SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 517322/2019
Motion Date: 7-18-22
Mot. Seq. No.: 7-9

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IVAN CHORNOPYSKYY,

Plaintiff,

-against-

DECISION/ORDER

151 LUDLOW OWNER LLC,
MGT PROPERTY MANAGEMENT, LLC,
TRIDENT RESTORATION INC. and
ORBIT PLUMBING & HEATING INC.,

Defendants.

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TRIDENT RESTORATION INC.,

Third Party Plaintiff,

-against-

S & P MECHANICAL PLUS INC.,

Third Party Defendant.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 164-202, 207-215, the motions are decided as follows:

In this action arising from a workplace accident, plaintiff IVAN CHORNOPYSKY seeks an order pursuant to CPLR § 3212: (1) granting summary judgment against the defendants, 151 LUDLOW OWNER LLC ("151 Ludlow") and TRIDENT RESTORATION INC. ("Trident") pursuant to Labor Law §§200, 240(1), 241(6), as well as common-law negligence for the relief demanded in the complaint; (2) dismissing all affirmative defenses asserted by 151 Ludlow and Trident; (3) for an award of costs, disbursements and reasonable attorney's fees and; 4) for such other and further relief as this Court may deem just and proper (Motion Sequence # 7). Defendant ORBIT PLUMBING & HEATING INC. ("Orbit") seeks an Order pursuant to CPLR § 3212: (1) dismissing the Plaintiff's Complaint and all crossclaims; and (2) for such other and further relief as the Court deems just, proper, and equitable (Motion Sequence # 8)[1]. Defendants

[1] Plaintiff consents to dismissal of the complaint as against Orbit.

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151 Ludlow and MGT PROPERTY MANAGEMENT, LLC ("Mgt") cross move for an order pursuant to CPLR §3212: (1) dismissing Plaintiff's Complaint; (2) granting contractual and common law indemnification as against defendant Trident; (3) granting contractual and common law indemnification as against Third-Party Defendant S&P MECHANICAL PLUS INC. ("S&P"); 4) together with such other and further relief as this Court deems just and proper (Motion Sequence # 9). The motions are joined for disposition.

Background:

The plaintiff IVAN CHORNOPYSKY commenced this action claiming that on January 3, 2019, he was injured when he fell from a ladder at a construction project at a commercial/residential five story building located at 151 Ludlow Street, New York, NY. At the time of the accident, the plaintiff was employed as a laborer with S&P, who has not appeared in the action. The construction project included the renovation of the building, including hallways and units. Defendant Trident was the General Contractor and hired the subcontractors, including S&P, to work on the project. Orbit was hired by S&P to perform plumbing work at the site. Defendant 151 Ludlow was the owner of the property.

Plaintiff's Deposition Testimony:

On the day of his accident, plaintiff was told by his supervisor, Misha, to clean the ceiling on the first floor of the building. He maintained that the flooring of the first floor was old and sagged under pressure. Indeed, about an hour prior to his accident, Misha warned the plaintiff that the flooring was old and sagging.

To clear the ceiling, the plaintiff was required to use one of the two A-frame ladders that were present on the first floor. He maintained that both ladders were in poor condition and that he chose to use the one that was in slightly better condition. The A-frame ladder that he chose to use was about 5 feet tall, wobbled and appeared old with worn treads and rounded steps. He also maintained that the locks on the braces of the ladder were loose.

The plaintiff testified that after he complained to Misha about the flooring and the ladder, the foreman checked he area. Misha nevertheless told the plaintiff that he had to use the ladder that was provided because there were no other ladders available.

Just prior to the accident, while standing on the ladder, the plaintiff was removing nails from a ceiling beam located directly above him. The ladder then began to shake and wobble. At the same time, the floor beneath the ladder began to sag. Because of this, plaintiff testified that he then thrown off the ladder into a pile of debris.

Stefan Bohdanowycz's E.B.T. Testimony

Stefan Bohdanowycz testified that he was the owner of Trident at the time of the incident. Trident's foreman, Alex, was present at the site daily. Trident hired S&P, the plumbing company, among other subs. He said that S&P and Orbit worked together. Mr. Bohdanowycz testified that if Alex saw an unsafe condition, he wouldn't stop work. The Building Department could stop the work. He testified that the foreman's job was to find out how much materials are needed, order materials, let him know when the deliver is coming to the job site.

Patrick Mattia's E.B.T. Testimony

Mr. Mattia testified that he was owner/representative for Slate Property Group who worked with the GC who did the renovations of 151 Ludlow. He further testified that Trident reported to him. Mr. Mattia testified that he also represented 151 Ludlow Owner LLC.

John Knobloch's E.B.T. Testimony

John Knobloch, the Vice President of Orbit Plumbing & Heating, testified that S&P hired Orbit to do plumbing work including demolition at 151 Ludlow. He testified that the only work performed by Orbit on the first floor was to remove plumbing, which was finished by November 14, 2018. Mr. Knobloch testified he had no knowledge of the condition of the first-floor flooring or what kind of ladders that might have been present.

Discussion

1. Motion Sequence No. 7:

That branch of Motion Sequence # 7 in which plaintiff seeks summary judgment against defendants 151 Ludlow and Trident on his claim pursuant to Labor Law 240(1) is GRANTED. "Labor Law § 240(1) imposes 'upon owners, general contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide proper protection from elevation-related hazards" (*Aslam v. Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 A.D.3d 790, 791, 24 N.Y.S.3d 147, quoting *Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 433, 13 N.Y.S.3d 305, 34 N.E.3d 815). In order to establish liability under Labor Law § 240(1), there must be a violation of the statute, and the violation must be a proximate cause of the plaintiff's injury (*see Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39, 790 N.Y.S.2d 74, 823 N.E.2d 439; *Hugo v. Sarantakos*, 108 A.D.3d 744, 745, 970 N.Y.S.2d 245). "[A]n accident alone does not establish a Labor Law § 240(1) violation or causation" (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 289, 771 N.Y.S.2d 484, 803 N.E.2d 757).

Where an accident is caused by a violation of Labor Law § 240(1), the plaintiff's own negligence does not furnish a defense; however, there can be no liability under Labor Law § 240(1) where the plaintiff's own actions are the sole proximate cause of the accident (*see Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 433, 13 N.Y.S.3d 305, 34 N.E.3d 815; *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d at 39, 790 N.Y.S.2d 74, 823 N.E.2d 439; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d at 290, 771 N.Y.S.2d 484, 803 N.E.2d 757). A plaintiff is the sole proximate cause of his or her own injuries and a defendant has no liability under Labor Law § 240(1) when the plaintiff: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice (*see Biaca–Neto v. Bos. Rd. II Hous. Dev. Fund Corp.*, 34 N.Y.3d 1166, 121 N.Y.S.3d 753, 144 N.E.3d 363).

Here, the plaintiff submitted admissible proof that he was standing on the ladder clearing a beam located directly above him of nails when the ladder began to shake and the floor beneath him began to sag. He maintained that this caused him to be thrown from the ladder into a pile of construction debris. Under these circumstances, a presumption arises that the ladder was not properly secured (see *Hanna v. Gellman*, 29 A.D.3d 953, 953–54, 815 N.Y.S.2d 713, 714; *citing Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280, 289 n. 8, 771 N.Y.S.2d 484, 803 N.E.2d 757; *Smith v. Pergament Enters. of S.I.,* 271 A.D.2d 870, 871–872, 706 N.Y.S.2d 505), *see also*, *Mingo v. Lebedowicz,* 57 A.D.3d 491, 869 N.Y.S.2d 163; *Hai-Zhong Pang v. LNK Best Grp., Inc.*, 111 A.D.3d 889, 976 N.Y.S.2d 139, 139–40; *Gonzalez v. AMCC Corp.*, 88 A.D.3d 945, 946, 931 N.Y.S.2d 415, 416. Thus, the plaintiff presented prima facie evidence demonstrating his entitlement to judgment as a matter of law on his Labor Law 240(1) claim.

In opposition, the defendants failed to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident. There is no evidence in the record which support's defendants' contention that the plaintiff had adequate safety devices available, knew both that the safety devices were available and that he or she was expected to use them, and that he chose for no good reason not to do so.

In light of this Court's determination that defendants 151 Ludlow and Trident are liable to the plaintiff pursuant to Labor Law 240(1), that branch of Motion Sequence # 7 in which plaintiff seeks summary judgment against defendants 151 Ludlow and Trident on his claim pursuant to Labor Law 241(6) is DENIED as moot (*see Rueda v. The Trustees of Columbia University in the City of New York*, No. 701938/14, 2018 WL 6377693, at *2 (N.Y. Sup. Ct. 2018), *Battle v. Structure Tone (uk), Inc.*, No. 3105282010, 2014 WL 7532241, at *5 (N.Y. Sup. Ct. 2014), *Batista v. Manhattanville College of the Female Academy of the Heart and TJR Inc*, No. 30118407, 2014 WL 7403457, at *2 (N.Y. Sup. Ct. 2014); *Sanchez v. 11A Spencer Owner, LLC*, No. 501580/2018, 2021 WL 4755910, at *1 (N.Y. Sup. Ct. Oct. 06, 2021).

Even if the court were to address the merits of whether plaintiff should be awarded summary judgment under Labor Law § 241(6), the motion would be denied. Labor Law § 241 (6), provides, in pertinent part, that:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515; *Rizzuto v L.A. Wenger Contr.* Co., 91 NY2d 343, 348; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728). "'To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" (*Zaino v. Rogers,* 153 A.D.3d 763, 764, 59 N.Y.S.3d 770, quoting *Aragona v. State of New York,* 147 A.D.3d 808, 809, 47 N.Y.S.3d 115). Even if defendants 151 Ludlow and Trident violated multiple sections of the Industrial Code, as plaintiff contends, a violation of the Industrial Code does not conclusively establish a defendant's liability as a matter of law under Labor Law 241(6) and only constitutes some evidence of negligence and thereby reserves for resolution by a jury, "the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *see Long v. Forest—Fehlhaber*, 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Daniels v. Potsdam Cent. School Dist.*, 256 A.D.2d 897, 898, 681 N.Y.S.2d 852; *Seaman v. Bellmore Fire Dist.*, 59 A.D.3d 515, 516, 873 N.Y.S.2d 181, 182—83). Thus, even if the plaintiff demonstrated as a matter of law that there was a violation of one of the provisions of the Industrial Code underlying the § 241(6) claim, and that such violation was a substantial factor in causing the accident, plaintiff would not be entitled to summary judgment on the § 241(6) claim.

That branch of Motion Sequence # 7 in which plaintiff seeks summary judgment against defendants 151 Ludlow and Trident on his claim pursuant to Labor Law 200 and under the common law is DENIED. Labor Law § 200(1) is a codification of the common-law duty of an owner and general contractor to provide workers with a safe place to work (*see Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Lombardi v. Stout*, 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55, 604 N.E.2d 117). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive" (*Ortega v. Puccia*, 57 A.D.3d 54, 61).

With respect to a means and methods claim, a contractor and/or a property owner may be held liable for common-law negligence or a violation of Labor Law § 200 only if they had "the authority to supervise or control the performance of the work" (*Ortega v. Puccia*, 57 A.D.3d at 61, 866 N.Y.S.2d 323; *see Cody v. State of New York*, 82 A.D.3d at 927, 919 N.Y.S.2d 55; *Pilato v. 866 U.N. Plaza Assoc., LLC*, 77 A.D.3d at 646, 909 N.Y.S.2d 80). "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 v. Puccia*, 57 A.D.3d at 62, 866 N.Y.S.2d 323; *see Cody v. State of New York*, 82 A.D.3d 925, 927, 919 N.Y.S.2d 55).

Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created or had actual or constructive notice of the dangerous condition that caused the accident (*Ortega*, 57 A.D.3d at 54, citing *Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728, 730, 848 N.Y.S.2d 688; *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626, 790 N.Y.S.2d 697; *Kobeszko v. Lyden Realty Invs.*, 289 A.D.2d 535, 536, 735 N.Y.S.2d 189; *Giambalvo v. Chemical Bank*, 260 A.D.2d at 433, 687 N.Y.S.2d 728).

Here, the plaintiff did not demonstrate as a matter of law that defendants 151 Ludlow and Trident bore the responsibility for the manner in which plaintiff's work was performed.

Likewise, the plaintiff did not demonstrate as a matter of law that that the accident was attributable to a dangerous condition on the property.

That branch of Motion Sequence # 7 in which plaintiff seeks an order dismissing the affirmative defenses of defendants 151 Ludlow and Trident on his claim pursuant to Labor Law 240(1) is granted solely to the extent that all such affirmative defenses based on plaintiff's culpable conduct are stricken. As stated above, a worker's comparative negligence is not a defense to a cause of action under Labor Law § 240(1) (*see Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280, 286, 771 N.Y.S.2d 484, 803 N.E.2d 757; *Rapalo v. MJRB Kings Highway Realty, LLC,* 163 A.D.3d 1023, 1024, 82 N.Y.S.3d 63). Further, the record does not raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident.

Since the plaintiff has not demonstrated any basis to recover attorney's fees against 151 Ludlow and Trident, that branch of Motion Sequence # 7 in which plaintiff seeks summary judgment against these defendants for attorney's fees is DENIED.

2. **Motion Sequence No. 8:**

The motion of defendant Orbit for an order pursuant to CPLR § 3212 dismissing plaintiff's complaint and all crossclaims alleged against it is GRANTED, without opposition.

3. **Motion Sequence No. 9:**

For the reasons stated above, that branch of Motion Sequence # 9 in which defendants 151 Ludlow and MGT PROPERTY MANAGEMENT, LLC ("Mgt") seek summary judgment dismissing plaintiff's Labor Law 240(1) and Labor Law 241(6) on the ground that the plaintiff's actions was the sole proximate cause of the accident is DENIED.

That branch of Motion Sequence # 9 in which defendants 151 Ludlow and Mgt seek summary judgment dismissing plaintiff's Labor Law 200 and common law claims is DENIED. Plaintiff attributes his accident, in part, due to fact the existence of a dangerous condition on the property. Specifically, the plaintiff claims that the floor upon which the ladder was set up sagged

under pressure. As stated above, where, as here, a premises condition is at issue, property owners and their agents contractors may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*Ortega*, 57 A.D.3d at 54, citing *Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728, 730, 848 N.Y.S.2d 688; *Kerins v. Vassar Coll.*, 15 A.D.3d 623, 626, 790 N.Y.S.2d 697; *Kobeszko v. Lyden Realty Invs.*, 289 A.D.2d 535, 536, 735 N.Y.S.2d 189; *Giambalvo v. Chemical Bank*, 260 A.D.2d at 433, 687 N.Y.S.2d 728). Here, neither 151 Ludlow nor Mgt demonstrated, as a matter of law, that the floor was not in a safe condition, or that they lacked actual and/or constructive notice that the floor was in a dangerous condition.

Those branches of Motion Sequence # 9 in which defendants 151 Ludlow and Mgt seek summary judgment granting them contractual and common law indemnification as against defendant Trident and S&P are DENIED. Pursuant to CPLR 3212(a), courts have "considerable discretion to fix a deadline for filing summary judgment motions" (*Brill v. City of New York,* 2 N.Y.3d 648, 651, 781 N.Y.S.2d 261, 814 N.E.2d 431), so long as the deadline is not "earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown" (*id.* at 651, 781 N.Y.S.2d 261, 814 N.E.2d 431; *see* CPLR 3212[a]; *Lanza v. M–A–C Home Design & Constr. Corp.,* 188 A.D.3d 855, 856, 135 N.Y.S.3d 495). Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits (*Brill v. City of New York,* 2 N.Y.3d at 652, 781 N.Y.S.2d 261, 814 N.E.2d 431). However, an untimely cross motion for summary judgment may nevertheless be considered by the court "where a timely motion was made on nearly identical grounds" (*Sikorjak v. City of New York,* 168 A.D.3d 778, 780, 91 N.Y.S.3d 186; *Sheng Hai Tong v. K & K 7619, Inc.,* 144 A.D.3d 887, 890, 41 N.Y.S.3d 266).

Here, those branches of Motion Sequence # 9, in which defendants 151 Ludlow and Mgt seek summary judgment granting them contractual and common law indemnification as against defendants Trident and S&P was made more than 60 days after the filing of the Note of Issue, the deadline imposed by the court for making summary judgment motions, and the plaintiff

offered no explanation for the delay. These branches of the motions are therefore untimely. Moreover, these branches of the cross motion did not raise nearly identical issues as the plaintiff's motion. Finally, the mislabeled cross motion was an improper vehicle for seeking affirmative relief against Trident, a nonmoving party (see *Terio v. Spodek*, 25 A.D.3d 781, 785-786).

Accordingly, it is hereby

ORDERED that the motions are decided as set forth above/

This constitutes the decision and order of the Court.

Dated: January 18, 2023

PPS

KINGS COUNTY CLERK
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2023 JAN 23 AM 9:56

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020