Seccafico v Roseland Dev. Assoc., LLC.
2023 NY Slip Op 30420(U)
February 9, 2023
Supreme Court, New York County
Docket Number: Index No. 157069/2017
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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ANTHONY SECCAFICO, MARIA SECCAFICO,

Plaintiff,

- v -

ROSELAND DEVELOPMENT ASSOCIATES, LLC., PAVARINI MCGOVERN, LLC., DFC STRUCTURES, LLC,

Defendant.

INDEX NO. 157069/2017

MOTION DATE 09/30/2022, 09/30/2022, 09/30/2022

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

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ROSELAND DEVELOPMENT ASSOCIATES, LLC., PAVARINI MCGOVERN, LLC.

Plaintiff,

-against-

DFC STRUCTURES LLC, DIFAMA CONCRETE, INC.

Defendant.

Third-Party
Index No. 596038/2017

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 99, 103, 104, 112, 115, 121, 124, 125

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 113, 114, 116, 119, 120, 122, 123, 126, 127

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 105, 106, 107, 108, 109, 110, 111, 117, 118

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiffs Anthony Seccafico ("Seccafico") and Maria Seccafico (collectively "Plaintiffs") commenced this action alleging violations of Labor Law §§ 240(1), 241(6), and

200, as well as common law negligence and loss of consortium, against property owner Roseland Development Associates, LLC ("Roseland"), general contractor Pavarini McGovern, LLC ("Pavarini"), and subcontractor DFC Structures, LLC ("DFC") (collectively, "Defendants"). Roseland and Pavarini, who are jointly represented in this action, then commenced a third-party action against DFC and DiFama Concrete, Inc. ("DiFama") asserting contractual indemnification, common law indemnification and contribution, and breach of contract causes of action, and seeking attorney's fees. It is undisputed that DFC and DiFama, who are also jointly represented, are related entities, but the nature of their relationship is in question.

In Motion Sequence 001, Plaintiffs move for summary judgment on their Labor Law § 241(6) cause of action. In Motion Sequence 002, Roseland and Pavarini together move for an order granting summary judgment dismissing all of Plaintiffs' causes of action as against them and awarding them summary judgment on their third-party causes of action for contractual indemnification, common law indemnification and contribution, and breach of contract against DFC and DiFama. In Motion Sequence 003, DFC and DiFama together move for summary judgment dismissing Plaintiffs' complaint as against DFC, as DiFama is not a defendant in the main action, and dismissing Roseland and Pavarini's third-party claims against both DFC and DiFama. All motions are opposed and are consolidated for disposition herein.

BACKGROUND

Plaintiffs allege that Seccafico, a concrete laborer employed by Third-Party Defendant DiFama, was injured on February 13, 2017, while working on the construction of a high-rise residential building at 242 West 53rd Street ("the premises"). On that date, Seccafico was moving clamps on the 28th floor of the premises in preparation for concrete pouring. He testified that the clamps had been hoisted from another level by way of a series of metal wire

slings. While carrying the clamps from the delivery area to another area of the worksite, his left leg allegedly became caught in an unused sling that was resting on the ground and tripped. He claims that he did not see this sling because it had been hidden by debris on the floor. Seccafico then allegedly fell backwards and was injured by a protruding jack that was on the floor behind him, purportedly leading to back and shoulder injuries.

Roseland owns the premises and had engaged Pavarini as general contractor for the project. Pavarini subcontracted with DFC to perform concrete work, and DFC then delegated it to DiFama, Seccafico's employer. It is undisputed that DFC and DiFama are solely owned by the same person, Gary Felsher, and employ the same chief financial officer, Joseph Chan.

Following the accident, Seccafico applied for Workers' Compensation benefits and was awarded $9,853.25 at a May 4, 2017 hearing (NYSCEF Doc. No. 69, Notice of Decision). Plaintiffs then commenced this action against Roseland, Pavarini, and DFC on August 7, 2017. On December 19, 2017, Roseland and Pavarini commenced the third-party action against DFC and DiFama.

DISCUSSION

In a motion seeking summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the

opponent who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiffs' Claims in the Main Action

In Motion Sequence 001, Plaintiffs move for summary judgment on their Labor Law § 241(6) cause of action. In Motion Sequence 002 and 003 respectively, Defendants Roseland and Pavarini and Defendant/Third-Party Defendants DFC and DiFama move for summary judgment dismissing this cause of action. Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection' to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a claim under § 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-02 [1993]).

Plaintiffs argue that Defendants have violated 12 NYCRR § 23-1.7(e)(1), which mandates that passageways be kept free from "accumulations of dirt and debris and from any other obstructions which could cause tripping," and § 23-1.7(e)(2), which requires 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 argue in opposition that the sling on which Seccafico tripped was integral to the work being performed. It is well established that there is no violation of § 23-1.7(e)(1) or (2) where a plaintiff is injured by an obstacle that is integral to the work being performed (*Bazdaric v Almah Partners LLC*, 203

AD3d 643, 644-45 [1st Dept 2022]). An obstacle is integral to the work being performed only where it was being used at the time of an accident (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668 [1st Dept 2019] ["the debris . . . was not inherent in, or an integral part of, the work being performed . . . at the time of the accident"]). Plaintiffs contend that, at the time Seccafico was injured, the slings were not in use because the clamps and other construction materials had already been delivered. They maintain that, while there was no designated storage area for slings not in use, the common practice was to drop unused slings back down to lower floors immediately after deliveries.

Here, the record shows that Seccafico's accident took place in a "working area" as defined by § 23-1.7(e)(2), rather than a "passageway" under § 23-1.7(e)(1) (*compare* § 23-1.7[e][2] [defining Working Areas as "[t]he parts of floors, platforms and similar areas where persons work or pass"] *with Quiqley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018] ["[C]ourts have interpreted the term [passageway] to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (citations omitted)]). It is undisputed that there were debris and scattered tools on the floor of the working area (*see* NYSCEF Doc. No. 40, Plaintiffs' Statement of Material Facts ¶ 19) and that the sling on which Seccafico tripped was also lying on the floor. The Court finds that the sling was not integral to the work being performed at the time Seccafico was allegedly injured, because it is undisputed that it was not in use at the time of the accident (*see Rossi*, 171 AD3d at 668). Seccafico so testified (Plaintiff EBT at 111-112) and DiFama's superintendent, Joseph Corvino, stated that the slings "wouldn't [be] on the floor" when in use (NYSCEF Doc. No. 47, Corvino EBT at 57). Defendants do not present any evidence that would create an issue of fact as to whether the sling was in use at the time of the accident. Therefore, Plaintiffs' motion seeking summary judgment

on their § 241(6) cause of action is granted and that branch of Roseland and Pavarini's motion seeking summary judgment dismissing this cause of action is denied.

DFC and DiFama likewise move for summary judgment dismissing Plaintiffs' § 241(6) claims against DFC. The primary argument advanced by DFC and DiFama is that this claim and all of Plaintiffs' claims against DFC are barred by the Workers' Compensation Law exclusivity defense. Specifically, Sections 11 and 29(6) provide that an employer may not be found liable in an action after an employee has been compensated under the Workers' Compensation Law for that injury. It is undisputed that DiFama, who is not a party in the main action, was Seccafico's employer at the time of the incident and provided him with workers' compensation benefits. DFC and DiFama argue that DFC is an alter ego of DiFama and therefore is also entitled to the exclusivity defense (*see Gonzalez v 310 W. 38th LLC*, 14 AD3d 464 [1st Dept 2005]). In opposition to this argument, Plaintiffs, Roseland, and Pavarini argue that DFC has not made a prima facie showing that it is an alter ego of DiFama and that there are material questions of fact.

Although it is undisputed that these entities have the same owner and CFO, DFC and DiFama fail to show that the companies' "finances were integrated, that they commingled assets, or that the principal[] failed to treat the entities as separate and distinct" such that they could be considered alter egos (*Soodin v Fragakis*, 91 AD3d 535, 536 [1st Dept 2012]) or that there is an absence of material issues of fact as to whether DFC exercised any supervision or control over DiFama employees (*see Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 459 [1st Dept 2012]). Therefore, both Plaintiffs' motion on the § 241(6) claim as to DFC and DFC and DiFama's motion seeking dismissal of that claim against DFC must be denied.

In Motion Sequence 002, Roseland and Pavarini additionally move for summary judgment dismissing the remaining causes of action based on Labor Law §§ 240(1) and 200,

common law negligence, and loss of consortium as against them. Labor Law § 240(1) requires contractors, owners, and agents who contract for the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" to furnish scaffolding, ladders, and other devices to give proper protection to persons employed in such tasks and was enacted to protect workers from gravity-related hazards stemming from differences in elevation on worksites (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Plaintiffs do not sufficiently allege that Seccafico's injuries resulted from any of the height- or gravity-related hazards contemplated by Section 240(1) or from Defendants' failure to provide him with an adequate safety device to protect him against such hazards (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Rocovich*, 78 NY2d at 514 [1991]). As tripping on an obstacle on a level floor does not fall within the ambit of Labor Law § 240(1), Roseland and Pavarini's motion for summary judgment seeking dismissal of the § 240(1) cause of action is granted.

In support of their motion for summary judgment dismissing the § 200 claim, Roseland and Pavarini argue that they did not possess actual or constructive knowledge of any dangerous conditions at the worksite and that they did not exercise supervision over Seccafico's work. An owner or general contractor is liable under Labor Law § 200 where it created a dangerous condition or where it "exercised supervisory control" over the "manner and means of the work" that caused the plaintiff's injury (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Owners or general contractors will not be held liable under a means and method theory where they only exercised, at most, "general supervisory powers over [the] plaintiff" (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

Defendants Roseland and Pavarini meet their prima facie burden. Roseland's representative, Bennet Chomfeld, testified that no Roseland employees worked directly on the site (NYSCEF Doc. No. 91 at 14). Pavarini's construction superintendent, Bryan Frederick, testified that his oversight of DiFama's preparatory work for the concrete pour and on workplace safety issues was limited to interactions with DiFama's foremen or supervisors, not individual DiFama employees (NYSCEF Doc. No. 88 at 66-70). Furthermore, Seccafico did not mention any interactions with Frederick or other Pavarini personnel in his EBT testimony. Plaintiffs do not tender any proof indicating that there is a material issue of fact regarding Roseland or Pavarini's supervisory roles on the project. Accordingly, the Court grants this branch of Roseland and Pavarini's motion and dismisses Plaintiffs' Labor Law § 200 and negligence causes of action against them.

Because the Court has found liability on the basis of Labor Law § 241(6), Roseland and Pavarini are not entitled to dismissal of Plaintiffs' loss of consortium on the grounds that that claim is derivative (*cf. Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]).

Turning to DFC and DiFama's motion seeking dismissal of Plaintiffs' § 200 and common law negligence claims, in light of DFC and DiFama's position that DFC is an alter ego of DiFama, issues of fact exist as to whether DFC exercised supervisory control over the manner and means of the work that caused the injury (*Cappabianca,* 99 AD3d at 143-144) requiring denial of this branch of the motion. Because the Court has denied DFC and DiFama's motion on the § 241(6), §200, and negligence claims, their application to dismiss the loss of consortium claim must also be denied. However, as set forth herein, Plaintiffs' fail to allege an injury that falls under Labor Law § 240(1) and therefore the branch of DFC and DiFama's motion seeking dismissal of that claim is granted.

Roseland and Pavarini's Third-Party Claims

Roseland and Pavarini next move, in Motion Sequence 002, for summary judgment on their third-party causes of action against DFC and DiFama for contractual indemnification, common law indemnification and contribution, and breach of contract. DFC and DiFama oppose and move, in Motion Sequence 003 for an order granting them summary judgment dismissing these causes of action.

Roseland and Pavarini argue they are entitled to summary judgment on their cause of action for contractual indemnification based on the terms of the subcontract between Pavarini and DFC (NYSCEF Doc. No. 74; NYSCEF Doc. No. 93, "Trade Agreement"). The plain language of Article 9 of the Trade Agreement requires DFC to indemnify both the construction manager and owner – here, Pavarini and Roseland, respectively (*see* NYSCEF Doc. No. 93 at 90-91). Therefore, summary judgment on Roseland and Pavarini's contractual indemnification claim must be granted as against DFC. DFC and DiFama's argument that the claim should nevertheless be dismissed because Pavarini was at least partially negligent is without merit as the Court has dismissed Plaintiffs' negligence claim against Pavarini (*see Fresco v 157 E. 72nd Condo.*, 2 AD3d 326, 328 [1st Dept 2003]). Roseland and Pavarini further take the position that the contractual indemnification claim must extend to DiFama, despite arguing elsewhere that issues of fact exist regarding that relationship. Because the Court has agreed that those questions of fact exist, both motions for summary judgment on the contractual indemnification claim must be denied as to DiFama.

With respect to Roseland and Pavarini's motion for summary judgment on their common law indemnification and contribution claims, a party is entitled to common law indemnification where it shows "(1) that it has been held vicariously liable without proof of negligence or actual

supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York* 94 AD3d 1, 11 [1st Dept 2012], citing *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). The Court has found that DFC and DiFama's motion for dismissal of Plaintiffs' § 200 and common law negligence claims must be denied given the issues of fact regarding whether DFC exercised actual supervision and/or control over Seccafico's work. Consequently, Roseland and Pavarini's summary judgment granting their common law indemnification claim and DFC and DiFama's motion dismissing that claim must be denied as to DFC.

As to DiFama, the common law indemnification claim must be dismissed. Workers' Compensation Law § 11 provides, in relevant part, that "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment" where the employee did not suffer a "grave injury." The statute limits "grave injury" to death and certain other permanent injuries. It is undisputed that Seccafico received Workers' Compensation benefits from DiFama. Furthermore, there is no dispute of fact that Seccafico's alleged injuries do not fall within the "grave injury" exception of Section 11 of the Workers' Compensation Law (*see* NYSCEF Doc. No. 58, Bill of Particulars ¶ 16). Accordingly, Roseland and Pavarini's common law indemnification claims cannot be granted against DiFama.

The Court further dismisses Roseland and Pavarini's breach of contract cause of action based on DFC and DiFama's purported failure to maintain agreed upon insurance coverage. DFC and DiFama are named insured on the relevant insurance policies acquired in connection with the project (NYSCEF Doc. No. 66, Hiscox policy at 5; NYSCEF Doc. No. 67, Arch policy at 36). Furthermore, they tender sufficient evidence to show that they have complied with the

minimum coverage requirements set forth in the Trade Agreement's insurance rider (*compare* Trade Agreement at 116 ¶ 2 *with* Hiscox policy at 3 and Arch policy at 2).

Accordingly, it is hereby:

ORDERED that Motion Sequence 001 is granted in part and Plaintiffs are awarded summary judgment on their Labor Law § 241(6) claim as to Roseland and Pavarini; and it is further

ORDERED that Motion Sequence 002 is granted to the extent that Plaintiffs' Labor Law § 240(1), § 200, and common law negligence are dismissed as against Defendants Roseland and Pavarini; and it is further

ORDERED that Motion Sequence 002 is further granted to the extent that Roseland and Pavarini are awarded summary judgment on their contract indemnification claim as against DFC; and it is further

ORDERED that Motion Sequence 003 is granted to the extent that Plaintiffs' Labor Law § 240(1) claim is dismissed as against DFC; and it is further

ORDERED that Motion Sequence 003 is further granted to the extent that Roseland and Pavarini's common law negligence claim is dismissed as against DiFama and their breach of contract claim is dismissed as against both DFC and DiFama; and it is further

ORDERED that all other relief sought herein is denied.

This constitutes the Decision and Order of the Court.

2/9/2023
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE