

Diaz v 29-45 Tenants Corp.

2023 NY Slip Op 33600(U)

October 16, 2023

Supreme Court, New York County

Docket Number: Index No. 155796/2017

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

-----X

GUSTAVO DIAZ,

Plaintiff,

- v -

29-45 TENANTS CORPORATION, JEFFREY GOLDSTEIN,
KELLIE GOLDSTEIN, DAKOTA CONSULTING CORP.,

Defendants.

-----X

29-45 TENANTS CORPORATION

Plaintiff,

-against-

DAKOTA CONSULTING CORP., JEFFREY GOLDSTEIN,
KELLIE GOLDSTEIN

Defendants.

-----X

JEFFREY GOLDSTEIN, KELLIE GOLDSTEIN, JEFFREY
GOLDSTEIN, KELLIE GOLDSTEIN

Plaintiffs,

-against-

DAKOTA CONSULTING CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 145, 146, 147, 148,
149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 196, 197, 198, 199, 200, 201, 202, 203,
206, 218, 220, 222, 223, 224, 225, 226, 232, 233, 234

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 163, 164, 165, 166,
167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187,
188, 189, 190, 191, 192, 193, 195, 205, 207, 219, 221, 227, 228, 229, 230, 231

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

DECISION + ORDER ON MOTION

Third-Party
Index No. 595816/2017

Second Third-Party
Index No. 596030/2021

The following e-filed documents, listed by NYSCEF document number (Motion 006) 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261

were read on this motion to/for

JUDGMENT - SUMMARY

In this Labor Law personal injury action arising out of an alleged bucket falling on plaintiff Gustavo Diaz at a construction site located at 29-45 East 9th Street, Unit 76, New York, New York defendants 29-45 Tenants Corporation (Tenants Corp.), Jeffrey and Kellie Goldstein, and Dakota Consulting Corp. (Dakota) each move for summary judgment. Tenants Corp. moves for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff's Labor Law § 200 and common law negligence cause of action as against it, for summary judgment on its cross-claims for contractual indemnification as against the Goldsteins, and for summary judgment on its cross-claims for common law indemnification as against Dakota (motion seq no 004). The Goldsteins move for summary judgment pursuant to CPLR § 3212 to dismiss the complaint in its entirety, dismiss the third-party complaint in its entirety, and dismiss any cross-claims against them (motion seq no 005). Dakota moves for summary judgment pursuant to CPLR § 3212 to dismiss plaintiff's complaint in its entirety or in the alternative, the complaint as against Dakota pursuant to Workers' Compensation Law (WCL) § 11 (motion seq no 006).

Plaintiff does not oppose the Goldsteins' motion for summary judgment except to the extent that it seeks "to dismiss plaintiff's case outright" (Miloski Affirm, ¶ 4, NYSCEF Doc No 193). Nor does any other party oppose dismissing the complaint as against the Goldsteins. Accordingly, the portion of the Goldstein's motion for summary judgment to dismiss the complaint as against them (motion seq no 5) will be granted and plaintiff's claims as against the Goldsteins will be deemed abandoned and will be dismissed (*cf Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]).

Plaintiff attempted to discontinue his claims against Dakota by stipulation dated June 15, 2023 (NYSCEF Doc No 255); however, the stipulation was not signed by the Goldsteins consequently plaintiff's claims were not discontinued as against Dakota (*see* CPLR 3217 [a] [2]). Accordingly, since no party, including plaintiff, opposes Dakota's motion for summary judgment (motion seq no 006), the portion of Dakota's motion for summary judgment to dismiss the complaint as against it will be granted and plaintiff's claims as against Dakota will be deemed abandoned and will be dismissed (*cf Kempisty*, 92 AD3d at 474).

Since both the Goldsteins and Dakota will be dismissed from the main action, upon searching the record, the second third-party complaint brought by the Goldsteins against Dakota will also be dismissed (*see generally Halwani v Boris Kogan & Assocs., P.C.*, 199 AD3d 413 [1st Dept 2021]; *Bd. of Mgrs. of 1984 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542 [1st Dept 2013]).

BACKGROUND

Plaintiff's employer, Dakota, was hired by the owner of the premises, the Goldsteins, to renovate their apartment in a cooperative building owned by Tenants Corp. (Statement of Facts, NYSCEF Doc No 146, ¶¶ 4-5). The owner of Dakota, Patricia Leone, supervised plaintiff's work and he did not receive directions from anyone else (NYSCEF Doc No 146, ¶ 8; Plaintiff's EBT, p 30 – 31). Plaintiff's only contact with Tenants Corp.'s employees was to say hello to them and ask how they were doing (NYSCEF Doc No 146, ¶ 21; Plaintiff's EBT, p 33 – 34).

On March 5, 2015, while plaintiff, a painter and plasterer for Dakota, was doing renovation work in the living room of the premises, a bucket filled with drywall compound (weighing approximately 45 pounds) that had been hooked to a scaffold placed a half-foot away from plaintiff fell approximately six feet striking plaintiff on the hand and left foot (NYSCEF

Doc No 146, ¶ 3; Plaintiff's EBT, p 31, 72-76, NYSCEF Doc No 149). No one else was in the apartment at the time of the accident (NYSCEF Doc No 149 at pp 75, 77). Plaintiff eventually underwent a course of treatment for his left foot that ultimately resulted in the amputation of his left leg below the knee (Plaintiff's Continued EBT, pp 174-75, NYSCEF Doc No 150).

Patricia Leone, the owner of Dakota, was deposed on July 12, 2022 (NYSCEF Doc No 146, ¶ 6; Leone EBT, NYSCEF Doc No 153). She stated that the first day plaintiff arrived on the job, fifteen days before the accident, he was limping (*id.* at pp 20, 60). Plaintiff allegedly told her that someone had dropped a five-gallon bucket on his foot (*id.* at pp 20, 60-61). At no time on the date of plaintiff's alleged accident did he tell Leone about it (*id.* at p 63). Plaintiff worked for Dakota for another two and a half weeks and when he came to Leone to quit, he told her it was due to a personal matter (*id.* at pp 24, 64). Leone testified that there was no scaffolding at the premises at the time of plaintiff's alleged accident and that she never saw drywall compound buckets stored on the top of it (*id.* at pp 26-27). The scaffold was used to work on the cathedral ceiling in the living room in January or February, well before plaintiff came on the premises (*id.* at pp 35, 70). Leone claims she was physically present when the scaffold was removed from the premises (*id.* at pp 37-38). Mr. Goldstein confirmed during his deposition on August 23, 2022 that the scaffold had been removed on a date prior to plaintiff beginning his work at the premises (Goldstein EBT, pp 21-23, NYSCEF Doc No 156).

DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make

such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Tenants Corp.’s Motion (motion seq no 004)

Labor Law § 200

Tenants Corp. moves for summary judgment to dismiss plaintiff’s Labor Law § 200 claim as against it by arguing that it is not liable under Labor Law § 200 since it did not supervise or control any of plaintiff’s work nor provide any of the equipment or materials used for plaintiff’s work. This part of Tenants Corp.’s motion is unopposed.

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Singh v Black*

Diamonds LLC, 24 AD3d 138, 139 [1st Dept 2005]; citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). It states in pertinent part, as follows:

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

(Labor Law § 200 [1]).

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see Ruisech v Structure Tone, Inc.*, 208 AD3d 412, 414 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012] [“Claims for personal injury under [section 200] 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.”]).

Where 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 actually exercised supervisory control over the injury-producing work” (*Jackson v Hunter Roberts Constr., LLC*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [“liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work”]). “General supervisory authority is insufficient to constitute supervisory control” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Where “a plaintiff’s injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007];). Notably, “[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, the means and methods test controls since plaintiff’s accident arose from equipment and materials used for the renovation work [the bucket filled with drywall compound] (*id.*). Tenants Corp. has met its *prima facie* burden by demonstrating that it did not exercise control over or supervise plaintiff’s work because plaintiff testified that he only took direction from his supervisor Patricia with Dakota and he had no contact with Tenants Corp.’s employees except to say hello to them. Tenants Corp.’s superintendent, Ray Barrett testified that he inspected the premises during the renovation project once per week to check on its progress (Barrett EBT, pp 15-19, 65-66, NYSCEF Doc No 152). Any general responsibility Tenants Corp. may have had for ensuring site safety does not rise to the level of supervisory control required to hold it liable for plaintiff’s accident caused by the means and methods of the work (*see Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, 170 AD3d 509 [1st Dept 2019]).

Accordingly, Tenants Corp.’s motion for summary judgment on plaintiff’s Labor Law § 200 and negligence claims as against it will be granted (motion seq no 004).

Contractual Indemnification

Tenants Corp. moves for summary judgment on its contractual indemnification claim against the Goldsteins based on indemnifications provisions in the proprietary lease and alteration agreement. The Goldsteins oppose arguing that the indemnification provisions are unenforceable under General Obligation Law (GOL) § 5-321 or in the alternative, ambiguous and unclear.

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

“In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see also *Lexington Ins. Co. v Kiska Dev. Group LLC*, 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee “has not established that it was free from negligence”]). Moreover, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia*, 259 AD2d at 65).

Here, the Goldsteins’ proprietary lease for their apartment provides in pertinent part:

3.4 Indemnity by Shareholder. The *Tenant-Shareholder will not require, permit, suffer or allow any work, decoration, alteration repair or upkeep of the apartment or any part thereof, or any Additional Space, or cleaning of any windows in the Apartment from the outside (within the meaning of the New York Labor Law) unless all equipment and safety devices required by law, ordinances,*

rules and regulations, including, without limitation, the New York Labor Law, are provided and used, and unless the industrial code of the State of New York is fully complied with; and the Tenant-Shareholders hereby agrees to indemnify the Apartment Corporation and its employees, other Tenant-Shareholders, and the managing agent, for all losses, damages or fines suffered by them as a result of the Tenant-Shareholder's requiring, permitting, suffering or allowing any work, decoration, alteration, repair, or upkeep of the Apartment or any part thereof, or any Additional Space, or any window in the Apartment to be cleaned from the outside, in violation of any of the requirements of the aforesaid laws, ordinances, regulations and rules.

(Proprietary Lease, ¶ 3.4, NYSCEF Doc No 157). The Goldsteins argue that they “did not direct or have any involvement with the specific details of the work being performed by Dakota.”

While they may not have been involved with the specific details of the work, they did “require, permit [] or allow” the work to be done in their apartment. Nor does the indemnification provision in the proprietary lease violate GOL § 5-321 because even if it can be interpreted to indemnify Tenants Corp. for its own negligence, “it is nevertheless enforceable because there is no view of the evidence that [Tenants Corp.] was actually negligent” (*Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). Therefore, Tenants Corp. is entitled to summary judgement on its contractual indemnification claim grounded in the proprietary lease.

Additionally, paragraph 3 (d) of the Alteration Agreement entered into by Tenants Corp and the Goldsteins requires the Goldsteins to:

Indemnification. I undertake to indemnify you, defend, and hold harmless you, your Managing Agent, agents, representatives, tenants and occupants of the building for any damages suffered, if any, to person or property as a result of the to reimburse you, your Managing Agent, agents, representations, tenants and occupants for any expenses (including, without limitation, attorneys' fee and disbursements) incurred as a result of such work. I understand that damages will be interpreted to include any physical or financial loss to the coop, resulting from the work.

(Alteration Agreement, ¶ 3 [d], NYSCEF Doc No 199). Though the word “work” is missing from the provision, it can reasonably be inserted after “as a result of the” by taking into account the similar phrase of “resulting from the work” found at the end of the provision (*see Compos v 68 East 86th Street Owners*, 1117 AD3d 593, 593 [1st Dept 2014] [emphasis added] [“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the *entire agreement . . . , surrounding facts and circumstances*”]). The provision is clear in that it evinces the Goldsteins’ intent to indemnify the Tenants Corp. for any physical or financial loss to Tenants Corp. resulting from the Goldstein’s construction project. Therefore, Tenants Corp. is entitled to summary judgement on its contractual indemnification claim grounded in the Alteration Agreement.

Accordingly, Tenants Corp.’s motion for summary judgment on its contractual indemnification claim against the Goldsteins (motion seq no 004) will be granted and the Goldstein’s motion for summary judgment dismissing this claim (motion seq no 005) will be denied.

Common Law Indemnification

Tenants Corp. moves for summary judgment on its common law indemnification claim against Dakota under Workers’ Compensation Law § 11.¹ Dakota does not oppose this party of

¹ Workers’ Compensation Law (WCL) § 11 sets forth, in pertinent part, as follows:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury’ which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand

the motion but rather argues that a conditional finding of liability against Dakota is premature unless plaintiff's Labor Law § 241 (6) claim is not dismissed.

To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work.

(*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

Here, Tenants Corp. has established its entitlement to summary judgment on its common law indemnification claim against Dakota because it may be held vicariously liable pursuant to Labor Law § 241 (6) and the record establishes that to the extent there was an accident Dakota exercised actual supervision or control over the injury producing work (*Chatham towers, In. v Castle Restoration & Constr., Inc.*, 151 AD3d, 419, 420 [1st Dept 2017] [“[c]ommon law indemnification may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the plaintiff”]).

Accordingly, Tenants Corp.'s motion for summary judgment on its common law indemnification claim against Dakota (motion seq no 004) will be granted.

CONCLUSION

Accordingly, it is

ORDERED that the portion of the Goldstein's motion for summary judgment to dismiss the complaint as against them is granted and plaintiff's claims against the Goldsteins are dismissed (motion seq no 005); and it is further

or foot, . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

There is no dispute that plaintiff's left leg below the knee was amputated.

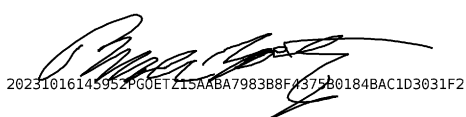
ORDERED that Dakota’s motion for summary judgment to dismiss the complaint as against them is granted and plaintiff’s claims against Dakota are dismissed (motion seq no 006); and it is further

ORDERED that the second third-party complaint brought by the Goldsteins against Dakota is dismissed; and it is further

ORDERED that Tenants Corp.’s motion for summary judgment to dismiss plaintiff’s Labor Law § 200 claim against it is granted (motion seq no 004); and it is further

ORDERED that Tenants Corp.’s motion for summary judgment on its contractual indemnification claim against the Goldsteins is granted (motion seq no 004) and the Goldstein’s motion for summary judgment on this same claim is denied (motion seq no 005); and it is further

ORDERED that Tenants Corp.’s motion for summary judgment on its claim for common law indemnification against Dakota is granted (motion seq no 004).


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10/16/2023
DATE

PAUL A. GOETZ, J.S.C.

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