

Rodriguez v Riverside Ctr. Site 5 Owner LLC
2023 NY Slip Op 35219(U)
October 26, 2023
Supreme Court, Bronx County
Docket Number: Index No. 300022/2017E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26-----X
Richard Rodriguez,

Index No.: 300022/2017E

Plaintiff,

-against-

DECISION/ORDERRiverside Center Site 5 Owner LLC, Tishman
Construction Corporation, and Five Star Electric Corp.,

Defendants.

-----X
Riverside Center Site 5 Owner LLC and Tishman
Construction Corporation,

Third-Party Plaintiff,

-against-

Five Star Electric Corp. and Port Morris Tile Corp.,

Third-Party Defendant.

-----X
Port Morris Tile Corp.

Second Third-Party Plaintiff,

-against-

Universal Builders Supply, Inc.,

Second Third-Party Defendant.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion
as indicated below:**Motion Sequence #2**

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits.....	1
Memorandum of Law in Support.....	2
Affirmation in Opposition & Exhibits.....	3
Affirmation in Reply & Exhibits.....	4

Motion Sequence #3

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits.....	1
Affirmation in Support & Exhibits.....	2
Notice of Cross Motion.....	3
Affirmation in Support of Cross Motion.....	4
Opposition to Cross Motion & Exhibits.....	.5
Affirmation in Reply & Exhibits.....	6

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

For the purposes of this decision, motion sequence two and three are consolidated. The plaintiff commenced this action for personal injuries following an accident that occurred on December 19, 2016, at a construction project located at 1 West End Avenue, New York, New York, 10023. The defendant/third-party defendant Five Star Electric Corp. (hereinafter “Five Star”) moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiffs complaint, the third-party complaint, counterclaims, and cross-claims with prejudice. In motion sequence three, the plaintiff moves for an order pursuant to CPLR § 3025 to grant plaintiff leave to serve an amended verified bill of particulars nunc pro tunc to add Industrial Code Rules of the State of New York § 23-1.22(b) ‘Runways and Ramps (1-4). The plaintiff further moves pursuant to CPLR § 3212 for an order granting partial summary judgment against the defendants Riverside and Tishman under Labor Law § 240(1) and § 241(6). Lastly, the defendants Riverside Center Site 5 Owner LLC (hereinafter “Riverside”) and Tishman Construction Corporation (hereinafter “Tishman”) cross move pursuant to CPLR § 3212 for an order dismissing the plaintiff’s causes of action under Labor Law § 240(1) and § 241(6).

This action arises out of an accident that occurred on December 19, 2016 when the plaintiff, Mr. Rodriguez, stepped into a partially covered hole by a loading dock at the premises located at 1 West End Avenue, New York, NY 10023. Mr. Rodriguez claims that he fell into a

hole that was as deep as his right leg. The hole was approximately a 2ft x 3ft triangle that was covered by a steel plate that had allegedly shifted. Mr. Rodriguez was employed by Port Morris Tile Corp. (hereinafter "Port Morris") as a delivery truck driver. Tishman was the general contractor for the project. Riverside was the owner of the building. The project was for a new residential building with ground floor retail consisting of 46 floors.

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320). Once the proponent of a motion for summary judgment meets this burden it is incumbent upon the party opposing the motion to submit proof in admissible form that an issue of fact exists which necessitates a trial (*Zuckerman v. City of New York*, 49 NY2d 557). The courts function on a motion for summary judgment is issue finding and not issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395). Summary judgment is a drastic remedy that deprives the litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (see *Assaf v. Ropog Cab Corp.*, 153 AD2d 520). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman supra*). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition (*Winegrad v. New York Univ. Med Center*, 64 NY2d 851).

The defendants/third party plaintiffs Five Star moves for summary judgment pursuant to CPLR § 3212 dismissing all of plaintiffs claims, third party claims, in addition to cross claims and counterclaims. Five Star argues that Mr. Rodriguez was not a protected worker for the

purposes of labor law. Alternatively, they argue that they are not considered statutory agents under the labor law and are not proper defendants in this action. Lastly, they move to dismiss claims of contribution and contractual indemnity.

Labor Law § 240(1) “aims to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility” (*Nicometi v. Vineyards of Fredonia, LLC*, 25 NY3d 90, quoting, *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500).

“Whether a plaintiff is entitled to recovery under 240(1) requires a determination of whether the injury is the type of elevation-related hazard to which the statute applies (*Willinski v. 334 E. 92nd Hous. Dev. Fund. Corp.*, 18 NY3d 1). “Violation of the statute alone is not enough; plaintiff is obligated to show that the violation was a contributing cause of his fall” (*Duda v. John W. Rouse Const. Corp.*, 32 NY2d 405). The statute imposes absolute liability upon owners, contractors and their statutory agents where a breach of this statutory duty proximately causes an injury (*Rosocovich v. Consolidated Edison Company*, 78 NY2d 509, 513).

Pursuant to his examination before trial, Richard Rodriguez was employed by Port Morris on December 19, 2016 (page 37 lines 19-25). He started working there in January 2016 as a driver (page 38 lines 14-19). On the day of the accident, Mr. Rodriguez was delivering building materials for Port Morris. Mr. Rodriguez delivered to that project between 20-30 times (page 40 lines 4-7). On December 19, 2016, Mr. Rodriguez made the delivery to the 59th Street entrance (page 103 lines 11-14). The typical procedure for deliveries would be pulling up to the entrance way, and upon arrival a security guard would be present in addition to a person receiving the deliveries and they would back them up into the loading dock (page 104 lines 2-9). Mr. Rodriguez was always there making deliveries at approximately 4:30 a.m. (page 106 line 23- page 107 line 3). The entire offloading process was done by Port Morris employees (page 107

lines 22-24). The accident occurred between 6:00 and 6:30 (page 118 lines 18-22). He testified that he had to be careful because it would always be dark (page 112 lines 20-21). Mr. Rodriguez testified that there were no lights outside of the building where he backed in (page 170 lines 18-21). There was some lighting, but it was minimal (page 171 lines 8-10). He maintains that he was essentially relying on his reverse lights to see (page 172 lines 20-24). Mr. Rodriguez went down a ramp and out through the middle dock when he fell. He testified that he took two steps before he fell (“exhibit j” page 54 lines 2-5). He was turning right and fell down on his second step (page 54 lines 6-11). Mr. Rodriguez fell into a hole that was as deep as his right leg (page 57 lines 4-6). The hole was approximately 2ft x 3ft triangle (page 55 lines 3-4).

Five Star argues that the plaintiff is a truck driver for Port Morris and is not a protected worker under the Labor Law statutes. He was not engaged in any work on the structure of the building and was present to deliver tiles to the construction site. In support of the motion, Five Star relies on *Gentile v. New York City Hous. Auth.*, 228 AD2d 296, which held that the plaintiff, a truck driver, that fell to the ground from a height of nine to ten feet, was not engaged “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure within the meaning of Labor Law § 240(1).

In *DeRosa v. Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, the First Department held that the plaintiff, a driver, failed to establish that the circumstances warranted the type of safety equipment enumerated in Labor Law § 240(1). In the instant matter, the plaintiff testified “well we make the deliveries. We would have to load the trucks up afterwards, help them with that. Whatever was needed. I’m driving, unloading trucks up” (page 88 lines 4-8). He further testified that the equipment that was provided to him, a safety hat, safety goggles, and safety vest, had nothing to do with the happening of his accident (page 140 lines 6-9). In *Chiarello v. J&D*

Leasing Co., 299 AD2d 183, the First Department found that a plaintiff who was a truck driver and was injured while delivering a heavy copper reel to the subcontractor hired to do the electrical work on a construction project, was not protected under labor law 240(1). In opposition, the plaintiff maintains that he is protected under the labor law. The plaintiff failed to raise an issue of fact in opposition as he does not provide any evidence that he was employed by Port Morris to do more than deliver to the construction site warranting the protections of Labor Law 240(1). Accordingly, defendants/third-party defendants branch of the motion to dismiss the plaintiffs Labor Law 240(1) claim is granted.

“Liability under Labor Law 241(6) is limited to accidents where the work performed involves “construction, excavation or demolition” (*Toro v. Plaza Const. Corp.*, 82 AD3d 505, citing, *Nagel v. D&R Realty Corp.*, 99 NY2d 98). Furthermore, “liability under labor law 241(6) is limited to accidents where the work performed involves construction, excavation or demolition” (*Toro v. Plaza Const. Corp.*, 82 AD3d 505). There is no evidence that Mr. Rodriguez was involved in such work as the activities he was engaged in did not include anything other than driving a truck and dropping off materials (*Id.*). Accordingly, Five Star’s motion to dismiss the plaintiff’s Labor Law 241(6) claim is granted.

“Claims under Labor Law 200 and the common law fall under two 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’” (*Jackson v. Hunter Robers Constr., LLC*, 205 AD3d 542, 543, quoting, *Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139). A subcontractor may also be held liable under the Labor Law as a statutory agent of the owner and general contractor when the provisions of the subcontract explicitly grant the subcontractor supervisory authority or the evidence demonstrates that the subcontractor actually exercised

supervisory authority over the area of the workplace where the injury occurs (*Nascimento v. Bridgehampton Const. Corp.*, 86 AD3d 189). “An implicit precondition to this duty...is that the party charged with that responsibility have the authority to control the activity bringing about the injury” (*Russin v. Picciano & Son*, 54 NY2d 311, 317).

As to the plaintiffs Labor Law § 200 claim, “as plaintiffs firm had not been hired to perform any construction work on the premises at the time the accident occurred, plaintiff was not a person ‘employed’ to carry out the repairs as that term is used in section 200(1), section 240(1), and section 241(6) of the labor law (*Gibson v. Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108). Accordingly, the plaintiffs labor law 200 claims against Five Star is also dismissed.

Five Star further argues that it is not liable under common-law negligence because it did not create the defect that allegedly resulted in Mr. Rodriguez’ injury.

Richard Sciarrone is the electrical foreman at Five Star Electric. According to his examination before trial, Mr. Sciarrone is identified as a safety representative. As a safety representative, Mr. Sciarrone is a point of contact for the general contractor in case something goes wrong with anything electrical on the job. The nature of Five Star Electric’s contract was to provide electrical installation and new construction. This included electrical work for the permanent structure and temporary lighting. The temporary lights were maintained to stay on for 24 hours a day (page 30 lines 4-6). They do not have a man on site for 24 hours a day (page 30 lines 8-9). The interior lights on the stairways and the loading dock areas had to be on for 24 hours a day (page 31 lines 8-13). He testified that on a daily basis Five Star had somebody on temporary light and power to make sure everything is lit up and maintained (page 57 lines 16-

23). He testified that the 400-watt high bay gives off 40,000 lumen per light covering a wide area of the loading dock areas which is sufficient for the standard needed for temporary lighting.

Five Star Electric installed lighting area in the temporary loading dock area (page 20 lines 11-15). It installed high bay lights (page 20 lines 16-18). There were two lights installed above the loading docks where the trucks pull in, three lights installed above the platform by the hoist and ramps and two lights toward Tishman's office which was in the back of the loading dock (page 21 lines 4-12).

The defendant further includes the testimony of Jeff Helitzer. Mr. Helitzer was a purchasing assistant for Tishman at the construction site. Pursuant to his examination before trial, the lights were always on at the loading dock and the lighting at the loading dock was adequate.

Five Star argues that the plaintiffs common law negligence claim fails because it did not create the defect that resulted in Mr. Rodriguez's injury. "A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v. Melville Snow Constrs.*, 98 NY2d 136). The Court of Appeals has identified three situations in which a party who enters into a contract may have a duty of care to third parties. These circumstances arise when the contracting party 1) launches 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 (*Id.*). Five Star argues that their work had nothing to do with creating a hole in the cement floor outside of the construction as they were only hired to do electrical work on the site.

“Issues of negligence, foreseeability and proximate cause involve the kinds of judgmental variables which have traditionally, and soundly, been left to the finders of fact to resolve even where the facts are essentially undisputed” (*Mei Cai Chen v. Everprime 84 Corp.*, 34 AD3d 321). “To state a claim for negligence, a plaintiff must sufficiently allege 1) a duty; 2) a breach of that duty; 3) causation; and 4) actual injury” (*Aetna Life Ins. Co. v. Appalachian Asset Mgt. Corp.*, 110 AD3d 32). There are questions of fact regarding the defendants alleged negligence which must be resolved by the trier of fact as to whether Five Star was negligent in their installation of temporary lighting in the area of plaintiffs accident. While Five Star argues that it was not obligated to put lighting where the plaintiffs accident occurred, the Tishman Construction Safety Guidelines state “temporary lighting must be maintained on all general work areas and especially emergency egress ways and site access” (see exhibit A). Furthermore, “all areas where employees have access must be illuminated, such as stairs, ladders, passageways, etc. All areas should provide enough light to enable a person to read newsprint. Lighting at a minimum must have 5-foot candles of lights”

To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836). There are issues of fact as to whether Five Star, as the electrical contractor had constructive notice of the lighting where the plaintiffs accident occurred (*Beltran v. Navillus Tile, Inc.*, 108 AD3d 414). Accordingly, Five Star’s branch of the motion seeking dismissal of the plaintiffs common law negligence claim is denied.

Five Star next moves to dismiss contractual indemnification claims. “A party is entitled to full contractual indemnification provided that the intention to indemnity can be clearly implied

from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 744).

Where the party seeking contractual indemnification is free from fault, a conditional judgment that is entitled to indemnity is appropriate; however, where there are factual questions as to whether the indemnitee was negligent, whether or not the alleged accident arose out of the acts or omissions of the indemnitor, such a finding is premature (*Narvaez v. 2914 Third Ave. Bronx, LLC*, 88 AD3d 500). There is an issue of fact regarding the negligence of defendant Five Star and therefore the motion to dismiss the contractual indemnification claim is premature.

As to the contribution claims, given that there are questions of facts as to whether the parties were negligent in plaintiffs accident, any determination of entitlement to contribution as against those entities is premature (*Bovis Lend Lease LMB Inc. v. Garito Contr., Inc.*, 65 AD3d 872).

Finally, Five Star moves for summary judgment on the insurance procurement claims by Riverside and Tishman. Five Star maintains that it has procured insurance. In support of its motion, Five Star annexed its insurance policy (exhibit Q). Accordingly, this branch of Five Stars motion is granted.

In motion sequence three, the plaintiff moves pursuant to CPLR § 3025 to amend his complaint to include Industrial Code rules of the State of New York 23-1.22 (b) Runways and ramps (1-4) and pursuant to CPLR § 3212 for an order awarding plaintiff partial summary judgment against defendants Riverside and Tishman under Labor Law § 240(1) and § 241(6) with violation of the accompanying ICR 23-1.7 and 23-1.30 “illumination.” This motion is denied as the court has found that the plaintiff is not a covered party under the Labor Law.

Riverside and Tishman argue that summary judgment pursuant to CPLR § 3212 is proper because the plaintiff is not covered under Labor Law § 240 or § 241(6). Since the court has found that the plaintiff is not covered under the protections of the Labor Law, the motion is granted and these claims are dismissed.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that Five Star Electric Corp.'s motion for summary judgment against the plaintiffs Labor Law § 200, § 240, & § 241 claims is granted, and it is further,

ORDERED AND ADJUDGED, that Five Star Electric Corp.'s motion for summary judgment on contractual indemnification and contribution is denied, and it is further,

ORDERED AND ADJUDGED, that Five Star Electric Corp.'s motion for summary judgment on common law negligence is denied, and it is further,

ORDERED AND ADJUDGED, that Five Star Electric Corp.'s motion for summary judgment on Riverside Center Site 5 Owner LLC and Tishman Construction Corporation's claim for failure to procure insurance is granted, and it is further,

ORDERED AND ADJUDGED, that the plaintiff's motion pursuant to CPLR § 3025 and CPLR§ 3212 is denied, and it is further,

ORDERED AND ADJUDGED, that Riverside Center Site 5 Owner LLC and Tishman Construction Corporation's cross motion is granted, and it is further,

ORDERED AND ADJUDGED, that the defendant shall serve a copy of this decision and order on all parties within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: October 26, 2023



Hon. Paul L. Alpert, J.S.C.