

Grisales v Sky View Parc II L.P.
2022 NY Slip Op 35264(U)
September 6, 2022
Supreme Court, Queens County
Docket Number: Index No. 710387/2016
Judge: Lourdes M. Ventura
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY
Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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CARLOS GRISALES,

Index

Number: 710387/2016

Plaintiff(s),

Motion

Date: May 16, 2022

-against-

SKY VIEW PARC II L.P., BRE SKY VIEW RETAIL
OWNER 2 LLC, NOBLE CONSTRUCTION GROUP,
LLC, and BENONI GROUP LTD.,

Motion

Seq. No.: 9

Defendant(s).

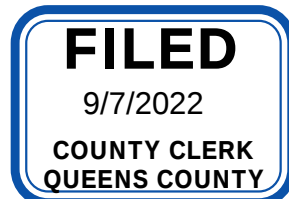
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The following numbered papers read on this motion by plaintiff for summary judgment on his Labor Law §§ 240[1] and 241[6] claims; cross motion by defendant Benoni Group Ltd. (Benoni) for summary judgment dismissing the complaint; cross motion by defendants Sky View Parc II L.P. (Sky View), Bre Sky View Retail Owner 2LLC (Bre Sky), and Noble Construction Group, LLC (Noble) (collectively owner defendants) for summary judgment dismissing the Labor Law claims and alternatively on their cross-claims against Benoni.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF 122-149
Notice of Cross Motion - Affirmation - Exhibits.....	EF 151-155
Answering Affirmation.....	EF 169
Reply Affirmation.....	EF 170-172
Notice of Cross Motion - Affirmation - Exhibits.....	EF 157-163
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Answering Affirmation.....	EF 169

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

On August 30, 2016, plaintiff commenced this action to recover damages for personal injuries sustained on July 8, 2016, when he fell from a ladder while working on premises owned by Sky View on a construction project for which Noble was construction manager and Benoni was a carpentry and drywall subcontractor. Benoni subcontracted its drywall labor to nonparty Overnite Construction (Overnite), plaintiff's employer. On March 30, 2017, plaintiff filed a supplemental summons and amended complaint to add Benoni as a defendant. The amended complaint alleges violations of Labor Law §§ 241[6], 240[1], and 200 and common law negligence. Plaintiff now



moves for summary judgment on his Labor Law §§ 240[1] and 241[6] claims against Sky View, Noble and Benoni. Benoni cross moves for summary judgment dismissing the complaint. Owner defendants cross move for summary judgment dismissing plaintiff's Labor Law claims, and alternatively for summary judgment on their cross claims for defense and contractual indemnification against Benoni.

Plaintiff, the sole witness to his injury, testified that he had been assigned to make holes in the wall eight feet above the floor on the twelfth floor and was given a four-foot A-frame ladder by his boss, Hector. When he discovered the floor was unfinished, not yet level and had pebbles, small rocks and holes in it, he advised Hector of these conditions but was told to be careful setting up the ladder. Prior to his injury, he had moved the ladder to the areas where he was to work and had used it 20 to 30 times. Immediately prior to his injury, he placed a thin piece of wood under the rear two feet of the ladder to make it level, locked the braces and tested the ladder to ensure it was secure. While plaintiff stood on the third step of the ladder and hammered the wall, both the ladder and he fell to the right causing his injuries.

The court first addresses owner defendants' cross motion for summary judgment dismissing the Labor Law claims against Noble, a construction manager, which is only liable when it serves as agent of the property owner or general contractor and has the ability to control the injury causing activity (see *Jin Gak Kim v Kirchoff-Consigli Constr. Mgt., LLC*, 197 AD3d 1289, 1290–91 [2d Dept 2021]; *Maurisaca v Bowery at Spring Partners, L.P.*, 168 AD3d 711, 712 [2d Dept 2019]). Owner defendants rely on the evidence that Benoni, not Noble, hired plaintiff's employer Overnite. Although plaintiff testified that only Hector or another Overnite employee supervised him and section 29.22 of Construction Management Agreement between Sky View and Noble dated June 15, 2015, provides that Noble was "an independent contractor and not an agent of the Owner," section 2.02 required Noble to "provide all services, business administration and supervision, necessary for, or incidental to, the successful prosecution and Final Completion of the Work in the most expeditious and economical manner, consistent with the best industry accepted standards, strict and complete compliance with codes and ordinances . . ." (see *Maurisaca*, 168 AD3d at 712–13). The Agreement also did not expressly remove Noble's control or responsibility for the work (see *Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 855–56 [2d Dept 2018]). Further, Brian Slattery, Noble's project manager, testified that Noble had general superintendents on site who oversaw the work and had the authority to stop work if a dangerous condition was observed (see *Caban v Plaza Constr. Corp.*, 153 AD3d 488, 490–91 [2d Dept 2017]). Thus, factual issues regarding Noble's authority over the injury producing work prevent summary dismissal of the Labor Law claims against it.

Turning to plaintiff's motion for summary judgment, plaintiff first seeks judgment on defendants' liability for violating Labor Law § 240[1] because the ladder upon which he was working fell and caused his injury. A fall from an unsecured ladder which proximately causes plaintiff's injury is *prima facie* evidence of a Labor Law § 240[1] violation (*Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 689 [2d Dept 2017]; *Casasola v State of New York*, 129 AD3d 758, 759–60 [2d Dept 2015]). That plaintiff was the sole witness to the accident does not undermine his *prima facie* showing (see *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097 [2d Dept 2012]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011]).

Defendants argue in opposition that plaintiff was the sole proximate cause of his injury. “A defendant has no liability under Labor Law § 240(1) when plaintiffs: (1) ‘had adequate safety devices available,’ (2) ‘knew both that’ the safety devices ‘were available and that [they were] expected to use them,’ (3) ‘chose for no good reason not to do so,’ and (4) would not have been injured had they ‘not made that choice’” (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167–68 [2020] quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Defendants point to the absence of a defect in the ladder plaintiff used and argue that he misused it by placing the wood under its feet. The court rejects defendants’ contention that the absence of a defect on the ladder shows that plaintiff was the sole proximate cause of his injury. A plaintiff provided with only an unsecured ladder and no safety devices is not solely at fault for his injuries even if he negligently placed the ladder (see *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 730 [2d Dept 2020]). However, defendants also present Slattery’s affidavit sworn February 14, 2022, in which he attests that on the date of plaintiff’s injury, the cement floors in the tower in which he worked were in place, smooth, level, and did not have holes or rocks. Since defendants raised a factual issue regarding the condition of the floor which purportedly required plaintiff to remedy by placing wood under the ladder, issues exist regarding the sole proximate cause defense to the Labor Law § 240[1] claim (see *McNamara v Gusmar Enters., LLC*, 204 AD3d 779, 782 [2d Dept 2022]; *Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 687 [2d Dept 2011]). The same issues preclude defendants’ separate cross motions for summary judgment dismissing the Labor Law § 240[1] claim (see *McNamara*, 204 AD3d at 782; *Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 678 [2d Dept 2021]).

Regarding the Labor Law § 241[6] cause of action, plaintiff argues entitlement to summary judgment on the claim for defendants’ violation of 12 NYCRR § 23-1.7[e][2], which provides that “[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.” Defendants oppose and seek dismissal of the claim. Defendants correctly contend that 12 NYCRR § 23-1.7[e][2] does not apply because plaintiff did not claim to have tripped or injured himself on the small rocks or pebbles on the floor (*Gaspar v Pace Univ.*, 101 AD3d 1073, 1074 [2d Dept 2012]; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 679 [2d Dept 2012]). Although plaintiff also alleged in his bill of particulars violations of 12 NYCRR §§ 23-1.5[a], [b], [c]; 23-1.7[a], [b], [e][1]; 23-1.16; 23-1.17; 23-1.21[b]; 23-3.3[b], [c], [e]; and 23-2.1, plaintiff abandoned reliance on them by failing to address them in opposition to defendants’ cross motions (*Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; see *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]). Nor did plaintiff oppose dismissal of the Labor Law § 241[6] cause of action based on those Industrial Code sections (see *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1303 [2d Dept 2020]). Under the circumstances, plaintiff is not entitled to summary judgment on this claim and defendants are entitled to its dismissal.

With respect to defendants’ separate cross motions to dismiss the Labor Law § 200 and common law negligence causes of action, if plaintiff’s injuries arose from the manner of the work performed, defendants are liable for a Labor Law § 200 violation and common law negligence upon

a showing that they had authority to supervise and control his work (*Hamm v Review Assoc., LLC*, 202 AD3d 934, 938 [2d Dept 2022]; *Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 950 [2d Dept 2021]). In order to demonstrate entitlement to summary judgment dismissing the Labor Law § 200 and common law negligence claims arising from an alleged defective condition, defendant must prove “that it neither created the dangerous condition nor had actual or constructive notice if it” (*Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 972 [2d Dept 2020]; see *Tomlinson v Demco Props. NY, LLC*, 189 AD3d 1294, 1295 [2d Dept 2020]). If both a premises defect and the manner of work were involved in the accident, a defendant seeking summary dismissal must address both liability standards (*Hamm*, 202 AD3d at 938; *Salgado v Rubin*, 183 AD3d 617, 619 [2d Dept 2020]).

Since owner defendants only argue that they lacked control over plaintiff’s work, but do not address the defective premises condition, they fail to meet their initial burden of demonstrating entitlement to dismissal of the Labor Law § 200 and common law negligence claims (*Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 842 [2d Dept 2021]; *Garcia v Market Assoc.*, 123 AD3d 661, 665 [2d Dept 2014]).

Benoni argues that it neither controlled plaintiff’s work nor created or had notice of any defective condition. Plaintiff’s testimony that only Hector and another Overnite employee directed his work establishes that Benoni did not supervise or control his work (*Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215–16 [2d Dept 2017]; *LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). In opposition, plaintiff argues that the testimony of Donald Terry, a Benoni employee or contractor, establishes that Benoni supervised Overnite workers. However, the transcript of Terry’s deposition does not support this argument. Benoni maintains that plaintiff’s testimony fails to demonstrate that it created or had notice of any defective premises condition. Benoni’s conclusory assertion, in effect, that no evidence existed of its notice or creation of any defect is insufficient to show its entitlement to summary judgment (see *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 981 [2d Dept 2021]; *Orahovac v CF Lex Assoc.*, 147 AD3d 968, 969 [2d Dept 2017]). Therefore, dismissal of the Labor Law § 200 and common law negligence causes of action is denied without regard to the sufficiency of plaintiff’s opposition (see *Rodriguez*, 192 AD3d at 842; *Crutch*, 192 AD3d at 981).

Turning to owner defendants’ cross claims against Benoni, they argue that it owes them contractual indemnification under Section 12.2 of the contract between Noble and Benoni. A party seeking contractual indemnification must demonstrate its freedom from negligence (see General Obligations Law § 5-322.1[1]; *Chuqui v Amna, LLC*, 203 AD3d 1018, 1023 [2d Dept 2022]; *Jin Gak Kim*, 197 AD3d at 1291). As owner defendants fail to demonstrate entitlement to dismissal of the Labor Law § 200 and common law negligence claim against them, they are not entitled to contractual indemnification from Benoni at this juncture (*Chuqui, LLC*, 203 AD3d at 1023; *Jin Gak Kim*, 197 AD3d at 1291). Owner defendants also requested summary judgment on Benoni’s duty to defend them in their notice of motion. However, since owner defendants make no arguments supporting this relief, they fail to meet their initial burden (see *Bovis v Crab Meadow Enters., Ltd.*, 67 AD3d 846, 848 [2d Dept 2009]).

Finally, although owner defendants also request dismissal of the cross-claims against them, their failure to seek that relief in their notice of cross motion dated February 14, 2022 requires denial of that relief (*see* CPLR 2214[a]; *Thomas v Avalon Gardens Rehabilitation & Health Care Ctr.*, 73 AD3d 744, 745 [2d Dept 2010]). In any event, the factual issues regarding owner defendants' liability preclude dismissal of Benoni's cross claims for common law indemnification and contribution against them.

Accordingly, plaintiff's motion is denied in its entirety; the branches of the Benoni's cross motion and owner defendants' cross motion for summary judgment dismissing the Labor Law § 241[6] cause of action are granted, but the remaining branches of those cross motions are denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: September 6, 2022



LOURDES M. VENTURA, J.S.C.