

Perez v NSA 2015 Hous. Dev. Fund Corp.

2023 NY Slip Op 31925(U)

May 17, 2023

Supreme Court, Bronx County

Docket Number: Index No. 29177/2017E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 3, 4, 5

KENNY PEREZ,

Index No.: 29177/2017E

Plaintiff,

- against -

DECISION and ORDER

NSA 2015 HOUSING DEVELOPMENT FUND
CORPORATION, NSA 2015 OWNER, GRENADIER REALTY
CORP., NOTIAS CONSTRUCTION, INC., and
FARA CONSTRUCTION, LLC,

Defendants.

	<u>PAPERS NUMBERED</u>
Defendant Fara Construction, LLC's Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits (Mtn. Seq. No. 3)	NYSCEF Doc. No. 95-121
Defendant Notias Construction, Inc.'s Affirmation in Opposition, Memorandum of Law in Opposition, Response to Statement of Material Facts, Exhibit (Mtn. Seq. No. 3)	NYSCEF Doc. No. 200-203
Plaintiff's Affirmation in Opposition, Memorandum of Law in Opposition, Response to Statement of Material Facts, Exhibits (Mtn. Seq. No. 3)	NYSCEF Doc. No. 217-226
Defendant Fara Construction, LLC's Reply Affirmation to Plaintiff's Opposition (Mtn. Seq. No. 3)	NYSCEF Doc. No. 227
Defendant Fara Construction, LLC's Reply Affirmation to Defendant Notias Construction, Inc.'s Opposition (Mtn. Seq. No. 3)	NYSCEF Doc. No. 228
Plaintiff's Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, Exhibits (Mtn. Seq. No. 4)	NYSCEF Doc. No. 122-140
Defendant Fara Construction, LLC's Affirmation in Opposition, Response to Statement of Material Facts (Mtn. Seq. No. 4)	NYSCEF Doc. No. 195-196
Defendants NSA 2015 Housing Development Fund Corporation's, NSA 2015 Owner LLC's, and Grenadier Realty Corp.'s Affirmation in Opposition, Response to Statement of Material Facts (Mtn. Seq. No. 4)	NYSCEF Doc. No. 197-199
Defendant Notias Construction, Inc.'s Affirmation in Opposition, Memorandum of Law in Opposition, Response to Statement of Material Facts, Exhibit (Mtn. Seq. No. 4)	NYSCEF Doc. No. 204-207
Plaintiff's Reply Affirmation, Memorandum of Law in Reply, Exhibits (Mtn. Seq. No. 4)	NYSCEF Doc. No. 229-232
Defendant Notias Construction, Inc.'s Notice of Motion, Memorandum of Law in Support, Affirmation in Support, Statement of Material Facts, Exhibits (Mtn. Seq. No. 5)	NYSCEF Doc. No. 166-191
Defendant Fara Construction, LLC's Affirmation in Opposition, Response to Statement of Material Facts, Exhibit (Mtn. Seq. No. 5)	NYSCEF Doc. No. 192-194
Plaintiff's Affirmation in Opposition, Memorandum of Law in Opposition, Response to Statement of Material Facts, Exhibits (Mtn. Seq. No. 5)	NYSCEF Doc. No. 208-216
Defendant Notias Construction, Inc.'s Reply Affirmation, Memorandum of Law in Reply (Mtn. Seq. No. 5)	NYSCEF Doc. No. 233-234

Upon the enumerated papers, and due deliberation had thereon, this Court finds:

According to Plaintiff, on the day of the accident, he was employed as a "floating" porter by non-party Crenulated Co., Ltd. ("Crenulated") at an apartment building owned by NSA and managed by Grenadier. As a "floating" porter, Plaintiff performs his duties as a porter at an NSA

building where the porters, normally assigned, are on vacation. His duties include cleaning the interior and exterior of buildings, sweeping, mopping, taking out trash, and performing tasks as instructed by his boss. Plaintiff testified that, on the date of the accident, his Crenulated supervisor, Woody, instructed him and a coworker (Umberto) to remove a refrigerator from an apartment unit. As he entered the apartment unit, Plaintiff went to the kitchen and cleared out debris in order to remove the refrigerator. Plaintiff testified there was one elevator in the building but he did not think the refrigerator would fit. Plaintiff and his coworker allegedly used the staircase in the building to transport the refrigerator on a hand truck as the elevator was taken out of service for replacement. Plaintiff took the top of the hand truck with the refrigerator on it and his coworker took the bottom of the hand truck. As they proceeded from mid-landing of the staircase to the first floor, Plaintiff alleged he slipped with the hand truck and refrigerator falling on top of him causing him to sustain injury.

He testified that it had snowed in the days prior to his accident and first noticed that the stairs were wet when he entered the building. Umberto testified he observed dust, debris, and water on the staircase before the accident occurred. The subject residential building was occupied by tenants and some apartment units were being renovated. Plaintiff testified he did not interact with any construction workers and received all of his instructions from his Crenulated supervisors. He also testified that he previously removed refrigerators from apartments whether or not construction was ongoing.

NSA retained Notias to serve as general contractor for a modernization and renovation project concerning all of the apartment units within the NSA development. Notias entered into a subcontract with Fara to perform carpentry work on the project.

Sergio Kovacs, the site supervisor for Notias, testified that he was present on the date of the accident and recalled the plumbing and electrician subcontractors as well as Fara were present on the job site on the date of the accident. Mr. Kovacs testified that building tenants and workers for the various subcontractors freely entered and exited the building as they pleased.

Robert Acosta, the owner and President of Fara, and a witness to the accident, testified that Fara is a subcontractor to Notias tasked with demolishing tenant-occupied apartments and renovating kitchen and bathrooms. Mr. Acosta testified that Fara workers used the elevator to remove garbage and debris and that Fara never used the staircase to transport materials. He further testified that Fara would clean or remove any debris that resulted out of the performance of its work and stated that the removal of the subject refrigerator at the time of the accident was not related to Fara's construction work.

Ellener Tuitt, director of property management for Grenadier, testified that the elevator in the subject building was taken out of service for replacement a week prior to Plaintiff's accident, and stated that the staircase is the only other alternative to transporting the refrigerator down. Carlos Quintero, project manager for Notias, also testified that because the elevator was out of service on the date of the accident, any tools, materials, equipment, and debris were transported using the staircase.

This Court finds that Defendant Notias established *prima facie* that the work being performed by Plaintiff at the time of his accident does not amount to any construction work, i.e., erection, demolition, repairing, altering, painting, cleaning or pointing which constitutes a significant physical change to the configuration or composition of the building or structure. *See Joblon v Solow*, 91 NY2d 457 [1998]. Plaintiff did not perform demolition, but only moved loose debris on the floor to clear a path to remove the refrigerator. There is no evidence that any

Crenulated employees were employed or tasked to assist with any construction work. Plaintiff also testified that he only reported to Crenulated supervisors and did not receive instructions from anyone other than Crenulated personnel. Plaintiff further testified that he had removed and transported refrigerators from apartment units on prior occasions as part of his normal course of employment as a porter for Crenulated. Plaintiff's attempted removal of the refrigerator was, therefore, routine and, as a result, Plaintiff is not within the class of persons subject to the protections of Labor Law 240(1) and 241(6). *See DeJesus v 935 Bronx Riv. Ave., LLC*, 213 AD3d 552 [1st Dept. 2023]; *see also Astrakan v City of New York*, 184 AD3d 444 [1st Dept. 2020]. In opposition, Plaintiff failed to raise triable issues of fact.

Defendants Fara and Notias also seek to dismiss Plaintiff's Labor Law 200 and common-law negligence claims. Labor Law 200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 341 [1998]. "A claim for common-law negligence may lie even though there is no Labor Law § 200 liability." *Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept. 2021]. "Claims for personal injury under the statute and the common law fall into two broad 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." *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept. 2012].

"A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it." *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept. 2015]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 [1st Dept. 2009].

To be entitled to summary judgment, an owner is required to show it did not create the hazardous condition and that it did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy same. *See Ceron v Yeshiva Univ.*, 126 AD3d 630 [1st Dept. 2015]. Contractors and subcontractors are only required to show they lacked constructive notice if they had the authority to supervise a plaintiff's work or the work area in general. *See Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept. 2015].

Although Defendants Fara and Notias demonstrated *prima facie* that Crenulated exclusively exercised supervision and/or control over the injury-producing work, the testimonies of Carlos Quintero for Notias and Ellener Tuitt for Grenadier raised triable issues of fact as to whether Notias or any of the subcontractors, including Fara, had constructive notice or contributed to the alleged hazardous condition of the staircase where all the trades were relegated to using the staircase to transport materials, debris, and equipment and was the alternative method of ingress and egress when the elevator was out of service on the date of the accident. *See Romano v New York City Tr. Auth.*, 213 AD3d 506 [1st Dept. 2023]; *see also Cackett v Gladden Props., LLC*, 183 AD3d 419 [1st Dept. 2020]; *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept. 2018].

Furthermore, this Court finds Defendant Notias did not establish its *prima facie* burden for judgment on its cross-claim for contractual indemnity against Fara as there are triable issues of fact as to whether Notias contributed or otherwise had notice of the alleged condition that caused Plaintiff's accident. As Defendant Notias has not established its freedom from negligence, it is not entitled to contractual indemnity from Fara at this juncture.

Additionally, this Court finds Defendant Fara did not demonstrate its *prima facie* entitlement to dismissal of the cross-claim asserted by Notias for breach of contract for failure to procure insurance. By failing to append the commercial general liability policy that was effective

on the date of the accident, Defendant Fara has not made a showing that it complied with its contractual obligation pursuant to its subcontract with Notias.

As there are triable issues of fact as to whether any of the trades present at the job site on the date of the accident were negligent in causing or contributing to Plaintiff's incident, a determination on liability for common-law indemnification and contribution is premature at this juncture. Therefore, Defendant Fara's request for dismissal of Notias' cross-claims for common law indemnification and contribution is respectfully denied. *See Naughton v City of New York*, 94 AD3d 1 [1st Dept. 2012]; *see also Pueng Fung v 20 W. 37th St. Owners, LLC*, 74 AD3d 635 [1st Dept. 2010]. Accordingly, it is

ORDERED, that Defendant Fara's summary judgment motion (Mtn. Seq. No. 3) seeking dismissal of Plaintiff's amended verified complaint as well as dismissal of all cross-claims asserted against it, is granted in part; and it is further

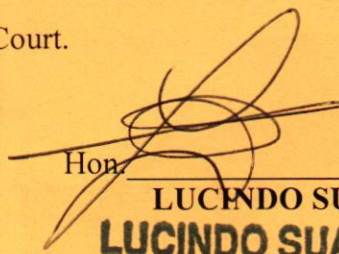
ORDERED, that Plaintiff's Labor Law 240(1) and 241(6) claims are dismissed; and it is further

ORDERED, that Plaintiff's summary judgment motion (Mtn. Seq. No. 4) seeking judgment on his Labor Law 240(1) and 241(6) claims, is denied; and it is further

ORDERED, that Defendant Notias' summary judgment motion (Mtn. Seq. No. 5) seeking dismissal of Plaintiff's Labor Law 200 and 241(6) claims, dismissal of all cross-claims asserted against it, and judgment on its cross-claim against Defendant Fara for contractual indemnity, is granted in part.

This constitutes the Decision and Order of the Court.

Dated: May 17, 2023

Hon. 
LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.