

Espinoza v 667 Madison Ave. De, LLC

2022 NY Slip Op 35059(U)

December 19, 2022

Supreme Court, Queens County

Docket Number: Index No. 702078/18

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

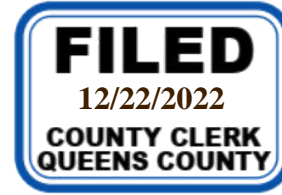
PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
PATRICIA ESPINOZA,
Plaintiff,
-against-

Index No.: 702078/18
Mot. Date: June 14, 2022
Mot. Seq.: 2 and 3

667 MADISON AVENUE DE, LLC, HARTZ
MOUNTAIN INDUSTRIES, INC. and THE
HARTZ GROUP, INC.,
Defendants.



-----X
667 MADISON AVENUE DE, LLC, HARTZ
MOUNTAIN INDUSTRIES, INC. and THE
HARTZ GROUP, INC.,
Third-Party Plaintiffs,
-against-

SILVER SERVICES GROUP CORPORATION,
Third-Party Defendant.

-----X
The following papers were read on this motion by defendants 667 Madison Avenue De, LLC (667 Madison), Hartz Mountain Industries, Inc., and the Hartz Group, Inc. (collectively referred to herein as “Hartz”), pursuant to CPLR 3212, seeking dismissal of plaintiff’s complaint in its entirety and summary judgment on their third party claims of contractual indemnity against Silver Services Group Corporation (Silver) (Motion Sequence No. 2), and motion by plaintiff Patricia Espinoza, pursuant to CPLR 3212 seeking summary judgment on her claims pursuant to Labor Law §§ 240(1) and 241(6) (Motion Sequence No. 3).

PAPERS
NUMBERED

	<u>Seq. 2</u>	<u>Seq. 3</u>
Notice of Motion-Affidavits-Exhibits.....	EF 49-64	EF 65-78
Answering Affidavits-Exhibits.....	EF 82-85	EF 79-81
Reply Affidavits-Exhibits.....	EF 89	EF 87-88

As an initial matter, the motion by defendants 667 Madison Avenue De, LLC (667 Madison), Hartz Mountain Industries, Inc., and the Hartz Group, Inc. (collectively referred to herein as Hartz), designated as Motion Sequence No. 2, and the motion by plaintiff Patricia Espinoza, designated as Motion Sequence No. 3, are hereby consolidated for purposes of disposition.

Upon the foregoing papers, it is ordered that the motion by plaintiff seeking summary judgment on her claims, pursuant to Labor Law §§ 240(1) and 241(6), to the extent that Labor Law § 241(6) is premised on 12 NYCRR § 23-1.7(b)(1), is granted (Motion Sequence No. 3), and the motion by defendants Hartz is granted solely to the extent of dismissing plaintiff's claims, pursuant to Labor Law § 241(6), to the extent that it is premised on the remaining alleged industrial codes and OSHA violations, and Labor Law § 200, to the extent that it is premised on the "means and methods" of the work performed. Defendants' motion is otherwise denied (Motion Sequence No. 2.)

On October 20, 2017, the plaintiff, while employed by Silver, allegedly sustained injuries when she partially fell into a hole in the floor of the mezzanine level of premises owned by 667 Madison. 667 Madison had retained Silver to perform demolition work at the subject premises. Plaintiff was cleaning up demolition debris at the time of the accident.

Plaintiff commenced an action against the defendants asserting claims, based on violations of Labor Law §§ 240(1), 241(6), 200 and common law negligence, on February 9, 2018. A third party action was commenced by the defendants against Silver, on June 11, 2018, which included claims for contractual indemnification. Silver appeared and answered, on September 10, 2018. However, the Court granted attorneys for Silver's application to be relieved as counsel, by Order dated January 19, 2021. Although the Order gave Silver the opportunity to retain new counsel, it appears that Silver remains unrepresented to date.

Defendants seek dismissal of plaintiff's complaint in its entirety and summary judgment on their third party claims for contractual indemnification against Silver (Motion Sequence No. 2). Plaintiff seeks summary judgment on her claims, pursuant to Labor Law §§ 240(1) and 241(6) (Motion Sequence No. 3).

According to the plaintiff's deposition testimony: at the time of the accident, she was

walking backwards, sweeping dust and debris from the floor of the mezzanine level, when “[she] felt that [she] fell into a hole”; her entire right leg, up to her right hip, fell into the hole; and her left leg remained on the mezzanine level, in a bent backwards position.

She further testified that: Wilson, her foreman at Silver, instructed her to clean construction debris from the mezzanine level, which overlooked part of the first floor; Wilson was the only one who instructed her on how to do her job; she had been working on the mezzanine level for two or three minutes before her accident; she had not been on the mezzanine level previously; and, had been unaware that there was a hole in the floor.

Sabino Giannotte (witness) testified on behalf of the defendants. He was employed by Hartz as a field supervisor in its construction division for 667 Madison. His duties included overseeing the work by contractors working at 667 Madison Avenue. At the time of the accident, Silver had been retained to perform demolition work of a previously occupied retail space, which encompassed the first floor and mezzanine level, of the subject building. The witness described the space as having concrete floors and steel beams which supported the mezzanine level. He reviewed the scope of the demolition work, which, included the removal of the mezzanine level, as well as the columns and beams which supported it with Wilson, before Silver began its work. He further testified that the defendants did not direct nor control any of Silver’s work. The witness stated that: he was at the site multiple times a day; he did not have any conversations with Wilson about site safety; he did not know if a safety consultant had been hired by Silver, and did not believe a site safety plan existed. The witness stated that the contractor “[is] the sole entity doing the work.” He did not see the plaintiff’s accident, but testified that Wilson told him that the plaintiff had injured her leg when she stepped in a hole. The witness was not aware of the location or nature of the hole and had not asked to see it.

The Court shall first consider the applications relating to the plaintiff’s claim, based on Labor Law §§ 240(1) and 241(6).

Labor Law § 240(1) imposes a non-delegable duty upon owners, contractors, and their agents to provide workers with appropriate safety devices to protect workers from risks inherent in elevated work sites. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Simmons v City of New York*, 165 AD3d 725 [2d Dept 2018];

Probst v 11 W. 42 Realty Invs., LLC, 106 AD3d 711 [2d Dept 2013].) In order to prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish that the defendant violated the statute and that such violation was a proximate cause of his injuries. (See *Morocho v Plainview-Old Bethpage Cent. Sch. Dist.*, 116 AD3d 935 [2d Dept 2014]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476 [2d Dept 2012].)

In support of the motion, plaintiff submits, *inter alia*, the deposition testimony of the parties as well as her affidavit. In her affidavit, the plaintiff approximates the measurements of the hole as 2 ½ feet x 2 ½ feet. She avers that at the time of the accident, she was 5 feet tall and weighed approximately 110 pounds. She further avers that had her left leg not bent backwards, she would have fallen through the hole to the first floor, which was located 12 feet below. According to plaintiff, the hole was “completely uncovered” and “[t]here were no barricades, railings, or other devices covering the hole or blocking off the area around the hole”. Here, the plaintiff established, *prima facie*, that she was not provided with proper protection for an elevation related risk under Labor Law § 240 (1) which was a proximate cause of her injuries. (See *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2d Dept 2012]; *Robertti v Chang*, 227 AD2d 542 [2d Dept 1996]; see also *Favaloro v Port Auth. of N.Y. & N.J.*, 191 AD3d 524 [2d Dept 2021]; cf. *Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222 [2d Dept 2018].)

In opposition, the defendants fail to raise a triable issue of fact. Defendants’ witness testified that he had no knowledge related to the nature or location of the hole. Contrary to the defendants’ contention, the plaintiff’s affidavit does not contradict her prior deposition testimony, as she was never asked to describe the hole (See *Serebrenik v Chelsea Apts., LLC*, 207 AD3d 677 [2d Dept 2022]; *Macgregor v Mrmd Ny Corp.*, 194 AD3d 550 [1st Dept 2021]; *Snyder v City of New York*, 234 AD2d 282 [2d Dept 1996]; cf. *Shpizel v Reo Realty & Constr. Co.*, 288 AD2d 291 [2d Dept 2001].)

As a predicate to liability pursuant to Labor Law § 241(6), the plaintiff must allege that the defendants violated a specific safety rule or regulation promulgated by the Commissioner of the Department of Labor and that such violation was a proximate cause of his accident. (See *Misicki v Caradonna*, 12 NY3d 511 [2009]; *Simmons*, 165 AD3d 725 [2d Dept 2018].) In her bill of particulars, the plaintiff alleges that the defendants

violated the following industrial code regulations: 12 NYCRR §§ 23-1.5(a)-(c), 23-1.7(a),(d)(e), 23-1.8(c)(1), 23-1.15, 23-1.16(a), 23-1.21(a)-(e), 23-1.22(c)(1), 23-1.30, 23-2.1(a)(b), 23-5.1, as well as multiple OSHA regulations, in support of her claim pursuant to Labor Law § 241(6).

Plaintiff makes a *prima facie* showing of her entitlement to summary judgment on her Labor Law § 241(6) claim, predicated upon a violation of 12 NYCRR § 23-1.7(b)(1), which requires, in part, that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing". She establishes that she fell into an unprotected opening in the floor, which was not guarded by a cover or safety railing. In opposition, defendants fail to demonstrate that the cited regulation is inapplicable herein, or that its violation was not the proximate cause of the plaintiff's accident. (*See Norero*, 96 AD3d 727; *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807 [2d Dept 2010]; *Treu v Cappelletti*, 71 AD3d 994 [2d Dept 2010].) Defendants' contention that 12 NYCRR § 23-1.7 (b)(1) is not a proper predicate for liability pursuant to Labor Law § 241(6) because the hole in question was too small for plaintiff's body to completely fall through is unsupported by any evidence. (*Cf. Johnson*, 164 AD3d 1222.) However, as the plaintiff only addresses the alleged violation of 12 NYCRR § 23-1.7(b)(1), she has abandoned her reliance on any other provisions of the industrial code and OSHA regulations, alleged in her bill of particulars. (*See Debenedetto v Chetrit*, 190 AD3d 933 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.* 156 AD3d 833 [2d Dept 2017]; *Harsch v City of New York*, 78 AD3d 781 [2d Dept 2010].)

With regard to the remaining industrial code and OSHA violations, the defendants made a *prima facie* showing of their entitlement to summary judgment on the plaintiff's Labor Law § 241(6) cause of action. It has been demonstrated that the remaining provisions of the industrial codes, as pled by the plaintiff in her bill of particulars, are either too general or inapplicable to the facts of this case. (*See Honeyman v Curiosity Works, Inc.*, 154 AD3d 820 [2d Dept 2017].) In opposition, the plaintiff fails to raise a triable issue of fact. Furthermore, as the plaintiff does not oppose nor address the remaining industrial codes and OSHA provisions, they are dismissed. (*See VanName v Rochester Gas & Electric*, 111 AD3d 1331 [2d Dept 2013].)

The Court shall now consider the branch of defendants' motion seeking summary judgment on the causes of action premised on Labor Law § 200 and common-law negligence.

Labor Law § 200 is essentially a codification of the common-law duty of an owner or general contractor to provide workers with a reasonably safe place to work. (*See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2d Dept 2008].) Liability, pursuant to Labor Law § 200, includes claims involving the manner in which the work is performed, as well as claims involving a dangerous or defective premises' condition at the work site. (*See Abelleira v City of New York*, 120 AD3d 1163 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008].)

Where an accident was caused by the manner in which the work was performed, "recovery against a property owner cannot be had 'unless it is shown that the [owner] had the authority to supervise or control the performance of the work'". (*Lazo v Ricci*, 178 AD3d 811, 813 [2d Dept 2019], quoting *Ortega*, 57 AD3d at 61.) "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed". (*Ortega*, 57 AD3d at 62.) However, general supervisory authority, the right to stop a contractor's work if an unsafe condition is observed, the authority to ensure compliance with safety regulations, or the terms of a contract, is insufficient to impose liability under Labor Law § 200. (*See Messina v City of New York*, 147 AD3d 748, 749 [2d Dept 2017]; *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707 [2d Dept 2015]; *Opalinski v City of New York*, 110 AD3d 694 [2d Dept 2013].) Conversely, "[w]here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2010], quoting *Ortega*, 57 AD3d at 61.) Where as here, an accident is alleged to involve both a dangerous condition on the premises and the "means and methods" of the work, a party moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards. (*See Chuqui v Amna, LLC*, 203 AD3d 1018 [2d Dept 2022]; *Banscher v Actus Lend*

Lease, LLC, 132 AD3d 707[2d Dept 2015]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2d Dept 2011].)

To the extent that plaintiff's Labor Law § 200 claim is premised upon the "means and methods" of the work, the defendants have demonstrated that aside from general supervisory authority, they did not direct nor control the manner or method the work was performed. (See *Messina*, 147 AD3d 748; *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2 Dept 2016]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744 [2d Dept 2016]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2d Dept 2005].) Their witness stated that Silver was the only entity performing the work, over which he did not exercise any control. Additionally, the plaintiff testified that Wilson from Silver was the only one who instructed her on how to perform her job. In opposition, the plaintiff fails to raise a triable issue of fact as to whether the defendants exercised supervision and control over Silver's work. Plaintiff's claim that the defendants had the authority to stop the work if an unsafe practice was observed is insufficient to establish liability, pursuant to Labor Law § 200 on this basis. (See *Messina*, 147 AD3d 748; *Ortega*, 57 AD3d 54.) However, to the extent that the plaintiff's Labor Law § 200 claim involves a dangerous or defective premises condition, the defendants failed to establish, *prima facie*, that they did not create the condition and/or lacked actual or constructive notice of the hole. The branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 claim, based upon a dangerous or defective premises condition on the work site, is denied.

Lastly, the Court shall consider the branch of defendants' motion seeking summary judgment on their third party claim for contractual indemnity against Silver. It is well settled that "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor". (*Barcliff v Schindler El. Corp.*, 197 AD3d 1228, 1230 [2d Dept 2021] citing *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; see *Davies v Simon Prop. Group, Inc.*, 174 AD3d 850 [2d Dept 2019].)

Defendants contend that as the plaintiff was injured during the course of the work performed by Silver, the indemnity provision contained in the purchase order between 667 Madison and Silver had been triggered and the defendants should be granted summary judgment. In support, they submit the purchase order together with an affidavit

from Salvatore Gentile, Executive Vice President of Hartz and 667 Madison, attesting that the provisions of the purchase order were in effect on the date of accident.

According to paragraph 8 "Indemnity" of the purchase order:

"[Silver] hereby agrees to save harmless, defend... and indemnify [667 Madison] and any owner... from any and all claims, suits, demands, damages, charges, liabilities, losses, costs and expenses... arising from or out of (a) the work incident to or resulting from any and all operations performed by [Silver] under or pursuant to any of the provisions of this Purchase Order; (b) any injury to, or death of any person or persons, or damage to or destruction of property, occurring wholly or in part in conjunction with or resulting from the work".

Here, because of unresolved liability issues involving the negligence of the defendants, "there is no basis for granting summary judgment on its claim for full or partial contractual indemnification at this juncture". (*Callan v Structure Tone, Inc.*, 52 AD3d 334, 335-336 [2008]; see *Davies*, 174 AD3d 850; *Arriola v City of New York*, 128 AD3d 747 [2d Dept 2015].)

Accordingly, it is

ORDERED that plaintiff's motion seeking summary judgment on her claims, pursuant to Labor Law §§ 240(1) and 241(6), to the extent that Labor Law § 241(6) is premised on 12 NYCRR § 23-1.7(b)(1), is granted (Motion Sequence No. 3); and it is further

ORDERED that defendants' motion is granted solely to the extent of dismissing plaintiff's claims, pursuant to Labor Law § 241(6), to the extent that it is premised on the remaining alleged industrial codes and OSHA violations, and Labor Law § 200, to the extent that it is premised on the "means and methods" of the work performed. Defendants' motion is otherwise denied.

Dated: December 19, 2022



TIMOTHY J. DUFFICY, J.S.C.

