At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the _____ day of _____2023

JUL 07 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION AND ORDER

Index No.: 521552/2018
Mot. Seq. 5 & 7

---X

FREDDIE K. FORTUNE,

Plaintiff,

-against-

1277 HOLDINGS, LLC, GATEWAY REALTY HOLDINGS, LTD., RAY BUILDERS, INC. and COLGATE ENTERPRISES CORP.

Defendants.

---X

1277 HOLDINGS, LLC and RAY BUILDERS, INC.

Third-Party Plaintiffs,

-against-

HILINE CONSTRUCTION, INC,

Third-Party Defendant.

---X

1277 HOLDINGS, LLC and RAY BUILDERS, INC.

Second Third-Party Plaintiff

-against-

COLGATE ENTERPRISES CORP.,

Second Third-Party Defendant.

---X

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion for Summary Judgment, Attorney Affirmation in Support of Motion for Summary Judgment affirmed by Oliver Owaid, Esq. on June 8, 2022, Exhibits.....	124-140
Defendant Colgate Enterprise Corp. Attorney Affirmation in Opposition to Summary Judgment affirmed by Frances A. Krische, Esq. on August 3, 2022, Exhibits, Memorandum of Law in Opposition dated August 3, 2022.....	192-200
Defendants 1277 Holdings, LLC and Ray Builders, Inc. Motion for Summary Judgment, Defendants 1277 Holdings, LLC and Ray Builders, Inc. Attorney Affirmation in Support of	

Motion for Summary Judgment affirmed by Daniel A. Alter, Esq. on July 21, 2022, Exhibits, Memorandum of Law in Support of Summary Judgment.....	165-190
Plaintiff's Attorney Affirmation in Partial Opposition to Summary Judgment affirmed by Oliver Owaid, Esq. on November 30, 2022, Third-Party Defendant Hiline Construction, Inc.'s Attorney Affirmation in Opposition to Summary Judgment affirmed by Robert N. Paessler, Esq. on December 6, 2022, Third-Party Defendant Hiline Construction, Inc.'s Response to Statement of Material Facts dated December 6, 2022, Third-Party Defendant Hiline Construction, Inc.'s Memorandum of Law in Opposition to Summary Judgment, Exhibit.....	226-229

This is an action for personal injuries, brought under Labor Law 200, 240(1) and 241(6) and common law negligence. Freddie Fortune ("plaintiff") was employed by third-party defendant Hiline Construction, Inc. as a laborer on a jobsite located at 1277 East 14th Street, Brooklyn, NY and transported material and supplies to and from the project. Third-party defendant Hiline Construction ("Hiline") was a masonry and stonework subcontractor for defendant Ray Builders, Inc. ("Ray Builders"), the general contractor. Defendant 1277 Holdings, LLC was the owner of 1277 East 14th Street. Defendant Colgate Enterprises Corp. was hired by Ray Builders to erect the scaffold in question. On March 19, 2018, plaintiff was allegedly working on a third-floor scaffold on the jobsite, handing bricks and stones to the masons. Plaintiff testified that he wore a harness when working on the scaffold, but the scaffold had no place to attach the harness. Plaintiff alleges that the metal floor beneath him on the scaffold gave way and he fell from the scaffold to the ground and sustained injuries.

The action was commenced by filing a summons and verified compliant on October 25, 2018. Issue was joined by defendants 1277 Holdings, LLC and Ray Builders, Inc. interposing a verified answer on December 11, 2018. Plaintiff moves for summary judgment on his Labor Law 240(1) claim against defendants 1277 Holdings, LLC, Gateway Realty Holdings LTD., Ray Builders, Inc. and Colgate Enterprise Corp ("Colgate"). (Mot. Seq. 5). Defendants 1277 Holdings, LLC and Ray Builders, Inc. move for summary judgment dismissing plaintiff's Labor Law 200 and common law negligence claims, and all crossclaims and counterclaims asserted against them (Mot. Seq. 7). By stipulation dated July 1, 2022, the parties discontinued the action as against defendant Colgate. NYSCEF # 219.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dep't 1999); *Tassone v. Johannemann*, 232 A.D.2d 627, 628 (2d Dep't 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dep't 1964). The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. *Alvarez v. Prospect Hosp,* 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York, supra at 562; Friends of Animals, Inc v. Associated Fur Mfrs, Inc,* 46 N.Y.2d 1065 (1979).

Labor Law 240(1) imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability, for injuries proximately caused by the failure to provide appropriate safety equipment. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991); *Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 124 (2015). An injury must flow from the application of the force of gravity to an object or a person to

be covered by Labor Law 240(1). *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604 (2009), citing *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 (1993). Moreover, liability under Labor Law 240(1) is contingent upon the failure to use or inadequacy of a safety device enumerated in the statute. *Ortiz v. Varsity Holdings, LLC,* 18 N.Y. 3d 335, 340 (2011); *Narducci v. Manhasset Bay Associates,* 96 N.Y.2d 259, 267-8 (2001). In the instant case, the only party who opposed the motion for summary judgment under Labor Law 240(1) is Colgate, who the action was discontinued against. Accordingly, plaintiff's motion for summary judgment on the issue Labor Law 240(1) liability is GRANTED against the remaining defendants, without opposition.

Defendants 1277 Holdings, LLC and Ray Builders, Inc. move for summary judgment dismissing plaintiff's Labor Law 200 and common law negligence claims. "Labor Law § 200 codifies the common-law duty imposed on owners and contractors to provide a safe construction site for workers." *Astarita v. Flintlock Constr. Servs., LLC.,* 69 A.D.3d 888 (2d Dep't 2010). "This provision applies to owners, contractors, and their agents." *Id* quoting *Gasques v. State of New York*, 59 A.D.3d 666, 667 (2d Dep't 2009). Cases involving Labor Law 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. *Ortega v. Puccia,* 57 A.D.3d 54, 61 (2d Dep't 2008). When a claim arises out of alleged defects or dangers involving the manner in which the work was performed, an owner or general contractor will be held liable under Labor Law 200 only if it possessed the authority to supervise or control the means and methods of the work. *Id; Reyes v. Sligo Construction Corp.,* 214 A.D.3d 1014, 1017 (2d Dep't 2023). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient." *Reyes* at 1017 quoting *Poulin v. Ultimate Homes, Inc.*, 166 A.D.3d 667, 670 (2d Dep't 2018).

In the instant case, the moving defendants contend that they did not direct, supervise or control the work of plaintiff Hiline, and did not have notice that Hiline altered the scaffold in question, which caused the accident. At his deposition, Solomon Banda, the owner of Hiline testified that the moving defendants did not supervise or control the work in question. Specifically, Banda testified that only his foreman stood over masons and laborers to tell "them how to do their jobs." NYSCEF # 179 p. 40. Banda further testified that outside of Hiline, nobody had authority to tell Hiline employees how to do their job. *Id* at 41. Additionally, Banda testified that Hiline moved the scaffold planks during the project, and it was industry practice to do so. *Id* at 64, 68.

Plaintiff opposes the motion for summary judgment on the ground that the moving defendants failed to establish a lack of notice of the dangerous and defective condition of the scaffold. Specifically, the moving defendants failed to submit evidence of last inspection prior to the accident. However, plaintiff does not contest the moving defendants' assertions that they had no authority to direct or control the work. Nor does plaintiff contend that a defect in the scaffold would have been apparent if the moving defendants did conduct a reasonable inspection. *See McLean v. 405 Webster Ave. Associates,* 98 A.D.3d 1090, 1093 (2d Dep't 2012). Accordingly, the branch of motion for summary judgment dismissing Labor Law 200 and common law negligence claims against defendants 1277 Holdings, LLC and Ray Builders, Inc. is GRANTED.

The moving defendants further move for summary judgment on their contractual indemnification and breach of contract claims against Hiline. As for the moving defendants' indemnification claim, the contract between Ray Builders, Inc. and Hiline states in relevant part:

> In consideration of the contract for work entered into by the Contractor and Subcontractor, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor, all entities the Contractor is required [to] indemnify and hold harmless, the owner of the property, and the officers, directors, agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the work covered by the contract to the extent such work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the indemnified parties. NYSCEF # 180 at 15.

As for the moving defendants' breach of contract claim, the contract between Ray Builders, Inc. and Hiline states in relevant part:

> The Subcontractor shall procure and shall maintain until final acceptance of the Work, such insurance as will protect the Contractor, all entities the Contractor is required indemnify and hold harmless, the Owner, and their officers, directors, agents and employees, for claims arising out of or resulting from Subcontractor's Work under this Contract Agreement, whether performed by the Subcontractor, or by anyone directly or indirectly employed by Subcontractor, or by anyone for whose acts Subcontractor may be liable. *Id.*

The contract states "[t]he Subcontractor's insurance shall include contractual liability coverage and additional insured coverage for the benefit of the Contractor, Owner and anyone else the Owner is required to name… The insurance required to be carried by the Subcontractor and any Sub-Sub-Contractors shall be PRIMARY AND NONCONTRIBUTORY." *Id.* The contract further provides that Hiline will obtain "Umbrella Liability Insurance with a limit of $2,000,000 per occurrence and general aggregate of $2,000,000. For scaffolding, demolition, and excavation contractors, Umbrella Liability Insurance with a limit of $5,000,000 per occurrence and general aggregate of $5,000,00 is required." *Id* at 166. The moving defendants contend that the insurance coverage Hiline procured was less than was required. *See* NYSCEF #181 and 187. Additionally, the moving defendants' submissions indicate that no umbrella liability insurance was procured by Hiline whatsoever. *Id.* Neither plaintiff nor Hiline oppose the branch of the motion for summary judgment on these claims. Accordingly, summary judgment on the issues of contractual indemnification and breach of contact are GRANTED against Hiline. For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion (Seq. 5) for summary judgment on the issue Labor Law 240(1) liability is GRANTED; and it is further

ORDERED that defendants1277 Holdings, LLC and Ray Builders, Inc.'s motion (Seq. 7) is GRANTED in its entirety.

This constitutes the decision and order of the court.

ENTER

Hon. Richard J. Montelione, J.S.C.