

<b>Hasenzahl v 44th St. Dev. LLC</b>
2022 NY Slip Op 33482(U)
October 13, 2022
Supreme Court, New York County
Docket Number: Index No. 161994-2015
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

CHRIS HASENZAHL

INDEX NO. 161994-2015

MOT. DATE

- v -

MOT. SEQ. NO. 3-5

44TH STREET DEVELOPMENT LLC et al

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).

This is an action for personal injuries sustained on a construction site. There are three motions pending which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 3, plaintiff moves for summary judgment on the issue of defendants' liability with respect to his Labor Law Section 241[6] claim. Defendants/third-party plaintiffs 44th Street Development LLC ("44th Street") and Gotham Construction Company, LLC ("Gotham" and together with 44th Street, "defendants") oppose the motion.

In motion sequence 4, Gateway Electric Group, LLC ("Gateway") moves to renew its prior motion for summary judgment dismissing the third-party complaint against it. Defendants oppose that motion as well.

Finally, in motion sequence 5, defendants move for summary judgment dismissing plaintiff's complaint as well as on its claims against Gateway for contractual indemnity and breach of contract for failure to procure insurance. Gateway opposes defendants' motion. By letter dated September 22, 2022, defendants oppose the portion of their motion against Gateway for breach of contract.

Issue has been joined as to plaintiff, defendants and Gateway and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The following facts are relevant as to plaintiff's and defendants' motion as to plaintiff's claims. Plaintiff was injured on April 16, 2013 while working at a construction project located at 550 West 45th Street, New York, New York (the "premises"). At all relevant times, 44th Street owned the premises and Gotham was the general contractor for the construction project where plaintiff worked. The project involved the construction of two buildings separated by a courtyard.

Dated: 10.13.22

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

On the date of his accident, plaintiff was working as an electrician for Gateway, the electrical sub-contractor at the project. At his deposition, plaintiff testified that he was injured while walking up a ramp. He claimed that as he moved out of the way of a concrete buggy coming down the ramp, he "tripped over a small piece of plywood or something that was on the ramp with [his] left foot and literally went over to [his] right and slid off the end of the ramp, off the edge of the ramp, on the right side." The ramp was a wooden access ramp used for moving workers and construction materials from the courtyard to the first floor of one of the buildings. According to plaintiff, the ramp was four feet wide, 10-12 feet long and one to two feet high.

Plaintiff was unsure what he tripped on other than it was "[s]omething that was sticking up. Maybe possibly a seam between two pieces of plywood, but it was definitely something sticking up." Plaintiff also stated that the item he tripped on "could have been attached to the ramp" or "could have been a loose piece of plywood". Plaintiff explained: "It happened so fast. I definitely tripped over a piece of plywood or something that was sticking up in the middle, you know – in the middle or possibly on the offset on the right or whatever, whichever way I was walking at the time." When pressed further, plaintiff stated "[i]t could have been a seam in between the plywood. It could have been the buggy coming down, and because it's very thin plywood, so it could have been a little bit of flexibility in it. I tripped over something."

Plaintiff further explained that when his right foot slipped, it went over the edge of the ramp because it "didn't have any toe guards or anything." After his right foot slipped, plaintiff claims that his right leg gave out and he wound up completely off the ramp, standing in the courtyard. Plaintiff did not know what he tripped on but described it as "[s]omething that was sticking up. Maybe possibly a seam between two pieces of plywood, but it was definitely something sticking up." Plaintiff was also asked about descriptions of his accident in his medical records which included "missed a step", "rolled his ankle" and "twisting injury on an uneven surface."

Plaintiff testified that he used the ramps at least ten times per day prior to his accident and at least once in the morning before his accident occurred. Plaintiff claimed that he complained to his supervisor that the ramps were not safe.

After the accident, plaintiff completed an accident report. According to the report, plaintiff "stepped on something & twisted ankle" and "was walking and tripped over a piece of plywood that was sticking up on ramp entrance from courtyard." Plaintiff has had two ankle surgeries since the accident. The First Department has already determined that plaintiff did not suffer a grave injury (203 AD3d 602 [1st Dept 2022]).

Gotham's witness, Richard Agresta, who performed site safety at the Project on behalf of Gotham, testified that carpenters from second third-party defendant Woodworks Construction Co., Inc. ("Woodworks") installed and maintained the ramps. There is no testimony that anyone else inspected the ramps. Gotham's witness also did not recall any concrete buggies at the project. Woodworks produced William Rives, its President and owner, for a deposition. Rives testified that he did not recall that Woodworks installed any ramps at the project nor had any recollection about the specific ramps at the project.

Plaintiff argues that he is entitled to summary judgment on his Section 241[6] claim because he tripped on a piece of wood in violation of Industrial Code § 23-1.7[e][1] and the ramp didn't comply with Industrial Code §§ 23-1.22[b][2] and/or 23-1.22[b][3]. In opposition, defendants argue that plaintiff does not actually know what caused him to trip and that the Industrial Code provisions plaintiff relies upon do not apply to the ramp at issue.

### 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]).

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. 57<sup>th</sup> 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[e][1] provides as follows:

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.

The court finds that neither side is entitled to summary judgment as to the alleged Section 23-1.7[e][1] violation. At his deposition, plaintiff clearly testified that he tripped over something. What that something was, whether it was debris or an obstruction which should have been removed or whether he just sidestepped off the ramp, would still constitute a violation of Section 23-1.7[e][1]. However, issues of credibility must be determined by the jury. Plaintiff testified that he was moving out of the way of an oncoming concrete buggy, whereas defendants' witness testified that there were no concrete buggies at the project and there is no mention of a concrete buggy in the accident report which plaintiff prepared. Also, plaintiff offered various versions of what caused his accident, and the accounts contained in his medical records contradict the versions he testified to. These varying accounts, while not fatal to plaintiff's claim, raise triable issues of fact and questions of credibility which a jury must determine.

Defendants' motion must be denied as to this claim because there is no testimony as to the condition of the ramp from defendants either before or after plaintiff's accident and plaintiff's failure to specifically identify what caused him to trip is not outcome determinative. Thus, defendants have failed to demonstrate that Section 23-1.7[e][1] was not violated as a matter of law. Accordingly, both plaintiff and defendants' motions are denied as to this Industrial Code provision.

Industrial Code § 23-1.22[b], entitled "Runways and ramps", provides in pertinent part as follows:

(2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially sup-

ported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed.

(3) Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used on such runways and ramps, it shall be laid close, butt jointed and securely nailed. Such runways and ramps shall be provided with timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of such runways and ramps. Bracing for such runways and ramps shall be installed at a maximum of four foot intervals.

At varying points, plaintiff claimed he tripped on plywood, a seam in the ramp, something loose, something attached, or from something created by flexibility in the ramp. Further, the debris or obstruction could have been in the middle of the ramp or could have been on the right. Plaintiff does not know what caused his accident. Therefore, plaintiff cannot demonstrate that Industrial Code § 23-1.22[b][2] was violated and this claim must be dismissed.

As for Industrial Code § 23-1.22[b][3], plaintiff testified that a concrete buggy was coming down the ramp and there is no dispute on this record that the ramp did not have a curb. Meanwhile, defendants' claim that there were no concrete buggies at the project. The court cannot simply reject plaintiff's testimony that there was a concrete buggy utilizing the ramp at the time of his accident. Therefore, there is a triable issue of fact as to whether Section 23-1.22[b][3] applied to the ramp. Further, defendants have raised a triable issue of fact as to whether the absence of a curb on the ramp was a proximate cause of plaintiff's accident. Accordingly, the parties' motions as to this claim is also denied.

Defendants also move for summary judgment dismissing plaintiff's Section 200 and common law negligence claim based upon the argument that plaintiff does not know what he tripped on. The court disagrees for the reasons already stated herein. Therefore, the balance of defendants' motion as to plaintiff's claims is denied.

Accordingly, plaintiff's motion is denied and defendant's motion as to plaintiff's complaint is granted only to the extent that plaintiff's claim premised upon Industrial Code § 23-1.22[b][2] is severed and dismissed.

#### Motions as to Gateway

At the outset, the court addresses the parties' arguments as to whether Gateway may properly renew its prior motion for summary judgment. Gateway's motion is premised upon discovery which was not available at the time Gateway made its prior motion for summary judgment. Therefore, Gateway may properly renew its prior motion. The following facts are relevant as to Gateway's motion and defendants' motion against Gateway. Gotham and Gateway's subcontract contains an indemnification provision which reads in part as follows:

Second Party [Gateway], to the fullest extent permitted by law, hereby indemnifies Indemnitees [44<sup>th</sup> Street and Gotham] against and shall hold Indemnitees harmless of and from any and/or all damages, losses or expenses, including but not limited to, attorney's fees and disbursements which Indemnitees have or claim to have sustained or incurred by reason of an Event which happens or is alleged to have happened (1) in or about the place where Work is in progress; or (2) while any of Second Party's or any of its subcontractors' property, equipment or personnel are in or about such place; or (3) as a result of or connected with the Work.

The term "Work" as used in said indemnification provision was defined as:

...all and any portion of work, labor, services or material (or supplies) performed and/or supplied to or for the benefit of the Project, through Second Party's own employees and agents (and/or the employees and agents of its corporate parent, subsidiaries, or affiliates); or for which Second Party is responsible though performed and/or supplied by through subcontractors and suppliers), but also preparation for work, and the mobilization and demobilization of Second Party's and or its subcontractor's (of any tier) personnel and equipment in connection with the Work.

Meanwhile, the General Conditions document contained a further indemnity provision which read in relevant part:

To the extent permitted by law, each Second Party shall indemnify, defend, save and hold the Owner [and] Gotham . . . (herein collectively called "Indemnitees") harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:

1. The performance of work by the Second Party, or any act or omission of Second Party;
2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where the Work is being performed or in the vicinity thereof (a) while the Second Party is performing the Work, either directly or indirectly through his subcontractor(s) or material supplier, or (b) while any of the Second Party's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work; [ . . . ]

Work" as used in the General Conditions document was defined in relevant part as:

...the furnishing of labor or material undertaken by the Second Party pursuant to the Subcontract Documents. Work includes, unless specifically excepted, the furnishing of all material, labor, equipment, supplies, plant tools, scaffolding, transportation, superintendence, temporary construction of every nature, contributions to union funds and benefits, insurance, taxes and all other services and facilities necessary for the full performance and completion of the requirements of the Subcontract Documents.

Defendants argue that if any portion of plaintiff's claims survive their motion, they are entitled to an order of conditional indemnity. Meanwhile, Gateway contends that the defendants are seeking indemnification for either their or Woodworks negligence and that "[p]laintiff's accident cause – purportedly a violation of Labor Law § 241(6) - is unrelated to and did not arise from GATEWAY's scope of work." Gateway further asserts that since only Gotham and Woodworks exercised control over the subject ramp, indemnification from Gateway would violate GOL § 5-332.1.

"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]).

Gateway does not argue that either indemnification provision was not triggered. Indeed, both were triggered because plaintiff's accident arose out of or was connected to Gateway's work under the sub-contract. Further, GOL § 5-332.1 does not bar defendants from obtaining indemnification to the extent they are not negligent, i.e. Woodworks is found negligent and defendants are jointly and severally liable to plaintiff. Accordingly, defendants motion as to Gateway is granted and defendants are entitled to conditional indemnification from Gateway to the extent plaintiff's accident was not caused by their negligence. Gateway's renewed motion is denied.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** plaintiff's motion is denied; and it is further

**ORDERED** that Gateway's motion is denied; and it is further

**ORDERED** that defendant's motion is granted to the extent that plaintiff's Labor Law § 241[6] claim premised upon Industrial Code § 23-1.22[b][2] is severed and dismissed and defendants are entitled to conditional indemnification from Gateway to the extent plaintiff's accident was not caused by defendants' negligence.

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: 10.13.22  
New York, New York

So Ordered:

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