

Kennedy v Hines 1045 Ave. of the Ams. Invs. LLC

2022 NY Slip Op 34127(U)

December 7, 2022

Supreme Court, New York County

Docket Number: Index No. 156501/2016

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

JOHN KENNEDY,

Plaintiff,

- v -

HINES 1045 AVENUE OF THE AMERICAS INVESTORS
LLC, 7BP OWNER, LLC, PACOLET MILLIKEN
ENTERPRISES, INC., STRUCTURE TONE, INC., GALASSO
TRUCKING AND RIGGING, INC., STRIANO ELECTRIC,

Defendants.

-----X

HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,
7BP OWNER, LLC, PACOLET MILLIKEN ENTERPRISES,
INC., STRUCTURE TONE, INC.

Plaintiffs,

-against-

GALASSO TRUCKING AND RIGGING, INC., STRIANO
ELECTRIC

Defendants.

-----X

GALASSO TRUCKING AND RIGGING INC.

Plaintiff,

-against-

IRON HORSE TRANSPORT, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 421, 437, 469, 470, 474, 496, 502

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 416, 417, 418, 419, 420, 424, 438, 447, 448, 449, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 475, 480, 482, 483, 489, 495

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER) .

The following e-filed documents, listed by NYSCEF document number (Motion 006) 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 423, 439, 471, 476, 479, 493, 497, 500

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 422, 440, 443, 444, 445, 446, 472, 477, 486, 487, 488, 490, 491, 492, 494, 498, 501

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 442, 450, 468, 473, 478, 481, 499

were read on this motion to/for AMEND CAPTION/PLEADINGS .

In this Labor Law personal injury action plaintiff was a foreman for his employer second third-party defendant Iron Horse Transport, Inc. (Iron Horse), when he was injured during the course of his work at the Bank of China New York branch at 7 Bryan Park. Defendants Hines 1045 Avenue of the Americas Investors LLC, 7BP Owner, LLC, and Pacolet Milliken Enterprises Inc. had ownership interests in the building and they hired defendant Structure Tone Inc. as the construction manager of the project. Structure Tone in turn hired defendant/third-party defendant Striano Electric (Striano) for all labor and materials to complete electrical infrastructure at the project. In order to complete this work, Striano needed to erect a derrick crane on the roof of the building and hired defendant/third-party defendant/second third-party plaintiff Galasso Trucking and Rigging, Inc. (Galasso) to perform this part of the work. Galasso in turn hired Iron Horse to supply union workers, which were required by the Local 40 union rules, to perform the work. Plaintiff claims that on July 6, 2016, as he was moving a dolly loaded with a piece of derrick onto an elevator, the dolly collapsed, causing a piece of derrick to strike

and injure plaintiff. Plaintiff asserts claims under Labor Law 200, 240(1) and 241(6) against all defendants as a result of this accident.

In motion #004, second-third party defendant Iron Horse, plaintiff's employer, moves for summary judgment seeking dismissal of the claims asserted in Galasso's second third-party complaint for common law indemnification and contribution, contractual indemnification, and failure to procure insurance. In motion #005, defendants/third-party plaintiffs Hines, 7BP Owner, Pacolet and Structure Tone move for summary judgment seeking dismissal of plaintiff's claims as against them and summary judgment on their third-party complaint against defendants/third-party defendants Striano and Galasso for contractual indemnification, common law indemnification and contribution, and failure to procure insurance. By cross-motion filed under motion #005 (NYSCEF Doc. 451), plaintiff cross-moves for summary judgment on his Labor Law 240(1) and 241(6) claims against all defendants. In motion #006, defendant/third-party defendant Striano moves for summary judgment seeking dismissal of plaintiff's claims as against it and dismissal of all cross-claims for common law indemnification and contribution or in the alternative, granting Striano's cross-claim against Galasso for common law indemnity. In motion #007, defendant/third-party defendant/second third-party plaintiff Galasso moves for summary judgment seeking dismissal of all claims and cross-claims asserted against it, or in the alternative, summary judgment in its favor on its contractual indemnification claim against second third-party defendant Iron Horse. Finally, in motion #008, defendant/third-party defendant/second third-party plaintiff Galasso moves to amend its answer to include an additional affirmative defense as against plaintiff. The motions are consolidated for disposition.

Motion #008

Galasso seeks to amend its answer to include an affirmative defense that plaintiff's claim is barred by Workers' Compensation law Section 11. Galasso fails to explain its four-year delay in seeking to assert this defense, which it merely states was inadvertently omitted. Further, and the amended pleading would prejudice the other parties as discovery is complete and they did not have an opportunity to develop evidence to show that plaintiff was not controlled and supervised by Galasso such as to make Galasso plaintiff's special employee under the Workers' Compensation Law. Accordingly, Galasso's motion to amend must be denied (*Bolofsky v. City of New York*, 205 A.D.3d 515, 515 [1st Dep't 2022]).

Motion #004

Second third-party defendant Iron Horse makes an argument related to Galasso's argument in support of its motion to dismiss Galasso's second third-party complaint. Iron Horse argues that the undisputed evidence shows that while plaintiff was retained by Iron Horse as a union employee, he was supervised and received instructions only from Galasso. Iron Horse did not provide any instructions for the performance of plaintiff's work, it did not have anyone on site at the time of the accident, and it did not provide any of the tools for plaintiff's work. Indeed, it is undisputed that the dolly used by plaintiff to transport the piece of derrick was owned by Galasso. As such, Iron Horse has demonstrated that plaintiff was Galasso's special employee at the time of the accident, and thus plaintiff's claims against Galasso are barred under Workers' Compensation Law Section 11 (*Thompson v. Grunman Aerospace Corp.*, 78 N.Y.2d 553 [1991]; *Villanueva v. Southeast Gran Street Guild Hous. Dev. Fund*, 37 A.D.3d 155, 156 [1st Dep't 2007]). Further, under CPLR 1008, second third-party defendant Iron Horse is entitled to rely on this defense even though it was not asserted, and cannot now be asserted, by Galasso (*Taylor v.*

Village of Illion, 265 A.D.2d 841 [2d Dep't 1999]). None of the parties submitted opposition to this motion. Accordingly, Iron Horse's motion to dismiss Galasso's second third-party complaint must be granted.

Motion #007

Defendant/third-party defendant/second third-party plaintiff Galasso moves for summary judgment seeking dismissal of all claims asserted against it on the grounds that plaintiff was its special employee and thus his claims are barred by Workers' Compensation Law Section 11 as his did not suffer a grave injury. However, as discussed above, Galasso failed to plead this as an affirmative defense in its answer and cannot now amend its answer to assert this defense (*Sweeney v. Purcell Const. Corp.*, 20 A.D.3d 872 [4th Dep't 2005]). Further, Galasso's motion for summary judgment on its claim for contractual indemnification against Iron Horse must be denied as premature as there has not yet been a finding as to whether Galasso and/or Iron Horse were negligent (*Pena v. Integrate Manhattan LLC*, 194 A.D.3d 576 [1st Dep't 2021]). Accordingly, Galasso's summary judgment motion must be denied.

Motion #005

Defendants/third-party plaintiffs first move to dismiss plaintiff's Labor Law 200, 240(1) and 241(6) claims. Regarding plaintiff's Labor Law 200 claim, defendants/third-party plaintiffs show that they did not supervise or control plaintiff's work and since plaintiff and the third-party defendants fail to rebut this showing, this claim must be dismissed as against defendants/third-party plaintiffs (*Haynes v. Boricua Village Hous. Dev. Fund*, 170 A.D.3d 509 [1st Dep't 2019]). As to plaintiff's Labor Law 240(1) claim, defendants/third-party plaintiffs argue that plaintiff's accident does not fall under the statute because it did not involve an elevation related risk. However, in view of the weight of the piece of derrick which fell and the amount of force it was

able to generate, even in falling a relatively short distance from the dolly, these factors are sufficient to bring plaintiff's accident within the protection of Labor Law 240[1] (*Ali v. Sloan Kettering Institute for Cancer Research*, 176 A.D.3d 561 [1st Dep't 2019]). Accordingly, plaintiff's 240(1) claim will not be dismissed. With regard to plaintiff's Labor Law 241(6) claim, defendants/third-party plaintiffs demonstrated that the Industrial Code Sections upon which plaintiff relies are inapplicable. Plaintiff only contests the applicability of Industrial Code Sections 1.28 and 1.5. However, plaintiff fails to show that the dolly was defective in any way—while it did not have straps and the wheels collapsed there is no evidence that this was a defect. Accordingly, plaintiff's Labor Law 241(6) claim must be dismissed against defendants/third-party plaintiffs.

As part of motion #005, defendants/third-party plaintiffs seek summary judgment on their third-party claims against Striano and Galasso. With regard to Striano, defendants/third-party plaintiffs argue that they are entitled to contractual indemnification and defense as they have demonstrated that they are free from negligence and Striano was obligated under Section 11.2 of its contract to indemnify it for any losses caused in whole or in part by its acts or the acts of its subcontractors. Here, there is no dispute that the accident falls within the terms of this indemnification provision and thus defendants/third-party plaintiffs are entitled to summary judgment on their contractual indemnification and defense claim (*Campos v. 68 East 86th Street Owners*, 117 A.D.3d 593, 595 [1st Dep't 2014]). Defendants/third-party plaintiffs also seek summary judgment on their common law indemnification claim against third-party defendant Galasso. In order to be entitled to common law indemnification, the movant must show that (1) it has been held liable without proof of any negligence or actual supervision on its part and (2) the alleged indemnitor was either negligent or exercised actual supervision and control over the

injury-producing work (*Naughton v. City of New York*, 94 A.D.3d 1, 10 [1st Dep't 2012]). Here, defendants/third-party plaintiffs have met this burden by showing that they were not negligent and are only liable under Labor Law 240(1), which does not require a finding of negligence. Further, defendants/third-party plaintiffs have demonstrated, and it is undisputed, that Galasso controlled and supervised plaintiff's work at the project. Accordingly, defendants/third-party plaintiffs are entitled to summary judgment on their common law indemnification claim against Galasso.

Plaintiff filed a cross-motion under motion #005 seeking summary judgment on his Labor Law 240(1) and 241(6) claims. The motion was filed on August 16, 2022, which is more than 60 days after the filing of the note of issue and under the last two status conference orders the parties were directed to file summary judgment motions within 60 days of the note of issue. While plaintiffs correctly argue that a cross-motion filed after the 60th day may be considered, the cross-motion must truly be a "cross-motion" as defined by CPLR 2215, meaning that it is directed only against the party that made the original summary judgment motion, it is returnable on the same date and time as the original motion, and it raises issues that are the same or substantially similar to the original summary judgment motion (*Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75 [1st Dep't 2013]). Here, the original motion filed by defendants/third-party plaintiffs was returnable on June 24, 2022, while the cross-motion was filed on August 16, 2022, several months thereafter. Further, while the cross-motion raises some of the same issues as the underlying motion, the cross-motion is also directed at defendants Striano and Galasso, who did not file the underlying motion. Therefore, since the plaintiff's cross-motion is procedurally defective, it cannot be considered a true cross-motion under CPLR 2215 and is untimely and will not be considered.

Motion #006

Striano moves for summary judgment seeking dismissal of the plaintiff's claims as against it as well as summary judgment on all cross-claims for common law indemnification and contribution, or in the alternative, granting summary judgment on Striano's cross-claim for common law indemnity as against Galasso. In support of its motion, defendant Striano submits evidence in the form of deposition testimony and documents, which are undisputed by the other parties, to show that it was not an owner/contractor for purposes of liability under Labor Law 240(1) and 241(6) and that the direction and control of plaintiff's work, including the means and methods of the work, came from Galasso, who also supplied the equipment (*Gonzalez v. Gelnwood Mason Supply Co.*, 41 A.D.3d 338 [1st Dep't 2007]). Accordingly, defendant Striano's motion must be granted.

Based on the foregoing, it is

ORDERED that motion #004 is granted and the second third-party complaint against second third-party defendant Iron Horse is dismissed with costs and disbursements and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the caption shall be amended as follows

John Kennedy,
 Plaintiff,
 -against

Hines 1045 Avenue of the Americas Investors LLC, 7BP Owner, LLC, Pacolet Milliken Enterprises, Inc., Structure Tone, Inc., Galasso Trucking and Rigging Inc., and Striano Electric,
 Defendants.

Hines 1045 Avenue of the Americas Investors LLC, 7BP Owner, LLC, Pacolet Milliken Enterprises, Inc., and Structure Tone, Inc.,

Third Party plaintiffs

-against

Galasso Trucking and Rigging Inc., and Striano Electric

Third party defendants.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of 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]; and it is further

ORDERED that the remaining claims are severed and continued; and it is further

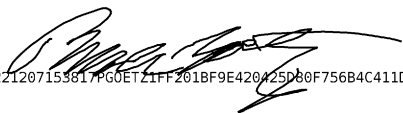
ORDERED that motion #005 is granted in part to the extent that plaintiff's Labor Law 200 and 241(6) claims are dismissed as against defendants Hines 1045 Avenue of the Americas Investors LLC, 7BP Owner, LLC, Pacolet Milliken Enterprises, Inc., and Structure Tone, Inc., and third-party plaintiffs are awarded summary judgment on their contractual indemnification and defense claim against third-party defendant Striano Electric and on their common law indemnification claim against third-party defendant Galasso Trucking and Rigging Inc., and is otherwise denied; and it is further

ORDERED that plaintiff’s cross-motion filed in connection with motion #005 is denied;
and it is further

ORDERED that motion #006 is granted and plaintiff’s claims against defendant Striano
Electric are dismissed and all cross-claims against defendant Striano for common law indemnity
and contribution are dismissed; and it is further

ORDERED that motion #007 is denied; and it is further

ORDERED that motion #008 is denied.


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<u>12/7/2022</u>			<u>PAUL A. GOETZ, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE