

Montana v New York City Sch. Constr. Auth.

2022 NY Slip Op 34353(U)

April 26, 2022

Supreme Court, Richmond County

Docket Number: Index No. 153365/2018

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

-----X
MARK MONTANA and LISA MONTANA,

Plaintiffs,

-against-

THE NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY, NATIONAL ENVIRONMENTAL
SAFETY, NATIONAL ENVIRONMENTAL SAFETY,
INC., DIERKS HEATING CO., INC., TDX
CONSTRUCTION CORP., CHAMPION
COMBUSTION CORP., "JOHN DOE" COMPANIES,
"JOHN DOE" COMPANIES, et. al.,

Defendants.
-----X

HON. THOMAS P. ALIOTTA

DECISION and ORDER

Index No. 153365/2018
Mot. Seq. No. 003

Recitation, pursuant to CPLR § 2219(A), of the following papers numbered "1" through "4" were fully submitted on the 23rd day of February 2022:

	Papers Numbered
Defendants' Notice of Motion for Partial Summary Judgment, Affirmation in Support, and Memorandum of Law	1, 2
Plaintiffs' Affirmation in Opposition and Memorandum of Law.....	3
Defendants' Reply Affirmation	4

Upon the foregoing papers, the motion (Seq. No. 003) of defendants the New York City School Construction Authority, National Environmental Safety Company, Inc., Dierks Heating Co., and TDX Construction Corp. for partial summary judgment dismissing plaintiff Mark Montana's first cause of action for common law negligence is granted.

This matter arises out of an accident that occurred on January 10, 2018, when plaintiff Mark Montana, a steamfitter employed by the Department of Education, fell from an allegedly "wet" and "shaky" extension ladder while performing emergency repair work on a boiler at

P.S. 37 in Staten Island, New York. At the time of the accident, the moving defendants were engaged in “prep work” for the construction of a free-standing building in the parking lot adjacent to the school building. Plaintiff removed the ladder from the construction site in the parking lot and used it to perform the boiler work in the school building.¹ Notably, there is no evidence in the record that Mr. Montana had permission to do so. The Department of Education (hereinafter, “DOE”), as owner of the premises, contracted with the New York City Construction Authority (hereinafter, the “SCA”) to coordinate the project. In turn, SCA retained TDX as the construction manager. Dierks Heating Co., Inc. was the HVAC prime contractor for the construction project.

Plaintiff commenced this action to recover damages for personal injuries, alleging common law negligence and violations of Labor Law §200, §240 and §241(6). Defendants New York City School Construction Authority, National Environmental Safety Company, Inc., Dierks Heating Co., and TDX Construction Corp. moved for partial summary judgment dismissing Mr. Montana’s Labor Law §§200, 240(1) and 241(6) causes of action on the grounds that Mr. Montana was not a protected person within the purview of the Labor Law. He was not employed by the moving defendants, nor did he perform work at the construction site. The Court granted defendants’ motion in a Decision and Order dated September 10, 2021, and held, in pertinent part, that movants “demonstrated, prima facie, the work they performed in connection with the P.S. 37 expansion [project] was entirely distinct from, and unrelated to, the injury-producing [emergency boiler] work being performed by plaintiff.” Plaintiff filed a Notice of

¹ The boiler repairs took place in the school building. Plaintiff’s work was not part of or related to the construction project in the parking lot.

Appeal to the Appellate Division of the Supreme Court, Second Judicial Department on or about October 8, 2021.

In the motion presently before the Court, movants seek partial summary judgment dismissing Mr. Montana's remaining claim of common law negligence (the "First Cause of Action") on the grounds that the Court's determination in the prior motion is dispositive of the seminal issues in the instant matter. The Court found that defendants (1) were "not owners, contractors, or agents with regard to plaintiff's work"; (2) they had no authority to supervise or control the work Mr. Montana performed; (3) nor did they exercise any such supervision and control over his work; and (4) defendants did not provide the ladder for plaintiff's use. The Court further noted "all parties agree the boiler repairs were unrelated to construction work being performed by and on behalf of the moving defendants."

In support of the summary judgment motion, defendants maintain, *inter alia*, Mr. Montana is precluded from asserting a negligence claim since the Court's findings are controlling. Movants allege that the Decision and Order establishes, *prima facie*, they did not owe Mr. Montana a duty to maintain the ladder at issue.

In opposition to the motion, Mr. Montana contends that he lawfully entered the construction area as an invitee and was injured due to the negligence of the construction manager charged with inspecting and monitoring the site and maintaining the ladder in a safe condition. He points out that Henry Vela, assistant program manager for TDX, testified at his deposition that a complete inspection of the entire job site was performed at the beginning of every shift. The inspections would include the condition of ladders that were present at the construction site. Furthermore, an employee of TDX was present while the job was in progress. In the event a defective or unsafe condition was observed, the employee had authority to "directly address" the

problem with the contractor responsible for the work. In view of Vela's testimony, plaintiff maintains TDX exercised sufficient control over the construction site and the ladder at issue to impose a duty on the part of defendants to maintain the area in a safe condition and free of hazards.

Mr. Montana further claims TDX had actual and/or constructive notice of the unsafe condition. He was aware of numerous complaints addressing the "wobbly" condition of the ladder at issue, however, he failed to identify the individuals who were notified of the hazard. Plaintiff contends that Mr. Vela's deposition testimony suggests it is very likely the slippery and icy condition of the ladder existed for a sufficient amount of time for TDX to discover and remedy the hazard prior to the accident.

Based on the foregoing, plaintiff maintains the motion for partial summary judgment must be denied since the Court's prior Decision and Order relates solely to his Labor Law claims and is not controlling as to whether defendants are liable for common law negligence.

DISCUSSION

To establish a prima facie case of negligence, plaintiff must demonstrate (1) the existence of a duty on the part of a defendant to the plaintiff, (2) a breach of that duty, and (3) an injury suffered as a result of the breach (*see Solomon v. City of New York*, 66 NY2d 1026, 1027 [1985]; *Jiminez v. Shahid*, 83 AD3d 900, 901 [2d Dept 2011], *lv denied* 18 NY3d 807; *Bennett v. State Farm Fire and Casualty Company*, 198 AD3d 857, 858 [2d Dept 2021]). Unless there is a duty of care owed to the person injured, a party cannot be held liable in negligence (*see Darby v. Compagnie Natl. Air France*, 98 NY2d 343, 347 [2001]).

Consonant with the foregoing, a threshold issue under the circumstances in this case is whether the moving defendants may be held liable to plaintiff, a third-party to the contractual

obligations under the Construction Management Emergency Contract between the construction manager (SCA) and the project manager (TDX) (*see Church v. Callanan Indus.*, 99 NY2d 104 [2002]).

Our courts have consistently held that “ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties” (*Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 NY2d 220, 226 (1990)). Stated otherwise, “[a] contractual obligation, standing alone [where no duty to act would otherwise exist], generally will not give rise to tort liability in favor of a third party” (*Koslosky v. Malmut*, 149 AD3d 925, 926 [2nd Dept 2017]; *see Landon v. Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013]). The injured party is relegated to its contractual remedies, if any (*see Church v. Callanan Indus.*, 99 NY2d at 111). However, under certain circumstances, a party who executes a contract thereby assumes a duty of care to certain persons outside the contract (*see Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 139-141 [2002]; *Church v. Callanan Indus.*, 99 NY2d at 111; *see also Timmins v. Tishman Const.*, 9 AD3d 62, 65-66 [1st Dept 2004], *lv dismissed* 4 NY3d 739).

More specifically, there are three noteworthy exceptions as set forth in *Espinal v. Melville Snow Contrs.* (98 NY2d at 139-141) and its progeny. A duty of care to noncontracting third parties may arise out of a contractual obligation or the performance thereof, where (1) the contractor creates an unreasonable risk of harm to another or increases that risk while engaged in the affirmative discharge of its contractual obligations; (2) the plaintiff is injured as a result of his or her reasonable reliance on the contractor’s continued performance of its contractual obligations; or (3) the contractor has entirely displaced the duty of, *e.g.*, an owner, to maintain the premises in a reasonably safe condition (*see Church v.*

Callanan, 99 NY2d at 111-112; see *Espinal v. Melville Snow Contrs., Inc.*, 98 NY2d at 139-141; *Abramowitz v. Home Depot USA*, 79 AD3d 675, 767 [2nd Dept 2010]). Under these circumstances, a duty of care to third persons may be found relating to the performance of the contractual obligation, thereby subjecting the promisor to tort liability for failing to exercise due care in the discharge of its contractual duties (*id.*).

In the matter at bar, it is undisputed that the injured plaintiff was a noncontracting third-party with respect to the Construction Management Agreement between SCA and TDX. Thus, SCA and TDX did not assume a duty of care to Mr. Montana. Even presuming the pleadings allege facts which would establish the applicability of the well-recognized exceptions, plaintiff has failed to convince the Court there is any evidence in the record that raises a triable issue of fact as to whether the moving defendants assumed a duty within the purview of the *Espinal* exceptions.

Also lacking in this case is evidence that the moving defendants owned the ladder and/or created the alleged dangerous condition. However, plaintiff maintains that TDX had constructive notice of the hazard, as evidenced by the deposition testimony of Henry Vela. He testified that the construction work was not performed following snow and/or rain until the snow melted and the ground dried. Thus, plaintiff argues that TDX had sufficient time to discover and remedy the hazard prior to his accident (see *Gordon v. American Museum of Natural History*, 67 NY2d 836, 838 [1986]). The Court finds the foregoing propositions are based on pure speculation.

The moving defendants have established, *prima facie*, that they lacked actual and/or constructive notice of the shaky and wet condition of the ladder. In opposition to defendants' *prima facie* entitlement to partial summary judgment dismissing plaintiff's common law

negligence claim, plaintiff has failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Accordingly, it is

ORDERED, defendants' motion for partial summary judgment dismissing plaintiff's first cause of action for common law negligence is granted; and it is further

ORDERED, the first cause of action for common law negligence is hereby dismissed; and it is further

ORDERED, that this action is dismissed in its entirety based upon the prior Order of this Court dated September 10, 2021; and it is further

ORDERED, the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

E N T E R,

Dated: April 26, 2022



HON. THOMAS P. ALIOTTA J.S.C.