Supreme Court of the State of New York
County of Kings

Part LL1

ANGEL SUQUITANA,

Plaintiff,

against

DRMBRE-85TH FEE LLC, PRATT CONSTRUCTION & RESTORATION, INC., CAPITAL RESTORATION & CONSULTING CORP. AND 85TH ESTATES COMPANY,

Defendants.

CAPITAL RESTORATION & CONSULTING CORP.,

Third-Party Plaintiff,

against

4G CONSTRUCTION & RESTORATION CORP.,

Third-Party Defendants.

Index Number 517109/2017
Seq. 009

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, defendant DRMBRE-85th Fee LLC's and 85th Estates Company's (together "Estates") motion for summary judgment (Seq. 009) is decided as follows:

Introduction

The plaintiff, an employee of third-party defendant 4G Construction & Restoration Corp. ("4G") brought this action pursuant to New York Labor Law for injuries that he claims to have sustained on May 24, 2017 when he was using a grinder to cut a piece of metal and a shard entered his eye.

Factual Background

It is undisputed that the plaintiff, Angel Suquitana, was an employee of 4G. On May 24, 2017, numerous types of work (including construction, demolition, and painting) were being performed on the second-floor roof of 185 E. 85th Street ("the Building"). Plaintiff was working that day on the second-floor roof.

The plaintiff alleges the following: On the day of his accident, the plaintiff was assigned to use a grinder to cut a piece of metal (Suquitana EBT at 24). While he was cutting the metal, a piece of metal flew up and hit the plaintiff in his unprotected left eye (*id.* at 26). The plaintiff's contention is that he was not given any eye protection for this task (*id.* at 26, 27, 31).

It is undisputed that the Building is owned by Estates. Estates entered a written contract with Pratt Construction & Restoration, Inc. ("Pratt") retaining Pratt as general contractor for the roof work. Pratt sub-contracted Capital Restoration & Consulting Corporation ("Capital") to do the work. Capital subsequently sub-contracted the work to Plaintiff's employer, 4G.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

The Plaintiff's Labor Law § 200 Claim

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d

Dept 2008]). "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. 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 the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident. By contrast, when the manner of work is at issue, no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed. Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega*, 57 AD3d at 61–62). "Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (*Ortega*, 57 AD3d at 62).

Plaintiff frequently references an unsafe or dangerous condition (Aff. in Opp. at 12–14) but does not provide evidence that an unsafe or dangerous *premises* condition caused this accident. Instead, the factual predicate to plaintiff's Labor Law § 200 claim is that he was required to grind metal without approved [eye] protection equipment suitable for the task that he was assigned (Bill of Particulars at ¶ 4; *Cf.* 12 NYCRR 23-1.8 [a]). That argument is essentially identical to the one made in support of his Labor Law § 241 (6) claim and does not include an allegation that the grinder itself, the premises, or the roofing upon which the plaintiff was working were defective. The plaintiff's Labor Law § 200 claim has to, therefore, rest on the

contention that the means and manner of the work caused the plaintiff's accident, and not a dangerous premises condition (*see e.g. Gomez v 670 Merrick Road Realty Corp.*, 189 AD3d 1187 [2d Dept 2020]).

Estates argues that it did not supervise the work and did not provide any equipment for the work. Estates' superintendent, Dusan Maras, testified that he did know that work was being performed on the second floor, but that no representative of Estates supervised the work and that Mr. Maras did not even see the work being done (Maras EBT at 21, 23–24, 29–30). Mr. Maras believed that Pratt was the contractor managing the work (*id.* at 25). Kryzystof Bak, the project manager for Pratt, testified that "Dusan" did not supervise the work on the roof nor did the owner of the building provide any of the equipment for the job (Bak EBT at 47).

The plaintiff does not produce any evidence to demonstrate that Estates, through its representatives, controlled the means or manner of the work. In essence, the plaintiff relies on the accusation that there is a question of fact about whether Estates had knowledge about a dangerous condition and cites caselaw accordingly. However, as this case concerns means and manner, not a dangerous premises condition, the jurisprudence of the Second Department is clear: notice by itself is inadequate to attach liability to an owner in cases where the Labor Law § 200 claim is predicated on unsafe means and manner of work being performed (*see Ortega*, 57 AD 3d at 61; *see also Cody v State*, 82 AD3d 925 [2d Dept 2011]; *Pilato v 866 U.N. Plaza Associates*, 77 AD 3d [2d Dept 2010]). Absent evidence indicating that Estates controlled the worksite, supplied the tools or other equipment, or otherwise exerted influence on the worksite, the plaintiff is unable to resist summary judgment as to his Labor Law § 200 claims.

Estates' Contractual Indemnification Claim

To prevail on a claim for contractual indemnification, a general contractor must

demonstrate that it is owed indemnification based on the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011] [quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 (2d Dept 2009)]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930 [2d Dept 2016] [internal citations omitted]).

Here, Estates presents a valid contract with Pratt that unequivocally obliges Pratt to indemnify Estates for any injuries "arising out of the Work or alleged to arise out of the Work" (Contract with Pratt at ¶ 10). However, the plaintiff maintains a claim against Estates that sounds in Labor Law § 241 (6) that will not be resolved by this motion. Because a violation of an Industrial Code provision is "some evidence of negligence" (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349 [1998]), Estates has not demonstrated as a matter of law that it is free from negligence. Because the language of the indemnification provision in the contract connects indemnification to any claim "arising out of the work," and is not limited to indemnification for injuries arising out of the negligence of identified parties, Estates cannot be awarded summary judgment on its contractual indemnification unless it demonstrates that it is free from negligence (General Obligations Law § 5-322.1; *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662). Summary judgment must therefore be denied.

Conclusion

Estates' motion for summary judgment (Seq. 009) is granted to the following extent: the plaintiff's Labor Law § 200 claim is dismissed as to defendants DRMBRE-85th Fee LLC and 85th Estates Company. The motion is in all other respects denied.

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This constitutes the decision and order of the court.

March 29, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court