims arising from its work. Since the subject provision is not reasonably susceptible to more than one meaning, there is no ambiguity (*US Oncology, Inc. v. Wilmington Trust FSB*, 102 AD3d 401 [1st Dept 2013]). The inconsistency arising from a situation where Eco was not negligent, thus obligating Hudson to hold Eco harmless under the contract, but also where the claim arose from Eco's work is not presented here. Therefore, the court need not pass on this issue.

"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]). Eco has established that plaintiff's accident did not arise in whole or in part from Eco's acts, failure to act, omissions, breach or default in connection with the performance of its contract with Hudson. Nunez's act of dropping the clamp down the staircase was the proximate cause of plaintiff's accident, and Eco's advisory duty as defined by its scope of work is too attenuated to be a contributing factor to plaintiff's accident. Otherwise, contrary to the third-party plaintiffs' contention, Eco has shown that it fulfilled its duties to observe and advise on construction safety issues on a daily basis. This duty was not, as the third-party plaintiffs would implicitly have this court hold, a promise by Eco to assume Hudson's non-delegable duties under the Labor Law. In turn, Hudson has failed to raise a triable issue of fact as to whether plaintiff's accident arose from Eco's work. Accordingly, Eco's motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted summary judgment on the issue of 63rd and Hudson's liability for violation of Labor Law §§ 240[1] and 241[6]; and it is further

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

ORDERED that Eco's motion for summary judgment is granted in its entirety, the third party complaint is severed and dismissed and the Clerk is directed to enter judgment accordingly.

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: 10/12/22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.