

Maldonado v Hines 1045 Ave. of the Ams. Invs. LLC
2022 NY Slip Op 34222(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 152214/2015
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 152214/2015

MARIO MALDONADO, JULISSA MALDONADO,

MOTION DATE 08/02/2022

Plaintiffs,

MOTION SEQ. NO. 002

- v -

HINES 1045 AVENUE OF THE AMERICAS INVESTORS
LLC, TURNER CONSTRUCTION COMPANY, FIVE STAR
ELECTRIC CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,
TURNER CONSTRUCTION COMPANY

Third-Party
Index No. 595791/2016

Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138 were read on this motion to/for DISMISS.

Plaintiffs, Mario Maldonado (Maldonado) and Julissa Maldonado (collectively, plaintiffs), commenced this personal injury action pursuant to Labor Law §§ 200/common law negligence, 240(1), and 241(6), seeking damages for personal injuries allegedly sustained by Maldonado in a February 18, 2015, trip and fall while he was working at a construction project located at 7 Bryant Park, New York, New York (premises). Defendants, Hines 1045 Avenue of The Americas Investors, LLC (Hines), and Turner Construction Company (Turner) (collectively, the Hines defendants), now move pursuant to CPLR 3212 for summary dismissal of the complaint and all crossclaims. The motion is opposed. For the following reasons, the Hines defendants' motion is granted in part.

BACKGROUND

At the time of the incident, Maldonado was an ornamental ironworker employed by non-party Jonathan Metal & Glass, Ltd. Maldonado was assigned to welding the installation of decorative steel panels at the front of the building's entrance, which leads to its lobby, and was

working outside of the building, near the main entrance to the premises. At some point during the day, Maldonado used the bathroom within the premises. After he came back from the bathroom, Maldonado stood next to a heater to warm up. After he finished warming up, Maldonado testified that he began to walk, when he tripped on one or more electrical conduit stubs (conduit). Maldonado testified that he did not complete one step before falling. Maldonado testified that there were multiple conduits in the area where he fell and that the conduits were approximately one foot in height protruding from the floor. He further testified that he did not see the conduits before falling and that he observed buckets in front of the conduits.

The parties do not dispute that Hines is the project owner, Turner was the general contractor for the project, and that co-defendant Five Star Electric Corp. (Five Star) was the electrical subcontractor. Five Star was hired to perform electrical work at the construction site pursuant to an agreement with Turner dated February 20, 2013. Five Star's scope of work included installation of the conduits and electrical wiring for turnstiles. According to the agreement, Five Star agreed to indemnify the Hines defendants, including for legal fees and disbursements, for all damages or injury resulting from or arising out of the work Five Star was contracted to perform at the premises.

Radoslaw Brzezinski (Brzezinski), project supervisor for Turner, testified that Turner was responsible for implementing safety protocols at the work site. Brzezinski testified that part of Five Star's work at the site included the installation of conduit piping through the floor. The conduit piping was part of the turnstile construction. Brzezinski further testified that Turner was responsible to ensure that all the tradesmen on site were compliant with the safety protocol. Brzezinski stated that Turner had authority to stop a worker from working unsafely, to correct an unsafe condition, and to remove debris that could cause tripping.

Frank Sceri (Sceri), project safety manager for Turner, stated that plywood encasing/boxes would be one method for barricading or covering or preventing a tripping hazard posed by the conduit. Sceri testified that the boxes were to be removed for the tile to be placed on the floor in the lobby. Sceri further testified that the conduit should be flush with the ground surface unless there was a specific reason for it to protrude. Specifically, Sceri stated that if he observed a conduit sticking out of the ground, he would direct the subcontractor responsible for that conduit "[t]o either cut it down or come up with another means of sawing it off so people would not trip on it" (NYSCEF doc. no. 99 at 45:9-17). Sceri further testified that another method of making the conduits safe for people walking by would be to paint them orange.

Richard Sciarrone (Sciarrone), the foreman employed by Five Star, testified that Five Star was hired to install the electrical conduits that would ultimately feed electricity to turnstiles in the lobby. Sciarrone further testified that part of the project required that the conduit be installed into the concrete floor prior to the concrete was poured. Sciarrone stated that the installation of the conduit was part of the project. Sciarrone testified that the conduits in the lobby were installed approximately six to eight months before Maldonado's fall, and that the conduits were painted orange. Sciarrone further testified that after Five Star installed the conduits and that Turner was responsible to pour the concrete surrounding the conduits. According to Sciarrone, Five Star was directed to wait for Turner's direction to mark the conduits. Sciarrone further testified that Turner was responsible for maintaining the conduits after they were installed. He further states that Five Star was not responsible for the inspection of conduits after they were

installed. Sciarrone further testified that he observed “[p]lywood boxes made over the conduits, built to go over the conduits” (NYSCEF doc. no. 98 at 71:6-8). According to Sciarrone, the boxes were placed over the conduits to prevent the conduits from being damaged and to prevent people from tripping over such conduits. Sciarrone stated that Turner was responsible for installing the boxes, and that Turner hired a carpenter safety company to create and install the boxes. According to Sciarrone, the boxes would be removed “[w]hen the stone guys were putting in the marble that go under the turnstile” (*id.* 74: 6-10).

According to the Hines defendants’ expert, Anthony J. Kelly, AIA, P.E. LEED AP, a construction site safety expert, states that Maldonado was not required to be provided with safety devices since at the time of his accident his was not exposed to any gravity related risk since he was simply walking across the lobby floor. Kelly further states that the conduits were “an integral part of the work relating to the installation of the turnstiles” (NYSCEF doc. no. 101 at ¶ 21).

Nicholas Bellizzi, P.E., plaintiffs’ expert, states that Turner maintained a standard requirement for work performed at the premises, entitled the Turner Building L.I.F.E., which required all conduits to be flush with the floor. Bellizzi further states that the conduits were specifically cited to be slip/trip/fall hazards to surrounding trades which is what occurred in this case to Maldonado. Bellizzi states that the conduits should have been cut flush with the floor surface. Bellizzi testified that the purpose of the conduit was to provide a hole in the concrete floor for the electrical wires to be run to the turnstiles. Bellizzi indicates that while the conduits could have been protruding when the concrete was being poured, the protruding conduits should have been cut flush after the concrete cured.

In support of their motion for summary dismissal, the Hines defendants argue that plaintiffs’ claim pursuant to Labor Law § 240(1) should be dismissed because the incident did not stem from a fall from an elevated height or as a result of a falling object. The Hines defendants next argue that plaintiffs’ Labor Law § 241(6) claims pursuant to Industrial Code §§ 23-1.5, 23-1.7(d), 23-1.7e(1), 23-17e(2), 23-1.30, 23-2.1(a)(1), 23-2.1(a)(2) and 23-2.1(b) should be dismissed. The Hines defendants further argue that the subject conduits were integral to the work performed at the construction project because they were part of the installation of the turnstiles. The Hines defendants next argue that plaintiffs’ claims under Labor Law § 200/common negligence should be dismissed because neither of the Hines defendants installed the conduits or directed, controlled, or supervised the means and methods of Maldonado’s work. Next, the Hines defendants contend they are entitled to judgment on its crossclaim for indemnification against Five Star because plaintiffs’ injuries arose from Five Star’s work at the premises. In the alternative, the Hines defendants argue they are entitled to a conditional order of contractual indemnification.

In opposition, plaintiffs argues that the Hines defendants failed to demonstrate that the conduits were integral to the construction project. Plaintiffs also argue they are entitled to an adverse inference concerning documents related to whether the conduits were integral to the project. Plaintiffs further contend that the Hines defendants’ expert affidavit is speculative and thus insufficient to demonstrate that the conduits were integral and that the expert fails to set forth what “discovery responses” he reviewed other than unspecified incident reports and

progress photographs, the latter of which plaintiffs argue were never produced in discovery although they were demanded. Plaintiffs further argue that Kelly's disclosure is deficient as he failed to submit his curriculum vitae setting forth his educational background and experience. Plaintiffs also argue that an issue of fact exists as to plaintiffs' claims pursuant to Labor Law § 200/common law negligence because the Hines defendants had notice of the alleged defective condition but failed to repair it. Specifically, plaintiffs contend that the agreement between Turner and Hines specifically mandates that Turner supervise, coordinate and monitor the trades' work. Plaintiffs also argue that the Hines defendant may be found liable under a "means and methods" theory, because they supervised the injury-producing activity, i.e. the installation of the conduit pipes and the safety measures concerning the conduits. Specifically, plaintiffs contend that Brzeskinski confirmed that it was part of Turner's and its third-party site safety consultant's responsibilities and duties to ensure that the conduit pipe had protective measures in place to prevent a tripping hazard.

Five Star also opposes the motion, first arguing that the Hines defendants failed to submit deposition transcripts reviewed and signed by the deponents. Five Star next argues that an issue of fact exists as to the Hines defendants' duties concerning keeping the premises safe and the direction and control of the company hired to install the plywood box covers, the "stone company" that moved the boxes and Maldonado's employer. Five Star next argues that Maldonado's accident did not arise out of their work, since Five Star's work was finished when they completed the installation of the conduits. Instead, Five Star contends that it was Turner's responsibility to cover the conduits. Next, Five Star further argues that an issue of fact exists as to what caused Maldonado's fall, since Maldonado testified there were buckets located next to the conduits. Finally, Five Star contends that Hines is not entitled to contractual indemnification, since it was neither a signatory nor an intended third-party beneficiary to the agreement.

DISCUSSION

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N. Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Reslani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Labor Law § 240/common law negligence

Labor Law § 240 (1) places a nondelegable duty on "contractors and owners and their agents" to provide safety devices to construction workers involved construction work that involves gravity-related risks (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Here, the Hines defendants demonstrate, and plaintiffs do not refute, that Maldonado's injuries were not gravity related, since the alleged accident occurred as he walked at ground level through the lobby of the construction project. Accordingly, the branch of defendant's motion for summary dismissal of plaintiffs' claims pursuant to Labor Law § 240 is granted.

Labor Law § 241(6)

Labor Law § 241(6) “requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). This section imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]). In order to recover a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross*, 81 NY2d at 501-502; *Long v Forest-Fehlhaber*, 55 NY2d 154 [1982]).

However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664 [1st Dept 2010] [“A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard”]). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long*, 55 NY2d at 160).

Plaintiffs’ opposition does not oppose the branch of the Hines defendants’ motion to dismiss plaintiffs’ Labor Law § 241(6) premised on the violations of Industrial Code §§ 23-1.5, 23-1.7(d), 23-1.7e(1), 23-1.30, 23-2.1(a)(1), 23-2.1(a)(2) and 23-2.1(b), and thus, plaintiffs’ claims under those alleged violations are dismissed (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [“Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]). The Court must next determine whether the Hines defendants are entitled to dismissal of plaintiffs’ remaining claim under Industrial Code § 23-1.7(e)(2).

Industrial Code § 23-1.7(e)(2), entitled “Tripping and other hazards – Working areas,” provides that: “the parts of floors, platforms and similar areas where persons work or pass shall be kept free from the accumulation of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.”

Defendant initially argues that Maldonado’s injury did not result from a sharp projection. Under section 23-1.7(e), a sharp projection is “[d]efined to include any projection that is ‘sharp’ in the sense that it is clearly defined or distinct” (*Kaufman v Cap. One Bank (USA) N.A.*, 188 AD3d 461, 462 [1st Dept 2020], quoting *Lenard v 1251 Americas Assocs.*, 241 AD2d 391, 392, [1st Dept 1997]). Here, it is clear from the testimony and the description of the conduits, which were projecting approximately one foot upward from the ground, that an issue of fact exists as to whether the conduits constituted a sharp projection for the purpose of Industrial Code § 23-1.7(e) (*see Kaufman*, 188 AD3d 461 [door stop that caused plaintiff to fall was a sharp object for the purposes of section 23-1.7 (e) (2)]).

The Hines defendants next contend that the conduits which caused Maldonado's injury were an integral part of the work being performed. Industrial Code § 23-1.7(e)(2) is inapplicable to items which are an "integral part" of the work (*see e.g., Thomas v. Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]). The integral to work defense "[a]pplies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident" (*Krzyzanowski v City of New York*, 179 AD3d 479, 481 [1st Dept 2020], citing *O'Sullivan v IDI Const. Co.*, 7 NY3d 805, 806 [2006]; *see Tucker v Tishman Constr. Corp. of New York*, 36 AD3d 417, 417 [1st Dept 2007] ["there is no liability under [§ 23-1.7 (e) (2)] because the rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris . . ."]; *Bazdaric v Almah Partners LLC*, 203 AD3d 643 [1st Dept 2022]).

Here, the Hines defendants make a prima facie showing that the conduits were an integral part of the construction at premises. The testimony of Brzezinski and Sciarrone reveal that the scope of Five Star's work included the installation of the conduits and electrical wiring for the turnstiles that were ultimately installed. In opposition, plaintiffs fail to raise an issue of fact. Plaintiffs contend that there is no evidence demonstrating that the conduit pipe was required to extend above floor's surface prior to Maldonado's injury or that the conduits were in their permanent form. However, as discussed above, the relevant inquiry is whether the debris or material was a part of any ongoing work at the construction project, not whether it would be come "useless" at some point in the construction project. Moreover, the removal of the plywood boxes is irrelevant to whether the conduits were internal to the work at the premises.

Plaintiffs' request for an adverse inference for missing documents concerning whether the conduits constituted an integral part of the work being performed is denied. In light of the above determination dismiss plaintiffs' claim under Labor Law § 241(6), it is unclear what use the proposed adverse inference would serve. In any event, the issue of whether plaintiffs are entitled to an adverse inference for incomplete or missing discovery is hereby referred to the trial judge to determine at the time of trial.

Labor Law § 200/common law negligence

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, liability cannot be imposed on a defendant unless it is shown that it exercised some supervisory control over the work (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the

dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc, IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, “whether [a defendant] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims . . .” (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

The Court finds that this injury in the matter was the result of a premises defect. Plaintiffs allege that Maldonado was injured when he tripped on conduit protruding from the ground while walking within a work area within the premises, not “[a]rising from the manner in which the work was performed” (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Further, while the Hines defendants demonstrate that Five Star installed the conduits, they fail to demonstrate that they did not have either actual or constructive notice of the allegedly dangerous condition.

Instead, the Hines defendants rely on *Dalanna v City of New York* (308 AD2d 400 [1st Dept 2003]) for the proposition that the injury falls within the “means and methods” category. However, the operative facts used by the court in *Dalanna* to determine whether that case was a means and methods case are distinct from those herein. Critically, unlike in *Dalanna*, where the court applied the means and methods analysis on the basis that the plaintiff was injured by defects created by the work the Maldonado’s employer was performing, Maldonado was not injured by the work his employer was contracted to perform (*see O’Sullivan v IDI Const. Co.*, 28 AD3d 225, 226, *affd*, 7 NY3d 805 [2006] [same]). Thus, the analysis the court used in *Dalanna* is inapplicable to the facts here. Accordingly, that branch of the Hines defendants for summary dismissal of plaintiffs’ claim pursuant to Labor Law § 200 is denied.

Contractual Indemnification

“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 N.Y.2d 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]). Generally, “[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous” (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]). The agreement between Turner and Five Star to perform the electrical work at the project states as follows:

“The [Five Star] hereby assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever (including death resulting therefrom) to all persons, whether employees of the [Five Star], any tier of the [Five Star] or otherwise, and to all property caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work, or any extension, modification, or amendment to the Work by change order or otherwise.”

(NYSCEF doc. no. 102, art XXIII).

The indemnification provision further provides that: "Throughout this Agreement the [Indemnified Part[ies] means Contractor ([Turner]) the Owner ([Hines])" (id. at 1).

The Hines defendants demonstrate that the subject incident arises out of Five Star's work pursuant to the agreement. The Court of Appeals has "[i]nterpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with' " (Regal Const. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38 [2010], quoting Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 472 [2005]). It requires "[o]nly that there be some causal relationship between the injury and the risk for which coverage is provided" (id., [internal quotation marks and citations omitted]).

It is undisputed that Five Star was contractually obligated to install, and did install, the conduits that Maldonado fell over. Taking into consideration the broad definition of "arises out of" in the indemnification context, that Maldonado was injured when he fell over the conduits installed by Five Star is sufficient to trigger the indemnification provision contained in the agreement.

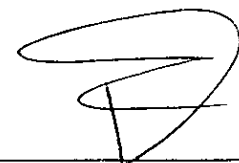
In opposition, Five Star argues that it installed the subject conduits several months prior to Maldonado's injury and that the work was approved by Turner, thus cutting off its responsibility to indemnify pursuant to the indemnification provision. However, Five Star does not cite to any case law or statute supporting its proposition. Accordingly, the Hines defendants are entitled to contractual indemnification from Five Star, including reasonable attorney's fees, as attorney's fees are clearly provided for by the indemnification provision.

Accordingly, it is hereby

ORDERED that the Hines defendants' motion pursuant to CPLR 3212 is granted to the extent that plaintiffs' claims under Labor Law §§ 240, 241(6) are dismissed, and HD are entitled to judgment on its claim for contractual indemnification against Five Star; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



12/8/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<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