

Rogers v County of Westchester
2023 NY Slip Op 35264(U)
July 14, 2023
Supreme Court, Westchester County
Docket Number: Index No. 63732/2020
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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.

-----X
CHRISTOPHER ROGERS,

Plaintiff,

-against-

COUNTY OF WESTCHESTER, SOMERS
CENTRAL SCHOOL DISTRICT, BARRETT
ROOFS, INC. and TRITON CONSTRUCTION
COMPANY, LLC,

Defendants.

-----X
BARRETT ROOFS, INC.,

Third-Party Plaintiff,

-against-

NYC DAYLIGHTING, INC.,

Third-Party Defendant.

-----X
SOMERS CENTRAL SCHOOL DISTRICT,

Second Third-Party Plaintiff,

-against-

NYC DAYLIGHTING, INC.,

Second Third-Party Defendant.

-----X

The following electronically filed papers (NYSCEF Doc Nos. 187-206; 233-237) were read on the motion by the defendants/second third-party plaintiff, Somers Central

School District and Triton Construction Company, LLC, for an order: (a) pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's Labor Law § 200 and common law negligence claims asserted against them; (b) pursuant to CPLR 3212, granting summary judgment on their claims for common law and contractual indemnification over and against the defendant, Barrett Roofs, Inc.; and (c) granting reimbursement of defense costs incurred from the defendant, Barrett Roofs, Inc.

Motion Sequence No. 7

Notice of Motion-Statement of Facts-Memo of Law-Exhibits (A-Q)

Aff. in Opposition (by Barrett Roofs)-Response/Counterstatement of Facts-Memo of Law Reply Affirmation-Exhibit (A)

Upon reading the foregoing papers, the motion is determined as follows:

Plaintiff sues to recover monetary damages for personal injuries allegedly sustained on August 16, 2019, when he fell from an unsecured ladder which collapsed at an elevated height of approximately fifteen (15) feet during the course of his employment with the third-party/second third-party defendant, NYC Daylighting, Inc. (NYC Daylighting). Plaintiff alleges he fell from the ladder while performing construction/alteration-related work at premises located at 110 Primrose Street, Lincolndale, New York, more commonly known as Primrose Elementary School (Primrose Elementary or work site). Plaintiff alleges, inter alia, that the ladder lacked rubber feet, was improperly set up, was not tied to the building, and that he was not provided with safety equipment.

Defendant Somers Central School District (Somers Central) owns Primrose Elementary. Somers Central hired defendant Barrett Roofs, Inc. (Barrett) as the prime roofing contractor to perform a roof replacement at Primrose Elementary. Barrett, in turn, retained NYC Daylighting to remove existing skylight windows and install new windows on the roof. Barrett was responsible for implementing, providing safety equipment and supervising safety at the work site. Defendant Triton Construction Company, LLC (Triton) served as construction manager for the job, acting as liaison between the owner, the architect, and the prime contractor. Plaintiff's complaint alleges causes of action sounding in common law negligence as well as violations of the Labor Law.

Following the completion of discovery, plaintiff moved (sequence no. 6) for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim against defendants Somers Central and Barrett. By decision and order dated December 19, 2022, and filed December 20, 2022, the court granted plaintiff's motion (*see* Decision & Order at NYSCEF Doc No. 184).

Somers Central and Triton (collectively, movants) now move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims asserted against them as well as for summary

judgment on their claims for common law and contractual indemnification over and against defendant Barrett. In addition, movants seek an order awarding them reimbursement of costs incurred in the defense of this matter. Defendant Barrett opposes those branches of the motion which seek summary judgment on the claims for common law and contractual indemnification over and against it as well as for the reimbursement of defense costs.

In support of the motion, movants contend that the plaintiff's Labor Law § 200 and common law negligence claims must be dismissed against them because they did not supervise or control the plaintiff's work. At most, movants argue that they possessed only general supervisory authority over the work which, they submit, is an insufficient basis for liability under Labor Law § 200. Moreover, movants assert that they did not have any notice of the alleged dangerous condition of the ladder which was supplied by Barrett. Consequently, movants submit that they are entitled to dismissal of the plaintiff's Labor Law § 200 and common law negligence claims. For these same reasons, movants submit that they are also entitled to common law indemnification from Barrett. Regarding their claim for contractual indemnification against Barrett, movants argue that inasmuch as any liability in this case against them would be statutory only, they are entitled to full indemnification from Barrett. Movants proffer the contract between Somers Central and Barrett (Contract) which, they assert, contains a broad indemnity clause obligating Barrett to indemnify and hold Somers Central and Triton harmless for any claims arising out of or resulting from the performance of Barrett's contracted work. Movants assert that in the absence of any active negligence on their part, and because the plaintiff's accident was caused at least in part by a statutory violation of Barrett (that is, the violation of Labor Law § 240 [1]), the Contract's indemnity clause has been triggered, and movants are therefore entitled to full indemnification from Barrett. Movants assert that at the very least, they should be granted a conditional order of contractual indemnification over and against Barrett conditioned on a finding that the plaintiff's injuries were caused, in whole or in part, by the act, omission, fault or statutory violation of Barrett or its subcontractor. Last, movants argue that they are entitled to the reimbursement of defense costs from Barrett in accordance with the indemnity clause of the Contract.

In opposition, Barrett argues that movants failed to establish their prima facie entitlement to judgment as a matter of law on their claims for common law and contractual indemnification and for the reimbursement of costs. Consequently, Barrett submits that their motion should be denied. As to the common law indemnification claim, Barrett asserts that because movants failed to establish that it (Barrett) was negligent, they failed to establish, prima facie, entitlement to common law indemnification. Barrett further argues that even if the court were to find that Barrett was negligent, the claim for common law indemnification must still be denied because issues of fact remain as to the degree of fault as to each party involved. Barrett further contends that movants are not entitled to contractual indemnification from it because the indemnity clause of the Contract violates General Obligations Law (GOL) § 5-322.1 (1) and, as such, is void and unenforceable. Alternatively, Barrett argues that the indemnity clause requires a finding that Barrett was

negligent by either act or omission and here, Barrett submits, there is no evidence that Barrett was negligent. At a minimum, Barrett asserts that there are questions of fact as to whether it was negligent and whether Somers Central and Triton were negligent and that such issues including, the degree of fault attributable to Somers Central and Triton, should be left to the trier of fact. In sum, Barrett contends that because the movants have not demonstrated entitlement to either common law or contractual indemnification, they have not demonstrated entitlement to the reimbursement of their defense costs and, as such, their motion should be denied in its entirety.

In reply, movants contend, among other things, that inasmuch as the indemnity clause of the Contract does not require a showing of negligence, Barrett's contention regarding movants asserted failure to demonstrate that Barrett was negligent is misplaced. Movants assert that one of the ways in which the indemnity clause of the Contract can be triggered is a "statutory violation of the Contractor" which movants submit, has already been established by the court's prior decision and order granting plaintiff summary judgment on his Labor Law § 240 (1) claim. Movants further submit that the indemnity clause has also been triggered since the plaintiff's claim "arises out of or results from" the performance of Barrett's work. Movants further argue that the indemnity clause does not run afoul of GOL § 5-322.1 (1) since the indemnity clause is enforceable "to the fullest extent permitted by law". Moreover, movants argue that Barrett has failed to raise any factual issues with respect to any negligence on the part of movants such that any liability on movants' part would be purely statutory. Movants reassert their position that they did not exercise any control or supervisory authority over the plaintiff's work and did not have any notice of the alleged dangerous condition of the ladder. Movants insist that Barrett exercised complete control over the plaintiff's work. Consequently, movants submit that they are entitled to common law indemnification and contractual indemnification from Barrett. Based thereon, movants assert that their motion should be granted in its entirety.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating the absence of triable issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant satisfies its prima facie burden, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

The court first addresses that branch of the motion which seeks an order granting summary judgment dismissing the plaintiff's Labor Law § 200 and common law negligence claims insofar as asserted against the movants.

“Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). A defendant moving for summary judgment dismissing a cause of action alleging a violation of Labor Law § 200 and common-law negligence “must examine the plaintiff's complaint and bill of particulars to identify the theory or theories of liability, in order to properly direct proof to premises issues, or means and methods issues, or both, as may be indicated on a case-by-case basis” (*Garcia v Market Assoc.*, 123 AD3d 661, 664 [2d Dept 2014]).

Employing a liberal reading of the plaintiff's complaint, as amplified by the bill of particulars, plaintiff has alleged theories of liability predicated on both premises defect as well as means and methods issues (*see* exhibit “H”, plaintiff's response to defendant Somers Central's bill of particulars at ¶ 8, pp. 39-41; *see also* plaintiff's response to defendant Triton's bill of particulars at ¶ 15, pp. 61-62, NYSCEF Doc No. 197). Thus, in order to meet their prima facie entitlement to judgment as a matter of law, it was incumbent upon movants to tender sufficient evidence eliminating all triable issues of fact on both theories of liability (*see Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51-52 [2d Dept 2011]).

To be held liable under Labor Law § 200 for injuries arising from a dangerous condition on the premises, a defendant may be subject to liability if it “either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition” (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2d Dept 2010] [internal quotation marks omitted]; *see Martinez v City of New York*, 73 AD3d 993, 997 [2d Dept 2010]). To be held liable for injuries arising from the manner in which work is performed, “a defendant must have authority to exercise supervision and control over the work” (*Rojas*, 74 AD3d at 1046 [internal quotation marks omitted]). “A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2d Dept 2008]). “The retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200” (*Dennis v City of New York*, 304 AD2d 611, 611 [2d Dept 2003]).

Here, Somers Central, as property owner, and Triton, as construction manager, each demonstrated their prima facie entitlement to judgment as a matter of law dismissing the plaintiff's Labor Law § 200 and common law negligence claims asserted against them by tendering competent evidence including, the Contract, the plaintiff's deposition testimony, and the deposition testimony of a witness for defendant Triton, which established that the movants did not exercise supervisory control over the plaintiff's work and that they did not create the defective condition or have notice of the alleged defective condition. At deposition, John Hansen (Hansen), the witness for defendant Triton, testified that the sole prime contractor for the roofing work was defendant Barrett (*see* Hansen deposition tr at p. 17, NYSCEF Doc No. 202). Hansen further testified that Barrett was responsible for directing the laborers performing the actual roofing work (*see id.* at p. 23) and that Triton did not direct any of the work done at Primrose Elementary (*see id.* at pp. 26-27). Hansen further testified that Barrett provided the ladders for workers to access the roof and that Triton did not supply any ladders (*see id.* at pp. 32 and 56-57). Plaintiff also testified that the subject ladder was supplied by Barrett (*see* plaintiff deposition tr at pp. 34-35 and 37, NYSCEF Doc No. 200).

Further, the Contract provides that "[t]he Contractor [Barrett] shall have total responsibility and control over the performance of the Work, including sole responsibility for construction means, methods, techniques, sequences, and procedures for coordinating and completing the various portions of the Work" (*see* exhibit "P" at exhibit "A", "AIA Document A132-2009" [i.e., Contract], § 3.3.1, p. 44, NYSCEF Doc No. 205). Hansen further denied knowledge of safety concerns with the ladders on the work site (*see* Hansen deposition tr at p. 59, NYSCEF Doc No. 202) and denied seeing a ladder on the work site that was not tied down (*see id.* at p. 39). Accordingly, the evidence tendered by Triton was sufficient to establish, prima facie, entitlement to dismissal of the plaintiff's Labor Law § 200 and common law negligence claims predicated upon a means and methods theory (*see Robinson v County of Nassau*, 84 AD3d 919, 920 [2d Dept 2011]; *Enriquez v B & D Dev., Inc.*, 63 AD3d 780, 781 [2d Dept 2009]) as well as upon a premises defect theory (*see Dasilva v Nussdorf*, 146 AD3d 859, 860-861 [2d Dept 2017]). Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562).

Plaintiff did not oppose the motion. Accordingly, plaintiff's Labor Law § 200 and common law negligence claims asserted against Somers Central and Triton are dismissed.

The court next addresses that branch of the motion which seeks summary judgment on the claims for contractual and common law indemnification over and against Barrett.

"A party's right to contractual indemnification depends upon the specific language of the relevant contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Campisi v Gambar Food Corp.*, 130 AD3d 854, 855 [2d Dept 2015])

[internal citations omitted]). “In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dept 2010] [internal quotation marks omitted]). Moreover, “a party who has been held liable to an injured worker solely on the basis of the statutory liability imposed by [Labor Law] section 240 (1), without any fault on its part, is entitled to recover under a contract of indemnity” (*Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 503 [2d Dept 2014] [internal quotation marks and brackets omitted]).

The contractual indemnity clause at issue herein required Barrett to indemnify Somers Central, as owner, and Triton, as construction manager:

“[F]rom and against any suits, actions, proceedings, claims, claims, damages, losses or expenses, including but not limited to attorneys’ fees and litigation costs, arising out of or resulting from performance of the Work, provided that such suit, claim, damage, loss or expense is attributable to any bodily injury, sickness, disease, or death, or injury to or destruction of any tangible property, including loss of use resulting therefrom, but only to the extent caused in whole or in part by the act, omission, fault, or statutory violation of the Contractor, a Subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of the above may be liable, *regardless of whether any of them has been negligent*. This provision shall not be construed to require the Contractor to indemnify the Owner, Construction Manager, or Architect for their negligence, in whole or in part, that proximately caused the damages resulting in the suit, claim, damage, loss or expense” (see Contract at § 3.18.1, p. 57, NYSCEF Doc No. 205 [emphasis added]).

Notwithstanding the fact that plaintiff has alleged that defendants are liable under both a means and methods theory and a premises defect theory, the competent evidence including, the plaintiff’s deposition testimony, demonstrates that plaintiff’s accident arose out of the performance of his work (i.e., the means and methods) which work was not supervised by the movants and which was performed on equipment (i.e., the ladder) that was provided and assembled by Barrett (see *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]).

Here, given the Contract’s broad indemnity clause which, contrary to Barrett’s assertion, does not, by its terms, limit indemnification to claims arising out of the negligence of Barrett in the performance of its work, coupled with the showing by movants that they were not actively negligent and that the accident arose out of the performance of the plaintiff’s work, movants have demonstrated their prima facie entitlement to judgment as a matter of law on their claims for contractual indemnification (see *Tapia v Mario*

Genovesi & Sons, Inc., 72 AD3d 800, 802 [2d Dept 2010] and common law indemnification against Barrett (*see Bermejo*, 119 AD3d at 504). In addition, movants have demonstrated, prima facie, that the indemnity clause has already been triggered since the court previously granted plaintiff partial summary judgment on his Labor Law § 240 (1) claim against Barrett. Accordingly, the burden of going forward shifted to Barrett to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562).

In opposition to the showing by movants that they were not actively negligent in the happening of the plaintiff's accident, Barrett failed to raise a triable issue of fact (*see* CPLR 3212 [b]; *Tapia*, 72 AD3d at 802-803). At most, the evidence demonstrates that Triton possessed only general supervisory authority which is insufficient to establish active negligence on its part (*see Reisman*, 74 AD3d at 774; *Cambizaca*, 57 AD3d at 702; *Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]; *Dennis*, 304 AD2d at 611; *cf. Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st Dept 2001]). In addition, the Contract limited Triton's role to reviewing and monitoring site safety instituted by the contractors (*see* Contract at § 4.2.5, p. 58, NYSCEF Doc No. 205; *see also* Hansen deposition tr at p. 30, NYSCEF Doc No. 202) which, again, is insufficient to impose liability (*cf. Sheppard*, 288 AD2d at 34 [general contractor had authority to stop work being performed unsafely]). Last, inasmuch as the Contract authorizes indemnification "to the fullest extent permitted by law", it does not run afoul of GOL § 5-322.1 (*see Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870-871 [2d Dept 2008]; *Bink v F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409 [2d Dept 2006]). In any event, an indemnification clause is enforceable where, as here, the party to be indemnified is found to be free of negligence (*see Giangarra*, 55 AD3d at 871).

To the extent not specifically addressed herein, the court finds Barrett's remaining arguments unavailing. Accordingly, that branch of the motion seeking summary judgment on the claims for contractual and common-law indemnification over and against Barrett is granted, and the amount of costs and reasonable attorneys' fees incurred by movants shall be determined at the trial of this action or following other disposition of the action.

Based on the foregoing, it is hereby:

ORDERED the motion is granted, and (1) the plaintiff's Labor Law § 200 and common law negligence claims insofar as asserted against Somers Central School District and Triton Construction Company, LLC are dismissed; and (2) Somers Central School District and Triton Construction Company, LLC are awarded summary judgment on their claims for contractual and common law indemnification over and against Barrett Roofs, Inc., and the amount of damages on these claims shall be determined at the trial of this action or following other disposition of the action; and it is further

ORDERED that the parties to this action shall appear for a settlement conference on a date and time as set by the clerk.

ENTER,

Dated: White Plains, New York
July 14, 2023


HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF