

Ame v Ocean Breeze Track & Athletic Assn., Inc.

2023 NY Slip Op 32692(U)

August 4, 2023

Supreme Court, New York County

Docket Number: Index No. 154834/2017

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

-----X

BUJAR AME,

Plaintiff,

- v -

OCEAN BREEZE TRACK & ATHLETIC ASSOCIATION,
INC.,SAGE AND COOMBE ARCHITECTS, LLP, NASDI,
LLC,FITZPATRICK & ASSOCIATES, INC.,C & L
CONTRACTING CORP.,

Defendant.

-----X

NASDI, LLC

Plaintiff,

-against-

NICHOLAS INDUSTRIES AND CORPORATION SERVICES

Defendant.

-----X

INDEX NO. 154834/2017

MOTION DATE 05/31/2023,
05/31/2023

MOTION SEQ. NO. 008 009

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595140/2018

The following e-filed documents, listed by NYSCEF document number (Motion 008) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 321, 322, 323, 324, 325, 326, 334, 335, 336

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 327, 328, 329, 330, 331, 332, 333

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

Plaintiff commenced the instant action to recover for injuries allegedly sustained, as a result of various violations of the Labor Law, while working at a construction site¹.

¹ The Court would like to thank Bani Bedi for her assistance in this matter.

Defendant/third-party plaintiff NASDI LLC (“Nasdi”) moves to dismiss the complaint and for contractual indemnification from third-party defendant Nicholas Industries and Corporation Services (“Nicholas”). Nicholas moves separately for partial summary judgment to dismiss plaintiff’s Labor Law § 241(6) claims. Plaintiff opposes both motions. For the reasons set forth below Nasdi’s motion is granted in part and Nicholas’ motion is granted in part.

Background

Nasdi was the prime contractor for the construction project at the Ocean Breeze Park Athletic Complex located at 625 Father Capodanno Boulevard on Staten Island. On or about October 24, 2016, Nasdi hired Nicholas to perform work associated with the construction of the parking lot, not to include any related electrical work. It is undisputed that Nicholas’s work included pouring concrete for the curbs.

On the date of the subject accident, November 30, 2016, plaintiff was employed by Nicholas as a curb setter. Plaintiff testified that the wood was “trembling” as his co-worker was cutting it with the saw, and he was instructed by his supervisor to stand on the wood in an attempt to stop the vibration. *See* NYSCEF Doc. 301 p. 160; NYSCEF Doc. 302, pp. 218, 221-222. Further, plaintiff testifies that the wood was wet and slippery because it rained earlier in the day. Plaintiff slipped and he fell toward the saw and cut his hand. *See* NYSCEF Doc. 301 pp. 179, 180.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law.

Alvarez v Prospect Hospital, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Nasdi's Motion

Defendant Nasdi seeks dismissal of all claims and causes of action based on Labor Law § 240(1), § 241(6), § 200 and common law negligence. Nasdi contends the record does not support existence of a triable issue under Labor Law § 240(1) and § 241(6) because plaintiff was the sole proximate cause of the accident. Nasdi also contends that no triable issue exists concerning plaintiff's Labor Law § 200 and common law negligence claims because Nasdi had neither created nor had actual or constructive notice of the alleged dangerous conditions nor possessed the authority to supervise or control the means and methods of plaintiff's work.

Additionally, Nasdi also seeks summary judgment on its crossclaims asserted against Nicholas for contractual indemnification.

Preliminarily, plaintiff does not oppose the portion of Nasdi's motion that seeks dismissal of its claims pursuant to Labor Law § 240(1). Accordingly, that portion of the motion is granted without opposition.

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].

Here, Nasdi has established its entitlement to judgment as a matter of law with respect to the Labor Law § 200 claims. Nasdi has established that it did not provide any material or equipment to the workers, and it did not control or direct the work that was being performed by plaintiff's employer, at the time of the accident. Furthermore, there is no evidence nor any allegation of any defective condition on site that caused the accident.

The case law is abundant that in order to be liable under the Labor Law, the construction manager must have had oversight of the injury causing activity. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998] (without controlling the injury producing work, a construction manager cannot be held liable under Labor Law). General oversight is insufficient. The record is abundant and unequivocal that at the time of the plaintiff's accident, the plaintiff's work was being directed and supervised by his employer. Accordingly, plaintiff's Labor Law § 200 claim is dismissed.

Labor Law §241(6)²

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).

² As both the direct defendant and the third-party defendant seek dismissal of these claims, both motion sequences 008 and 009 will be addressed here.

Plaintiff alleges that the defendants violated Industrial Code 12 NYCRR 23-1.7(d), 23-1.12(c)(1), and 23-9.2(a)³. The Court will address each Industrial Code section in turn.

Plaintiff alleges violations of Industrial Code 12 NYCRR 23-1.12 (c)(1). 12 NYCRR 23-1.12 (c)(1) is entitled Power Driven Saws and provides:

Every portable, power driven, hand-operated saw which is not provide with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable selfadjusting guard below the base plate which will completely cover the saw blade to a depth of the teeth when such saw blade is removed from the cut.

12 NYCRR 23-9.2(a) entitled Maintenance provides that in pertinent part that “all power operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance.”

Nasdi contends that there is no allegation that the power saw was not operating normally or was defective in any way. In opposition plaintiff argues that the fact that he was injured by the saw raises a question of fact about whether the saw was compliant with these regulations. The Court does not agree.

Plaintiff was not injured as a result of his use of the saw, it was simply his proximity to the tool when he fell that caused the injury. In support of its motion, defendant submits that inspections conducted by Mr. Oreckinto, Mr. Wynn, and an employee of the City of New York after the accident found no defects with the saw. Further, defendant argues that there had been no complaints about the saw prior to the accident. Plaintiff has failed to rebut Nasdi’s prima

³ Plaintiff’s Bill of Particulars cite to many more sections of the Industrial Code, all of which the movants have sought dismissal of. The sections listed above are the only Industrial Codes that plaintiff contends should survive the instant motions.

facie showing that the saw was in good working order and had no defects. Accordingly, plaintiff's Labor Law claims pursuant to alleged violations of sections 23-1.12 and 23-9.2 of the Industrial Code. The Court therefore grants the defendant's motion for summary judgment with reference to these sections.

Next, the Court turns to the alleged violation of Industrial Code 12 NYCRR 23-1.7(d) 12 NYCRR 23-1.7(d) and (e) require protection from (d) slipping hazards and (e) tripping and other hazards. Subsection (d) states that employees shall not "use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." 12 NYCRR 12-1.7(d).

Defendant contends that the area in which plaintiff was working in was an outdoor dirt and sand trench, thus rendering this section of the Industrial Code inapplicable. In opposition, plaintiff contends that he was directed to use the wooden board as a working surface thus there is an issue of fact as to whether this section applies.

The case law holds that when an accident occurs in dirt or a pit of dirt, the regulation does not apply, but if there are other kinds of surfaces involved, there may be a question of fact to resolve. In *Alvarado*, the plaintiff fell in an excavation pit, which was muddy ground and thus not the kind of work surface, passageway, floor, or platform within the purview of the Industrial Code. *Alvarado v. SC 142 W. 24 LLC*, 209 AD3d 422 [1st Dept 2022]. In *Carrera*, the dirt or rocks on the ground were considered part of the ground, and thus did not constitute a work surface under the law. *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585 [1st Dept 2014].

In *Cappabianca*, however, the plaintiff was using a saw to cut bricks while standing on a pallet, and he slipped and got injured by the saw, there the court found that there may be a valid 12 NYCRR 23-1.7(d) claim. *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139 [1st Dept 2012].

Plaintiff did not slip on muddy ground composed of sand and dirt, but rather on a wooden plank he was directed to stand on, above a gravel trench. This presents a question of fact about whether the wet plank constituted a platform or work surface. Based on the myriad of case law and the facts of this case, the Court finds that the defendant Nasdi, has not made a prima facie showing that the plank on which the plaintiff slipped and injured his hand was not the kind of surface contemplated by 12 NYCRR 23-1.7(d).

Indemnification

The Court finds that Nasdi has established entitled to indemnification by the plaintiff terms of the contract. The relevant portion of the contract reads as follows:

To the fullest extent permitted by law, Subcontractor shall indemnify [...] arising out of or resulting from performance or nonperformance of Subcontractor's Work under this Subcontract, [...] loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent or willful acts or omissions or breach of Subcontractor, Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable (collectively, the "Indemnitors"), **or caused by or arising out of the use of any products, material or equipment furnished by Subcontractor** [...]

emphasis added.

In opposition, Nicholas claims that it was not negligent, thus the negligence trigger of the indemnification clause does not apply. Further, Nicholas contends that plaintiff's accident occurred as a result of a slippery condition on a slab of wood. Nicholas does not address how this wood does not qualify as "products, material or equipment" furnished by it, pursuant to the

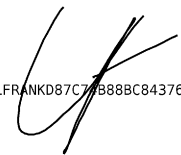
subcontract. Pursuant to the terms of the subcontract Nicholas furnished all of its own equipment, materials, supplies, and tools to perform this project.

Here, it is undisputed that neither the wood nor the saw were provided by Nasdi. In opposition, Nicholas attempts to have argue that the absence of a defect in the materials provided somehow renders this provision inapplicable. However, the contract omits any necessity of defective material, rather it simply provides that by virtue of the injury being caused by the use of any material or equipment provided by Nicholas, Nasdi is entitled to indemnification. As the Court finds that Nasdi is entitled to indemnification based on this provision, it does not reach the issue of the negligence trigger. Accordingly, it is hereby

ORDERED that plaintiff’s claims pursuant to Labor Law § 200 and Labor Law § 240(1) are dismissed: and it is further

ORDERED that defendant/third-party plaintiff’s and third-party defendant’s motion for summary judgment to dismiss plaintiff’s Labor Law § 241(6) claims are granted in part in that plaintiff’s Labor Law § 241(6) claims alleging violations of Industrial Code 12 NYCRR 23-1.12 (c)(1). 12 NYCRR 23-1.12 (c)(1) are hereby dismissed; and it is further

ORDERED that the portion of defendant/third-party plaintiff’s motion that seeks contractual indemnification from third-party defendant is granted.


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8/4/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE