

Merlo v 49 Grove Realty LLC

2023 NY Slip Op 34896(U)

March 22, 2023

Supreme Court, Westchester County

Docket Number: Index No. 54711/2021

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
LEHI ALEJANDRO NUNEZ MERLO and
KELIN GISSELA IRIAS MARADIAGA,

Plaintiffs,

– against –

49 GROVE REALTY LLC and ABC
RESTORATION, INC.,

Defendants.

Index No. 54711/2021

Motion Seq. 2 & 3

DECISION & ORDER

----- X
49 GROVE REALTY LLC and ABC RESTORATION,
INC.,

Third-Party Plaintiffs,

– against –

MID-STATE CONSTRUCTION CORP.,

Third-Party Defendants.

----- X
MID-STATE CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

– against –

RONALIO CONSTRUCTION CORP.,

Second Third-Party Defendant.

----- X
In an action to recover damages for personal injuries,

(1) defendants/third-party plaintiffs, 49 GROVE REALTY LLC and ABC RESTORATION, INC. move (motion seq. 2) for (a) summary judgment and dismissal of plaintiffs, LEHI ALEJANDRO NUNEZ MERLO and KELIN GISSELA IRIAS MARADIAGA¹'s complaint pursuant to CPLR 3212(a), and (b) summary judgment against third-party defendant, MID-STATE CONSTRUCTION CORP., upon its contractual indemnification, third-party claim; and

(2) third-party defendant/second third-party plaintiff, MID-STATE CONSTRUCTION CORP. moves (motion seq. 3) for summary judgment dismissing

¹Hereinafter referred to as "plaintiff" as Kelin Gissela Irias Maradiaga's claim is derivative.

plaintiffs LEHI ALEJANDRO NUNEZ MERLO and KELIN GISSELA IRIAS MARADIAGA's amended verified complaint in its entirety pursuant to CPLR 3212.

Papers Considered

Motion Seq. 2 NYSCEF DOC NO. 111-122; 162-165; 170; 176

1. Notice of Motion/Affirmation of Michael T. Reagan, Esq./Statement of material facts/Exhibits A-G/Memorandum of law/Affidavit of service
2. Notice of Cross-Motion²/Affirmation of Timothy Norton, Esq. in opposition/Response to statement of material facts/Exhibit A/Affidavit of service
3. Affirmation of Michael T. Reagan, Esq. in opposition and reply
4. Affirmation of Timothy Norton, Esq. in reply³

Motion Seq. 3 NYSCEF DOC NO. 124-157; 166-169; 171-175; 177

1. Notice of Motion/Statement of material facts/Affirmation of Matthew S. Lerner, Esq./Exhibits A-AA/Memorandum of law
2. Affirmation of Michael T. Reagan, Esq. in partial opposition/Affidavit of service
3. Reply Affirmation of Matthew S. Lerner, Esq.
4. Affirmation of Timothy Norton, Esq. in opposition/Response to statement of material facts/Exhibit A/Affidavit of service
5. Affirmation of Matthew S. Lerner, Esq./Exhibits BB-DD/Memorandum of law
6. Affirmation of Timothy Norton, Esq. in reply⁴

Factual and Relevant Procedural Background

Plaintiff commenced this action on or about January 11, 2019 by filing a summons and complaint seeking Labor Law 240(1), 241(6) and 200/common-law negligence recovery for personal injuries sustained by plaintiff on December 20, 2018 at “[t]he building under construction located at 49 Grove Street, NY, NY 10014.” (“building”). Plaintiff alleges that the defective and dangerous condition entails unsecured metal sheets which were caused to collapse and fall and strike plaintiff while he performed his assigned work. The defendants and third-party defendant joined issue by service of their answers.

At the time of plaintiff's alleged accident, plaintiff was working for Ronalio Construction and his job duties included painting and demolition work. Prior to the accident, plaintiff had been working at the building for approximately two weeks. 49 Grove Realty LLC (“49 Grove”) was the owner of the building and ABC Restoration, Inc. (“ABC”)

² The Trial Readiness Order (NYSCEF Doc. No. 107) issued by this Court on May 31, 2022 expressly directs “SUMMARY JUDGMENT MOTIONS: Any motion(s) or cross-motion(s) for summary judgment by any party must be served via NYSCEF within sixty (60) days of the filing of the Note of Issue on NYSCEF;”. Here, the Note of Issue was filed on June 22, 2022 (NYSCEF Doc. No. 109). Therefore, plaintiff's cross-motion, filed on November 3, 2022, is untimely and will not be considered by this Court.

³ Affirmation in reply will not be considered, see footnote 1.

⁴ Affirmation in reply will not be considered, see footnote 1.

was the general contractor on the project at the building. ABC hired third-party defendant Mid-State Construction Corp. ("Mid-State") as a subcontractor on site. Alex Tager ("Tager"), owner and president of Mid-State, was not at the building when the accident happened. No one other than plaintiff's boss, Ronaldo, and co-workers, Emilio or Fernando gave plaintiff direction as to what to work on at the building. If plaintiff had questions about his work in the building, he asked Emilio, who plaintiff thought was the foreman at the worksite.

A few days prior to the alleged accident, Mid-State delivered metal sheets to the building and handed them to Ronaldo of Ronalio Construction Corp. and two of plaintiff's co-workers, Lolo and Fernando, to bring them into the building. The metal sheets were stored in a storage room in the basement, where the accident happened, and positioned in a manner in which one side of the sheets rested on the floor and the other side of the sheets rested on the storage room's wall. The height of the sheets came up to plaintiff's chest when he stood next to them. There were 12 to 15 metal sheets leaning against the wall, unsecured.

On the morning of the accident, plaintiff and his co-workers were removing debris in the basement. Just before the alleged accident, plaintiff's co-worker Emilio asked him to retrieve a tool called a grinder from the storage room, which was on the floor in front of, but not touching, the metal sheets. The storage room was not large, it had the appearance of a cubical and contained iron laminate sheets, the grinder, drills, hammer and extension cords. Plaintiff crouched down to pick up the grinder and the metal sheets fell on him. Plaintiff never contacted the laminate sheets prior to them falling on top of him.

Motion Seq. 2: Defendants/Third-party plaintiffs, 49 Grove Realty LLC and ABC Restoration, Inc.'s motion for summary judgment

49 Grove and ABC argue that plaintiffs' Labor Law 240(1) claim must be dismissed as plaintiff's accident occurred because of the usual and ordinary construction site danger, and he was not working at an elevation nor struck by an elevated object. Rather, plaintiff was hit by an object resting on the basement floor that was being stored for future use. 49 Grove and ABC argue that plaintiffs have not alleged the violation of a specific and applicable industrial code provision and therefore recovery under Labor Law 241 (6) is also prohibited. 49 Grove and ABC claim that plaintiffs' labor law 200/common law negligence claim must be dismissed as neither had anything to do with how Mid-State stored the laminate to be used for the work that it contracted to perform, and therefore ABC cannot be held liable. Lastly, 49 Grove and ABC argue that they are entitled to contractual indemnification from Mid-State as the plaintiff's accident occurred while he was performing work that Mid-State contracted with ABC to effectuate.

In opposition, plaintiffs argue that the force and weight of the metal sheets that fell on plaintiff illustrate that they were an "object that needed to be secured for the undertaking." Plaintiffs argue that defendants violated Labor Law 240(1) as plaintiff suffered harm that flowed directly from the application of the force of gravity as plaintiff testified that 12 to 14 metal sheets fell onto him from at least five feet over his head. Plaintiffs argue that as Tager testified that the metal sheets cut in half weighed 150 lbs. each, 1800 lbs. of weight fell onto plaintiff, which required them to be secured.

Plaintiff submits the affidavit of William Mizel ("Mizel"), a board-certified safety professional with over 30 years of experience in safety, health, environmental management and site experience in the construction industry. Mizel opines, to a reasonable degree of professional site safety certainty, that defendants did not provide a safe working environment for their employees and violated New York State Labor Law 240(1), 241(6) and 200. Specifically, Mizel opines, within a reasonable degree of professional safety certainty, that Labor Law 240(1) was violated as defendants failed to properly secure the laminate metal sheets by chalking, ties, bundling or some other mechanical means, and by failing to properly stack and secure the metal sheets, place them in a proper location away from worker traffic, defendants exacerbated a serious risk of the sheets from falling over onto workers. Mizel opines that 1500 to 1800 lbs. of material fell from at least five feet above plaintiff, generating an extreme force onto a worker in a crouched position retrieving a tool, knocking him unconscious and trapping him beneath.

Mizel opines that defendants' failure to properly situate the laminate metal sheets and secure them led directly to the plaintiff becoming injured and trapped by the heavy metal sheets in breach of Labor Law 200. Mizel opines that reasonable and adequate protection pursuant to Labor Law 200 necessitated that the laminate metal sheets be secured at a sufficient distance from an active storage area where workers were constantly coming and going retrieving tools and other work material in violation of OSHA standard 29 CFR 1926(a)(1).

Mizel opines that the storage of the metal sheets, each weighing 300 pounds uncut, was unsafe, could not be left unsecured and needed to be bounded and stored away from a high activity area where workers were coming and retrieving tools on a regular basis. Mizel opines that, with regard to Labor Law 241(6), defendants failure to safeguard the edge of the excavation was in violation of 12 NYCRR 23-2.1(a)(1) which requires that all building materials be secured in a safe manner and that all material piles be stable under all conditions; as the stacked metal sheets were not secured in any fashion and they toppled over onto plaintiff, and such violation was a direct, substantial and proximate cause of plaintiff's accident and injuries.

Mizel opines to a reasonable degree of professional safety certainty, that the accident and injuries sustained by plaintiff were caused by defendants' failure to comply with New York Labor Law, in addition to OSHA Regulations which are good and accepted construction industry customs and practice, and that these violations were individually and/or collectively the substantial, direct and proximate causes of the plaintiff's accident and injuries.

Motion Seq. 3: Third-party defendant/Second third-party plaintiff, Mid-State's Motion for Summary Judgment

Mid-State argues that plaintiff's alleged accident does not fall under Labor Law 240(1) because the metal sheets falling in a storage room was not an inherent risk of the work plaintiff was performing, plaintiff was not working at an elevation, and the metal sheets were at the same level as plaintiff before they allegedly fell on top of him. As a result, plaintiff's accident did not involve a physically significant elevation differential and was not a direct consequence of the absence of protection against the risk of the metal sheets falling.

Mid-State argues that Labor Law 241(6) does not apply as most of the industrial code provisions do not apply to the work plaintiff was performing when the accident occurred. Mid-State argues that plaintiff's common law negligence and labor law 200 claims are meritless as no one from Mid-State, 49 Grove or ABC supervised or directed the means and methods of plaintiff's work. Instead, plaintiff testified that one of the owners of Ronalio Construction Corp. or his coworkers directed his work and supervised him. Mid-State argues that the placement of the metal sheets was not a dangerous or defective condition at the worksite, and even if it was, neither Mid-State, 49 Grove, nor ABC created a dangerous or defective condition or had actual or constructive notice of any alleged dangerous condition or defect.

Mid-State submits an affidavit of Bernard P. Lorenz, P.E. ("Lorenz") in support who opines, within a reasonable degree of engineering and construction safety certainty, that Mid-State did not deviate from any standard of care and did not violate Labor Law 200, 240 (1) or 241 (6). Lorenz opines that plaintiff exerted a force on the static and stable metal sheets which caused them to become unstable and fall away from the wall on which they were leaning, and that no dangerous or defect existed in the location or manner in which the metal sheets were stored. Lorenz opines that there were no enumerated safety devices that were required to be used in order to store the metal sheets, as they were static and stable and stored in a manner consistent with construction industry custom and practice. Lorenz further opines that the metal sheets were positioned at the same level where plaintiff was working at the time of his accident, and were not being hoisted or transported. Lorenz opines that many of the industrial code provisions cited by plaintiff are inapplicable or irrelevant to the facts of the case. Specifically with regard to 23-2.1, maintenance and housekeeping, Lorenz opines that the manner in which the metal sheets were stored, leaning up against the wall on a concrete floor, prior to plaintiff's alleged accident was in accordance with standard custom and practice in the construction industry and in accordance with industrial code 12 NYCRR 23-2.1(a)(1), and were located as to not obstruct any passageway, walkway, stairway or other thoroughfare.

Mid-State argues that the third party causes of action based on contribution and common-law indemnification should be dismissed as it was not negligent and did not direct or supervise plaintiff's work. Mid-State argues that the third-party claims for breach of contract for Mid-State's alleged failure to procure insurance should be dismissed because Mid-State complied with the contract and procured insurance and submits the insurance policy and a certificate of insurance naming 49 Grove and ABC as additional insureds. With regard to the third-party cause of action for common law and contractual indemnification, Mid-State argues that the anti-subrogation rule applies because it procured insurance for 49 Grove and ABC as additional insureds, and this bars ABC's causes of action for contribution, common law and contractual indemnification. Lastly, Mid-State argues that as there is no liability, the hold harmless provision was not triggered.

49 Grove and ABC argue in partial opposition that anti-subrogation does not apply as 49 Grove and ABC's additional insured coverage is not co-extensive with Mid-State's indemnification obligation. Under Mid-State's policy with Accredited Surety & Casualty Company, 49 Grove and ABC argue they are only entitled to indemnification for Mid-State's "acts or omissions," and policy endorsements which condition additional insured coverage thereunder upon a determination that the putative additional insured's

damages/liability arose out of the named insured's "acts or omissions" have been interpreted to mean negligent acts or omissions. 49 Grove and ABC argue that Mid-State's indemnification obligation is not contingent upon a determination that it was negligent, or that its work was the proximate cause of 49 Grove and ABC's putative liability. 49 Grove and ABC claim that the anti-subrogation doctrine is not applicable as Mid-State has only agreed to defend but not indemnify them.

In opposition, plaintiff argues that it is undisputed that the heavy metal sheeting was not secured in the cubical storage space, an obvious violation of Labor Law 240(1) and Labor Law 241(6), and the storage of these materials raises issues of fact concerning a violation of Labor Law 200 and general negligence. Plaintiff argues that the force and weight of the metal sheets illustrate that they were an "object that needed to be secured for the undertaking", and cites to expert Mizel who opined that the metal sheets were required to be secured and stored in a safe manner.

Plaintiff argues that defendants' violation of industrial code rule 12 NYCRR 23-2.1(a)(1) constitute such clear-cut evidence of negligence under labor law 241(6), that there can be no defense to plaintiff's cause of action for a violation of this provision. Plaintiff argues that experts Mizel and Lorenz differ over whether the metal sheeting needed to be secured, and also contends that Lorenz's opinion ignores Tager's testimony regarding the weight of the metal sheets, deeming it speculative. Plaintiff also argues there are issues of fact concerning plaintiff's labor law 200 claim.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Zuckerman v City of New York*, 49 NY2d at 562).

Labor Law 240 (1)

The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do "not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*Simmons v City of New York*, 165 AD3d 725, 726 [2d Dept 2018]; see also *Parrino v Rauert*, 208 AD3d 672, 673 [2d Dept 2022]). In determining whether a plaintiff is entitled to the extraordinary protections of Labor Law § 240 (1), the "single decisive question [is] whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.*). "Without a significant elevation differential, Labor Law § 240 (1) does not apply, even if the injury is caused by the application of gravity on an object" (*id.* at 726-727).

"With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which

materials or loads must be positioned or secured” (*id.* at 727). Therefore, “a plaintiff must show more than simply that an object fell, thereby causing injury to a worker” (*id.*). “[A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking” (*id.*). A plaintiff must also show that “the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*id.*).

Here, defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff’s injuries were not caused by an elevation-related or a gravity-related risk encompassed by Labor Law 240 (1). In opposition, plaintiff failed to raise a triable issue of fact. At the time of the alleged accident, plaintiff was not engaged in an activity enumerated in the statute. While plaintiff argues that the statute extends to objects that “require securing for purposes of the undertaking”, plaintiff has failed to show that the object fell because of the absence of the absence or inadequacy of a safety device of the kind enumerated in the statute. Even the affidavit of plaintiff’s expert, Mizel, does not address the cause of the metal sheets to fall. This claim is dismissed.

Labor Law 241(6)

“Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Simmons* at 728-729). As a predicate to a section 241 (6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code (*id.*).

Defendants’ motion which was for summary judgment dismissing so much of the Labor Law § 241 (6) cause of action as was premised upon violations of 12 NYCRR 23-1.5; 23-1.7; 23-1.16; 23-1.17; 23-1.19; 23-2.1; 23-2.6; 23-3.2; 23-3.3; 23-8.2; 23-9.6; 23-5; 23-8.5; and 23-6. The defendants established, prima facie, that the regulations plaintiff alleges they violated were either inapplicable under the circumstances or lack the specificity required to qualify for predicate liability under Labor Law § 241 (6) (*see Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 937-938, 914 NYS2d 203 [2010]; *cf. Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 825 NYS2d 551 [2015]). In opposition, the plaintiff only opposed defendants’ motion with regard to 12 NYCRR 23-2.1(a)(1) and failed to raise a triable issue of fact. It is undisputed that the metal sheets were stored in a storage room, and not located to obstruct a passageway, walkway, stairway or other thoroughfare (12 NYCRR 23-2.1 [a] [1]; *Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003 [2d Dept 2012]) (“The cause of action pursuant to Labor Law § 241 (6) is predicated on 12 NYCRR 23-2.1 (a) (1), which requires owners and general contractors to store ‘[a]ll building materials . . . in a safe and orderly manner’ so as ‘not [to] obstruct any passageway, walkway, stairway or other thoroughfare’”). This claim is dismissed.

Labor Law 200/common law negligence

Labor Law § 200 is a codification of the common-law duty of an owner or employer to provide employees with a safe place to work (*Simmons v City of New York*, 165 AD3d at 727). “This provision applies to owners, contractors, or their agents, who ‘have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition’” (*id.*). “Claims for personal injury under the statute 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" (*id.* at 727-728).

Here, the plaintiff contends that an allegedly dangerous premises condition consisting of 1800 lbs. of unsecured metal sheets in an active storage cubicle caused the accident. In cases involving a dangerous condition on the premises, "property owners 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, 866 NYS2d 323 [2008]; see *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801, 965 NYS2d 156 [2013]; *Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 945 NYS2d 343 [2012]). A contractor may be held liable in common-law negligence and under Labor Law § 200 for a dangerous condition on the premises if it had control over the work site and actual or constructive notice of the dangerous condition (see *Doxey v Freeport Union Free Sch. Dist.*, 115 AD3d 907, 908, 982 NYS2d 539 [2014]; *Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940, 888 NYS2d 142 [2009]).

Defendants 49 and ABC established prima facie entitlement to judgment as a matter of law as the owner and general contractor, that they did not create or have actual or constructive notice of the alleged dangerous condition. In opposition, plaintiff raises a triable issue of fact as to whether ABC had actual notice of the alleged dangerous condition as Farooq, employee of ABC and supervisor for the company working the project everyday, testified that aluminum sheets were stored in the basement.

Defendant Mid-State also established prima facie entitlement to judgment as a matter of law as the subcontractor. In opposition, however, plaintiff raises a triable issue of fact as to whether Mid-State had actual notice of the alleged dangerous condition as Tager testified that he saw the metal sheets leaning on the wall.

The competing expert opinions presents an issue of credibility for the trier of fact to determine (*Rapaport v. Sears, Roebuck & Co.*, 28 A.D.3d 449, 450 [2d Dept. 2006]).

With regard to the third-party causes of action for contribution and common-law indemnification, issues of fact exist including whether there was a dangerous condition and whether Mid-State and ABC are liable for same. Mid-State has made a prima facie showing that it procured insurance coverage for 49 Grove and ABC which is not opposed by them.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

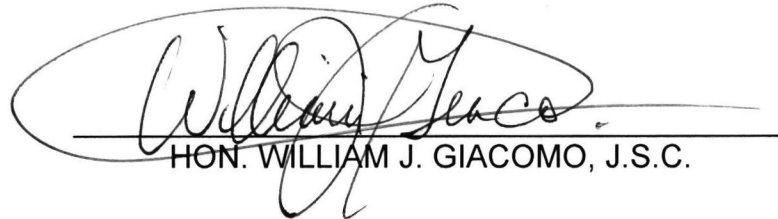
ORDERED that defendants/third-party plaintiffs, 49 GROVE REALTY LLC and ABC RESTORATION, INC. motion (motion seq. 2) for summary judgment and dismissal of plaintiffs, LEHI ALEJANDRO NUNEZ MERLO and KELIN GISSELA IRIAS MARADIAGA's complaint pursuant to CPLR 3212(a) is GRANTED in part and DENIED in part (motion seq. 2); and it is further

ORDERED that defendants/third-party plaintiffs, 49 GROVE REALTY LLC and ABC RESTORATION, INC. motion for summary judgment against third-party defendant, MID-STATE CONSTRUCTION CORP., upon its contractual indemnification, third-party claim is DENIED; and it is further

ORDERED that third-party defendant/second third-party plaintiff, MID-STATE CONSTRUCTION CORP. ("Mid-State") motion for summary judgment dismissing plaintiffs LEHI ALEJANDRO NUNEZ MERLO and KELIN GISSELA IRIAS MARADIAGA's amended verified complaint in its entirety pursuant to CPLR 3212 is GRANTED in part and DENIED in part as detailed above.

The remaining parties are directed to appear for a settlement conference on April 24, 2023 at 11:00 a.m., subject to confirmation by the virtual conference link emailed by this Court.

Dated: White Plains, New York
March 22, 2023



HON. WILLIAM J. GIACOMO, J.S.C.