

Rohles v Metropolitan Transp. Auth.

2023 NY Slip Op 31782(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 157185/2019

Judge: David B. Cohen

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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. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 157185/2019

GREG ROHLES,

MOTION SEQ. NO. 003

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, THE
NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY
(CAPITAL CONSTRUCTION COMPANY), and JUDLAU
CONTRACTING/TC ELECTRIC, A JOINT VENTURE,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

METROPOLITAN TRANSPORTATION AUTHORITY, THE
NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY (CAPITAL
CONSTRUCTION COMPANY), JUDLAU CONTRACTING/TC
ELECTRIC, A JOINT VENTURE

Third-Party
Index No. 595161/2020

Plaintiff,

-against-

REBAR STEEL CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

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

In this Labor Law action, defendants/third-party plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of contractual indemnification against third-party defendant Rebar Steel Corp. Rebar Steel opposes.

Factual and Procedural Background

This case arises from an incident on March 28, 2019, in which plaintiff was allegedly injured after being struck by an excavation machine while working at a construction site located near the intersection of 14th Street and Avenue A in Manhattan (the premises) (NYSCEF Doc No. 77). Plaintiff commenced this action against defendants asserting causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) (Doc No. 77). Defendants joined issue by their answer dated February 14, 2020 (Doc No. 78), and subsequently commenced a third-party action against third-party defendant Rebar Steel Corp asserting claims of, among other things, contractual indemnification (Doc No. 80).

In May 2022, after the completion of discovery, plaintiff filed a note of issue (Doc No. 92). Shortly thereafter, he discontinued his Labor Law § 240(1) claims against defendants (Doc No. 73). Defendants move for partial summary judgment against Rebar Steel on the issue of contractual indemnification (Doc No. 74), which Rebar Steel opposes (Doc No. 99).¹

Relevant Documents

Plaintiff's Deposition Testimony (Doc Nos. 88-89)

At his deposition, plaintiff testified that he was an employee of Rebar Steel and had been hired to install rebar on the premises. On the day of the incident, he was tasked with gathering various types of rebar. As he walked towards an area of the premises where rebar was stored, he passed by an excavation machine chipping concrete nearby. The machine had four outriggers—large metal legs with a flat plate at the end used to balance the weight of the machine while it

¹ While this motion was pending, plaintiff discontinued his Labor Law § 200 and common-law negligence claims against defendants (Doc Nos. 109-110), leaving his Labor Law § 241(6) claims as the only remaining claims in the case.

operated. Prior to the incident, all four outriggers were fully extended and resting flat against the ground.

As plaintiff was partially bent over searching through a pile of rebar, he was struck on his hip and thrown to the ground. As he got up, he noticed the excavation machine moving in reverse towards him; the outriggers were only partially retracted and were positioned approximately waist high off the ground.² Although he did not see the outrigger strike him, he opined that it had to be the reason he was knocked over.

Witness Deposition Testimony (Doc No. 101)

At his deposition, a union worker employed by Judlau testified that he was operating the excavation machine on the day of the incident in an area where rebar was stored. Although he normally extended all four outriggers on the machine when operating it, he only extended the two on the front of the machine that day because there was material nearby that prevented him from doing so. While he was using the machine to break some concrete blocks, he looked in his rearview mirror and saw plaintiff lying on the ground and holding his thigh behind the machine. Plaintiff then got up off the ground, said he was okay, and left the area.

Subcontract Between Judlau and Rebar Steel (Doc No. 85)

Pursuant to the subcontract, the scope of work to be performed by Rebar Steel included, among other things, the furnishing and installation of rebar. The subcontract also contained an indemnification provision that listed defendants as the parties to be indemnified.³ The provision provided that Rebar Steel would indemnify defendants “for any and all claims, damages, losses

² When the outriggers are fully extended and resting on the ground, the machine cannot move; it is only possible to move if the outriggers are fully or partially retracted.

³ More specifically, it listed, among others, Judlau and parties to the “Prime” contract which included defendants Metropolitan Transportation Authority, The New York City Transit Authority, and Metropolitan Transportation Authority (Capital Construction Company).

and expenses, including but not limited to, attorneys' fees, resulting from, arising out of[,] or occurring in connection with" the work Rebar Steel performed. It also provided that Rebar Steel would indemnify defendants against claims to the fullest extent of the law, and the provision "shall not be construed in any way to require [Rebar Steel] . . . to indemnify [defendants] for any claims caused by or resulting from [defendants'] own fault or negligence."⁴

Legal Analysis and Conclusions

Generally, "summary judgment on [a] contractual indemnification claim must be granted conditionally rather than unconditionally, in light of the pending issues of fact" regarding a defendant's negligence (*Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept 2015] [granting conditional contractual indemnity where plaintiff established defendant liable under Labor Law § 240(1) but questions of fact existed regarding plaintiff's Labor Law § 200 and common-law negligence claims because accident caused in part by defendants' Labor Law § 240(1) violation]; see e.g. *Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 650-651 [1st Dept 2014] [similar]). Defendants, however, cannot be found directly liable because plaintiff discontinued his claims of common-law negligence and violations of Labor Law §§ 200 and 240(1). Plaintiff's only remaining claims are for violations of Labor Law § 241(6), which only imposes *vicarious liability* (see *Nostrum v A.W. Chesterton Co.*, 15 NY3d 502, 506-507 [2010]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). Therefore, the only question remaining is whether defendants are entitled to full, unconditional contractual indemnification.

Here, the plain language of the indemnification provision demonstrates its breadth, as it requires Rebar Steel to indemnify defendants against claims "resulting from, arising out of[,] or

⁴ However, somewhat confusingly, it also provided that Rebar Steel would indemnify defendants "whether or not such claims are based upon [defendants'] alleged fault."

occurring in connection with” Rebar Steel’s work. That broad provision was triggered by this action, as Rebar Steel was responsible for furnishing and installing rebar at the construction site, and plaintiff was alleged injured while searching for such rebar. Therefore, his claims arise out of the work performed by Rebar Steel (*see Aramburu*, 126 AD3d at 500-501 [finding indemnification provision requiring indemnification for claims “which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of the (w)ork” triggered by plaintiff’s Labor Law action after he slipped and fell on wooden ramp]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 271 [1st Dept 2007] [affirming grant of contractual indemnification where electrician fell off scaffolding and subcontract required subcontractor to “furnish[] and install[]” all scaffolding]).

“Further, the indemnification provision, which has a savings clause limiting any indemnification to the extent permitted by law, does not violate General Obligations Law § 5-322.1(1), which allows contractual provisions requiring indemnification whether or not the promisor is partially negligent” (*Mancusi v Avalonbay Communities, Inc.*, 199 AD3d 463, 464 [1st Dept 2021] [citations omitted]; *see Alvarado v SC 142 W. 24 LLC*, 209 AD3d 422, 424 [1st Dept 2022] [granting contractual indemnification because provision only required that accident arise out of contractors work and did not “run afoul of” General Obligations Law]).

Lastly, the indemnification provision also provides that defendants are entitled to recover costs incurred in defending this action (*see DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269-270 [1st Dept 1994]).

The parties remaining contentions are either without merit or need not be addressed given the findings outlined above.

Accordingly, it is hereby:

ORDERED that the motion by defendants Metropolitan Transportation Authority, The New York City Transit Authority, Metropolitan Transportation Authority (Capital Construction Company, and Judlau Contracting/TC Electric for partial summary judgment on the issue of contractual indemnification is granted; and it is further

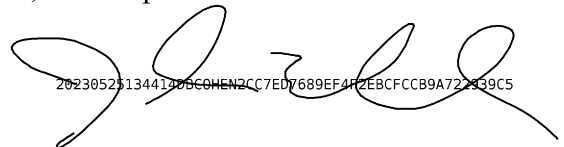
ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties shall appear for a trial scheduling/settlement conference in person at 71 Thomas Street, Room 305, on June 20, 2023, at 2:30 p.m.

5/25/2023
DATE



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DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: