

Pitang v Beacon Broadway Co., LLC
2023 NY Slip Op 35149(U)
January 17, 2023
Supreme Court, Bronx County
Docket Number: Index No. 27350/2017E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 3, 4, 5

MANGUILIBE PITANG and AVEGNIDOU PITANG,

Index No.: 27350/2017E

Plaintiffs,

- against -

DECISION and ORDER

BEACON BROADWAY COMPANY, LLC; and
BEACWAY OPERATING, LLC; and EAST SIDE
PRIMARY MEDICAL CARE, P.C.; and DANIEL P.
KLEIN, MD,

Defendants.

and a Third-Party action.

	PAPERS NUMBERED
Defendants/Third-Party Plaintiffs Beacon Broadway Company, LLC's and Beacway Operating, LLC's Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 3)	NYSCEF Doc. No. 93-105
Third-Party Defendant Skyline Restoration, Inc.'s Partial Affirmation in Opposition, Response to Statement of Material Facts, Exhibit(s) (Mtn. Seq. # 3)	NYSCEF Doc. No. 122-123, 146-148
Plaintiffs' Affirmation in Opposition, Exhibits (Mtn. Seq. # 3)	NYSCEF Doc. No. 128-123
Defendants/Third-Party Plaintiffs Beacon Broadway Company, LLC's and Beacway Operating, LLC's Reply Affirmation (Mtn. Seq. # 3)	NYSCEF Doc. No. 143
Plaintiffs' Notice of Motion, Affirmation in Support, Exhibits (Mtn. Seq. # 4)	NYSCEF Doc. No. 107-114
Defendants/Third-Party Plaintiffs Beacon Broadway Company, LLC's and Beacway Operating, LLC's Affirmation in Opposition (Mtn. Seq. # 4)	NYSCEF Doc. No. 126
Third-Party Defendant Skyline Restoration, Inc.'s Memorandum of Law in Opposition to Plaintiffs' motion (Mtn. Seq. # 4)	NYSCEF Doc. No. 140-142
Third-Party Defendant Skyline Restoration, Inc.'s Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits (Mtn. Seq. # 5)	NYSCEF Doc. No. 115-121, 124
Defendants/Third-Party Plaintiffs Beacon Broadway Company, LLC's and Beacway Operating, LLC's Affirmation in Partial Opposition (Mtn. Seq. # 5)	NYSCEF Doc. No. 127
Plaintiffs' Affirmation in Opposition, Exhibits (Mtn. Seq. # 5)	NYSCEF Doc. No. 134-139
Third-Party Defendant Skyline Restoration, Inc.'s Reply Memorandum of Law in Support (Mtn. Seq. # 5)	NYSCEF Doc. No. 144-145

Upon the enumerated papers, and due deliberation had thereon, this Court finds:

Plaintiffs' summary judgment motion with respect to the Labor Law 240(1) and 241(6) claims, must be dismissed as Plaintiff was not faced with the type of elevation-related hazard contemplated by the statute. Furthermore, the Labor Law 241(6) claim must be dismissed as it is not premised on any violation of specific safety rules and regulations applicable to the facts at bar.

This Court holds Beacon and Beacway has not demonstrated *prima facie* their entitlement for contractual indemnity from Skyline; however holds Skyline established its entitlement for dismissal of the third-party complaint¹ sounding in breach of contract for failure to procure insurance, contractual indemnity, common law indemnity and contribution.

According to Plaintiff Manguilibe Pitang, on the day of the accident, he was working for non-party Metropolitan Northeast as a scaffold erector at the job site. About ten other workers employed by Metropolitan Northeast were assigned to build a sidewalk bridge at the premises. When Plaintiff first arrived at the job site, the sidewalk bridge was partially erected. Plaintiff testified that his foreman, Ricardo, instructed him to unload wood planks off a flatbed truck that were intended to be used to build a platform on the sidewalk bridge. He was instructed to pass the wood planks up to other workers on the sidewalk bridge. Plaintiff testified that he initially stood on the surface of the flatbed truck to pass the wood planks, and as the pile of planks went down, Plaintiff then stood on the remaining planks until all of the planks were unloaded. When a coworker, who stood on the sidewalk bridge above, asked him to pass him a soda, Plaintiff stood on 2 X 4's (two by fours) that were placed on the flatbed to support the planks that were stacked on top of them for additional height to pass the soda. While attempting to pass the soda, the 2 X 4's allegedly flipped and caused Plaintiff to fall off the flatbed truck onto the ground. According to Plaintiff, he fell 4 (four) feet to the ground resulting in injury. Plaintiff stated that he was not wearing a safety harness at the time of the accident. He further testified that even with a safety harness, there was no where to tie off the harness. Plaintiff did not believe that any other type of safety device would have prevented him from falling.

¹ This Court shall not consider Third-Party Defendant Skyline's summary judgment motion (Mtn. Seq. # 5) seeking dismissal of Plaintiffs' complaint as these claims are not asserted against Skyline. Moreover, the arguments regarding dismissal of the Labor Law 240(1), 241(6), and 200 claims were raised and decided in Plaintiffs' and Defendants/Third-Party Plaintiffs Beacon's and Beacway's motions for summary judgment.

Labor Law 240(1) provides in part: "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, altering, painting, cleaning or pointing 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."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept. 2009] [citations and quotations omitted].

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; see *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999] [holding "[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists"]].

This Court finds Plaintiff Manguilibe Pitang was not faced with the type of elevation-related hazard as contemplated by Labor Law 240(1). *See James v Alpha Painting & Constr. Co, Inc.*, 152 AD3d 447 [1st Dept. 2017]; *see also Bond v York Hunter Constr., Inc.*, 95 NY2d 883 [2000]. As the Court of Appeals has held, the risk of falling or alighting from a construction vehicle is not an elevation-related risk that calls for the provision of any of the safety devices listed in section 240(1). *See Bond*, 95 NY2d at 885; *see also Landa v City of New York*, 17 AD3d 180 [1st Dept. 2005].

In addition, Plaintiffs have not alleged any concrete specific safety rule and/or regulation of the State Industrial Code that was violated by the defendants pursuant to Labor Law 241(6) in their legal arguments, their Bill of Particulars, or Complaint, and as such, the Labor Law 241(6) claim must be dismissed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].

Further, Beacon and Beacway established their *prima facie* burden for dismissal of the Labor Law 200 claim as the evidence demonstrated that neither Beacon nor Beacway exercised any supervision and/or control over the injury-producing work. Plaintiff failed to raise any triable issue of fact that Beacon or Beacway supervised or controlled the work tantamount to impose liability under Labor Law 200. *See McLean v Tishman Constr. Corp.*, 144 AD3d 534 [1st Dept. 2016]; *see also Griffin v Clinton Green S., LLC*, 98 AD3d 41 [1st Dept. 2012]. There was also no argument proffered by Plaintiffs that Beacon or Beacway created the alleged dangerous condition or that either possessed actual or constructive notice of same. Therefore, the Labor Law 200 claim must be dismissed.

In addition, as to Skyline's summary judgment motion, this Court finds it demonstrated its entitlement to dismissal of Beacon and Beacway's third-party claims sounding in common law

indemnity and contribution as said claims are barred by Workers Compensation Law §11 since it was undisputed that Plaintiff's injuries were not "grave" within the meaning of the statute. *See Cashbamba v 1056 Bedford LLC*, 168 AD3d 638 [1st Dept. 2019].

With respect to the third-party claim for contractual indemnification, Beacway, as the operating company and lessee of Beacon, entered into a written contract with Skyline wherein Skyline agreed to indemnify the "[o]wner, its partners, directors, members, officers, employees, servants, representatives, consultants and agents" to the extent an injury occurred arising out of or resulting from Skyline's negligence "or wrongful act, error, omission, breach of any statute, code or rule or breach of contract" in connection with Skyline's contracted work or that of its subcontractors and sub-subcontractors. This Court however finds that Beacon and Beacway have not demonstrated *prima facie* that they are entitled to contractual indemnity from Skyline as they have not adduced evidence that the accident was caused by the negligence of Skyline or its subcontractors. Further, in seeking dismissal of the claim for contractual indemnity, Skyline established that no employees of Skyline or its subcontractor were present at the job site on the date of the accident and that no employees of Skyline or its subcontractor exercised any supervision or control over Plaintiff's work. In opposition, Beacon and Beacway failed to raise a triable issue of fact.

Lastly, Skyline demonstrated that it complied with its contractual obligation to procure insurance by appending a commercial general liability policy that was effective on the date of the accident, which included a blanket endorsement that covered any obligation by Skyline to provide insurance to an additional insured. Beacon and Beacway failed to provide an affidavit or some other form of admissible evidence demonstrating that no liability insurance was obtained by Skyline. Thus, whether the insurer refused to indemnify Beacon and/or Beacway does not alter the

fact that Skyline complied with its contractual obligation. *See Perez v Morse Diesel Int'l, Inc.*, 10 AD3d 497 [1st Dept. 2004].

Accordingly, it is

ORDERED, that Defendants/Third-Party Plaintiffs Beacon's and Beacway's summary judgment motion (Mtn. Seq. #3) is granted in part; and it is further

ORDERED, that Plaintiffs' Complaint as against Defendants Beacon and Beacway with respect to Labor Law 240(1), 241(6), and 200 is dismissed; and it is further

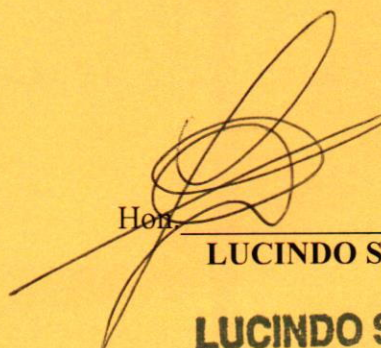
ORDERED, that Plaintiffs' motion for summary judgment (Mtn. Seq. # 4) is denied; and it is further

ORDERED, that Third-Party Defendant Skyline's motion for summary judgment (Mtn. Seq. # 5) is granted in part; and it is further

ORDERED, that Defendants/Third-Party Plaintiffs Beacon's and Beacway's Third-Party Complaint against Third-Party Defendant Skyline with respect to third-party claims for contractual indemnity, common law indemnity, contribution, and breach of contract for failure to procure insurance, is dismissed.

This constitutes the Decision and Order of the Court.

Dated: January 17, 2023


Hon. _____
LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.