

Byrd v Pavarini McGovern, LLC

2023 NY Slip Op 32799(U)

August 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 524967/18

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of August, 2023.

PRESENT:

HON. RICHARD VELASQUEZ

Justice.

-----X

CHERIE BYRD,

Plaintiff,

-against-

Index No.: 524967/18

PAVARINI McGOVERN, LLC, and ROSELAND DEVELOPMENT ASSOCIATES, LLC,

Defendants.

-----X

PAVARINI McGOVERN, LLC, and ROSELAND DEVELOPMENT ASSOCIATES, LLC,

Third-Party Plaintiffs

-against-

DELTA SHEET METAL,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>53-67, 68-87</u>
Opposing Affidavits (Affirmations) _____	<u>91.92,93-98</u>
Affidavits/ Affirmations in Reply _____	<u>99-100, 107, 108</u>
Other Papers: _____	_____

Upon the foregoing papers, third-party defendant Delta Sheet Metal (Delta) moves, in motion (mot.) sequence (seq.) 1, for an order pursuant to CPLR 3212, dismissing

plaintiff Cherie Byrd's complaint against defendants/third-party plaintiffs Pavarini McGovern, LLC (Pavarini) and Roseland Development Associates, LLC (Roseland) (collectively, defendants). Delta further moves for summary judgment dismissing Pavarini and Roseland's third-party complaint against it or, alternatively, dismissing defendants' common-law indemnification claim against it. Defendants move, in mot. seq. 2, for an order dismissing plaintiff's complaint against them. Defendants/third-party plaintiffs further move for summary judgment under their third-party contractual indemnification claim against Delta. Finally, they move for summary judgment dismissing Delta's counterclaims against them.

Background Facts and Procedural History

On July 25, 2017, plaintiff sustained various injuries while installing metal ductwork during the construction of a new building located at 242 West 53rd Street in Manhattan (the building). Prior to the accident, Roseland, which owned the building, hired Pavarini to serve as the general contractor on the construction project. Thereafter, Pavarini hired plaintiff's employer, Delta, to perform HVAC work on the building, which included the installation of ductwork. At the time of the accident, plaintiff had worked on the construction project for approximately two or three months, where she was supervised, at all relevant times, by Delta's foreman, John Musumeci.¹

On the day of the accident, plaintiff and her co-worker Antony Doran were assigned the task of running sheet metal ductwork or "risers" vertically through several floors in the

¹ During her deposition, plaintiff referred to Mr. Musumeci as John "Mitsubishi."

building. These risers were run through rectangular holes that had been pre-cut into the floors. When the ducts were not being installed, pieces of plywood were placed over the openings as a safety measure to prevent workers from falling into the holes. At her deposition, plaintiff testified that laborers employed by Pavarini were normally responsible for removing the plywood covers from the floors where Delta was installing risers prior to Delta commencing its work. However, on the accident date, this did not occur and plaintiff and Mr. Doran had to remove the plywood covers themselves. In particular, plaintiff testified that:

“Normally, [Pavarini was] responsible for taking up the plywood off the holes and so a lot of times some of those floors, [Pavarini] will take up the plywood and then we proceed. But for some reason that day, I guess – I don’t know about their manpower but they told my supervisor, my foreman, you know, that they were going to do it but they didn’t get to it in a timely fashion. So [Mr. Musumeci] told us to take them up and install.”

In addition to plaintiff, Anthony Cliffe, Pavarini’s mechanical, electrical, plumbing and sprinkler systems supervisor, testified that Pavarini was responsible for removing the plywood covers from the holes in the floors before Delta ran ductwork through the ceilings. According to Mr. Cliffe, Pavarini laborers carried out this work by prying up the plywood, which was nailed to the floor, using crowbars. Mr. Cliffe also testified that Pavarini was responsible for monitoring that the covers were removed in an orderly and timely fashion.

Mr. Musumeci also appeared for a deposition in this matter. However, Mr. Musumeci’s testimony differed from plaintiff and Mr. Cliffe’s testimony in certain respects. In particular, Mr. Musumeci testified that ordinarily, Delta workers were responsible for removing the plywood covering the holes in the floor when installing risers.

Mr. Musumeci further testified that he would only contact Pavarini to remove the plywood if Delta workers encountered problems and were unable to remove the plywood themselves. Finally, Mr. Musumeci testified that he did not contact Pavarini to remove any plywood covers on the day of the accident.

Prior to the accident, plaintiff and Mr. Doran had removed the plywood covers and installed risers on the two floors below where the accident took place. In order to carry out this work, plaintiff stood below the plywood cover and hit the corner of the plywood with a pipe or two-by-four piece of lumber. Mr. Doran, who was on the floor above plaintiff, then grabbed the plywood and removed it from the hole. Thereafter, plaintiff and Mr. Doran installed the riser through the uncovered hole. The accident occurred when plaintiff attempted to remove a third plywood cover on the 26th floor of the building. In this regard, plaintiff climbed the first two or three rungs of an A-frame ladder situated below the cover and held onto the ladder with her left hand while holding the end of a five-foot long two-by-four in the palm of her right hand. Plaintiff then thrust the two-by-four upward into the corner of the plywood cover with the intention of knocking it up so that Mr. Doran could grab it. However, for some reason the plywood cover did not budge. In this regard, plaintiff testified that “[t]he plywood didn’t go up. So with the pressure that I pushed with the two-by-four, and the plywood not going up, the two-by-four spring back on me.” Plaintiff further testified that after it sprung back, the bottom of the two-by-four twisted in her palm and cut her wrist. As a result, plaintiff suffered various injuries to her wrist and back.

By summons and complaint dated December 10, 2018, plaintiff commenced the instant action against Pavarini and Roseland alleging that she sustained injuries on the construction project as a result of their negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The complaint further alleges that the defendants violated the New York State Industrial Code provisions 12 NYCRR 23-1.7 and 1-6. Pavarini and Roseland subsequently filed a joint answer in which they generally denied the allegations in the complaint. Thereafter, on or about February 5, 2019, Pavarini and Roseland commenced a third-party action against Delta seeking common-law and contractual indemnification, as well as damages for breach of contract to procure liability insurance. In its answer to the third-party complaint, Delta asserted counterclaims against defendants sounding in common-law indemnification and common-law negligence. Discovery is complete and the instant motions are now before the court.

Plaintiff's Labor Law § 240 (1) Claim

Delta and defendants separately move to dismiss plaintiff's Labor Law § 240 (1) cause of action. In so moving, Delta and defendants raise similar arguments. In particular, the movants point to plaintiff's own deposition testimony, in which she stated that she did not fall from the ladder. Delta and defendants also maintain that plaintiff was not struck by a falling object that required securing inasmuch as the two-by-four merely bounced back into the palm that she was holding it in when the plywood cover that she was attempting to dislodge did not move. Under the circumstances, Delta and the defendants contend that plaintiff's accident was not gravity-related as required for coverage under Labor Law § 240 (1).

In opposition to this branch of Delta and defendants' respective motions, plaintiff maintains that the accident is covered under Labor Law § 240 (1) because the force of gravity which was generated by the weight of the two-by-four required that it be sufficiently controlled or secured from falling while it was being used to remove the plywood cover.

Labor Law § 240 (1) provides, in pertinent part, that:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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.”

Labor Law § 240 (1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who “are best situated to bear that responsibility” (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, “[t]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross*, 81 NY2d at 500).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In falling object cases, “the claimant must demonstrate that, at the time the object fell, it either was being hoisted or secured, or required securing for the purpose of the undertaking” (*Houston v State of New York*, 171 AD3d 1145, 1146 [2019], citing *Fabrizi v 1095 Avenue of the Ams., LLC*, 22 NY3d 658, 662-663 [2014]). In addition, the statute “does not automatically apply simply because an object fell and injured a worker; [a] plaintiff must show that the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi v 1095 Avenues of the Ams., LLC*, 22 NY3d at 663, quoting *Narducci v Manhasset Bay Assoc.*, 96 N2d 259, 268 [2001]).

As an initial matter, it is undisputed that plaintiff did not fall from the ladder that she was standing on at the time of the accident. In this regard, plaintiff specifically testified that she “didn’t get hurt off the ladder” and that “I didn’t fall off the ladder.” Moreover, plaintiff was not injured as a result of a falling object. In particular, the two-by-four remained in plaintiff’s palm and her injuries occurred when she thrust the two-by-four upward and struck the plywood cover. In any event, even if the two-by-four could be considered a falling object, it was not being hoisted at the time of the accident and did not require securing given the fact that plaintiff was using the two-by-four in an attempt to dislodge the plywood covering the hole by thrusting the two-by-four upward. Accordingly, Labor Law § 240 (1) is inapplicable in this case and those branches of Delta and

defendant's respective motions which seek summary judgment dismissing this claim are granted.

Plaintiff's Labor Law § 241 (6) Claim

Delta and defendants separately move for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action. In so moving, the movants contend that the New York State Industrial Code regulations (12 NYCRR 23 et seq.) upon which plaintiff bases her claim are either inapplicable, or too general to support a Labor Law § 241 (6) cause of action. Plaintiff has not submitted any opposition to the movants' motions to dismiss her Labor Law § 241 (6) claim.

Labor Law § 241 (6) provides, in pertinent part, that:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.”

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a specific standard of conduct rather than a mere reiteration of

common-law principles (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]).

Here, as previously noted, plaintiff's Labor Law § 241 (6) claim is based upon her allegation that the defendants violated 12 NYCRR 23-1.7 and 23-6.1. However, neither one of these regulations is applicable in this case. In particular, section 23-1.7 requires protection against overhead hazards (23-1.7[a]), falling hazards (23-1.7[b]), drowning hazards (23-1.7[c]), slipping hazards (23-1.7[d]), tripping hazards (23-1.7[e]), risks associated with accessing working levels (23-1.7[f]), risks associated with air-contaminated or oxygen deficient work areas (23-1.7[g]), and protection against corrosive substances (23-1.7[h]). Plaintiff's accident was not related to any of these hazards or risks. Further, by its own terms, section 23-6.1 applies to "all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks" (12 NYCRR 23-6.1[a]). Here, plaintiff's accident did not involve any such equipment. In any event, plaintiff has not discussed these regulations in her opposition papers and has therefore abandoned her Labor Law § 241 (6) claim (*Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [2012]). Accordingly, those branches of Delta and defendants' respective motions which seek summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action are granted.

Plaintiff's Labor Law § 200/Common-Law Negligence Claim

Pavarini and Roseland also move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them.² In support of this branch of their motion, defendants maintain that they did not exercise supervisory control over the means and methods employed by plaintiff and her Delta coworkers when carrying out the work. In this regard, defendants point to plaintiff's own deposition testimony, wherein she stated that she was supervised solely by her Delta foreman, Mr. Musumeci. Defendants further point out that Mr. Musumeci testified that Delta was responsible for removing the plywood covers and that he never informed Pavarini that the covers needed to be removed on the day of the accident. Finally, defendants argue that, to the extent that the accident was caused by a dangerous condition, they did not create or have notice of this condition.

In opposition to this branch of defendants' motion, plaintiff argues that there are issues of fact regarding Pavarini's supervision and control of the work that she was performing at the time of the accident. In particular, plaintiff points out that both she and Mr. Cliffe testified that Pavarini was responsible for coordinating with Delta and removing the plywood coverings so as to allow Delta to run the risers through the floors of the building. Plaintiff further maintains that defendants' argument that Pavarini did not supervise her sheet metal work is irrelevant since there is evidence that Pavarini exercised control over and was responsible for the work that plaintiff was carrying out at the time she

² In its notice of motion, Delta indicates that it is moving for summary judgment dismissing plaintiff's entire complaint against Pavarini and Roseland. However, Delta's motion papers do not contain any arguments regarding plaintiff's Labor Law § 200 and common-law negligence claims against Pavarini and Roseland.

was injured (i.e., removing the plywood covers). In addition, plaintiff argues that there is an issue of fact as to whether Pavarini was negligent in failing to remove the plywood cover. Finally, plaintiff avers that the fact that Mr. Musumeci testified that Delta was responsible for removing the plywood covers merely raises credibility issues for the jury to resolve since she and Mr. Cliffe testified that Pavarini was responsible for removing the covers.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners [and contractors] may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). On the other hand, "[w]here a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the

work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law” (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2011]).

The instant accident arose out of the means and methods plaintiff employed in attempting to remove the plywood cover from the hole. Further, the evidence before the court demonstrates that the owner Roseland did not exercise any control over this work. In this regard, it does not appear that Roseland had any employees present at the jobsite and Mr. Cliffe was unaware that Roseland owned the building. Further, plaintiff’s opposition papers do not contend that her work was controlled and supervised by Roseland. Accordingly, that branch of defendants’ motion which seeks summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence claims against Roseland is granted.

With respect to Pavarini, there are issues of fact regarding whether or not it exercised sufficient supervision and control over the removal of the plywood covers so as to subject it to liability under plaintiff’s Labor Law § 200 and common-law negligence claims. In particular, as noted above, both plaintiff and Mr. Cliffe testified that Pavarini was responsible for removing the plywood covers from the holes in the floors of the building as Delta’s work progressed. Further, Mr. Cliffe testified that, unlike Delta’s workers, Pavarini’s laborers were equipped with crowbars which they used to remove the covers, which were nailed to the floor. In addition, while it is true that Mr. Musumeci and Mr. Cliffe testified that Pavarini was not notified of the need to remove the cover that plaintiff was attempting to dislodge at the time of the accident, Mr. Cliffe also testified that

Pavorini was responsible for monitoring that the covers were removed in an orderly and timely fashion. Accordingly, that branch of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Pavarini is denied.

Defendants' Common-Law Indemnification Claim Against Delta

Delta moves for summary judgment dismissing defendants' third-party common-law indemnification claim against it. In so moving, Delta maintains that this claim is barred under Workers' Compensation Law § 11 since it was plaintiff's employer and plaintiff did not sustain a grave injury as defined in the statute. In support of this contention, Delta points to the injuries alleged in plaintiff's bill of particulars. In particular, Delta contends that none of these injuries qualify as grave injuries under Workers' Compensation Law § 11. Defendants have not submitted any opposition to this branch of Delta's motion.

Workers Compensation Law § 11 precludes a defendant from obtaining common-law contribution or indemnification from a plaintiff's employer except in those cases where the plaintiff sustained a "grave injury" as defined in the statute (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 770 [2007]). Here, Delta has made a prima facie showing that plaintiff did not sustain a grave injury by pointing to plaintiff's bill of particulars specifying the nature of her alleged injuries. In particular, none of the alleged injuries in this pleading qualifies as being a grave injury under the statute (*Marshall v Arias*, 12 AD3d 423, 423-424 [2004]). Accordingly, inasmuch as defendants have failed to submit any opposition to this branch of Delta's motion, defendants' third-party common-law indemnification and contribution claims against Delta are dismissed.

Defendants' Contractual Indemnification Claim Against Delta

Delta also moves for summary judgment dismissing defendants' contractual indemnification claims against it. At the same time, defendants move for summary judgment awarding them contractual indemnification against Delta. In support of this branch of their motion, defendants point to a clause in the contract between Delta and Pavarini, which states:

“To the greatest extent permitted by law, [Delta] shall indemnify [Pavarini and Roseland] ... from and against all liability damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, 1. The performance of work by [Delta], 2 Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work is being performed.”

Here, inasmuch as the underlying accident clearly arose out of Delta's work, defendants maintain Delta's contractual obligation to indemnify them has been triggered. Further, defendants contend that this provision is fully enforceable since the accident was not caused by any negligence on their part. In support of its own motion to dismiss defendants' contractual indemnification claim, Delta maintains the plaintiff does not have any actionable claims against defendants and therefore, there is no basis for their contractual indemnification claim against Delta.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3de 925, 930 [2009]). Finally, a party seeking contractual

indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; General Obligations Law § 5-322.1).

The indemnification provision in the contract between Delta and Pavarini is broad, and requires that Delta indemnify Pavarini and Roseland for any accident arising out of Delta's work. Here, it is clear that plaintiff's accident arose out of Delta's work. Further, the court has already determined that the accident was not caused by any negligence on Roseland's part. Accordingly, Roseland is entitled to summary judgment under its contractual indemnification claim against Delta. However, inasmuch as all of plaintiff's claims have been dismissed against Roseland, Roseland's indemnification award will be limited to attorney's fees. With respect to Pavarini, the court has already determined that there are issues of fact regarding its control and supervision over the work and/or whether it was negligent. Accordingly, Pavarini's motion for summary judgment against Delta under its contractual indemnification claim is denied. Finally, in light of the court's determinations above, Delta's motion for summary judgment dismissing defendants' contractual indemnification claim is denied.

Delta's Counterclaims

Finally, that branch of defendants' motion to dismiss Delta's counterclaim is granted and same is dismissed. In particular, there is no basis for Delta's common-law indemnification against defendants since plaintiff has not asserted any claims

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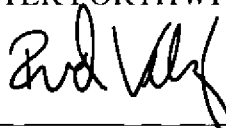
against Delta. Further, Delta's common-law negligence claim is also without merit since Delta was not damaged by any alleged negligence on defendants' part.

Summary

In summary, those branches of Delta's motion, in mot. seq. 1, which seek summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against defendants are granted. That branch of Delta's motion which seeks summary judgment dismissing defendants' third-party complaint against it is granted only to the extent that defendants' common-law indemnification claim is dismissed against Delta. Those branches of defendants' motion, in mot. seq. 2, which seek summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against them are granted. That branch of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them is granted with respect to Roseland and denied with respect to Pavarini. That branch of defendants' motion which seeks summary judgment under their contractual indemnification claim against Delta is granted with respect to Roseland and denied with respect to Pavarini. That branch of defendants' motion which seeks summary judgment dismissing Delta's counterclaims against them is granted.

This constitutes the decision and order of the court.

ENTER FORTHWITH:



RICHARD VELASQUEZ, J. S. C.
Hon. Richard Velasquez, JSC

AUG 07 2023