

Calvo v 94th Ave. Jamaica, LLC

2023 NY Slip Op 31114(U)

March 29, 2023

Supreme Court, New York County

Docket Number: Index No. 151115/2019

Judge: Richard G. Latin

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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. RICHARD LATIN PART 46V

Justice

-----X

DIEGO CALVO,

Plaintiff,

- v -

94TH AVENUE JAMAICA, LLC, ARTIMUS CONSTRUCTION
INC.,

Defendant.

-----X

94TH AVENUE JAMAICA, LLC, ARTIMUS CONSTRUCTION
INC.

Plaintiff,

-against-

FORWARD HEATING CORP.

Defendant.

-----X

94TH AVENUE JAMAICA, LLC, ARTIMUS CONSTRUCTION
INC.

Plaintiff,

-against-

EVEREST SCAFFOLDING, INC.

Defendant.

-----X

INDEX NO. 151115/2019

MOTION DATE 12/09/2022,
12/09/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595326/2019

Second Third-Party
Index No. 595388/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 95, 96, 98, 99, 100, 101, 102, 104, 110

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 103, 105, 106, 107, 108, 109

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

Upon the foregoing documents, it is ordered that motion sequence numbers 001 and 002 are hereby consolidated for disposition and determined as follows:

Plaintiff commenced the instant action to recover from injuries allegedly sustained on April 14, 2017 while working as a plumber on the construction of a new 25-story building at 147-36 94th Avenue in Queens, New York (the “premises”). Plaintiff claimed he was injured when he was pushing a dolly onto a hoist and the bottom of the hoist gate unexpectedly rose up, causing plaintiff to trip and fall.

In his complaint, plaintiff asserted claims for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). 94th Avenue Jamaica, LLC (“94th Avenue”) and Artimus Constriction Inc. (“Artimus”), in their third-party complaint against Everest Scaffolding, Inc. (“Everest”), sought common-law indemnification, contribution, and contractual indemnification, and alleged a breach of contract for failure to procure insurance.

In motion sequence 001, defendants/third-party plaintiffs 94th Avenue Jamaica, LLC and Artimus move for summary judgment dismissing the plaintiff’s complaint pursuant to CPLR 3212. 94th Avenue and Artimus additionally move for leave to amend their answer pursuant to CPLR 3025 (b), adding the affirmative defense of collateral estoppel. Upon such amendment, 94th Avenue and Artimus move to dismiss plaintiff’s claims for lost earnings pursuant to CPLR 3211 (a) (5). In motion sequence 002, second third-party defendant Everest moves for summary judgment dismissing 94th Avenue and Artimus’ second third-party complaint pursuant to CPLR 3212.

Background

Plaintiff testified that on the date of the incident he was employed by Forward Heating (“Forward”) as a plumber and was working on the premises. Plaintiff was pushing a dolly onto the “west hoist” on the seventh floor. The hoist operator opened the mesh metal gates on the hoist from the inside. Plaintiff testified: “And while I was walking in, the gate door just raised up and it caused me to trip and fall right there.” The incident occurred between 11:00 a.m. and 12:00 p.m. Plaintiff observed after the incident that the hoist operator was holding the top part of the gate with his hand and the bottom part with his foot to prevent it from closing. Plaintiff returned to work on light duty the next day. About a week and a half after the incident, Forward ended his employment.

Dennis Normile was a senior construction supervisor for Artimus, the general contractor, at the time of the incident. He was the site supervisor at the premises. He would walk the job site, create daily reports, look for safety hazards, and make sure work was conforming to the plans and specifications. Normile testified that he walked the site twice a day, once in the morning and once after lunch. Normile explained: “I would take the hoist or whatever means to the top and walk my way down.” The site had an exterior hoist consisting of two cars: the west and east cars. He explained that each car of the hoist had two metal gates, which would be opened by an Artimus hoist operator who would push the top gate up and the bottom gate down. He explained that it was normal for the operator to put his foot down on the bottom gate when people were going in and out. Normile stated that the hoist was visually inspected by the operators daily and that the gates would be opened 500 to 600 times per day. Normile did not experience any problems with the hoist or the gates prior to the date of the incident. Had there been a problem, Normile would have made a repair request with Everest.

Joseph Milohnic, president of Forward, testified that he would ride the hoists once or twice per week. He never observed any problems with the hoists and was not aware of any complaints. Plaintiff's employment with Forward ended two weeks after the accident.

Ronen Gabay was manager of the elevator and hoist division of Everest at the time of the incident. He testified that he supervised the installation of the hoist on the premises. He was also responsible for training the hoist operators. Everest was responsible for monthly maintenance of the hoist and 90-day inspections conducted by a third party. Gabay explained that the operator pushes the doors apart to open it. He explained that usually the operators start to open the gate by hand, then use the lever, and then use their foot to push it down.

Beau Snell was the site safety manager and fire safety manager for non-party City Safety Compliance Corp. ("City Safety") at the time of the incident. He testified that he would perform daily site inspections, walk the job site, and identify, document, and report safety deficiencies. He explained that the hoist doors operate in conjunction; if one went up, the other would go down. After the incident, he observed that the gate would slowly start to close on its own. He was not aware of this issue prior to the incident. Following the incident, he made an accident report. Snell testified that the bottom gate is not supposed to rise on its own and that it would present a safety concern if it did.

Following the incident, an accident report was created by City Safety and an incident report was created by Artimus. On the accident report, Snell wrote, "West hoist gate still continues to malfunction."

Plaintiff filed a workers' compensation claim. At an August 1, 2017 hearing, the Workers' Compensation Law Judge found that plaintiff "was terminated for reasons having nothing to do with the accident of 4/14/17 and shall not be entitled to awards for this period." On appeal, a panel

of the Workers' Compensation Board affirmed and determined in a decision dated February 21, 2018 that plaintiff's "separation from employment was due to conditions unrelated to his disability."

Artimus and Everest entered into an AIA agreement for the 147-20 94th Avenue project on January 10, 2017. The agreement provides: "To the fullest extent permitted by law, [Everest] shall indemnify, defend and hold harmless [94th Avenue], [Artimus] . . . from and against claims . . . including but not limited to reasonable attorney's fees . . . but only to the extent caused by the intentional wrongful acts or negligence of [Everest]." Exhibit F to the agreement (the insurance rider) provides: "To the fullest extent permitted by law, [Everest] shall indemnify, defend, protect and hold harmless the following: 94th Jamaica LLC . . . Artimus Construction Inc. from and against claims . . . including but not limited to reasonable attorney's fees . . . but only to the extent caused by the intentional, wrongful acts or negligence of [Everest]."

Everest attaches to its motion papers its primary and excess policies with a blanket additional insured endorsement. The blanket additional insured endorsement provides: "It is agreed that this Policy shall include as additional insureds any person or organization to whom [Everest] has agreed by written contract to provide." Defendants attach Everest's tender rejection letter.

Discussion

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted];

see also CPLR 3212 [b]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

A. Plaintiff’s Labor Law § 200 and Common-Law Negligence Claims

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases involving the duty to provide a safe workplace fall under two categories: “those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Jackson v Hunter Roberts Constr., L.L.C.*, -- AD3d -- , 2022 NY Slip Op 03321, *1 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Here it is alleged that plaintiff’s injuries arose from the hoist gate rising up and causing plaintiff to trip and fall. Plaintiff argues that the gate constituted a dangerous and defective condition. In such a case, an owner or general contractor will be held liable where “the owner or general contractor created the condition or had actual or constructive notice of it” (*Cappabianca*, 99 AD3d at 144 [internal citations omitted]).

Plaintiff’s argument that defendants created the defective condition or were on actual notice of the condition are based on mere speculation and thus insufficient to defeat summary

judgment. As to constructive notice, defendants have met their burden on summary judgment. Normile testified that he would inspect the site daily, including riding the hoist to the top of the building. In addition, he testified that the hoist operator would visually inspect the hoists daily. There is no evidence that defendants were made aware of a dangerous condition on the hoist prior to the incident as to put defendants on notice. Moreover, plaintiff testified that he did not observe the hoist operator holding down the bottom of the gate until after the incident. Thus, defendants have established a lack of constructive notice. In opposition, plaintiff fails to raise a triable issue of fact. Defendants' motion for summary judgment is thus granted as to the Labor Law § 200 and common-law negligence claims.

B. Plaintiff's Labor Law § 240 (1) Claim

Plaintiff does not oppose the branch of defendants' motion for summary judgment as to the Labor Law § 240 (1) cause of action. As such, this claim is abandoned (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549, 550 [1st Dept 2018]).

C. Plaintiff's Labor Law § 241 (6) Claim

Labor Law § 241 (6) imposes a “nondelegable duty of reasonable care upon owners and contractors ‘to provide reasonable and adequate protection and safety’” to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). Labor Law § 241 (6) is not self-executing because it depends upon an outside source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). Thus, to prevail under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision and show that the violation was a proximate cause of the accident

(*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). “The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence” (*id.*).

In opposition to defendants’ motion, plaintiff only relies on 12 NYCRR § 23-1.7 (e) (1), § 23-1.7 (e) (2), § 23-1.5 (c) (3), and § 23-9.2 (a). Plaintiff has thus abandoned reliance on the remaining Industrial Code provisions cited in the complaint.

12 NYCRR § 23-1.7 (e) (1)

12 NYCRR § 23-1.7 (e), entitled “Tripping and other hazards,” states: “(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.”

Liability under § 23-1.7 (e) (1) depends on whether the accident occurred due to a tripping hazard in a passageway. Courts have defined “passageway” as “a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” *Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018], citing *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]). The First Department has found that a doorway may constitute a passageway within the meaning of § 23-1.7 (e) (1) (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]; *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421-422 [1st Dept 2013]). In *McCullough*, the court found that summary judgment should not have been granted for defendants on Labor Law § 241 (6) based on an alleged violation of § 23-1.7 (e) (1) where plaintiff was injured while “passing from an exterior roof on a construction site to an interior room, moved his left foot across an approximately one- or two-foot-high threshold in a doorway” (132 AD3d at 492).

Here, plaintiff testified that the accident occurred while he was pushing a dolly from the seventh floor of the worksite onto a hoist. Plaintiff tripped and fell as a result of the hoist gate unexpectedly rising up. Thus, plaintiff's accident occurred within a doorway and thus within the ambit of 12 NYCRR § 23-1.7 (e) (1). As such, there are triable issues of fact as to whether plaintiff's injuries were proximately caused by a tripping hazard in a passageway.

12 NYCRR § 23-1.7 (e) (2)

12 NYCRR § 23-1.7 (e) (2) states: "Working areas. The 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."

The First Department has defined "sharp projection" broadly to include "any projection that is 'sharp' in the sense that it is clearly defined or distinct" (*Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 393 [1st Dept 1997]). In *Lenard*, the court held that the lower court erred in dismissing the Labor Law § 241 (6) based on an alleged violation of § 23-1.7 (e) (2), finding that a door stop was, in addition to "debris," a "sharp projection" because it was "not a gradual change in the level of the floor but was, instead, a distinct object jutting out from the rest of the floor's surface" (*id.* at 394). Here, the bottom of the hoist gate rising up from the floor and causing plaintiff's alleged injuries could be characterized as distinct object jutting out of the floor. Thus, there is a question of fact as to whether plaintiff's injury was proximately caused by a violation of this section.

12 NYCRR § 23-1.5 (c) (3)

12 NYCRR § 23-1.5 (c), entitled “Conditions of equipment and safeguards,” states: “(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.”

The First Department has held that § 23-1.5 (c) (3) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). Defendants argue that even if this provision can be the basis for a § 241 (6) claim, there is still a notice requirement (*see Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 AD3d 937, 940 [2d Dept 2019]).

As discussed above, defendants have established a lack of notice and are thus entitled to summary judgment as to the Labor Law 241 (6) predicated upon a violation of 12 NYCRR § 23-1.5 (c) (3).

12 NYCRR § 23-9.2 (a)

The third sentence of 12 NYCRR § 23-9.2 (a) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Misicki v Caradonna*, 12 NY3d 511, 521 [2009]). § 23-9.2 (a) refers to “all power-operated equipment” and the third sentence provides: “Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.” Liability based on this regulation requires actual notice of the defect or unsafe condition (*see id.*).

Here, as above, defendants have satisfied their burden demonstrating a lack of notice. As such, defendants are entitled to summary judgment as to plaintiff’s Labor Law § 241(6) claim based on a violation of 12 NYCRR § 23-9.2 (a).

D. Defendants' Motion for Leave to Amend

Defendants seek leave to amend their answer to add an affirmative defense of collateral estoppel based on the determination of the Workers' Compensation Board. "Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is 'prejudice or surprise resulting directly from the delay,' or if the proposed amendment 'is palpably improper or insufficient as a matter of law'" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal citations omitted]).

Here, there is no surprise or prejudice to plaintiff as he was involved in the Workers' Compensation hearing. Moreover, the doctrine of collateral estoppel applies to the determinations of administrative agencies (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]). The collateral estoppel defense based on the determination of the Workers' Compensation Board is thus not palpably insufficient. Defendants may amend their answer to add the affirmative defense of collateral estoppel.

E. Defendants' Collateral Estoppel Affirmative Defense

Defendants seek dismissal of plaintiff's claims for lost earnings based on the doctrine of collateral estoppel. The doctrine of collateral estoppel precludes a party from relitigating an issue clearly raised in a prior action and decided against that party (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). For collateral estoppel, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001]). The party invoking collateral estoppel bears the burden of

establishing identity of issue (*see Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]).

Here, defendants have failed to show that the identical issue was necessarily decided in the prior action. The Workers' Compensation Board determined that plaintiff's termination from his employment was unrelated to the April 14, 2017 incident. However, contrary to defendants' contention, it does not follow from this determination that plaintiff did not sustain any subsequent lost earnings as a result of his injuries. In fact, the Workers' Compensation Board subsequently awarded plaintiff \$165,245.68 based on his having sustained a permanent partial disability. As such, plaintiff is not collaterally estopped from seeking damages for lost earnings in this action.

F. Defendants/Third-Party Plaintiffs' Common-Law Indemnification & Contribution Claims

“To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any 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, 10 [1st Dept 2012]). For a contribution claim, the party seeking contribution must show that “the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v Braun*, 90 NY2d 177, 183 [1997])

Everest installed the hoist but was not responsible for operating it. Pursuant to the agreement with Artimus, Everest was only required to do monthly maintenance and an inspection every 90 days. Any additional repairs were to be requested. There is no evidence that Everest supervised plaintiff's work nor that it was negligent in its installation or inspection of the hoist. In

opposition, defendants failed to raise a triable issue of fact as to Everest's negligence. Dismissal of the claims for common-law indemnification and contribution is thus appropriate.

G. Defendants/Third-Party Plaintiffs' Contractual Indemnification Claim

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]).

The 2017 AIA agreement between Artimus and Everest limits Everest's obligation to indemnify 94th Avenue and Artimus to claims caused by "the intentional wrongful acts or negligence of [Everest]." Here, there is no evidence of intentional, wrongful, or negligent conduct on the part of Everest. As the indemnification provisions only apply to Everest's intentional, wrongful, or negligent acts, the cause of action for contractual indemnification must be dismissed.

H. Defendants/Third-Party Plaintiffs' Breach of Contract Claim

The First Department has found that a blanket endorsement for contractually designated additional insureds is sufficient to satisfy a requirement to procure insurance (*see Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). A refusal to indemnify is not a basis for finding failure to procure insurance (*see id.*). As such, defendants' breach of contract cause of action must be dismissed as Everest provided its policies with a blanket additional insured endorsement.

Accordingly, it is


ORDERED that defendants/third-party plaintiffs 94th Avenue and Artimus' motion for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 200 and common-law negligence claims, plaintiff's Labor Law § 240 (1) claim, plaintiff's Labor Law § 241 (6) claim predicated upon a violation of 12 NYCRR § 1.5 (c) (3) and § 23-9.2 (a) and other Industrial Code violations deemed abandoned, and is otherwise denied; and it is further

ORDERED that 94th Avenue and Artimus' motion for leave to amend is granted; and it is further

ORDERED that, upon amendment, 94th Avenue and Artimus' motion to dismiss is denied; and it is further

ORDERED that second third-party defendant Everest's motion for summary judgment is granted.

This constitutes the decision and order of the court.

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