

Andino v Wizard Studios N. Inc.

2022 NY Slip Op 34964(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 161437/2018

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

-----X

RENE ANDINO,

Plaintiff,

- v -

WIZARD STUDIOS NORTH INC., AT&T MOBILITY SERVICES LLC, MOSAIC SALES SOLUTIONS US OPERATING CO., THE CITY OF NEW YORK., TEAM P.R. OMOTION LLC, DIFFUSION ENTERTAINMENT STUDIOS LLC,

Defendant.

-----X

WIZARD STUDIOS NORTH INC., AT&T MOBILITY SERVICES LLC, MOSAIC SALES SOLUTIONS US OPERATING CO.

Plaintiff,

-against-

KM PRODUCTIONS NY INC.

Defendant.

-----X

INDEX NO. 161437/2018

03/02/2022, 04/15/2022, 05/05/2022, 06/15/2022

MOTION DATE

MOTION SEQ. NO. 004 005 006 007

DECISION + ORDER ON MOTION

Third-Party Index No. 595487/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 135, 136, 137, 138, 139, 140, 141, 151, 152, 153, 154, 155, 156, 238

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 246, 247, 248, 257, 258, 259, 260, 261, 262, 263, 264, 271, 272, 273, 274, 275

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 240, 249, 250, 251, 252, 253, 265, 266, 267, 268, 269, 270, 276, 277

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 241, 242, 243, 244, 245, 254, 255, 256, 278

were read on this motion to/for

JUDGMENT – SUMMARY

Plaintiff commenced the instant action for injuries allegedly sustained while working in the Times Square area on a movie release event. Plaintiff moves for summary judgment alleging various violations of the Labor Law and Industrial Codes. Defendants and third-party defendants all oppose and move and cross move for summary judgment.

Background

Plaintiff Rene Andino seeks damages for injuries sustained during a fall from an elevated height during the erection of a truss structure for a movie release event (“the project”) while in the course of her employment with KM Productions Ny Inc (“KM”). Plaintiff alleges that she was not properly trained for working from heights and that she was not properly equipped, and that she fell from a height of approximately 20 feet after her equipment failed. This incident occurred on October 4, 2017 at a plaza within Times Square, located on Broadway between 42nd and 43rd Street, in the County, City and State of New York. Plaintiff’s employer, KM, was hired as a subcontractor for WIZARD STUDIOS NORTH INC. (“Wizard”), AT&T MOBILITY SERVICES LLC (“ATT”), MOSAIC SALES SOLUTIONS US OPERATING CO. (“Mosaic”), and TEAM P.R.OMOTION LLC (“Team”), in the promotion project that plaintiff was working on at the time of the incident. More specifically, ATT was the owner of the project. Mosaic was the general contractor for ATT and was in charge of getting the permit from New York City for the project, as well as managing the production of the project. Wizard was a subcontractor for Mosaic and was also managing the production of the project from a more technical aspect. KM was a subcontractor for Wizard, and was executing the production of the project. Team was a subcontractor for Mosaic and was responsible for expediting the permits, creating the ground plan

for the project and for adjusting the project build out according to the ground plan they had created. The City of New York (the “City”) was the owner of the land on which the project was conducted.

Discussion

Motion Seq. 007

Defendants ATT, Mosaic, and Wizard move for summary judgment to dismiss the claims under labor law §240(1), §241(6), and §200(1). Defendants argue that they never exercised any supervisory control over plaintiff’s injury-producing activity, which they allege is not a protected activity under Labor Law. The Court will discuss each issue of liability in turn.

Labor Law §240(1)

Labor Law §240(1) states in pertinent part as follows: “All contractors and owners and their agents ... 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.” The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury. *Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 513 [1991].

The crux of Defendants’ argument is that plaintiff was not erecting the construction, but rather bringing “cosmetic changes” to an existing structure, thereby making Labor Law §240(1) inapplicable in this case. The court agrees with this argument. The First Department has held that the issue of whether scaffolding law applies to personal injury claim should not be analyzed based

on whether plaintiff's work was "integral," "necessary" or "incidental" to construction project. *Adair v Bestek Lighting & Staging Corp.*, 298 AD2d 153 [1st Dept 2022]. Similarly, the same court held in *Royce v DIG EH Hotels, LLC*, 139 AD3d 567 [1st Dept 2016] that the activities of a worker, who fell off a ladder while attempting to replace a gel that altered the color of one light on a temporary lighting stand secured to the floor by sandbags, did not alter or cause a substantial physical change to the building, and thus fell outside of activity protected by scaffold law.

The facts are undisputed that, at the time of her fall, plaintiff was affixing a vertical banner on a temporary structure that was already built. Plaintiff was tasked with the groundwork of the banner attachment and was not at any time involved in the construction of the structure. *See* NYSCEF Doc. 172, p. 54, lines 9-12. Defendants ATT, Mosaic, and Wizard are therefore entitled to Summary Judgment to dismiss the Labor Law §240(1) claim.

Labor Law §241(6)

Labor Law § 241(6) places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross at 501-502*). Accordingly, to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id. at 502; Ares v State*, 80 NY2d 959, 960, 590 NYS2d 874 [1992]; see also *Adams v Glass Fab*, 212 AD2d 972, 973 [4th Dept 1995]). Plaintiff's claim under §241(6) is based on a violation of the Industrial Code Section 12 NYCRR § 23-1.16, which reads in relevant part:

(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his

employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

(c) Instruction in use. Every employee who is provided with an approved safety belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline.

For liability to exist under Labor Law 241(6), the injured worker has to be engaged in construction, or any other work covered under the section *Marney v Cornell Kent II Holdings, LLC*, 194 AD3d 917 [2nd Dept 2021]. As explained above, this court does not find that plaintiff was engaged in covered work under Labor Law. Defendants ATT, Mosaic, and Wizard are therefore entitled to Summary Judgment to dismiss the Labor Law §241(6) claim.

Labor Law §200 and common law negligence claims

"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" (*Edwards v State Univ. Constr. Fund*, 196 AD3d 778, 780 [2021] [internal quotation marks and citations omitted]; *see Wiley v Marjam Supply Co., Inc.*, 166 AD3d 1106, 1109 [2018], lv denied 33 NY3d 908 [2019]). Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2nd Dept 2014]; *see Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d at 689 [2nd Dept 2021]. Those two broad categories of actions are where a worker's injuries arise as a result of dangerous or defective premises conditions at a work site, and those involving injuries arising from the method and the manner in which the work is performed (*see Modugno v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820, 822 [2nd Dept 2020])

Plaintiff argues, with regards to defendants Wizard and Mosaic only, that they failed to provide an equipped, arranged, operated and properly conducted working area as to provide reasonable and adequate protection to the safety and health of the plaintiff. Defendants counterargue with various affirmative defenses such as culpable conduct, contributory negligence, assumption of risk, and sole proximate cause on the part of the plaintiff. The Court finds these defenses unavailing. In a deposition, Meredith Ahern of Mosaic, NYSCEF Doc. 173, and Shawn Cooper of Wizard, NYSCEF Doc. 169, testified to organizing, supervising, and controlling the erection of the truss structure for the project. *See* NYSCEF Doc. 173, p. 29. Moreover, Ms. Ahern and Mr. Cooper testified that they both had the power and authority to stop work if they saw an unsafe hazard. *See* NYSCEF Doc. 169, p. 65-66; Doc. 173, p. 40-41.

This Court finds that Wizard and Mosaic supervised and controlled the specific project that plaintiff was engaged in at the time of the accident. There exists a question of fact to this Court as to whether these entities were negligent in allegedly not providing a proper harness to plaintiff while she performed her work. Therefore, the defendants' motion for summary judgement to dismiss the Labor Law §200 and common law negligence claims are denied.

Motion Seq. 006

Third-party defendant KM moves for Summary judgment to dismiss claims for common-law contribution, common-law indemnification, and contractual claims brought by third-party plaintiffs Wizard, ATT, and Mosaic. KM states that, with regards to common-law contribution and indemnification, that Workers' Compensation Law § 11 bars actions for contribution or indemnification against an employer unless there is a contractual indemnification provision warranting same or there is evidence of a grave injury. KM argues that there is neither a grave injury nor a contractual provision, and third-party plaintiffs argues the opposite.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

The issue of whether plaintiff has sustained an acquired injury to the brain caused by an external physical force resulting in permanent total disability has not been sufficiently established by either of the parties. This is a clear question of fact requiring determination by a factfinder. Therefore, viewing the evidence in the light most favorable to the plaintiff and affording them every inference which may properly be drawn from the facts presented, it is the Court's opinion that Third-party Defendant KM has not met their burden for summary judgment on the issue of common-law contribution and common-law indemnification.

On the issue of the dismissal of contractual claims brought by third-party plaintiffs Wizard, ATT, and Mosaic, KM's arguments are unopposed. KM is therefore entitled to summary judgment for the dismissal of all contractual claims brought third-party plaintiffs by against it.

Motion Seq. 004

Defendant Team moves for summary judgment pursuant to CPLR §3212 to dismiss the complaint and all crossclaims against it.

For the reasons set forth above regarding motion seq. 007, this motion is granted.

Motion Seq. 005

Plaintiff Rene Andino argues, using various affidavits and reports, that it is entitled to Summary Judgment on the issues of liability pursuant to Labor Law §240(1), §241(6), with regards to Defendants Team, Wizard, ATT, THE CITY OF NEW YORK (“the City”), and Mosaic. Plaintiff also argues that it is entitled to Summary Judgment on the issues of liability pursuant to labor law §200(1) with regards to defendants Mosaic and Wizard.

For the reasons set above (*See motion Seq. 007*), plaintiff’s motion is denied in its entirety.

City of New York’s Cross-Motion

The City cross-moves for summary judgment on the issues of liability, as well as for indemnification from Mosaic and Wizard. For the reasons set above (*See motion Seq. 007*), the City’s motion is granted.

Accordingly, it is hereby

ORDERED that the matter including the third-party action is dismissed in its entirety against all entities except defendants WIZARD STUDIOS NORTH INC and MOSAIC SALES SOLUTIONS US OPERATING CO., for which all claims are dismissed except to the ones sounding in Labor Law Section 200 and common law negligence; and it is further

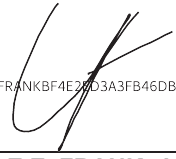
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsels for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court 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 at the address www.nycourts.gov/supctmanh).

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LYLE E. FRANK, J.S.C.

10/4/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: