

Jones v TDA Constr., Inc.
2023 NY Slip Op 30130(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 154007/2013
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

MICHAEL JONES and JOY JONES,

Plaintiffs,

- v -

TDA CONSTRUCTION, INC., WEIDLINGER ASSOCIATES, INC., and SAFESPAN SCAFFOLDING, L.L.C.,

Defendants.

-----X

WEIDLINGER ASSOCIATES, INC.,

Plaintiff,

-against-

SAVIN ENGINEERS, P.C.,

Defendant.

-----X

INDEX NO. 154007/2013

MOTION DATE 07/28/2020

MOTION SEQ. NO. 002 003 004 005

ORDER - AMENDED (MOTION RELATED)

Third-Party Index No. 595561/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 187, 204, 209, 210, 211, 212, 213, 214, 215, 216, 227, 228, 236, 237, 240, 244, 248

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 188, 205, 241, 245

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 189, 206, 217, 218, 219, 220, 221, 242, 246

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 190, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 207, 208, 222, 223, 224, 229, 230, 231, 232, 233, 234, 235, 238, 243, 247

were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the Decision and Order dated January 10, 2023, resolving motion sequence numbers 002, 003, 004 and 005 in this action, is VACATED, RESETTLED AND CORRECTED, pursuant to CPLR § 5019(a) as follows:

ORDERED that the motion of defendant Weidlinger Associates, Inc, for summary judgment dismissing the complaint and cross claims against it (motion seq no 002) is granted to the extent that such claims are based upon any violation of Labor Law § 240(1) (the Scaffold Law) or of Labor Law § 241(6) predicated on Industrial Code §23-1.7(e), and such claims are dismissed; and it is further

ORDERED that the motion of defendant Weidlinger Associates, Inc is otherwise denied with respect to any violation of Labor Law § 200 and common law negligence or of Labor Law § 241(6) predicated upon Industrial Code § 23-5.8[h]; and it is further

ORDERED to the extent that it seeks summary judgment granting conditional summary judgment on its third party complaint for common law and contractual indemnification against third party defendant Savin Engineers, PC, the motion of third party plaintiff Weidlinger Associates, Inc (mot seq no 002) is denied; and it is further

ORDERED that the motion of defendant Savin Engineers, PC, for summary judgment dismissing the third party complaint against it is (motion seq no 003) is denied; and it is further

ORDERED that the motion of defendant TDA Construction, Inc., for summary judgment dismissing claims against it (motion seq no 004) is granted to the extent that such claims are based upon any violation of Labor Law § 240(1) (the Scaffold Law) or of Labor Law § 241(6) predicated upon Industrial Code §23-1.7(e), and such claims are dismissed; and it is further

ORDERED that the motion of defendant TDA Construction, Inc. is otherwise denied with respect to any violation of Labor Law § 200 and common law negligence or of Labor Law § 241(6) predicated upon Industrial Code § 23-5.8[h]; and it is further

ORDERED that the motion of defendant Safespan Scaffolding, LLC for summary judgment dismissing the claims and cross claims against it (motion seq no 005) is granted to the extent that such claims are based upon any violation of Labor Law § 240(1) (the Scaffold Law) or of Labor Law § 241(6) predicated on Industrial Code §23-1.7(e), and such claims are dismissed; and it is further

ORDERED that the motion of defendant Safespan Scaffolding, LLC is otherwise denied with respect to any violation of Labor Law § 200 and common law negligence or of Labor Law § 241(6) predicated on Industrial Code § 23-5.8[h].

DECISION

To the extent of Labor Law § 240(1), plaintiff has failed to raise an issue of fact that the unsecured deck constituted an elevation-related hazard. See Smith v New York State Elec & Gas Corp, 82 NY2d 781 (1993).

In Pietrowski v ARE-East Riv Science Park, 86 AD3d 467 (1st Dept 2011), the appellate court determined that Industrial Code § 23-58(h), Scaffold platform, set forth a specific regulation that constitutes a predicate for liability pursuant to Labor Law § 241(6). Defendants fail to prima facie establish that their actions or inactions were not a substantial factor in the decking having not be "nailed in placed or otherwise secured against displacement" causing the generator that plaintiff was moving to jerk, tripping him forward resulting in him striking his shoulder against the decking truss.

However, defendants have prima facie established the inapplicability of Industrial Code §23-1.7(e) to plaintiff's assertions, as plaintiff does not allege that he tripped on any dirt and debris or protrusions in the passageway.

Defendants have not prima facie established that they had no knowledge of the unsecured decking. See Torkel v NYU Hospitals Center, 63 AD3d 587, 591 (1st Dept 2009) ("plaintiff made a prima facie showing that [the general contractor] was responsible for or was aware of the dangerous condition.")

Finally, the record before the court contains an incomplete copy of the contract between third party defendant Savan Engineers, PC and third party plaintiff Thorton Tomasetti, Inc., formerly known as Weidlinger Associates, as such copy comprises only 7 of 9 pages of such contract (NYSCEF Document Numbers 125 and 174). The copy of Exhibit B to the contract that sets forth third party defendant Savan Engineers, PC's scope of work is not part of the record before this court. Thus, there is an issue of fact as to what inspection services third party defendant Savan Engineers, PC promised to perform under such contract, and whether Savan owes contractual indemnification to third party plaintiff Weidlinger Associates for any failure to perform.

Debra A. James

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<u>1/13/2023</u>			<u>DEBRA A. JAMES, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE