

Pena v 52 W. 9th St. Owners Corp.

2023 NY Slip Op 32313(U)

July 10, 2023

Supreme Court, New York County

Docket Number: Index No. 158982/2018

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X

OMAR PENA,
Plaintiff,

- v -

52 WEST 9TH STREET OWNERS CORP., HUDSON
GREEN CRAFT LLC, MARIO D. DEBENEDETTI,
ALESSANDRA DEBENEDETTI,

Defendants.

-----X

HUDSON GREEN CRAFT LLC,
Plaintiff,

-against-

GOLDS PLUMBING CORP.,

Defendant.

-----X

INDEX NO. 158982/2018
MOTION DATE 07/06/2022, 07/06/2022, 07/06/2022
MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595210/2019

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, 170, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 235, 236, 240, 241, 242, 251, 252, 253, 254, 255, 256

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 172, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 237, 238, 239, 243, 244, 245, 249, 250

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 246, 247, 248, 257, 258, 259, 260, 261, 262

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, after oral argument held on Monday, April 10, 2023, and for the reasons stated hereinbelow, the instant motions are decided as follows.

Background

On Tuesday May 9, 2017, plaintiff, Omar Pena (“Pena”), a plumber employed by third-party defendant, Golds Plumbing Corp. (“Golds”), allegedly fell off a ladder while working at a renovation project on the third floor of a townhouse located at 52 West 9th Street, New York, New York (the “Building”). NYSCEF Doc. No. 1.

The Building is a cooperative owned by defendant 52 West 9th Street Owners Corporation (“52 West”) consisting of two single-family apartments, both of which were being renovated at the time. NYSCEF Doc. Nos. 108, 110.

Defendants Alessandra DeBenedetti and Mario D. DeBenedetti (collectively, the “DeBenedettis”) occupy the top half of the Building, while non-parties, Craig Newmark and Eileen Newmark (collectively, the “Newmarks”), occupy the lower half. NYSCEF Doc. No. 107.

Between September 2016 and March 2017, defendant Hudson Green Craft LLC (“Hudson”), as general contractor, entered into separate contracts to renovate the Building with the Newmarks, the DeBenedettis, and 52 West. NYSCEF Doc. No. 167 at 20, 40, and 5.

Hudson’s contracts with the Newmarks, the DeBenedettis, and 52 West, dated September 23, 2016, March 14, 2017, and April 11, 2017, respectively, are all standard-form AIA contracts that state on their first page that “AIA Document A201-2007, General Conditions of the Contract for Construction, is adopted in this document by reference.” NYSCEF Doc. No. 167. A201-2007, in turn, includes a standard indemnity clause at § 3.18.1. NYSCEF Doc. No. 158.

On October 28, 2016, Hudson entered into a subcontract with Golds that includes an indemnification clause stating:

[Golds] shall indemnify and hold harmless [Hudson] and Owner ... from and against claims, damages, losses, and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of [Golds’] Work, provided that such claim, damage, loss or expense is attributable to bodily injury ... cause [sic] in whole or in part by negligent acts or omissions of [Golds]

NYSCEF Doc. No. 88.

On May 9, 2017, around 1:30 p.m., Pena allegedly fell off a ladder while working in the DeBenedettis’ apartment and was seriously injured (the “Incident”). NYSCEF Doc. No. 1. The circumstances of the Incident are disputed. Pena states, inter alia, that, after being tasked with installing a two-inch waste line in the ceiling of the third floor, someone had left him an “unsecured” wood plank on top of the floor beams and a ladder on top of the plank so that he could climb up to reach the ductwork in the ceiling. NYSCEF Doc. Nos. 104, 105. Pena alleges the plank was “shaky and old” and did not sit well on the beams. *Id.* Pena further alleges that

there was no one to hold the ladder while he climbed it and that it lacked rubber coverings on its feet. Id. Despite this, Pena climbed the ladder, eventually standing with both feet on the ladder's sixth rung. Id. The ladder then tipped over, and Pena allegedly sustained injuries. Id.

Pena alleges that Hudson, as general contractor, was in a position to ensure its subcontractors performed their work according to the plan and could direct them how to do it. NYSCEF Doc. No. 99. Hudson denies this allegation and states that it did not "direct, supervise, or control the means and methods of the work of the subcontractors, including Golds and the Plaintiff." NYSCEF Doc. No. 104.

Nobody provided Pena with a scaffold on which to work. NYSCEF Doc. No. 178. Hudson notes that its contract with Golds required that the latter "provide its own plant and facilities, including scaffolding and hoists." NYSCEF Doc. No. 88.

Pena claims there was no permanent floor or subfloor installed on the third floor when the Incident occurred. NYSCEF Doc. No. 99. Hudson admits there was no permanent floor but argues that the second-floor ceiling was a subfloor for the third floor. NYSCEF Doc. No. 174.

Hudson argues that Pena's allegations are questions of fact for a jury to decide, as the Incident was unwitnessed. NYSCEF Doc. No. 174. Hudson further alleges that nobody from Hudson had a role in causing the set-up of the ladder. Id. As there was no other floor, Hudson required its employees and its subcontractors and their employees, to secure plywood to the floor beams/joists with screws before setting up any ladders. Id. Hudson contends Golds was aware of this requirement. Id.

Hudson also notes that Pena admitted that he placed the "ladder on the unsecured plywood, climbed up it, testified that it was moving like a trampoline, and came back down, and said to himself that it is not going to work." NYSCEF Doc. Nos. 104, 174. Essentially, Hudson argues that plaintiff was the sole proximate cause of his injuries because he knew that the plywood was problematic yet chose to go back up the ladder anyway. Id.

Procedural History

On September 27, 2018, plaintiff commenced this action, asserting causes of action against Hudson and 52 West for: (1) negligence; and (2) violations of various New York Labor Law provisions. NYSCEF Doc. No. 1.

On November 27, 2018, 52 West answered with general denials, 16 affirmative defenses, and two cross claims against Hudson, asserting: (1) vicarious liability, and (2) contractual indemnification. NYSCEF Doc. No. 7.

On December 7, 2018, Hudson answered with general denials, 13 affirmative defenses, and four cross claims against 52 West, asserting: (1) that 52 West was primarily responsible for any alleged damages; (2) breach of contract for failure to procure insurance; (3) common law indemnification and contribution; and (4) contractual indemnification. NYSCEF Doc. No. 8.

On March 14, 2019, Hudson filed a third-party complaint against Golds, asserting three causes of action: (1) common law contribution and indemnification; (2) contractual indemnification; and (3) failure to procure insurance. NYSCEF Doc. No. 19.

On May 23, 2019, Justice Doris Ling-Cohan granted plaintiff's motion, pursuant to CPLR 3025, to amend the complaint to add the DeBenedettis, and on May 29, 2019, plaintiff filed an Amended Complaint. NYSCEF Doc. Nos. 43, 46. On June 5, 2019, Hudson filed an Amended Answer with 13 affirmative defenses and four cross claims. NYSCEF Doc. No. 48.

On June 24, 2019, Golds filed a Verified Answer to the Third-Party Complaint with general denials, 12 affirmative defenses, three cross claims against its co-defendants, and a counter claim of negligence against the third-party plaintiff, Hudson. NYSCEF Doc. No. 53. Golds' cross claims against Hudson allege: (1) common law indemnification; (2) contribution and/or indemnification; and (3) contractual indemnification. NYSCEF Doc. No. 53.

On July 2, 2019, 52 West and the DeBenedettis answered with 15 affirmative defenses, and the same two cross claims against Hudson as they had asserted previously. NYSCEF Doc. No. 55. Also on July 2, 2019, 52 West and the DeBenedettis answered Golds cross claims with general denials. NYSCEF Doc. No. 56.

Motion Sequence 3

On March 28, 2022, Pena moved, pursuant to CPLR 3212, for summary judgment: against 52 West, pursuant to Labor Law §§ 240(1) and 241(6); and against Hudson, pursuant to Labor Law §§ 240(1), 241(6), 200, and common law negligence; and for dismissal of their affirmative defenses, and, inter alia, attorneys' fees ("Motion Sequence 3"). NYSCEF Doc. No. 98.

Pena alleges that, inter alia, all defendants violated Labor Law §§ 200, 240(1), and 241(6) and are liable under a theory of common law negligence. He contends: that 52 West and Hudson as owner and general contractor are liable under § 240(1) because they failed to provide him with "stable flooring, a secure ladder, or alternative method to work safely at a height"; that Hudson is liable under § 200 and common law negligence, as it caused and created a dangerous condition and forced him to perform his work in a precarious fashion; and that all defendants violated § 241(6) because the ladder "wobbled and collapsed". NYSCEF Doc. No. 99.

In opposition, Hudson alleges plaintiff was the sole proximate cause of his accident, that his injury did not occur due to Hudson's violation of any specific code or regulation, and that Hudson did not create or have notice of the allegedly dangerous or defective ladder that caused Pena to fall. NYSCEF Doc. No. 175.

In opposition, 52 West argues that it qualifies as an "owner" entitled to the one- or two-family dwelling exemption in Labor Law §§ 240(1) and 241(6) and that its cooperative shareholders are statutorily exempt from Labor Law claims under that exemption. NYSCEF Doc. No. 235.

Golds alleges that Pena is not entitled to summary judgment on any of his claims because there is a question of fact as to whether he was the sole proximate cause of his injuries. NYSCEF Doc. No. 247.

Motion Sequence 4

On April 7, 2022, Hudson moved, pursuant to CPLR 3212, for summary judgment: (1) dismissing plaintiff's Labor Law §§ 240, 241(6), 200, and general negligence claims; (2) granting Hudson's third-party complaint against Golds; and (3) dismissing all co-defendants cross claims and counter claims against it ("Motion Sequence 4"). NYSCEF Doc. No. 117.

Hudson argues, inter alia that: Pena was the sole proximate cause of his accident; Pena was a recalcitrant worker; Pena did not fall from a scaffold, which would entitle him to Labor Law § 240(3) protection; and that Pena's Labor Law § 241(6) cause of action should be dismissed because his injury did not occur due to Hudson's violation of a specific Industrial Code provision. NYSCEF Doc. No. 119.

In opposition, Pena contends, inter alia, that Hudson failed to raise an issue of fact as to whether his negligence was the sole proximate cause of the accident and that his expert established violations of §§ 240(1) and 241(6). NYSCEF Doc. No. 213.

In opposition, Golds asserts that the indemnity provision at issue is not an "arising out of" trigger but rather a "negligence trigger." Golds argues that the intent of its contract with Hudson was to afford Hudson contractual indemnity *only* if Golds was negligent and notes that there are serious questions of fact as to Golds' negligence. NYSCEF Doc. No. 241.

Motion Sequence 5

On April 7, 2022, 52 West and the DeBenedettis moved, pursuant to CPLR 3212, for summary judgment dismissing all claims and crossclaims against them ("Motion Sequence 5"). NYSCEF Doc. No. 148.

The DeBenedettis and 52 West argue, inter alia, that: 52 West qualifies as an "owner" entitled to the two-family dwelling exemption in Labor Law §§ 240(1) and 241(6); the DeBenedettis are entitled to the single-family dwelling exemptions in Labor Law §§ 240(1) and 241(6); and that 52 West and the DeBenedettis are entitled to contractual indemnification from Hudson and Golds. NYSCEF Doc. No. 150.

In opposition, Hudson argues, inter alia, that this Court should dismiss 52 West and the DeBenedettis' cross claims for three reasons: (1) there is no written indemnification agreement between Hudson and 52 West; (2) there is no written indemnification agreement between Hudson and the DeBenedettis; and (3) 52 West and the DeBenedettis cannot obtain common law indemnity from Hudson because Hudson was not negligent. NYSCEF Doc. No. 196.

As a matter of law, Hudson is incorrect that its contracts with 52 West and the DeBenedettis lacked an indemnification clause; that clause is clearly and explicitly incorporated by reference. NYSCEF Doc. Nos. 150, 167.

Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party

opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests' [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Labor Law §§ 200, 240, and 241 were enacted to protect the safety of workers from injuries arising out of construction accidents. Labor Law § 240(1) provides, "All contractors and owners and their agents, *except owners of one or two-family dwellings who contract for but do not direct or control the work*, in the erection, demolition, repairing, altering ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor ... ladders ... which shall be so constructed, placed, and operated as to give proper protection to a person so employed" (emphasis added). Labor Law § 240(1) imposes strict liability on contractors and owners to provide proper safety equipment.

To establish a prima facie Labor Law § 240(1) case, a plaintiff must show that the statute was violated, that there was an injury, and that the violation was a proximate cause of the injury. "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense; however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability." Barretto v Metro. Transp. Auth., 25 NY3d 426, 432 (2015) (internal quotation marks and citation omitted).

To establish that a plaintiff was the sole proximate cause of an accident pursuant to Labor Law § 240(1), a defendant must produce evidence that: adequate safety devices were available; plaintiff knew devices were available and that he or she was expected to use them; and that plaintiff unreasonably chose not to use the safety devices, causing injury. Naciewicz v R.C. Church of the Holy Cross, 105 AD3d 402 (1st Dept 2013). Comparative negligence is not a defense to liability under Labor Law § 240(1) and contributory negligence does not exculpate a defendant who violated Labor Law § 240(1) and proximately caused a plaintiff's injury. A defendant may be released from liability only if the worker's actions were the sole proximate cause of his or her injuries.

Labor Law § 241(6) provides that "all owners and contractors, in constructing or demolishing buildings or performing excavation therewith shall comply with requirements that all areas in which such work is performed be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The Court of Appeals has found that a general contractor is liable for a hazardous condition if it had control over the work site and either caused the dangerous condition or had notice, having

repeatedly recognized that section 241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein. Thus, once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether

the negligence of some party to, or participant in, the construction project caused plaintiff's injury.

Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 350 (1998) (emphasis in original).

Motion Sequences 3 and 4

In Pena's and Hudson's motions for summary judgment (Motion Sequence 3 and 4), the parties dispute material issues of fact about the Incident.

Pena contends, inter alia, that defendants violated Labor Law § 240(1) by failing to provide him with stable flooring, a secure ladder, or an alternative method to work safely at a height.

Schultze v 585 W. 214th St. Owners Corp., 228 AD2d 381, 381 (1st Dept 1996) ("It is well settled that failure to properly secure a ladder to [e]nsure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1).").

Hudson, citing Gallagher v New York Post, 14 NY3d 83 (2010), argues that liability "does not attach" here, as plaintiff's conduct was the sole proximate cause of his injuries because safety devices were available at the work site, and Pena knew he should have used them but for no good reason failed to. To that end, Hudson points to Pena's testimony that he knew from testing "the ladder and the plywood setup, which he created, merely seconds before the accident, that he had not created a stable and secure ladder setup." NYSCEF Doc. No. 175.

Pena, however, relies on Stolt v Gen. Foods Corp., 597 NYS2d 650, 651 (1993), where the Court of Appeals held that a mere allegation that plaintiff did not obey his supervisor's instructions when he climbed a broken ladder did not provide a basis for a defense against plaintiff's Labor Law § 240(1) cause of action, that an injured party's contributory negligence is not a defense to a claim, "and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices." Pena argues that he was forced to work in an unsafe manner and workspace and that Hudson is responsible. NYSCEF Doc. No. 99.

"It is generally agreed that the purpose of the strict liability statute is to protect construction workers . . . from the pronounced risks arising from construction worksite elevation differentials." Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 (2009). Failure to secure a ladder is a violation of § 240(1) as a matter of law. Fernandez v MHP Land Assoc., 188 AD2d 417 (1st Dept 1992).

Pena does not need to prove that the ladder here was defective; it is sufficient under Labor Law § 240(1) that adequate safety devices to prevent the ladder from slipping were absent. Torres v Monroe Coll., 12 AD3d 261, 262 (1st Dept 2004) ("Defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident.")

The Labor Law does not require a worker to have acted in a manner "completely free from negligence"; if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame. Hernandez v Bethel United Methodist Church of New York, 49 AD3d 251, 253

(1st Dept 2008); Rodriguez v BSREP UA Heritage LLC, 181 AD3d 537 (1st Dept 2020) (“[w]orker's actions were not sole proximate cause of injuries he sustained. . . and thus building owner could not avoid liability to worker for violations of the scaffold law, even though worker did not show that the ladder was otherwise defective and had not asked a coworker to hold the ladder while he worked.”); Martinez v Kingston 541, LLC, 210 AD3d 556 (1st Dept 2022) (“Plaintiff was not sole proximate cause of his injuries since he was following directions of his supervisors.”).

Here, Hudson and/or Golds’ failure to provide adequate safety devices, to provide a properly footed ladder, or to properly secure the ladder, contributed to Pena’s accident. Thus, Pena cannot be the sole proximate cause of the Incident, and this Court must grant his motion for summary judgment. Summary judgment is not precluded by the fact that the Incident was unwitnessed. See Casabianca v Port Auth. of New York and New Jersey, 237 AD2d 112 (1st Dept 1997). Accordingly, Hudson’s motion for summary judgment must be denied as to Pena’s complaint.

Hudson’s indemnification claim against 52 West must also be denied, as there is no evidence that 52 West agreed to indemnify Hudson.

Hudson’s cross claim for indemnification from Golds, however, must be granted. Golds and Hudson’s subcontract explicitly states that Golds is responsible for indemnifying Hudson when the underlying accident was caused in “whole or in part by negligent acts or omissions of [Golds].” NYSCEF Doc. No. 88. The subcontract also states that Golds “shall provide its own plant and facilities, including scaffolding and hoists, do its own cleanup, and repair or replace damaged, defective, and defaced work caused by its own negligence.” *Id.* Therefore, Golds must indemnify Hudson because it failed to provide Pena with a secure platform.

Motion Sequence 5

In Motion Sequence 5, 52 West and the DeBenedettis argue that they are exempt from liability under §§ 240(1) and 241(6) and that they are entitled to common-law indemnification from Hudson and Golds.

Labor Law §§ 240(1) and 241(6) exempts owners of one- or two-family dwellings who do not direct or control the work being performed by their contractors. See Cannon v Putnam, 76 NY2d 644, 649 (1990) (“[I]t is unrealistic to expect the owner of a one or two family dwelling to realize, understand and insure against the responsibility sections 240 and 241 now place upon him [or her].”); Small v Gutleber, 299 AD2d 536, 537 (2d Dept 2002) (“Although the defendants' building is classified as a multiple dwelling, the defendants occupy the entire space except for a portion of one floor which they rent to a tenant . . . Under these facts, the defendants are entitled to the benefit of the homeowners' exemption.”); Ramirez v Hansum, 202 AD3d 605 (1st Dept 2022).

Here, 52 West, a co-op occupying a two-family dwelling, qualifies as an “owner” that is entitled to the two-family dwelling exemption. The DeBenedettis are also entitled to the exemption because the Building is intended to be (and is) inhabited by two families, is not used for

commercial purposes, and the DeBenedettis did not direct or control plaintiff's work. There is no evidence that 52 West and the DeBenedettis were negligent.

Therefore, this Court must grant 52 West and the DeBenedettis motion for summary judgment dismissing the complaint and crossclaims against them; and, as such, this Court need not reach any further questions of indemnification.

This Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, the motion for summary judgment by plaintiff, Omar Pena, is hereby granted on liability; the motion of defendant and third-party plaintiff, Hudson Green Craft LLC, for summary judgment is granted only as to its cross claim for indemnification from third-party defendant, Golds Plumbing Corp., and is otherwise denied; and the motion of defendants, 52 West 9th Street Owners Corp., Alessandra DeBenedetti, and Mario D. DeBenedetti, for summary judgment dismissing the complaint against them is granted; and the Clerk is hereby directed to enter judgment accordingly.

To obtain a trial on damages plaintiff must file a Note of Issue along with a copy of this Decision and Order and pay of any necessary fees.



7/10/2023
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: