

Lliguin v DDG Dev. LLC

2023 NY Slip Op 30979(U)

March 29, 2023

Supreme Court, New York County

Docket Number: Index No. 152339/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

RUBEN LLIGUIN,

Plaintiff,

- v -

DDG DEVELOPMENT LLC, DDG PARTNERS LLC, 180
EAST 88TH STREET REALTY LLC, CARNEGIE GREEN
LLC,

Defendants.

-----X

DDG DEVELOPMENT LLC, DDG PARTNERS LLC, 180 EAST
88TH STREET REALTY LLC

Plaintiff,

-against-

Defendant.

-----X

DDG DEVELOPMENT LLC, DDG PARTNERS LLC, 180 EAST
88TH STREET REALTY LLC

Plaintiff,

-against-

ALLIED SAFETY CONSULTANTS L.L.C.

Defendant.

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INDEX NO. 152339/2018

MOTION DATE 03/24/2023

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595865/2018

Second Third-Party
Index No. 596000/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 222, 223, 225, 226, 229, 230

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 224, 227, 228, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240

were read on this motion to/for

JUDGMENT - SUMMARY

Motion Sequence Numbers 004 and 005 are consolidated for disposition. Second and third-third-party Defendant Allied Safety Consultants, LLC (“Allied”)’s motion (MS004) for summary judgment against second third-party plaintiff BMNY Contracting Corporation (“BMNY”), for summary judgment against third-third party plaintiffs DDG Development, LLC, DDG Partners, LLC and 180 East 88th Street Realty LLC (collectively, “DDG”) is denied.

DDG’s motion (MS005) for summary judgment dismissing plaintiff’s complaint and for summary judgment on its third-party claims for contractual indemnity as against BMNY, and for contractual and common law indemnity and contribution against Allied is granted in part and denied in part.

Background

This Labor Law action arises out of plaintiff’s accident on January 9, 2018. Plaintiff was working for BMNY at a construction site on the Upper East Side in Manhattan when he was injured while pulling out a nail. As he pulled the nail out, a piece broke off and hit him in the eye. He testified that “we didn’t want to do the job because we had already changed to our house clothing. We were on our way back home and the person that takes care of the equipment had already gone home” (NYSCEF Doc. No. 233 at 36). Apparently, the workers didn’t want to do the work because it was so cold but the “safety guy” said to do the job anyway despite the fact that they had already put away their safety equipment (*id.*). Plaintiff said when he pulled a nail out, it flew into his eye (*id.* at 45). He admitted that the person who told him to do the work was an employee of BMNY (*id.* at 127) but also suggested that it was a safety person (*id.* at 128). Allied was hired by DDG to work as the safety consultant at the job site.

DDG's Motion Against Plaintiff

In MS005, DDG seeks summary judgment on the ground that plaintiff was the sole proximate cause of his injury. It argues that plaintiff failed to use the readily available safety goggles because he was in a rush to go home for the day. DDG points out that plaintiff had safety goggles and had used them previously. It claims that plaintiff's argument that he was not allowed to go get the safety device is "unbelievable."

The Court declines the branch of the motion that seeks summary judgment to dismiss the complaint on the ground that plaintiff was the sole proximate cause of his accident. On a motion for summary judgment, the Court cannot find that plaintiff's story is "unbelievable." The Court cannot make such a finding of fact on this record, especially where plaintiff testified that "We didn't have time to do so [get the safety goggles]. Because they said do this real quick. It was somewhat of an emergency thing" (NYSCEF Doc. No. 208 at 70). That DDG may find that testimony unpersuasive or claim that plaintiff should have insisted on using his safety equipment is an issue for a fact finder. In other words, the Court cannot make a finding based on a credibility assessment of plaintiff's account of the accident.

DDG also seeks to dismiss plaintiff's Labor Law § 241(6) claims and asserts that the Industrial Code sections cited in the bill of particulars, 23-1.5, 23-1.7, 23-1.7(f), 23-1.8(a), 23-3.2, and 23-3.3, are inapplicable.

The only Industrial Code section plaintiff addresses in opposition is 23-1.8(a), which provides that:

"Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes."

The Court denies DDG's motion to the extent it seeks summary judgment on this Industrial Code section as plaintiff claimed his employer refused to let him go get his safety goggles (*Crawford v Williams*, 198 AD2d 48, 603 NYS2d 456 [1st Dept 1993] [concluding that evidence produced at trial that a plaintiff's employer refused to let him do demolition work without safety glasses demonstrated a violation of Labor Law § 241(6)]). Here, there is clearly an issue of fact with respect to whether plaintiff was permitted to do the job with the appropriate safety devices.

The remaining provisions upon which this claim is based are severed and dismissed.

DDG also seeks to dismiss plaintiff's Labor Law § 200 claim. Plaintiff did not substantially or sufficiently oppose that branch of the motion and so the Court severs and dismisses this claim.

Indemnification Claims

DDG also moves for summary judgment on its indemnification claims against BMNY and Allied. It claims that it entered into a contract with BMNY that required it to indemnify DDG for accidents arising out of their assigned work and that plaintiff was doing that work when he was injured. DDG also claims that it was not negligent at all and so it should be awarded summary judgment against BMNY.

Allied also makes its own motion (MS004) for summary judgment on the ground that plaintiff was supervised by a BMNY foreman and that there is no basis to support the position of BMNY and DDG that Allied's supervisor told plaintiff to remove the nail.

“In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue

and irrelevant” (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

“Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). “[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident” (*Correia*, 259 AD2d at 65).

The Court denies both motions as plaintiff’s testimony is unclear as to which person told him to remove the nail (allegedly without allowing him to retrieve his safety glasses). Plaintiff claimed that a “safety person” told him to remove the nail and that this person was previously on the job site with a group who monitored safety issues (NYSCEF Doc. No. 207 at 128, 129). Allied is certainly correct that plaintiff’s testimony is, at certain points, contradictory. He also testified that the person who told him to pull the nail worked for BMNY (*id.* at 127).

The Court cannot reconcile these two differing accounts a motion for summary judgment. And because the Court cannot determine which entity was responsible (potentially) for directing plaintiff to purportedly do the work without his safety glasses, it is premature to reach a conclusion about the indemnification or contribution issues. A jury could find that the person who instructed plaintiff to the work was an employee of Allied and thereby possibly absolve BMNY of any potentially liability or they could find that it was an employee of BMNY who


demanded the job get done immediately. Or, alternatively, a jury could find that plaintiff was solely responsible for his actions and none of these entities have any liability.

But the Court cannot make such a determination in these papers, where plaintiff’s account of this key fact—the employer of the person who purportedly told him to get to work without allowing him to get his safety device—is internally inconsistent.

Accordingly, it is hereby

ORDERED that defendant Allied Safety Consultants, LLC (“Allied”)’s motion (MS004) for summary judgment against second third-party plaintiff BMNY Contracting Corporation (“BMNY”), for summary judgment against third-third party plaintiffs DDG Development, LLC, DDG Partners, LLC and 180 East 88th Street Realty LLC (collectively, “DDG”) is denied; and it is further

ORDERED that DDG Development, LLC, DDG Partners, LLC and 180 East 88th Street Realty LLC’s motion is granted only to the extent that plaintiff’s Labor Law § 200 claim and his Labor Law § 241(6) claims based upon Industrial Code sections 23-1.5, 23-1.7,23-1.7(f), 23-3.2, and 23-3.3 are severed and dismissed, and denied with respect to the remaining requests for relief.

<u>3/29/2023</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		