

Diaz v P&K Contr., Inc.
2022 NY Slip Op 35162(U)
April 18, 2022
Supreme Court, Bronx County
Docket Number: Index No. 32673/2019E
Judge: Lucindo Suarez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 2, 4

DORIAN DIAZ,

Plaintiff,

- against -

Index No.: 32673/2019E

P&K CONTRACTING, INC., and TDX
CONSTRUCTION CORPORATION,

Defendants.

TDX CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

- against -

DECISION and ORDER

STEEL CONSTRUCTION, LLC,

Third-Party Defendant.

P&K CONTRACTING, INC.,

Second Third-Party Plaintiff,

- against -

STEEL CONSTRUCTION, LLC,

Second Third-Party Defendant.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiff's summary judgment motion is whether he is entitled to judgment as to liability on the Labor Law §§240(1), 241(6), and 200 claims.¹ In addition, the issue raised

¹ Defendant/Third-Party Plaintiff TDX Construction Corporation also filed a cross-motion seeking dismissal of the complaint and all cross-claims asserted against it.

in Defendant/Second Third-Party Plaintiff P&K Contracting, Inc.'s (P&K) summary judgment motion is whether it established its entitlement to dismissal of the complaint and for judgment on its second third-party claims against Third-Party Defendant/Second Third-Party Defendant Steel Construction LLC ("Steel").

This court holds as follows: (1) Defendant/Third-Party Plaintiff TDX Construction Corporation ("TDX") is not a proper Labor Law Defendant under the Labor Law §§240(1) and 241(6) claims; (2) there are triable issues of fact as to whether there was a Labor Law §240(1) violation; (3) TDX, P&K, and Steel are entitled to dismissal of the Labor Law §241(6) claim; (4) TDX and P&K are entitled to dismissal of the Labor Law §200 claim, however, Plaintiff established his entitlement to judgment as to liability under the Labor Law §200 claim as against Steel; and (5) P&K is only entitled to contractual indemnification and contribution with respect to its second third-party claims against Steel.

Plaintiff testified on the day of the accident he was tasked with unloading stacks of sidewalk shed posts from a delivery truck's flatbed. He claims he was directed by a Supervisor employed by Steel to use a ladder to ascend to the top of the stack. He claims the accident occurred as he was passing the sidewalk shed posts down to another worker when unexpectedly the posts shifted causing him to twist his body and fall approximately three to four feet onto the delivery truck's flatbed, thereby, rendering him injured.

I. Labor Law Defendant

TDX is not a proper Labor Law Defendant. Despite the contentions otherwise, the subject construction manager contract did not delegate to TDX the ability to control the activity which brought about the injury; thus, it cannot be subject to vicarious liability under the Labor

Law §§240(1) and 241(6) claims. *See Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 831 N.E.2d 408, 798 N.Y.S.2d 351 (2005).

II. Labor Law §240(1)

There are triable issues of fact regarding the Labor Law §240(1) claim because Plaintiff proffered inconsistent accounts as to how the accident occurred. Although Plaintiff testified his accident resulted from falling from the top of a stack of sidewalk shed posts, his medical records appear to contradict that claim. Plaintiff's statements contained in his medical records indicate that his injury occurred as he was lifting a heavy object when he felt a pull in his lower back, and he denied he fell or sustained head trauma.

Therefore, this court will consider Plaintiff's medical records under the hearsay exception rule as the statements contained therein were germane to his treatment and diagnosis. Moreover, even assuming, *arguendo*, that the statements were not germane to his treatment and diagnosis, it would nonetheless constitute an admission as the statements were directly attributable to Plaintiff. *See Pina v. Arthur Clinton Hous. Dev. Fund Corp.*, 188 A.D.3d 614, 132 N.Y.S.3d 753 (1st Dep't 2020).

III. Labor Law §241(6)

Plaintiff cites Industrial Codes 12 NYCRR §§23-2.1(a)(1), 23-1.7(f), 23-2.3(c), and 23-1.5(c)(2) in support of the Labor Law §241(6) claim abandoning all other predicates not raised in his legal arguments. *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).

Industrial Code 12 NYCRR §23-2.1(a)(1) is inapplicable to the facts at bar as the accident did not occur in a passageway, hallway, stairway or other thoroughfare. *See Gualpa v.*

Leon D. DeMatteis Constr. Corp., 121 A.D.3d 416, 997 N.Y.S.2d 1 (1st Dep’t 2014). Further, as to Industrial Code 12 NYCRR §23-1.7(f) Plaintiff failed to establish his *prima facie* burden of a violation of this Industrial Code. Under either version of the events there were no allegations that the accident was proximately caused by Defendants’ failure to provide safe stairways, ramps or runways as the means of access to working levels above or below ground. *cf. Ferguson v. Durst Pyramid, LLC*, 178 A.D.3d 634, 117 N.Y.S.3d 12 (1st Dep’t 2019) [“[b]ecause no stairways, ramps, or runways were available to plaintiff to access the platform, he was entitled to summary judgment on his Labor Law §241(6) claim predicated upon Industrial Code 12 NYCRR §23-1.7(f)”].

Similarly, Industrial Code 12 NYCRR §23-2.3(c) is inapplicable as under either version of the events there were no allegations that the sidewalk shed posts were being hoisted at the time of the accident. *cf. Macgregor v. Mrmd Ny Corp.*, 194 A.D.3d 550, 143 N.Y.S.3d 880 (1st Dep’t 2021) [Plaintiff demonstrated entitlement to summary judgment on his Labor Law §241(6) claim based on a violation of Industrial Code 12 NYCRR §23-2.3(c) by submitting evidence showing that defendant’s failed to use tag lines or other safety devices to secure steel beams that were being hoisted during a storm]. Likewise, Plaintiff failed to prove his *prima facie* burden as to Industrial Code 12 NYCRR §23-1.5(c)(2) because same is too general to serve as Labor Law §241(6) predicate. *Ortega v. Trinity Hudson Holding LLC*, 176 A.D.3d 625, 112 N.Y.S.3d 33 (1st Dep’t 2019).

IV. Labor Law §200

Plaintiff failed to demonstrate his *prima facie* burden of a Labor Law §200 violation against P&K and TDX. He did not elicit evidence to suggest that P&K or TDX exercised supervision and control over the injury-producing work or that they had actual or constructive

notice of the dangerous condition. Additionally, even if they did retain the right to generally supervise the work, to stop work if a safety violation is noted or to ensure compliance with safety regulations this court finds that does not amount to the “supervision and control” required to impose liability under Labor Law §200. *See Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 948 N.Y.S.2d 8 (1st Dep’t 2012). However, Plaintiff did establish his *prima facie* burden of a Labor Law §200 violation against Plaintiff’s employer, Steel. It was uncontroverted that Steel controlled and supervised the injury-producing work and Steel did not raise triable issues of fact to preclude judgment in Plaintiff’s favor under this statute.

V. P&K Second Third-Party Claims

P&K demonstrated its entitlement to contractual indemnity from Steel. The subcontracting agreement between P&K and Steel explicitly provided that Steel would indemnify P&K for “all claims... arising out of or resulting from the performance of the work.” Therefore, P&K is entitled to full contractual indemnification as Steel’s intention to indemnify P&K was unequivocal, and the subject indemnification clause was triggered as it was undisputed the accident resulted from Steel’s work. *See Torres v. Morse Diesel Intl., Inc.*, 14 A.D.3d 401, 788 N.Y.S.2d 97 (1st Dep’t 2005). Likewise, P&K showed its entitlement to contribution as Steel’s violation of Labor Law §200 had a part in causing or augmenting the injury. *See Trump Vil. Section 3, Inc. v. NY State Hous. Fin. Agency*, 307 A.D.2d 891, 764 N.Y.S.2d 17 (1st Dep’t 2003).

However, at this juncture, P&K failed to establish its *prima facie* burden with respect to its common law indemnification claim as it has not been held vicarious liable, therefore, it cannot obtain common-law indemnification. *See Stewart Tit. Ins. Co. v. NY Tit. Research Corp.*, 178 A.D.3d 618, 117 N.Y.S.3d 175 (1st Dep’t 2019).

Accordingly, it is

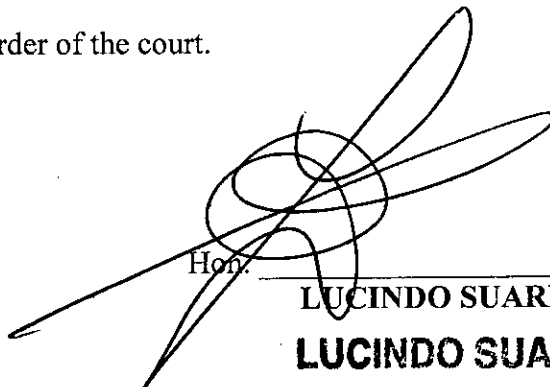
ORDERED, that Plaintiff's summary judgment motion (Mtn. Seq. # 2) is granted in part only as to liability on the Labor Law §200 claim solely against Steel; and it is further

ORDERED, that TDX's cross-motion for summary judgment (Mtn. Seq. # 2) is granted and the complaint and all cross-claims asserted against it are dismissed; and it is further

ORDERED, that P&K's summary judgment motion (Mtn. Seq. # 4) is granted in part to the extent it sought dismissal of the Labor Law §§241(6) and 200 claims and with respect to its application for judgment on its second third-party claims it is only entitled to contractual indemnification and contribution from Steel.

This constitutes the decision and order of the court.

Dated: 4/18/2022


Hon. _____
LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.