

Szulborski v 4212 28St LLC
2023 NY Slip Op 35199(U)
March 8, 2023
Supreme Court, Queens County
Docket Number: Index No. 708251/2016
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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RAFAL SZULBORSKI,

Index No. 708251/2016

Plaintiff,

Part 6

Motion Date: January 30, 2023

-against-

Calendar No. 27

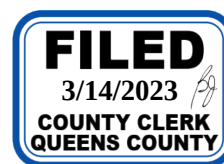
4212 28ST LLC, 28 ST CON LLC, TRADE OFF LLC,
CONSTRUCTION REALTY SAFETY GROUP, INC.,
J. PETROCELLI CONTRACTING, INC., and
AMERICAN SECURED FENCING CORP.,

Sequence No. 13

Defendants.

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4212 28ST LLC, 28 ST CON LLC and J.
PETROCELLI CONTRACTING, INC.,



Third-Party Plaintiffs,

-against-

MIDWEST CURTAINWALLS, INC., CROWNE
ARCHITECTURAL SYSTEMS, INC. and
BARVIP GLASS CORP.,

Third-Party Defendants.

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The following papers numbered 1 to 24 read on this motion by defendants 4212 28ST LLC, 28 ST CON LLC, and J. PETROCELLI CONTRACTING, INC., for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212, and for summary judgment on their claims for contractual indemnification against defendants Trade Off, Construction Realty Safety Group, American Secured Fencing, Midwest Curtainwalls, and Crowne Architectural Systems.

Papers

Numbered

Notices of Motion, Affirmation, Facts, Memorandum, Exhibits.....1-6

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Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants 4212 28ST LLC, 28 ST CON LLC and J. Petrocelli Contracting, Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint is granted solely as to plaintiff's Labor Law §240(1) and §241(6) claims. Defendants' motion for summary judgment and dismissal of plaintiff's Complaint with respect to plaintiff's Labor Law §200 claim is granted solely as to defendants 4212 28 ST LLC and 28 ST CON LLC, and denied as to defendant Petrocelli. Defendants' motion for summary judgment on their claims for contractual indemnification is denied as moot, as all claims against those parties were previously dismissed. Defendants' motion for summary judgment on their claim for contractual indemnification from co-defendant Trade Off LLC is denied.

Plaintiff commenced this action for personal injuries sustained on March 11, 2016, while working at a construction site located at 42-12 28th Street in Long Island City, New York. At the time of plaintiff's accident, a metal fence attached to an Yodock Barrier (hereinafter referred to as "Y-barrier") struck plaintiff's head causing injuries. Plaintiff filed the Summons and Complaint on July 14, 2016, and issue was subsequently joined on August 16, 2016.

Defendants 4212 28ST LLC, 28 ST CON LLC, and J. Petrocelli Contracting, Inc. (hereinafter referred to collectively as "defendants") argue that plaintiff's Labor Law claims should be dismissed because he was not performing an enumerated activity at the time of his accident, defendants did not supervise, direct, or control plaintiff's work at the project, the Y-barrier does not constitute a "falling object", and plaintiff failed to allege violations of applicable Industrial Codes. Defendants also argue that they are entitled to contractual indemnification from co-defendants American Secured Fencing (hereinafter referred to as "ASFC"), Trade Off, Construction Realty Safety Group (hereinafter referred to as "CRSG"), Crowne, and Midwest Curtainwalls pursuant to the contracts they held with defendants. Defendants presented the pleadings, contracts, and deposition testimony of the parties in support of their motion.

Defendants rely on the deposition testimony of the parties in support of their motion. Plaintiff testified that at the time of the accident he was working as a mechanic and window installer for defendant Barvip Glass Corp. (hereinafter referred to as "Barvip"). He testified that

it was particularly windy that day because he recalled that the exterior elevator could not go up to the higher floors due to high winds. Plaintiff further testified that at approximately 9:15 am on March 11, 2016, he was walking offsite to purchase a bottle of water from a deli when he felt a strong impact to the back of his head that knocked him down. Plaintiff further testified that he turned around and saw a barricade with a metal mesh fence that had struck him, but was unsure which part of it struck him. Plaintiff further testified that the barricade had not been filled with water or sand and was empty.

Ronald Walker testified on behalf of defendants 4212 28ST LLC and 28 ST CON LLC that 4212 28ST LLC owned the property the project was taking place on, 28 ST CON LLC was the general contractor, and Petrocelli was the project manager. Walker further testified that co-defendant Trade Off LLC was a subcontractor responsible to provide skilled labor, perform punch-list work, and maintain housekeeping on the project. Walker further testified that he did not know who installed the Y-barriers or was responsible for filling them. Walker further testified that CRSG was responsible for inspecting the Y-barriers and found them to be in good condition during an inspection the day before plaintiff's accident.

Blaise Swiatkowski testified as project superintendent for Petrocelli, and stated Petrocelli did not have any employees performing work at the Project, as Trade Off was hired to perform the labor. Swiatkowski further testified that Trade Off installed the Y-barriers, was responsible for moving them for truck deliveries, filling them with water, moving them back and forth, and maintaining them. Justin Hagedorn testified on behalf of Trade Off that if a Trade Off employee filled a Y-barrier with water it was at the direction of Petrocelli.

Co-defendant Trade Off opposed defendants' motion for contractual indemnification and argued it was not entitled to contractual indemnification because plaintiff's accident did not arise out of Trade Off's work performance. Trade Off further argued that all determinations regarding the Y-barriers, their setup, and the means and methods for maintaining them was made exclusively by and at the direction of Petrocelli, and therefore it was not liable for plaintiff's injuries.

Plaintiff opposed defendants' motion and argued that it is untimely and that defendants failed to demonstrate a prima facie entitlement to summary judgment. Plaintiff argued that the motion is untimely because it was filed one day past the deadline for dispositive motions. Plaintiff also argued that he is entitled to the protections of Labor Law §240(1) and §241(6) because plaintiff was engaged in an enumerated activity, as he was contracted to install windows on a high-rise building at the project, and because the Y-barrier constitutes a falling object pursuant to Labor Law §240(1). Plaintiff further argued that defendants are liable pursuant to Labor Law §200 because they directed and supervised the means and methods of the work related to the Y-barriers and had notice of its dangerous condition.

Pursuant to CPLR §3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

Labor Law §200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work. (*Casilari v. Condon*, 185 A.D.3d 896, 897 [2d Dept. 2020].) A cause of action alleging a violation of Labor Law §200 or common-law negligence may arise from either a dangerous or defective condition at a work site or the manner in which the work is performed. (*Rodriguez v. Trades Constr. Servs. Corp.*, 121 A.D.3d 962, 964 [2d Dept. 2014].) However, a claim that arises out of alleged defects or dangers in the method or material of the work can only be recoverable if the plaintiff can demonstrate that defendants had the authority to supervise or control the performance of the work. (*Id.*)

Labor Law §240(1) generally imposes a nondelegable duty and absolute liability upon owners and general contractors “to provide safety devices necessary to protect workers from risks inherent in elevated work sites.” (*Ennis v. Noble Constr. Group, LLC*, 207 A.D.3d 703, 704 [2d Dept. 2022]; *see also Riffo-Veloza v. Village of Scarsdale*, 68 A.D.3d 839, 840 [2d Dept. 2009].) Specifically, Labor Law §240(1) requires owners and contractors to provide workers with appropriate safety devices to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*Rodriguez v. Waterfront Plaza, LLC*, 207 A.D.3d 489, 490 [2d Dept. 2022].) To prevail on a Labor Law §240(1) cause of action, a plaintiff must establish that the statute was violated, and that the violation was a proximate cause of the injuries. (*Guaman v. 178 Ct. St., LLC*, 200 A.D.3d 655, 657 [2d Dept. 2021].) Although comparative fault is not a defense to the strict liability of the statute, “where the plaintiff is the sole proximate cause of his or her own injuries, there can be no liability under Labor Law §240(1). (*Orellana v. 7 W. 34th St., LLC*, 173 A.D.3d 886, 887 [2d Dept. 2019].) A plaintiff is the sole proximate cause of his own injuries and a defendant has no liability under Labor Law §240(1) when the plaintiff: “(1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that

choice.” (*Cioffi v. Target Corp.*, 188 A.D.3d 788, 791 [2d Dept. 2020].)

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party. (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 [2002]; *see also Pino v. Walt Whitman Mall, LLC*, 175 A.D.3d 541, 543 [2d Dept. 2019].) The Court of Appeals has recognized three exceptions to the general rule: “(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely”. (*See Espinal, supra* at 140.) A defendant is not required to affirmatively demonstrate that the exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law. (*Parrinello v. Walt Whitman Mall, LLC*, 139 A.D.3d 685, 687 [2d Dept. 2016].)

As a threshold matter, defendants’ motion was made in a timely fashion. Defendants demonstrated that although the deadline to submit dispositive motions was September 13, 2022, defendants e-filed the motion on September 14, 2022, at 12:03 am after experiencing technical difficulties. Therefore, the Court accepts defendants’ reasonable cause for the delay, and recognizes the public policy in favor of resolving cases on their merits significantly outweighs the hyper technicality of the three-minute delay. (*See generally Rektman v. Clarendon Holding Co., Inc.*, 165 A.D.3d 856 [2d Dept. 2018].)

Defendants established a prima facie entitlement to summary judgment pursuant to Labor Law §240(1), as plaintiff was not performing an enumerated or protected activity at the time of his accident and the Y-barrier does not constitute a falling object. Plaintiff failed to raise a material issue of fact in dispute. Plaintiff’s argument that he was contracted to perform window installation work on a high-rise building is irrelevant, as plaintiff was not engaged in that work at the time of his accident. It is undisputed that at the time of his accident, plaintiff was offsite and was walking to a deli to purchase water. Accordingly, plaintiff was not performing an enumerated or protected activity pursuant to Labor Law §240(1) at the time of his accident. (*See Simon v. Granite Bldg. 2, LLC*, 114 A.D.3d 749 [2d Dept. 2014]; *see also Ferenczi v. Port Auth. Of N.Y. & N.J.*, 34 A.D.3d 722 [2d Dept. 2006].) Defendants further demonstrated that the Y-barrier does not constitute a falling object pursuant to Labor Law §240(1), as it was not related to a risk inherent in elevation at which the Y-barrier was being secured, but rather, was stationary. (*See Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259 [2001][holding that in falling object cases the object had to have been related to a risk inherent in elevation at which the material was secured, and the mere fact that a falling object caused injuries is insufficient pursuant to Labor Law §240(1)].)

Defendants established a prima facie entitlement to summary judgment pursuant to Labor Law §241(6), as they established that plaintiff failed to allege violations of applicable Industrial

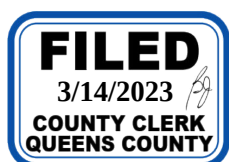
Codes. Plaintiff failed to raise a material issue of fact in dispute, as plaintiff failed to refute defendants' argument or present Industrial Code sections that were violated by defendants.

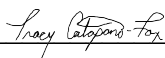
Defendants established a prima facie entitlement to summary judgment pursuant to Labor Law §200, as defendants established that they did not have authority to supervise or control plaintiff's work or the work related to the Y-barriers. Defendants demonstrated through the deposition testimony that they did not own or install the Y-barriers, and were not responsible to fill them or maintain them. However, co-defendant Trade Off and plaintiff both raised material issues of fact in dispute with respect to defendant Petrocelli's liability by demonstrating that there are issues of fact regarding Petrocelli's authority over the Y-barriers. Specifically, Hagedorn testified on behalf of defendant Trade Off that if a Trade Off employee filled a Y-barrier, it would have been at the direction of defendant Petrocelli. Therefore, summary judgment as to defendant Petrocelli is not warranted.

Defendants established a prima facie entitlement to summary judgment for contractual indemnification from defendant Trade Off. Defendants demonstrated through their production of the subcontracts that each subcontractor was to indemnify defendants for accidents arising out of their scope of work. However, as indicated above, Trade Off demonstrated that there are issues of fact regarding who controlled the work with respect to the Y-barriers and whose responsibility it was to fill them, and therefore summary judgment as to the cross-claims against defendant Trade Off are denied.

Accordingly, defendants 4212 28ST LLC, 28 ST CON LLC and J. Petrocelli Contracting, Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint is granted as to plaintiff's Labor Law §240(1) and §241(6) claims. Defendants' motion for summary judgment and dismissal of plaintiff's Complaint with respect to plaintiff's Labor Law §200 claim is granted solely as to defendants 4212 28 ST LLC and 28 ST CON LLC, and denied as to defendant Petrocelli. Defendants' motion for summary judgment on their claims for contractual indemnification is denied as moot with respect to co-defendants Construction Realty Safety Group, American Secured Fencing, Midwest Curtainwalls, and Crowne Architectural Systems, as all claims against those parties were previously dismissed. Defendants' motion for summary judgment on their claim for contractual indemnification from co-defendant Trade Off is denied. Plaintiff's claims pursuant to Labor Law §240(1) and §241(6) are dismissed against defendants 4212 28 ST LLC, 28 ST CON LLC, and J. Petrocelli Contracting. Plaintiff's claims pursuant to Labor Law §200 are dismissed against defendants 4212 28 ST LLC and 28 ST CON LLC. This constitutes the decision and Order of the Court.

Dated: March 8, 2023




Hon. Tracy Catapano-Fox, J.S.C.