Barczewski v 14 Jay St. Owners Corp.
2022 NY Slip Op 34214(U)
December 2, 2022
Supreme Court, Kings County
Docket Number: Index No. 522261/2018
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of December, 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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KAZIMIERZ BARCZEWSKI,

Plaintiff,

- against -

14 JAY STREET OWNERS CORP. and PRATT CONSTRUCTION & RESTORATION, INC.,

Defendants.

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Index No. 522261/2018

Motion #8, #9, and #10

PRATT CONSTRUCTION & RESTORATION, INC.,

Third-Party Plaintiff,

- against -

RBS RENOVATION CORP.,

Third-Party Defendants.

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14 JAY STREET OWNERS CORP.,

Second Third-Party Plaintiff,

- against -

RBS RENOVATION CORP.,

Second Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF #:
Notice of Motion/Cross Motion Affidavits/Affirmations, Exhibits Annexed	203 - 216; 217 - 233; 235 - 254

Answer/Opposing Affidavits (Affirmations)	255 - 256; 261; 263 - 265; 267 - 275; 277 - 289; 291
Reply Papers	293; 294 - 296; 297 - 299

In this matter, defendant/second third-party plaintiff, 14 Jay Street Owners Corp. ("Jay Street"), moves by notice of motion (Motion Seq. 8) for an order pursuant to CPLR 3212, dismissing plaintiff's common law negligence and Labor Law §§ 200, 240(1) and 241(6) claims. Jay Street seeks an order granting summary judgment against defendant/third-party plaintiff Pratt Construction & Restoration Inc. ("Pratt") and second third-party defendant RBS Renovation Corp ("RBS") on its claims for indemnification and breach of contract to procure insurance coverage. Jay Street further seeks an order granting summary judgment against second third-party defendant. ("RBS") for contractual indemnification and breach of contract to procure insurance.

Plaintiff, Kazimierz Barczewski ("plaintiff") moves by notice of motion (Motion Seq. 9) for an order pursuant CPLR 3212, granting summary judgment on his Labor Law 240(1) cause of action against Jay Street and Pratt. Defendant/third-party plaintiff, Pratt, moves (Motion Seq. 10) for an order granting summary judgment, dismissing plaintiff's complaint and all cross claims against Pratt. Pratt further requests an order declaring that third-party defendant/second third-party defendant, RBS, is contractually obligated to indemnify Pratt. Pratt also requests summary judgment against RBS on is breach of contract claim for failure to procure insurance, together with damages and reimbursement of its attorneys fees.

Defendant/second-third party plaintiff, Jay Street, owned the premises located at 14 Jay Street, Brooklyn, New York. Jay Street entered into a general contractor agreement with

defendant/third-party plaintiff, Pratt, for sidewalk/vault repair work, which involved the installation of new sidewalks and curbs at the subject site. Pratt hired plaintiff's employer, third-party/second third-party defendant, RBS, to remove and rebuild the sidewalk and curbs. Plaintiff claims that he was working with other laborers, and the foreman, on September 11, 2018, unloading three seven-feet long, 10-12 inch wide, cement curb pieces from a flatbed truck when a piece of curb that the foreman was in the process of cutting broke and fell onto the truck bed. Plaintiff claims that the force and reverberation from the fallen curb piece caused a wooden plank that was leaning against the side of the flatbed truck to spring up and strike plaintiff in his head and back.

Plaintiff commenced this matter by the filing of a Summons and Verified Complaint on November 5, 2018 to recover damages for the injuries he allegedly sustained on September 11, 2018. Plaintiff asserted claims pursuant to Sections 200, 241(6) and 240(1) of the New York Labor Law. In the Bill of Particulars, plaintiff alleges, *inter alia*, that Jay Street and Pratt failed to provide plaintiff with adequate protection, equipment and safety devices from the risks involved with the task he was assigned to complete. Plaintiff further alleges that Jay Street and Pratt negligently permitted a dangerous and defective condition to exist by not erecting and maintaining devices that secured and prevented construction materials from falling. Additionally, plaintiff asserts that Jay Street and Pratt failed to properly manage, supervise, operate, and control the work site, or take the necessary precautions to prevent the occurrence that caused plaintiff to suffer injuries. Jay Street and Pratt interposed Answers to plaintiff's complaint, on December 17, 2018 and March 18, 2019, respectively. Jay Street also filed a cross

claim against Pratt for indemnification and a second/third-party complaint against the subcontractor, and plaintiff's employer, RBS. Pratt filed a third-party complaint against RBS, also seeking a declaration that RBS is contractually obligated to indemnify Pratt.

Jay Street contends that it entered into a general contract agreement with Pratt, which subsequently entered into a subcontract agreement with plaintiff's employer, RBS, to provide the labor for sidewalk and vault repair work. Jay Street contends that it is entitled to summary judgment as a matter of law dismissing plaintiff's Labor Law 200 and common law negligence claims, because Jay Street neither directed, nor controlled, the work that plaintiff was performing at that time. Jay Street argues that summary judgment dismissing plaintiff's Section 241(6) claims is also warranted, because the Industrial Code Sections on which plaintiff relies are inapplicable.

Plaintiff does not oppose those branches of Jay Street's motion seeking summary judgment on his Labor Law 200, 241(6), and common law negligence claims. However, plaintiff maintains that Jay Street's motion for summary judgment on his Labor Law 240(1) claim must be denied, and plaintiff's motion for summary judgment against Jay Street on his 240(1) claim should be granted.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]. The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact (*See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the moving party makes a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994].

Section 240 (1) of the Labor Law, often referred to as the "scaffold law", was designed to prevent those types of accidents in which a scaffold, hoist, stay, ladder or other protective device proved inadequate to shield a worker from harm that directly flows from the application of the force of gravity to an object or person (*Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 604 *quoting Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). The purpose of 240(1) is to protect workers by placing the "ultimate responsibility" for work site safety on the owner and general contractor, instead of the workers themselves (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Thus, Section 240 (1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which proximately caused a worker's injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d at 513). The duty imposed is

"nondelegable and ... an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control" (*Rocovich*, at 513; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]).

Labor Law § 240 (1), states, in relevant part, that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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 . . .

Section 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, at 501 [1993]).

In order to prevail on summary judgment in a Section 240 (1) case, the injured worker must demonstrate the existence of a hazard contemplated under the statute "and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay*

Assoc., 96 NY2d 259, 267 [2001] *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, at 500). Essentially, the plaintiff must demonstrate that at the time the injury producing object fell, it either was being "hoisted or secured" (*Narducci*, 96 NY2d at 268), or that it "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008]).

Here, plaintiff and four other workers were tasked with manually removing seven-foot long, sixteen-inch wide, 700 pound pieces of concrete curb from a flatbed truck for sidewalk and vault repair work. There were three workers on the flatbed truck, while plaintiff and another worker assisted from the ground. The workers manually removed the curb pieces from the flatbed surface, which sat approximately 4 to 4 1/2 feet above the street surface. There is no evidence that an assistive device, or any safety equipment, was provided to the workers when it was discovered that one of the curb pieces needed to be cut before it could be lowered from the flatbed truck. The foreman and one of the workers used crowbars to raise the curb, then used a belt to secure it while cutting it with a circular saw. The accident allegedly occurred when a piece of curb that was being cut fell off of the larger piece with such force and reverberation that the impact of the piece of curb onto the flatbed caused one of the unsecured wooden plank pieces that were leaning against the back of the truck to spring up in the air and strike plaintiff.

As owner and general contractor, Jay Street and Pratt, respectively, are subject to the provisions of Section 240(1). Both have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevation-related work tasks. The court finds that the injury producing work in the instant matter also falls within contemplation of Section 240(1).

In *Ramos-Perez v Evelyn USA, LLC*, 168 AD3d 1112 [2d Dept 2019], the Appellate Division, Second Department found that 240(1) was implicated under similar circumstances. In *Ramos-Perez*, the plaintiff was injured while he and a coworker were unloading flooring materials from the back of a truck at a construction site. A hydraulic lift was being used to lower flooring materials that were on skids weighing approximately 2,500 pounds from the bed of the truck that sat approximately four feet above the ground. The plaintiff in *Ramos-Perez* was injured when one of the skids, which had been loaded onto the lift, fell off and struck him. The injury producing work in this case involved heavy material that was on a truck bed at an elevation of approximately four feet off the ground.

RBS's foreman and one of plaintiff's co-workers utilized a belt to secure the curb piece that was being cut rather than a safety device of the kind enumerated in the statute *(Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014] *quoting Narducci v. Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Labor Law § 240(1) was designed to prevent this type of accident, as the belt proved inadequate to shield plaintiff from harm that directly flowed from the application of the force of gravity to the 700-pound curb piece. Failure to use the appropriate safety device created a risk that goes beyond the type of ordinary risk that is inherent in construction work. Thus, the court finds that the plaintiff has established, prima facie, entitlement to summary judgment on the issue of liability on his 204(1) claims against Jay Street and Pratt, both of which failed to raise materials issue of fact for trial.

The next issue to be addressed is whether Jay Street is entitled to summary judgment on its cross claim against Pratt for contractual indemnification. The court is guided by the specific

language of the Jay Street/Pratt agreement, because promise to indemnify Jay Street must be clearly implied from the language and purpose of the entire agreement and surrounding circumstances (*George v. Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]; *Canela v. TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). Jay Street must also prove itself free from negligence, because it cannot be indemnified to the extent that its own negligence contributed to the accident (General Obligations Law § 5–322.1; *Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, Pratt's intention to indemnify Jay Street is clear from the language in Section 9.15.1 of the Jay Street/Pratt agreement. That Section provides that Pratt shall indemnify and hold Jay Street harmless from and against, *inter alia*, claims and damages for bodily injury, but only to the extent caused by the negligent acts or omissions of Pratt or one of its subcontractors. RBS is one of Pratt's subcontractors, and Jay Street has established, prima facie, that it did not contribute to, or cause, the accident. Jay Street further established that it did not supervise, direct, or control any portion of the work that gave rise to plaintiff's injury. Moreover, under Section 9.2 of Jay Street/Pratt agreement, Pratt contractually obligated itself to supervise and direct the work at the site. Pratt also agreed that it would be solely responsible for, and have control over, the means, methods, procedures, and for coordinating all portions of the sidewalk/vault repair work. Thus, Jay Street has demonstrated, prima facie, its entitlement to summary judgment on its cross claim for contractual indemnification against Pratt. Pratt failed to raise a material issue of fact for trial.

The court will next address whether Pratt is entitled to summary judgment on its third-party claim against RBS for contractual indemnification. There is no dispute that Pratt entered into a subcontract agreement with RBS to perform the sidewalk and vault repair work. The indemnification provision in the Pratt/RBS subcontract is as follows:

> In consideration of the Contract Agreement, and to the fullest extent permitted by law, the subcontractor shall defend and shall indemnify, and hold harmless, at subcontractor's sole expense, the contractor, all entities the contractor is required indemnify and hold harmless, the owner of the property, and the officers, directors, agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the work covered by this contract agreement to the extent such work was performed by or contracted through the subcontractor or by anyone for whose acts the subcontractor may be held liable excluding any liability created by the sole and exclusive negligence of the Indemnified parties. This indemnity agreement shall survive the completion of the work specified in the Contract Agreement.

The above language sufficiently and unambiguously obligates RBS to indemnify Pratt, to the fullest extent provided by law, for liability arising out of, or resulting from, the sidewalk/vault repair work. The court is cognizant that a construction contract that indemnifies a party for its own negligence is void under General Obligations Law § 5-322.1. However, such contractual provisions may be enforced where the party to be indemnified is found to be free of any negligence (*Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508 [2d Dept 2005]).

There is no question that the subject accident is covered under the Pratt/RBS agreement, because plaintiff's injury arose out of the sidewalk/vault repair work. A review of the record reveals that Pratt orchestrated delivery of the concrete curb pieces to the work site and, in doing

so, utilized its own truck that was driven by a Pratt employee ("driver"). The driver, along with one RBS worker, removed the wooden planks from the side of the truck. The driver claims that he placed the wooden planks at the front end of the truck, and an RBS employee placed planks at the back end of the vehicle. Pratt's driver further claims that he did not participate in the unloading process that ensued. Rather, it was RBS's foreman, with the help of an RBS laborer, who cut the curb piece on the flatbed truck. The part of curb piece that broke off and fell onto the floor of the truck caused the wooden plank that had been placed at the back of truck (by an RBS employee) to strike plaintiff.

The above facts demonstrate that RBS played an active role in the injury producing work. However, under provision 9.2.1 of the Jay Street/Pratt agreement, Pratt agreed that it "shall supervise and direct" the sidewalk/vault repair work. Pratt further agreed that it "shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions" of such work. Since the RBS/Pratt indemnification provision excludes any liability created by the sole and exclusive negligence of Pratt, the issue of whether Pratt was negligent based upon its actual authority must first be resolved. For this reason, the court finds that Pratt has failed to establish entitlement to summary judgment as a matter of law on its third-party claim for contractual indemnification against RBS. Because issues of fact exist as to its negligence, the court finds that Pratt is entitled to conditional summary judgment on its contractual indemnification against RBS.

Those branches of Jay Street and Pratt's respective motions for a declaration that RBS breached its contract to provide commercial general liability insurance are premature. A party

seeking summary judgment based on an alleged failure to procure insurance must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with (*see Rodriguez v. Savoy Boro Park Assocs. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]).

Here, there is no dispute that the Pratt/RBS subcontract required RBS to acquire commercial general liability insurance that covers Pratt and Jay Street. Under Section 2.2 of the Pratt/RBS subcontract, RBS warranted that the coverage provided under its commercial general liability policy would be written with, among other things, "broad" coverage and further, that "no policy provision [would] restrict, reduce, limit or otherwise impair contractual liability coverage, [or Pratt's and Jay Street's] status as insured[s]" under the policy. There is evidence in the record that RBS did procure commercial general liability insurance. The issue, however, is whether such insurance satisfied the aforementioned criteria, because the carrier disclaimed coverage for the subject accident. By letter dated March 20, 2020, the Third-Party Administrator[1] for RBS's insurance carrier[2] acknowledged that Jay Street and Pratt were additional insureds under RBS's policy. However, the Administrator advised that it was disclaiming coverage on the ground that the commercial general liability policy obtained by RBS contained an Auto Exclusion, which excludes coverage for bodily injury that arises out of the use of an auto. In the letter, the Administrator points out that in the Definitions section of the policy, the term "auto" is defined as, *inter alia*, a vehicle, trailer or semitrailer, designed for

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[1]National Claim Services

[2] Clear Blue Specialty Insurance Company

travel on public roads. The Administrator, without referring to the Definitions section, also unilaterally determined that the word "use" includes "loading and unloading." The fact of the disclaimer itself is not dispositive on the issue of whether RBS provided the requisite insurance. Thus, the court finds that there exists issues of fact as to whether RBS failed to procure appropriate insurance pursuant to the Pratt/RS agreement.

Accordingly, it is hereby

ORDERED, that the motion of 14 Jay Street Owners Corp. (Motion Sequence 8) for summary judgment in its favor, dismissing plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6) is granted to the extent that plaintiff's Labor Law §§ 200 and 241(6) claims are hereby dismissed as against 14 Jay Street Owners Corp., and it is further

ORDERED, that summary judgment is awarded in favor of 14 Jay Street Owners Corp. on its contractual indemnity claim against Pratt, and it is further

ORDERED, that the motion of Pratt Construction & Restoration, Inc. (Motion Sequence 10) for summary judgment in its favor, dismissing plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6) is granted to the extent that plaintiff's Labor Law §§ 200 and 241(6) claims are hereby dismissed as against Pratt Construction & Restoration, Inc., and it is further

ORDERED, that the branch of Pratt Construction & Restoration, Inc.'s motion for a declaration that RBS Renovation Corp. is contractually obligated to indemnify Pratt Construction & Restoration, Inc. is granted to the extent that conditional summary judgment is granted in favor of Pratt Construction & Restoration, Inc. against RBS Renovation Corp. upon a finding of negligence, and it is further

ORDERED, that those branches of 14 Jay Street Owners Corp. and Pratt Construction & Restoration, Inc.'s motions for summary judgment on their Third-Party and Second Third-Party claims, respectively, against RBS Renovation Corp. for failure to procure insurance are denied, without prejudice, as premature.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice