

Valinotti v Procida Constr. Corp.
2022 NY Slip Op 35111(U)
August 3, 2022
Supreme Court, Bronx County
Docket Number: Index No. 300004/2017E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 1, 2

DOMINIC VALINOTTI and MICHELLE VALINOTTI ,

Index No.: 300004/2017E

Plaintiffs,

- against -

DECISION and ORDER

PROCIDA CONSTRUCTION CORP., PROCIDA
CONSTRUCTION CORP. OF NY, WEST SIDE
FEDERATION FOR SENIOR AND SUPPORTIVE
HOUSING, INC., EAST ONE THIRTY EIGHTH HOUSING
DEVELOPMENT FUND COMPANY, INC., TRES
PUENTES, L.P., PROCIDA-BUTZ and POSILICO
DRILLING, INC.,

Defendants.

and Third-Party actions.

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Upon the enumerated papers; the oral arguments held April 4, 2022; and due deliberation; this court finds:

The issue in Plaintiffs' summary judgment motion is whether they established their entitlement to judgment with respect to the Labor Law §§240(1), 241(6), and 200 claims. This court holds there are triable issues of fact concerning the Labor Law §240(1) claim that preclude Plaintiffs' application for summary judgment. Furthermore, the Labor Law §241(6) claim

premised upon Industrial Codes 12 NYCRR §§23-9.5(c), 23-9.2(b)(2), 23-9.4(h)(1), 23-9.4(h)(5) must be dismissed as either too general to serve as Labor Law §241(6) predicate or inapplicable to the facts at bar. However, with respect to the Labor Law §241(6) claim premised upon Industrial Codes 12 NYCRR §§23-8.2(c)(3) and 23-8.1(f)(2)(ii) there are triable issues of fact that preclude Plaintiffs' application for summary judgment. Lastly, the Labor Law §200 claim asserted against Procida must be dismissed as Plaintiff failed to demonstrate his *prima facie* burden of a Labor Law §200 violation.

Further, the issue in Defendant/Third-Party Plaintiff Procida Construction Corp.'s ("Procida") cross-motion for summary judgment is whether it established its entitlement to judgment concerning its third-party claims for defense, indemnification and attorneys fees from Defendant/Third-Party Defendants/Second Third-Party Defendants/Third Third-Party Defendants Posillico Civil, Inc. and Posillico Drilling, Inc. (collectively "Posillico"). This court holds Procida demonstrated its entitlement for contractual indemnity from Posillico.

Moreover, the issue in Posillico's cross-motion for summary judgment is whether it established its entitlement for dismissal of the third-party complaint, second third-party complaint, and third third-party complaint. This court holds Posillico only established its entitlement for dismissal of the third-party/second third-party/third third-party claims sounding in common law indemnity and contribution as same are barred by Workers Compensation Law §11.

Lastly, the issue in Defendant/Third Third-Party Plaintiff and Defendant/Second Third-Party Plaintiffs Tres Puentes, L.P.'s, East One Thirty Eight Housing Development Fund Company, Inc.'s, and West Side Federation for Senior and Supportive Housing Inc.'s (collectively "Defendants") summary judgment motion is whether they established their claims

for contractual indemnification, conditional indemnification, and reimbursement of attorneys' fees against Posillico, Procida, and Defendant Procida-Butz.¹ This court holds Defendants established their entitlement to contractual indemnification from Posillico, however, they failed to show their entitlement for contractual indemnification from Procida and Defendant Procida-Butz.

According to Plaintiff, Dominic Valinotti, ("Plaintiff") on the day of the accident he was working for Posillico as a Union Local 1556 Dock Builder. He was assigned by Posillico to a crew of workers that drilled pipe pilings into the ground with a drill rig. He further testified Mr. Michael Gallagher, the General Foreman, instructed him to move a pipe, which was going to be drilled into the ground as it needed to be grinded and cleaned prior to being drilled. Plaintiff described the pipe as being approximately 24-inches in diameter, a half inch thick, 20 feet long, and weighing about a ton. He alleges that Mr. Gallagher instructed him to roll the pipe by using an excavator instead of a pipe roller device due to the pipe's size. Plaintiff then proceeded to attach one end of the pipe with a strap and the other to a hook connected to the end of the excavator's arm. He claims the excavator operator then lifted the pipe approximately two feet off the ground, when it suddenly swung towards him and dropped, landing on his left leg, thereby, causing him to sustain injury.

This court finds although Plaintiff testified his injury resulted from the subject pipe falling two feet onto his left leg, his testimony appears to be contradicted by the operator of the excavator, Erbin Regalado. Mr. Regalado testified he did not lift the subject pipe, but rather he placed sufficient tension on the straps in order to make the pipe roll, which then caused it to roll

¹ Defendants also sought dismissal of the Labor Law §200 claim, which went unopposed by Plaintiff. Therefore, that branch of Defendants' motion is granted, without opposition. Further, this court notes that Plaintiff only asserted the Labor Law §200 claim against Procida.

onto Plaintiff's left foot. Therefore, there are triable issues of fact as to whether Plaintiff was subject to a statutorily protected gravity-related injury as contemplated under Labor Law §240(1).

In addition, Plaintiff cites Industrial Codes 12 NYCRR §§23-9.5(c), 23-9.2(b)(2), 23-9.4(h)(1), 23-9.4(h)(5), 23-8.2(c)(3), and 23-8.1(f)(2)(ii) to support the Labor Law §241(6) claim, therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

This court finds 12 NYCRR §23-9.5(c) must be dismissed as the New York State Court of Appeals has deemed the instant Industrial Code not specific enough to serve as a Labor Law §241(6) predicate. *See Toussaint v. Port Auth. of NY*, 38 N.Y.3d 89, 188 N.E.3d 571 (2022). Likewise, 12 NYCRR §23-9.2(b)(2) must be dismissed as inapplicable because the undisputed facts show that Mr. Regalado was at the excavator's controls while the subject pipe was being handled. Similarly, 12 NYCRR §§23-9.4(h)(1) and 23-9.4(h)(5) are inapplicable as these Industrial Codes govern the use of power shovels or backhoes, not excavators. Lastly, there are triable issues of fact concerning the applicability of Industrial Codes 12 NYCRR §§23-8.2(c)(3) and 23-8.1(f)(2)(ii) due to the conflicting testimony as to whether the subject pipe was being hoisted or rolled at the time of accident.

Further, this court finds Plaintiff's argument with respect to the imposition of Labor Law §200 liability based upon Procida's violation of New York City Administrative Code §27-1009(a) is without merit. Plaintiff failed to demonstrate his *prima facie* burden of a Labor Law §200 violation as Procida's guilty plea for violating said Administrative Code did not establish

either it exercised supervision/control over the injury-producing work or that it possessed actual/constructive notice of the conditions, which led to the accident, therefore, the Labor Law §200 claim must be dismissed.

Moreover, this court finds Procida and Defendants are entitled to contractual indemnity from Posillico. Defendant Procida-Butz and Defendant Posillico Drilling, Inc., entered into a written contract wherein Posillico Drilling, Inc., agreed to indemnify Defendants Procida-Butz Tres Puentes, L.P., and East One Thirty Eight Housing Development Fund Company, Inc., to the extent an injury occurred arising out of or resulting from Defendant Posillico Drilling, Inc.'s contracted work.

Posillico's contention that Defendant Posillico Civil Inc., is not required to indemnify Defendant Procida Construction Corp. because those entities were not specifically named in the contract is unavailing. It was undisputed that the accident resulted from Plaintiff's employment with Defendant Posillico Civil, Inc. Further, the testimony of Defendant Posillico Civil Inc.'s General Superintendent, Bob Hutzler, established that Defendant Posillico Civil Inc. and Defendant Posillico Drilling, Inc., are interrelated companies as Defendant Posillico Civil Inc., is the parent company of Defendant Posillico Drilling, Inc. Similarly, Defendant Procida Construction, Corp.'s Chief Executive Officer, Mario Procida, testified that Defendant Procida Construction, Corp. assigned its contracts in relation to the subject construction site to Defendant Procida-Butz, thereby, establishing that Defendants Procida Construction, Corp. and Procida-Butz are interrelated companies.

Furthermore, Posillico's argument that the subject indemnity provision did not trigger because it was not negligent has no merit. There was no requirement of negligence on the part of Posillico for the indemnity provision to trigger. Posillico was under the obligation to indemnify

Procida and Defendants if it was established, as it was here, that an injury arose out of its contracted work. Finally, Posillico's argument with respect to the Workers' Compensation Law §11 defense only bars claims for common law indemnity and contribution, however, it does not bar Procida's or Defendants' claims for contractual indemnity since, prior to the accident, Posillico agreed to indemnify them. *See Fiorentino v. Atlas Park LLC*, 95 A.D.3d 424, 944 N.Y.S.2d 60 (1st Dept 2012).

Lastly, Defendants' application for contractual indemnity from Procida must be denied. The subject indemnity provision between Defendants and Procida only triggered if the injury resulted from Procida's negligence. Therefore, since the Labor Law §200 claim was dismissed as to Procida there is no basis to claim that Procida was negligent with respect to the underlying accident.

Accordingly, it is

ORDERED, that Plaintiff's summary judgment (Mtn. Seq. #1) is denied; and it is further

ORDERED, that Procida's cross-motion for summary judgment (Mtn. Seq. # 1) is granted in part; and it is further

ORDERED, that Posillico's cross-motion for summary judgment (Mtn. Seq. # 1) is granted in part; and it is further

ORDERED, that Defendants' summary judgment motion (Mtn. Seq. # 2) is granted in part; and it is further

ORDERED, that the Labor Law §241(6) claim premised upon Industrial Codes 12 NYCRR §§23-9.5(c), 23-9.2(b)(2), 23-9.4(h)(1), and 23-9.4(h)(5) are dismissed; and it is further

ORDERED, that the Labor Law §200 claim is dismissed; and it is further

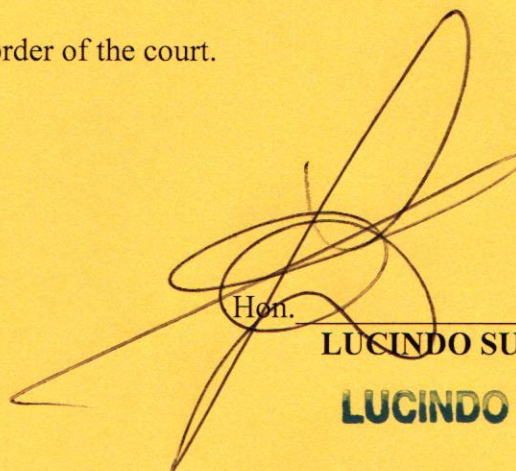
ORDERED, that Procida and Defendants are entitled to contractual indemnity from Posillico; and it is further

ORDERED, that Defendants' application seeking contractual indemnity from Prodica is denied; and it is further

ORDERED, that the third-party/second third-party/third third-party claims for common law indemnity and contribution asserted against Posillico are dismissed.

This constitutes the decision and order of the court.

Dated: 8/3/2022

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Hon.
LUCINDO SUAREZ, J.S.C.

LUCINDO SUAREZ, J.S.C.