Supreme Court of the State of New York
County of Kings

Part LL1

IVAN POPOVYCH,

Plaintiff,

against

2815 ATLANTIC HOLDINGS LLC.,

Defendant.

2815 ATLANTIC HOLDINGS LLC.,

Third-Party Plaintiff,

against

AGGREGATE ENVIRONMENTAL GROUP LLC.,

Third-Party Defendant.

2815 ATLANTIC HOLDINGS LLC.,

Second Third-Party Plaintiff,

against

SUNSHINE CONSTRUCTION USA INC. AND PLI GROUP CORP.,

Second Third-Party Defendants.

Index Number 522896/2018
Seqs. 004 & 006

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	1–2
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2–3
Replying Affidavits	4
Exhibits	
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 004) and defendant 2815 Atlantic Holdings LLC.'s motion for summary judgment (Seq. 006) are decided as follows:

Introduction

Plaintiff Ivan Popovych commenced this action against defendant 2815 Atlantic Holdings LLC. (Atlantic) for injuries he claims to have sustained in an accident on September 6, 2018. Plaintiff alleges that defendant was negligent and violated New York Labor Law §§ 200, 240 (1), and 241 (6). The plaintiff moves for summary judgment under Labor Law § 240 (1). Atlantic moves for summary judgment as to: 1) plaintiff's Labor Law §§ 200 and 241 (6) claims and all crossclaims; and 2) for contractual indemnification from third-party defendants Aggregate Environmental Group, LLC. (Aggregate) and Sunshine Construction USA Inc. (Sunshine).

Procedural History

Plaintiff commenced this action on November 12, 2018. Plaintiff served Atlantic a supplemental summons and amended complaint on August 16, 2019. Atlantic impleaded third-party defendant Aggregate on July 9, 2019. Atlantic impleaded second third-party defendant Sunshine on February 18, 2020. Sunshine impleaded third-party defendant Aggregate and PLI Group Corp. (PLI) on June 26, 2020.

Justice Lawrence Knipel issued two discovery orders in this action dated May 28, 2021, and December 8, 2021 (*see* Knipel Orders). The plaintiff contends that defendants and third-party defendants failed to produce any witnesses for depositions within the timeline for the first order and should be barred from offering further evidence. However, the second order supersedes the first, rendering the first moot. The second order extended the dates for discovery. At oral argument the parties acknowledged that all depositions had been completed within the deadlines provided by the second discovery order.

Factual Background

Plaintiff contends he was injured on September 6, 2018, when he fell from a ladder. Plaintiff was employed as part of a construction project and tasked with removing asbestos in a building owned by Atlantic located at 2815 Atlantic Avenue, Brooklyn, New York. Plaintiff testified he was employed by PLI at the time of the accident (Popovych July EBT at 21). Atlantic retained Sunshine as the general contractor who in turn sub-contracted with Aggregate and PLI for the construction job at 2815 Atlantic Avenue. Both the foreman and supervisor at the construction site were employed by PLI (*id.* at 97).

To perform asbestos work, plaintiff wore a respirator and plastic suit which covered his shoes while he was on a ladder (*id.* at 40–42). The work area was covered with plastic, and it was normal for the plastic to be punctured during the removal of the asbestos (*id.* at 35). Plaintiff was tasked with sealing the punctured plastic (*id.*). In addition, the floor was wet and also covered in plastic to manage the asbestos particulate matter (*id.* at 58–59; Popovych August EBT at 142–146).

Plaintiff was told by his supervisor to utilize a plastic six-foot A-frame ladder to reach the punctures in the plastic (Popovych July EBT at 36–37). He inspected the ladder and found no problems (*id.* at 38–39). The braces, stairs, and feet of the ladder were all intact (*id.*). The plaintiff then set up the ladder and locked the braces. Plaintiff went up and down this ladder approximately 10–20 times prior to the time of his accident without incident. Plaintiff testified he was working alone (*id.* at 49).

Plaintiff initially testified he did not know how he fell and that he had lost consciousness when he hit the floor (*id.* at 50–55). After a short break in his deposition, the plaintiff subsequently testified, "[w]ell, I remember the ladder going out from under, under my feet, I

fell" (*id.* at 57, lines 10–12). He testified that he believes the ladder slipped due to the wet floor (*id.* at 57).

When asked if he felt the ladder slip under his feet, plaintiff testified, "[y]es, I did feel that because… But I don't know the actual reason of it slipping out of—from out of my feet." (*id.* at 58, lines 7–11). In a later deposition, plaintiff testified he remembers the ladder falling from out under him (Popovych August EBT at 233). No one else witnessed the accident (Popovych July EBT at 61).

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 fact that an accident was unwitnessed does not preclude granting summary judgment for a plaintiff (*Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010]).

Plaintiff's Motion for Summary Judgment (Seq. 004)

"Liability under Labor Law § 240 (1) [is] 'absolute' in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control over the work" (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 NY2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). That "liability is contingent on a statutory violation and proximate cause" (*id.* at 287). The statutorily enumerated safety devices are "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" (NY Labor Law § 240 [1]).

Additionally, "the mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" (*Delahaye v St. Anns School*, 40 AD3d 679, 682 [2d Dept 2007]).

Plaintiff contends the statute was violated because the ladder, an enumerated safety device, slid out from under him. Plaintiff admits that he set the ladder up and that all its features were in good order. Further, he states that he was required to set it up on a wet floor covered in plastic. But it is clear from plaintiff's testimony he is unsure whether or how the ladder slipped, shifted, or collapsed. At different points in his deposition, the plaintiff provides different accounts of the accident, including a response that "[he] was not sure what the reason was" when asked if "[he believed] that the ladder slipped because of the wet plastic" (Popovych July EBT at 59).

Plaintiff cites case law that supports the proposition that a collapse or malfunction of a ladder for no apparent reason creates a presumption that the ladder was defective or proper safety protection was not provided (*Blake,* 1 NY3d at 289 n. 8 [2003]). Further, plaintiff cites case law supporting the proposition that a Labor Law § 240 (1) claim is not precluded even if the worker himself had placed the ladder on a slippery surface (*Bland v Manocherian*, 66 NY2d 452, 464 [1985]).

While it is the case that a plaintiff can obtain summary judgment when they are the sole witness to an accident (*see Cardenas v 111-127 Cabrini Apartments Corp.*, 145 AD3d 955, 957 [2d Dept 2016]), that scenario requires that the plaintiff's testimony about the accident be sufficient to resolve all questions of fact, leaving only issues of law. Here, the plaintiff's inconsistent testimony about whether the ladder fell, including admitting that he did not look at

the ladder after he had fallen (*id.* 59–60), leaves open questions of fact about the adequacy of the ladder as a safety device. By extension, the plaintiff's testimony leaves open a question about whether the defendants violated the statute. Accordingly, plaintiff's motion must be denied.

Atlantic's Motion for Summary Judgment (Seq. 006)

Labor Law § 200

Atlantic seeks summary judgment dismissing plaintiff's claims for violation of Labor Law § 200. "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, violations of Labor Law § 200 are evaluated using a basic negligence analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

A property owner or general contractor is liable under Labor Law § 200 in two circumstances: (1) if there is evidence that the owner or general contractor either created a dangerous condition on the premises, or had actual or constructive notice of it without remedying it within a reasonable time or (2) if there are allegations of the use of dangerous or defective equipment at the job site and the owner or general contractor supervised or controlled the means and methods of the work (*Grasso v New York State Thruway Auth.*, 159 AD3d 674, 678 [2d Dept 2018]; *Wejs v Heinbockel*, 142 AD3d 990, 991 92 [2d Dept 2016], lv to appeal denied, 28 NY3d 911 [2016]).

Atlantic contends plaintiff's claim under Labor Law § 200 should be dismissed because there is no issue of fact regarding Atlantic's liability. Atlantic contends it is not liable under Labor Law § 200 because it did not possess the power of supervision and control over the means and methods of the work being performed. It is undisputed that Atlantic retained Sunshine as the general contractor who in turn sub-contracted with Aggregate and PLI for the construction job at

2815 Atlantic Avenue. It is also undisputed the foreman and supervisor at the construction site were employed by PLI (Popovych July EBT at 97).

Plaintiff does not offer any argument to rebut Atlantic's motion for summary judgment on Labor Law § 200. There is no evidence offered that Atlantic created a dangerous condition on the premises or had actual or constructive notice of such a condition without remedying it within a reasonable time. There is also no evidence presented that Atlantic supervised or controlled the use of dangerous or defective equipment at the job site.

Accordingly, Atlantic's motion is granted without opposition.

Labor Law § 241 (6)

Atlantic moves for summary judgment with respect to plaintiff's claim for violation of Labor Law § 241 (6). To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]).

Plaintiff does not predicate his § 241 (6) claim on a specific violation of any Industrial Code provision. Although plaintiff includes Industrial Code provisions in his complaint, he has not proffered evidence in admissible form that these code violations were violated. Additionally, the plaintiff does not oppose Atlantic's motion on this claim. In the absence of any opposition or evidentiary submission by the plaintiff, Atlantic's motion is also granted as to plaintiff's Labor Law § 241 (6) claims.

Contractual Indemnification

Finally, Atlantic moves for summary judgment on its third-party actions for contractual indemnification against Sunshine and Aggregate. In evaluating contractual indemnification clauses, courts look to the specific language of the contract (*George v Marshalls of MA, Inc.*, 61

AD3d 925, 930, 878 NYS2d 143 [2009]). A promise to indemnify should not be found unless it can be "clearly implied from the language and purpose of the entire agreement and the surrounding circumstance" (*Santos v Power Auth. of State of NY*, 85 AD3d 718, 722 [2d Dept 2011]).

"A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]). In addition, a party seeking contractual indemnification must not have had the authority to supervise, direct, or control the manner of the work that caused the injury (*Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331 [2d Dept 2005]).

The indemnification clause between Atlantic and Sunshine states,

> "To the fullest extent permitted by law, the contractor shall indemnify and hold harmless the Owners and managers and employee of either of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the contractors and Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), including loss of use resulting therefrom, caused in whole or in part by negligent acts or omissions of the contractor or Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described above."

Notwithstanding that this provision contains language ("regardless of whether [the occurrence] is caused in part by a party indemnified hereunder") that could be read to violate General Obligations Law § 5-322.1, the language of the above agreement does clearly memorialize an agreement that the contractor will indemnify the owners and managers. The issue of a party seeking indemnification for damages for which it was responsible is dealt with below.

The indemnification clause between Sunshine and Aggregate states,

> "In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor, all entities the Contractor is required indemnify [sic] and hold harmless, the Owner of the property, and the officers, directors, agents, employees, successors and assigns of each of them, all entities the Owner is required indemnify and hold harmless from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties."

It is clear from the language of the contract that the valid indemnification agreement between Aggregate and Sunshine also provides for the indemnification of Atlantic.

In light of the dismissal of the plaintiff's Labor Law §§ 200 and 241 (6) claims against Atlantic, the only remaining liability that could be found against Atlantic is the statutory liability of Labor Law § 240 (1). It is therefore appropriate to award conditional summary judgment to Atlantic against both Aggregate and Sunshine on Atlantic's contractual indemnification claims (*Arriola v City of New York*, 128 AD3d 747 [2d Dept 2015]). Specifically, Aggregate and Sunshine shall indemnify Atlantic to the extent that either party is found to have been negligent and that such negligence contributed to the plaintiff's injuries, which is appropriate under the relevant provisions of the General Obligations Law.

Conclusion

Plaintiff's testimony leaves open questions of fact about the adequacy of the ladder as a safety device and, by extension, whether the defendants are responsible for a statutory violation. Accordingly, plaintiff's summary judgment motion as to Labor Law § 240 (1) (Seq. 004) is denied.

Atlantic's motion for summary judgment (Seq. 006) is granted to the extent of dismissing the plaintiff's claims pursuant to Labor Law §§ 200 and 241 (6). Atlantic's motion is further granted to the extent that it is awarded conditional summary judgment on its contractual indemnification claims against Aggregate and Sunshine.

This constitutes the decision and order of the court.

April 4, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court