Palacios v McEvoy
2023 NY Slip Op 35032(U)
April 17, 2023
Supreme Court, Suffolk County
Docket Number: Index No. 067898/2014
Judge: Linda J. Kevins
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SHORT FORM ORDER

INDEX No. 067898/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T :

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 4/22/22 (#002)
MOTION DATE 6/22/22 (#004)
ADJ. DATE 11/15/22
Mot. Seq. # 002 MotD
Mot. Seq # 004 MD

---X

JOSE LEON PALACIOS and SIRIS BARRIOS,

Plaintiff,

- against -

ROBERT MCEVOY, SABRINA MCEVOY and FARRELL BUILDING COMPANY, INC.,

Defendants.

---X

ROBERT MCEVOY, SABRINA MCEVOY and FARRELL BUILDING COMPANY, INC.,

Third-Party Plaintiffs,

- against -

CB TRIMMING INC.,

Third-Party Defendant.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motions/ Order to Show Cause and supporting papers by defendants/third-party plaintiffs dated, April 22, 2022; Notice of Motions/ Order to Show Cause

and supporting papers by third-party defendant, dated June 22, 2022 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiff, dated August 31, 2022, and by defendants/ third-party plaintiffs, dated July 25, 2022 ; Replying Affidavits and supporting papers by third-party defendant, dated November 14, 2022 ; Other ___; it is

ORDERED that the motion (002) by defendants/third-party plaintiffs Robert McEvoy, Sabrina McEvoy, and Farrell Building Company, Inc., and the motion (004) by third-party defendant CB Trimming, Inc., are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants/third-party plaintiffs Robert McEvoy, Sabrina McEvoy, and Farrell Building Company, Inc., for summary judgment dismissing the complaint against them is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by third-party defendant CB Trimming, Inc., for summary judgment dismissing the third-party complaint against it is denied; and it is further

ORDERED that, if applicable, the movant is directed to promptly serve upon the Suffolk County Clerk, notice pursuant to CPLR §8019 [c] together with a copy of this Order and payment of any required fees; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff Jose Palacios commenced this action to recover damages for injuries he allegedly sustained on September 26, 2011, while working at the construction site of new single-family home located at 18 Ranch Court, Sagaponack, New York. The accident allegedly occurred when plaintiff, who was relocating his vehicle at the request of a supervisor at the worksite, reversed into an open trench. The premises was owned by defendants/third-party plaintiffs Robert McEvoy and Sabrina McEvoy. The McEvoys retained defendant/third-party plaintiff Farrell Building Company, Inc., as the project's general contractor. Farrell Building Company hired plaintiff's employer, defendant/third-party defendant CB Trimming, Inc., to install molding and trimmings inside the new home. By way of his complaint, plaintiff alleges causes of action against defendants based on common law negligence, and violations of Labor Law §§ 200, 240 (1), and 241 (6). The complaint also includes a derivative claim by plaintiff's wife, Siris Barrios, for damages related to loss of services and the payment of medical expenses.

Defendants joined issue denying plaintiff's claims and asserting affirmative defenses. Thereafter, they brought a third-party action against CB Trimming asserting, among other things, claims for indemnification, contribution, and breach of contract based on CB Trimming's alleged failure to procure general liability insurance in their favor as required by the parties' agreement. CB Trimming joined the third-party action and asserted counterclaims against Farrell and the McEvoys based on contribution and indemnification.

Defendants/third-party plaintiffs now move for summary judgment dismissing the complaint against them. They argue that the claims against the McEvoys should be dismissed, as they are exempted from liability, and they neither controlled plaintiff's work nor possessed notice of the alleged dangerous condition that caused his injuries. As to plaintiff's claims against Farrell Building Company (hereinafter referred to as "Farrell"), Farrell asserts that Labor Law § 240 (1) is inapplicable under the circumstances of this case, and that plaintiff failed to plead applicable violations of the Industrial Code in support of his Labor Law § 241 (6) claim. With respect to the common law negligence and Labor Law § 200 claims, Farrell argues that it cannot be held liable therefor, as plaintiff's own negligence, namely, his failure to keep a close watch as he reversed his vehicle over unfamiliar terrain, was the superceding cause of the accident. Plaintiff opposes the motion to the extent it seeks dismissal of the complaint against Farrell, arguing that it failed to establish that Labor Law § 240 (1) was inapplicable where, as in this case, he fell into an uncovered and unprotected trench. Plaintiff asserts that the purported violations of 12 NYCRR §§ 23-1.7 (b) (1), 23-1.33 (a) and (c), and 23-4.2 (h) and (j), are all applicable to the circumstances of this case. Additionally, plaintiff asserts that his conduct of accidentally reversing his vehicle into an open trench cannot be regarded as the superceding cause of the accident, because it was a foreseeable consequence given the existence of such a dangerous condition at the construction site.

By way of a separate motion, CB Trimming moves for dismissal of the third-party complaint against it on the grounds plaintiff was not its employee at the time of the accident and, even assuming arguendo that plaintiff was so employed, the contribution and indemnification claims against it would be barred by section 11 of the Workers' Compensation Law. In addition, CB Trimming argues that Farrell's contractual indemnification claim must fail under section 5-322.1 of the General Obligations Law, because it was not free from negligence in relation to the happening of the accident. CB Trimming further avers that its obligation to procure general liability insurance was never triggered, and that plaintiff's injuries would not, in any event, be covered by such a policy, as the accident did not arise out of the performance of its work. Defendants/third-party plaintiffs oppose CB Trimming's motion on the ground a triable issue exists as to whether plaintiff was an employee of CB Trimming at the time of the alleged accident. Additionally, defendants/third-party plaintiffs assert that their claims for contribution and indemnification should not be barred by Workers' Compensation Law § 11, as CB Trimming indicated that plaintiff was not its employee and, even assuming arguendo, that it did employ plaintiff, there would still be no bar to its contribution and indemnification claims because CB Trimming admitted that it never provided plaintiff with Workers' Compensation benefits after the accident.

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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

At the outset, the court notes that by failing to oppose the branch of defendants/third-party plaintiffs' motion seeking dismissal of the complaint against the McEvoys, plaintiff is deemed to have abandoned his claims against them (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]). In any event, an examination of defendant/third-party plaintiffs' moving papers reveal that the McEvoys established their entitlement to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against them pursuant to the homeowners' exemption, as they submitted evidence that the subject single-family home was used exclusively for residential purposes, and that they did not control or supervise the details of plaintiff's work (*see* ***Khela v Neiger***, 85 NY2d 333, 624 NYS2d 566 [1995]; ***DiMaggio v Cataletto***, 117 AD3d 984, 986 NYS2d 536 [2d Dept 2014]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]). Additionally, the McEvoys, who testified that they had not taken possession of the premises at the time of the accident and were unaware of the alleged dangerous condition, met their prima facie burden with respect to their request for dismissal of the common law negligence and Labor Law § 200 claims against them (*see* ***LaGiudice v Sleepy's Inc.***, 67 AD3d 969, 890 NYS2d 564 [2d Dept 2009]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Therefore, the branch of the motion seeking dismissal of the complaint against the McEvoys is granted.

Turning to the branch of the motion seeking dismissal of the complaint against Farrell, it met its burden with respect to its request for dismissal of the Labor Law § 240 (1) claim against it by submitting evidence that the accident occurred when plaintiff, who was relocating his vehicle on the worksite at the request of a supervisor, inadvertently reversed his vehicle into an open trench. Such evidence indicates that plaintiff's accident occurred due to an ordinary and usual danger at a construction site, and that the activity in which plaintiff was engaged did not expose him to any risk that the safety devices referenced in Labor Law § 240 (1) would have protected against (*see* ***Seem v Premier Camp Co., LLC***, 200 AD3d 921, 161 NYS3d 117 [2d Dept 2021]; ***Kickler v Dove-Tree Greenery, Inc.***, 185 AD3d 1017, 126 NYS3d 368 [2d Dept 2020]; ***Farruggia v Town of Penfield***, 119 AD3d 1320, 989 NYS2d 715 [4th Dept 2014]; ***Shaw v RPA Assoc., LLC***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]). It is well established that the protections of Labor Law § 240 (1) do not encompass any and all perils connected in some tangential way with the effects of gravity (*see* ***Nicometi v Vineyards of Fredonia, LLC***, 25 NY3d 90, 97, 7 NYS3d 263 [2015]), or guard against routine work place risks found at construction sites (*see* ***Runner v New York Stock Exch., Inc.***, 13 NY3d 599, 603, 895 NYS2d 279 [2009]; ***Rodriguez v Margaret Tietz Ctr. for Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994]). Indeed, when evaluating claims under the statute, "[c]ourts must take into account the practical differences between 'the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)'" (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011], quoting ***Rodriguez v Margaret Tietz Ctr. for Nursing Care***, 84 NY2d 841, 843, 616 NYS2d 900, 901 [1994]). In light of the foregoing, plaintiff's conclusory assertions that Labor Law § 240 (1) applies merely because of the tangential effects of gravity on his vehicle when it partially fell into the open trench is insufficient to defeat defendants/third-party plaintiff's prima facie showing. Therefore, the branch of the motion seeking dismissal of the Labor Law § 240 (1) claim against Farrell is granted.

Defendants/third-party plaintiffs also met their prima facie burden with respect to the branch of the motion seeking dismissal of plaintiff's Labor Law § 241 (6) claims against Farrell by establishing that the Industrial Code provisions specified by plaintiff in support of his claim, namely 12 NYCRR § 23-1.7 (b) (1), 12 NYCRR § 23-1.33 (a) and (c), and 12 NYCRR § 23-4.2 (h) and (j), were either inapplicable or did not proximately cause plaintiff's accident. Notably, defendants/third-party plaintiffs established that the alleged violation of 12 NYCRR § 23-1.7 (b) (1), which requires hazardous openings to be guarded by a substantial cover fastened in place or by a safety railing, was inapplicable and did not proximately cause the accident where, as in this case, none of the enumerated safety devices would have prevented plaintiff's vehicle, rather than plaintiff himself, from reversing into the trench which measured no more than five to six feet deep (*see* ***Mancini v Pedra Constr***., 293 AD2d 453, 740 NYS2d 387 [2d Dept 2002]). Additionally, defendants/third-party plaintiffs established that 12 NYCRR § 23-1.33 (a) and (c), that is meant to protect persons and vehicles passing by construction sites, are inapplicable under the circumstances of this case, as plaintiff testified that he was working at the premises at the time of the accident (*see* ***Mancini v Pedra Constr***., 293 AD2d 453, 740 NYS2d 387; ***Lawyer v Hoffman***, 275 AD2d 541, 711 NYS2d 618 [3d Dept 2000]). They similarly established that 12 NYCRR §23-4.2 (h), which requires that excavations adjacent to sidewalks, street, highways or other area lawfully frequented by any person be guarded, or protected by a substantial cover, or barricade, is inapplicable for the same reason, as that section of the Industrial Code has been held only applicable to lawful pedestrians (*see* ***Lamela v City of New York***, 560 F Supp 2d 214 [EDNY 2008]; ***Ruland v Long Island Power Auth***., 5 AD3d 580, 774 NYS2d 84 [2d Dept 2004]). As to 12 NYCRR §23-4.2 (j), which requires that temporary sheet piling be installed in a trench until its retaining wall has developed enough strength to support an intended load, also is inapplicable, as the trench in question was not meant to support a load (*see* ***Natale v City of New York***, 33 AD3d 772, 822 NYS2d 771 [2d Dept 2006]; ***Magnuson v Syosset Community Hosp***., 283 AD2d 404, 725 NYS2d 55 [2d Dept 2001]). In opposition, plaintiff failed to raise a significant triable issue warranting denial of the motion to dismiss his Labor Law § 241 (6) claim (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). Notably, plaintiff's contention that the existence of a triable issue as to whether he was as an employee of CB Trimming at the time of the accident requires denial of the motion is unavailing, as it is undisputed that he was working at the construction site shortly before the accident occurred (*see* ***Mancini v Pedra Constr.***, 293 AD2d 453, 740 NYS2d 387; ***Lawyer v Hoffman***, 275 AD2d 541, 711 NYS2d 618). Accordingly, the branch of the motion seeking dismissal of the Labor Law § 241 (6) claim against Farrell is granted.

Defendants/third-party plaintiffs failed, however, to meet their burden with respect to dismissal of the common law negligence and Labor Law § 200 claim against Farrell, as they failed to demonstrate, as a matter of law, that plaintiff's failure to observe the trench before he partially reversed his vehicle into it was a superseding cause of his injuries (*see* ***Hain v Jamison***, 28 NY3d 524, 46 NYS3d 502 2016]; ***Kuligowski v One Niagara, LLC***, 177 AD3d 1266, 112 NYS3d 383 [4th Dept 2019]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d

688 [2d Dept 2007]). "When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant[s'] negligence" (***Hain v Jamison***, 28 NY3d 524, 529, 46 NYS3d 502, 509). However, "[a]s with determinations regarding proximate cause generally, '[b]ecause questions concerning what is foreseeable and what is normal may be the subject of varying inferences, whether an intervening act is foreseeable or extraordinary under the circumstances generally [is] for the fact finder to resolve'" (***Santaiti v Town of Ramapo***, 162 AD3d 921, 927, 80 NYS3d 288, 295, quoting ***Turturro v City of New York***, 28 NY3d 469, 484, 45 NYS3d 874, 886 [2016]). Therefore, the branch of the motion seeking summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claim against Farrell is denied.

Turning to the motion by CB Trimming for dismissal of the third-party claims against it, an essential requirement for protection under the Workers' Compensation Law is the existence of an employer/employee relationship with the injured worker (Workers' Compensation Law §§ 11, 29 [6]; *see* ***Matter of Ovadia v Office of the Indus. Bd. of Appeals***, 19 NY3d 138, 946 NYS2d 86 [2012]). Additionally, New York's Worker's Compensation Law § 11 permits third-party contractual indemnification claims against employers where such claim is based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see* ***Rodrigues v N&S Blg. Contrs. Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Moreover, General Obligations Law § 5-322.1 does not prohibit such contractual indemnification where the parties agreement requires indemnification only "[t]o the fullest extent of the law" (*see* ***Brooks v Judlau Contr. Inc.***, 11 NY3d 204, 869 NYS2d 366 [2008]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]). "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, 6, 940 NYS2d 21 [1st Dept 2012]) Contribution or apportionment among tortfeasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tortfeasors share in responsibility for an injury (*see* ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Rogers v Dorchester Assoc.***, 32 NY2d 553, 347 NYS2d 22 [1973]).

Here, CB Trimming failed to meet its burden on the motion, as it own submissions, including the transcripts of plaintiff's deposition testimony and an affidavit by its owner, Chris Cole, raise a triable issue as to whether plaintiff was an employee of CB Trimming at the time of the accident and, if so, whether he was entitled to the protections of Workers' Compensation Law §§ 11 and 29 (6). In particular, plaintiff testified that someone by the name "Chris" from CB Trimming contacted him by phone and requested that he turn up at the construction site to work as a subcontractor for CB Trimming on the day of the accident. The owner of CB Trimming, Christopher Cole, testified that plaintiff was never an employee of CB Trimming, that plaintiff called him on the morning of the day of the accident seeking work, and that he only promised to meet with him to discuss the level of his skill as a carpenter and whether he would be hired for work. Such evidence raises significant factual issues to be

determined by the trier of fact. Thus, the branches of CB Trimming's motion seeking dismissal of the third-party common law indemnification and contribution claims against it are denied (*see* ***Nolan v Irwin Contr., Inc.***, 121 AD3d 1060, 997 NYS2d 138 [2d Dept 2014]; ***Persad v Abreu***, 84 AD3d 1046, 923 NYS2d 656 [2d Dept 2011]; ***Slikas v Cyclone Realty***, 78 AD3d 144, 908 NYS2d 117 2d Dept 2010]).

As to the branch of CB Trimming's motion seeking dismissal of the contractual indemnification claim against it, a review of the agreement between Farrell and CB Trimming reveals that it includes the savings clause requiring contractual indemnification only to the "[t]o the fullest extent of the law," ensuring it does not run afoul of the proscriptions of General Obligations Law § 5-322.1. Therefore, CB Trimming failed to establish that the contractual indemnification claim against it was barred, as a matter of law (*see* ***Brooks v Judlau Contr. Inc.***, 11 NY3d 204, 869 NYS2d 366; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966). Moreover, CB Trimming failed to establish its entitlement to judgment dismissing the contractual indemnification claim on the basis plaintiff was not its employee, because, as discussed above, triable issues remain as to whether plaintiff was hired as a subcontractor to perform work for CB Trimming at the construction site. It is further noted that Farrell, which was not moving for judgment on its contractual indemnification claim, was not required to demonstrate its freedom from negligence. Rather, as the movant, CB Trimming was required to demonstrate its prima facie entitlement to judgment and, as discussed above, it failed to do so (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316). Therefore, the branch of CB Trimming's motion seeking dismissal of the contractual indemnification claim against it is denied.

As to the branch of the motion by CB Trimming for judgment dismissing the breach of contract claim against it based on its alleged failure to procure general liability insurance naming defendants/third-party plaintiffs as additional insureds, a determination of the intent of the parties to a contract can only be made as a matter of law where their intent is discernable within the four corners of an unambiguously worded agreement (*see* ***Nappy v Nappy***, 40 AD3d 825, 836 NYS2d 256 [2d Dept 2007]; ***Geothermal Energy Corp. v Caithness Corp***., 34 AD3d 420, 825 NYS2d 485 [2d Dept 2006] ***Siegel v Golub***, 286 AD2d 489, 729 NYS2d 755 [2d Dept 2001]). Courts determine as a matter of law whether a contract is ambiguous by looking at the document itself and the circumstances under which it was executed, and only look to extrinsic evidence if an ambiguity exists (*see* ***Kass v Kass***, 91 NY2d 554, 566, 673 NYS2d 350 [1998]; ***Stuyvesant Plaza v Emizack, LLC***, 307 AD2d 640, 640, 763 NYS2d 146 [3d Dept 2003]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (*see* ***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Here, CB Trimming disputes that it was required to procure general liability insurance naming defendants/third-party plaintiffs as additional insureds based on handwritten notes contained in paragraph 6 of the subcontractor agreement. Specifically, while paragraph 6 of the agreement provides

FILED: SUFFOLK COUNTY CLERK 04/24/2023 02:27 PM INDEX NO. 067898/2014
NYSCEF DOC. NO. 106 RECEIVED NYSCEF: 04/24/2023

that the subcontractor was required to procure and maintain general liability insurance prior to the start of its work, a handwritten note has been added to the document which states that the procurement of such insurance will only be mandated "if [it] is required by contractor in proposal." However, the court's review of the agreement reveals that the note is initialed only by CB Trimming's principal, Robert Bellini. Further, CB Trimming failed to submit a "contractor proposal" in support of the motion indicating that the insurance procurement required was not ultimately included to the parties' agreement. Additionally, the court notes that Farrell argues that the insurance procurement requirement was mandatory for all subcontractors working at the construction site, and it questions the authenticity of the purported handwritten notes. Inasmuch as such evidence raise significant triable issues concerning ambiguities within the parties' agreement and whether they shared a meeting of the minds with respect to the insurance procurement requirement, the branch of CB Trimming's motion seeking dismissal of breach of contract claim also is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 4.17.23

LINDA KEVINS, JSC

_____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION