

Morris v Structure Tone, Inc.

2023 NY Slip Op 31254(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 156695/2019

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

QUINTAY MORRIS, Plaintiff, - v - STRUCTURE TONE, INC., 6163 CROSBY STREET, INC., Defendant. INDEX NO. 156695/2019 MOTION DATE 12/08/2022 MOTION SEQ. NO. 001 002 003 DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 193, 196, 197, 208

were read on this motion to/for JUDGMENT - SUMMARY

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, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 180, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 201, 202, 203, 204, 205, 206, 209, 210

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 181, 195, 198, 199, 200, 207

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of injuries allegedly sustained because of a handrail that became dislodged in a permanent staircase at a construction site. Plaintiff now moves for summary judgment alleging various violations of the Labor Law. Defendants/third-party plaintiffs, third-party defendant/second third-party plaintiff and second-third party defendants all move and cross move for summary judgment. The motions will be discussed in turn.

Facts

Defendant 6163 Crosby Street, Inc. is the owner of the subject premises. Defendant Structure Tone Inc. (Structure Tone) was the construction manager for the job. Structure Tone

then contracted with third-party defendant/second third-party plaintiff, Kraman Iron Works, Inc. (Kraman) to fabricate and install steel handrails in all interior fire stairs, including the stairway where the accident occurred. Kraman then contracted with second third-party defendant Steel Riser Corp. (Steel Riser) to install the handrails.

Plaintiff was employed by Metropolitan Construction System, Inc.¹, a subcontractor retained by defendant Structure Tone, to perform roofing work at the construction site located at 6163 Crosby Street, New York, New York. On the date of the incident, plaintiff's second day at the jobsite, plaintiff was carrying a 50-pound roll of roofing material while climbing the stairs to reach the roof, plaintiff grabbed the handrail which came loose, and plaintiff fell backward. Prior to the incident, plaintiff previously used the staircase but did not use the handrail. It is undisputed that prior to the subject incident there were no complaints nor any visible defects with the subject handrail.

Motion Sequence 001

Second third-party defendant Steel Riser moves for summary judgment seeking dismissal of the second third-party complaint, including dismissal of the (i) common law indemnification claim; (ii) contribution; (iii) breach of contract for failure to procure requisite insurance claim²; (iv) contractual indemnification claim; and (v) dismissing all crossclaims³. Second third-party plaintiff, Kraman, opposes the instant motion. For the reasons set forth below the motion is denied.

¹ A third-party action was commenced as against Metropolitan Construction System, Inc., however that action has since been discontinued.

² There are no substantive arguments to support dismissal of this claim, accordingly that portion of the motion is denied.

³ Steel Riser has not identified any crossclaims, accordingly that portion of the motion is denied.

Steel Riser contends that there was nothing negligent regarding its installation of the subject handrail because its work was limited solely to the installation of the handrail with all supplies and instruction provided by Kraman.

After the incident photos were taken of the walls and subject handrail. These photos were shown to Michael Planer, general superintendent employed by Structure Tone, at his deposition, and Mr. Planer testified that based on the photographs it was evident that contrary to the shop drawings epoxy anchors were not used. Steel Riser contends that the only logical conclusion that can be drawn from the evidence in the record, is that Kraman selected and delivered an inappropriate, non-epoxy wall anchor which was installed correctly. This court cannot make such a leap.

Steel Riser has failed to meet its burden that it was not supplied with the appropriate hardware, epoxy included, to install the handrail. The conclusion that Steel Riser wishes this court to find is not supported by the record. The record is devoid of any itemization of materials received by Steel Riser and or sent by Kraman, nor do the parties cite to any such document. Thus, contrary to Steel Riser's position that the absence of the epoxy is evidence of Kraman's negligence, it does not establish an absence of negligence as to Steel Riser. There is a question as to whether the epoxy was in fact provided to Steel Riser and just not used. Accordingly, as there are questions of fact as to Steel Riser's compliance with the drawings regarding whether epoxy was used with the anchor and whether it was the lack of epoxy or whether it was an improper anchor that was used that caused the handrail to detach, summary judgment must be denied.

Motion Sequence 002

Plaintiff moves for summary judgment as against Structure Tone and 6163 Crosby Street alleging defendants' violation of Labor Law §§ 200, 240 (1) and 241(6). Defendants Structure Tone and 6163 Crosby oppose the motion and cross move for summary judgment. Third-party defendant/second third-party plaintiff, Kraman opposes plaintiff's motion for summary judgment and cross move for summary judgment as against second third-party defendant Steel Riser⁴.

Based on the reasons set forth below, plaintiff's motion is granted in part.

Labor Law § 200

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002].

The Court finds that plaintiff has failed to establish a prima facie entitlement to judgment as a matter of law as to its claims pursuant to Labor Law § 200. Plaintiff's papers are silent as to what notice, if any, defendants had regarding the dangerous condition that caused plaintiff's accident. Further, plaintiff does not contend that defendants had the ability to control the activity which caused the defective condition. Accordingly, the portion of plaintiff's motion that seeks summary judgment as to its Labor Law § 200 claims is denied⁵.

⁴ The Court notes that Kraman's cross motion is procedurally improper, however as the second third-party defendant has fully opposed the motion, for the sake of judicial economy the Court will overlook the procedural defect.

⁵ The Court will later address the defendants' cross-motion with respect to these claims.

Labor Law §240(1)

Labor Law §240(1) states in pertinent part as follows: “All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury. *Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991].

It is well established law that “an accident alone does not establish a Labor Law § 240(1) violation or causation.” (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id.*

Plaintiff contends that the subject stairway does qualify as a safety device pursuant to the Labor Law because it was the sole means of access to plaintiff’s worksite. Defendants do not substantively oppose the position that the subject stairway was the only means of access to the plaintiff’s worksite, rather, without any legal support, contend that that fact alone does not bring the subject stairway into the purview of Labor Law § 240(1). In opposition, defendants contend that although the stairway was the sole means of access to the roof, it was not designed to be the sole means of access, thereby removing it from the ambit of Labor Law § 240(1). The Court does not agree.

The First Department has held that a permanent stairway qualifies as an "other" safety device under the statute when it is provided as the sole means of access to and from the work area, *see (Gory v Neighborhood Partnership Hous. Dev. Fund Company, Inc., 113 AD3d 550 [1st Dept 2014]; Ramirez v Shoats, 78 AD3d 515, 516 [1st Dept 2010])*.

Preliminarily, it is undisputed that the subject staircase was the only means of access to the plaintiff's work location, the roof. As such, the stairway is an "other" safety device pursuant to the Labor Law. Notwithstanding that finding, it was a defective condition within the stairway, namely the handrail, that caused plaintiff's accident. Defendants cite to the dissenting opinion in *Ramirez* to support its contention that the decision in *Ramirez* is not sound and should not be followed by this Court. However, the dissenting opinion specifically provides "[i]f the staircase here was being used by plaintiff in lieu of a scaffold and was the sole means of access to the elevation level required to perform his work, it may be that it could then be deemed a "safety device" within the ambit of section 240 (1) (*see Jones v 414 Equities LLC, 57 AD3d 65, 866 NYS2d 165 [1st Dept. 2008]*)" *id.* at 519. Contrary to defendants' contention, the dissenting opinion supports plaintiff's position, and the *Ramirez* decision has precedential value.

Moreover, under the specific facts of this case, plaintiff's injuries did result from an "other" protective device designed "to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." *Lindstedt v 813 Assocs., 238 AD2d 386 [2d Dept 1997]*. Specifically, the stairway, that was the only means of access to plaintiff's worksite was equipped with a defective handrail, under these circumstances the Court finds that plaintiff is entitled to summary judgment on its Labor Law § 240(1) claim.

Labor Law §241(6)

It is well settled law that for there to be liability pursuant to Labor Law § 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute).

Plaintiff alleges that the defendants violated Industrial Code 12 NYCRR 23-1.7(f), which provides the following:

Vertical passage, stairways, ramps or runways shall be provided as a means of access to working levels above or below ground except where the nature or progress of the work prevents their installation in which case ladder or other safe means of access shall be provided.

Plaintiff has established a *prima facie* case with respect to its Labor Law § 241(6) claim. The Court finds that plaintiff has sufficiently established how Industrial Code 12 NYCRR 23-1.7(f) was violated, namely not providing a “safe means of access”, as the defective handrail renders the stairway unsafe.

Defendants contend that Industrial Code 12 NYCRR 23-1.7(f) is not applicable to the instant case in that it does not refer to handrails and there are no alleged defects to the subject staircase. The Court declines to adopt defendants’ interpretation of the Industrial Code, especially when the First Department has specifically held that Industrial Code 12 NYCRR 23-1.7(f) imposes a duty to provide a safe staircase, free of defects (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 493 [1st Dept 2010]). Accordingly, plaintiff’s motion seeking summary judgment on its Labor Law § 241(6) claim pursuant to a violation of Industrial Code 12 NYCRR 23-1.7(f) is granted.

Structure Tone, Inc. and 6163 Crosby Street cross motion

Defendants/third-party plaintiffs Structure Tone and 6163 Crosby Street, cross move for summary judgment and seek dismissal of plaintiff's claims pursuant to Labor Law §§ 200, 240(1) and 241(6). For the reasons stated above, as well as additional analysis below, the motion is granted in part.

Preliminarily, as the Court has already decided that plaintiff has established its entitlement to judgment as a matter of law for its claims pursuant to Labor Law §§ 240(1) and 241(6), defendants/third-party plaintiff's motion that seeks dismissal of these causes of action is denied.

As to plaintiff's Labor Law § 200 claims, defendants/third-party plaintiffs have established entitlement to judgment as a matter of law. The undisputed testimony is that neither Structure Tone nor 6163 Crosby Street were on notice of a dangerous or defective condition, namely the improperly installed handrail, nor did those defendants/third-party plaintiffs control the means or methods of the work that caused the condition. Moreover, it is undisputed that the defective condition, whether it was an improper anchor or a lack of epoxy, was not a condition that was visible and apparent to provide constructive notice to the movants.

Plaintiff, or any other party in this matter has failed to raise an issue of fact to rebut defendants/third-party plaintiffs *prima facie* showing. Accordingly, defendants/third-party plaintiff's motion to dismiss plaintiff's claims pursuant to Labor Law § 200 is granted.

Kraman's improper cross motion as against Steel Riser

Third-party defendant/second third-party plaintiff Kraman seeks summary judgment on its contractual indemnity claims against second third-party defendant Steel Riser, as well as

common law indemnification and contribution. For reasons previously stated, as well as the discussion below, the motion is granted in part.

As the Court previously addressed above, in declining to grant Steel Riser's motion for summary judgment, there are questions of fact that preclude a finding in favor of Kraman. Kraman has not provided any admissible evidence that it provided either the appropriate hardware to Steel Riser or the epoxy, which it contends the absence of caused the handrail to dislodge. Specifically, Kraman has failed to establish *prima facie* showing that it is free from negligence to trigger indemnification pursuant to the contract. Accordingly, Kraman's cross motion for contractual indemnity, common law indemnification and contribution is denied.

As to the breach of contract claim, the Court finds that Steel Riser has in fact breached the express terms of the contract by failing to properly name Kraman as an additional insured. Steel Riser has not rebutted Kraman's *prima facie* showing. Accordingly, the portion of Kraman's motion seeking summary judgment as to its breach of contract claims is granted.

Motion Sequence 003

Defendants/third-party plaintiffs, Structure Tone, Inc. and 6163 Crosby Street, motion against third-party defendant/second third-party plaintiff Kraman for contractual indemnification is granted.

It is undisputed that the contract between Structure Tone and Kraman is unambiguous and provides for indemnification of the construction manager and owner for "all claims, suits . . . damages, losses, . . . and expenses, including . . . reasonable attorney's fees . . . arising in whole or in part and in any manner from the acts [or] omissions" of Structure Tone's subcontractor and sub-subcontractors. As the court has already determined that there is an issue of fact as to the negligence of Steel Riser and Kraman, and that neither Structure Tone nor 6163 Crosby Street

had actual or constructive notice of the defect, nor did either entity control or supervise the means and methods of the alleged defective work, the absence of negligence of Structure Tone and 6163 Crosby Street has been established.

In opposition, Kraman does not raise a triable issue of fact, rather it contends that this motion is premature and that the defect, lack of epoxy, is something that the movants could have and should have seen and corrected. These arguments are belied by the record. Accordingly, it is hereby

ORDERED that second third-party defendant Steel Riser Corp.’s motion for summary judgment, motion sequence 001, is denied; and it is further

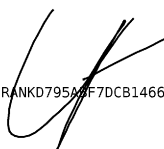
ORDERED that plaintiff’s motion for summary judgment, motion sequence 002, is granted in part as against defendants Structure Tone Inc. and 6163 Crosby Street Inc., for its claims pursuant to Labor Law §§ 240(1), 241(6); and it is further

ORDERED that third-party defendant/second third-party plaintiff Kraman Iron Works, Inc., cross motion as against Steel Riser is granted in part as to its breach of contract claims and otherwise denied; and it is further

ORDERED that defendants/third-party plaintiffs Structure Tone Inc. and 6163 Crosby Street Inc., cross motion is granted in part, to the extent that all claims against it, pursuant to Labor Law § 200, are dismissed; and it is further

ORDERED that defendants/third-party plaintiffs Structure Tone Inc. and 6163 Crosby Street Inc., motion that seeks contractual indemnification, motion sequence 003, is granted in its entirety.

4/19/2023
DATE


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LYLE E. FRANK, J.S.C.