

**Hernandez v Board of Mgrs. of the
NOMA Condominium**

2024 NY Slip Op 32128(U)

June 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 509237/2018

Judge: Kerry J. Ward

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Kings

Index Number 509237/2018
Seqs. 009, 010

Part 9

DECISION/ORDER

EVER HERNANDEZ,

Plaintiff,

against

BOARD OF MANAGERS OF THE NOMA
CONDOMINIUM, NOMA CONDOMINIUM,
PATER REALTY COMPANY, LYSANDER
REALTY CO., INC., LEEDING BUILDERS GROUP
LLC, 846 6TH AVE VENTURE LLC, ALCHEMY
6TH AVENUE LLC AND ALCHEMY
PROPERTIES INC.,

Defendants.

BOARD OF MANAGERS OF THE NOMA
CONDOMINIUM, NOMA CONDOMINIUM,
PATER REALTY COMPANY, LLC, LEEDING
BUILDERS GROUP LLC, 846 6TH AVE VENTURE
LLC, ALCHEMY 6TH AVENUE LLC and
ALCHEMY PROPERTIES INC.,

Third-Party Plaintiffs,

against

GMJ CONTRACTING CORP.,

Third-Party Defendant.

Recitation, as required by CPLR §2219.(a), of the papers considered in the review of this Motion

NYSCEF Docs. Numbered

Notice of Motion and Affidavits Annexed 208-210,
225-228
Order to Show Cause and Affidavits Annexed. _____
Answering Affidavits 233-254,
248, 257-260
Replying Affidavits 260, 264
Exhibits Var.
Other _____

Under motion sequence 9, plaintiff Ever Hernandez seeks an Order pursuant to C.P.L.R. Rule 3212, granting summary judgment to Plaintiff on the issue of liability under Labor Law § 240(1) against defendants Board of Managers of the NOMA Condominium, NOMA Condominium, Pater Realty Company, LLC, Leeding Builders Group LLC, 846 6th Ave Venture LLC, Alchemy 6th Avenue LLC and Alchemy Properties Inc. (hereinafter, “defendants”).

Under defendants’ cross-motion sequence 10, defendants seek an Order pursuant to C.P.L.R. Rule 3212, dismissing plaintiff’s Complaint in its entirety, including its claims under Labor Law

sections 200, 240(1), and 241(6), and granting the moving defendants' claims seeking contribution, contractual indemnification, and common law indemnification against third-party defendant GMJ Contracting Corp. Upon the foregoing papers, the motions are decided as follows:

Plaintiff's motion seeking summary judgment on the issue of liability under Labor Law § 240(1) (Mot. Seq. 9) against the defendants is hereby granted.

Labor Law § 240(1) was designed to protect workers from elevation/gravity-related risks. The statute applies to both "falling worker" and "falling object" cases. Section 240(1) of the Labor Law imposes absolute liability on owners, contractors and their agents, and requires that they "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." In this matter, it is alleged that as plaintiff was in the process of handing concrete blocks up to his coworker who was standing on a scaffold approximately nine feet high, multiple blocks fell off of the scaffold, hitting him on the head, neck and back. Plaintiff was not provided with any safety devices or gear that could aid him and his coworker in the process of handing the bricks up. Likewise, no safety devices were in place to prevent the concrete blocks from falling off the scaffold and onto plaintiff. In *Cortes v. Jing Jeng Hang*, the plaintiff was injured when a concrete block weighing about 45 pounds fell off of a scaffold that was about five feet, five inches above the ground. The Second Department held that the plaintiff was entitled to summary judgment as to § 240(1) because "there were no pulleys, hoists, or other safety devices in place to prevent such falling hazard accidents" (*Cortes v. Jing Jeng Hang*, 143 A.D.3d at 855, 40 N.Y.S.3d at 436 [2d Dept. 2016]).

Thus, plaintiff's motion seeking summary judgment on the issue of liability under Labor Law § 240(1) (Mot. Seq. 9) against the defendants is granted, and defendants' cross-motion to dismiss plaintiff's § 240(1) claim (Mot. Seq. 10) is denied.

Defendants' cross-motion to dismiss plaintiff's claims under Labor Law sections 200, 240(1), and 241(6) is granted in part and denied in part as decided herein.

With regard to the cross-motion (Mot. Seq. 10) to dismiss plaintiff's Labor Law § 200 and common law negligence claim, defendants' motion is granted to the extent that plaintiff's Labor Law § 200 and common law negligence claims must be dismissed, as based on the record before the Court, the moving defendants neither supervised, controlled or directed plaintiff's work on the date of the incident,

nor did they create any alleged dangerous condition of the scaffold nor the Concrete Masonry Unit (CMU) block, nor did they have actual or constructive notice of same.

To prove a violation of Labor Law § 200 and common law negligence, a plaintiff must show that the defendant owner and/or contractor exercised supervision or control over the work performed by the contractor's employees, or that it had actual or constructive notice of the unsafe condition causing the accident. (*see Burkoski v. Structure-Tone, Inc.*, 40 A.D.3d 378, 836 N.Y.S.2d 130 [1st Dept. 2007]). Where the injury was caused by the manner, means, and the methods of the work, the owner and/or contractor may only be found liable if it actually exercised supervisory control over the injury-producing work. (*see Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 A.D.3d 476, 923 N.Y.S.2d 57 [1st Dept. 2011]). Plaintiff's Labor Law § 200 and common law negligence claims are dismissed because third-party defendant GMJ Contracting Corp., plaintiff's employer, oversaw and controlled the means and methods of their employees' work, not the moving defendants. The moving defendants neither created, nor were aware of any alleged defect in the scaffold as none existed. Thus, defendants' motion is granted, and plaintiff's Labor Law § 200 and common law negligence claims are dismissed.

As aforementioned, with regard to the cross-motion (Mot. Seq. 10) to dismiss plaintiff's Labor Law § 240(1) claim, defendants' motion is denied.

With regard to the cross-motion (Mot. Seq. 10) to dismiss plaintiff's Labor Law § 241(6) claim, defendants' motion is denied.

In the Bill of Particulars, plaintiff alleges that defendants violated the following sections of the New York Industrial Code: 23-1.4, 23-1.5(c)(1-3), 23-1.7(a)(b)(d)(e)(1-2), 23-1.8(c), 23-1.11(a), 23-1.12(c), 23-1.13(b)(1-5, 8), 23-1.15, 23-1.16(a-f), 23-1.17(b-e), 23-1.18 (b)(1-3)(c), 23-1.19, 23-1.20(a-d), 23-1.21(b)(1-10)(d)(e)(2, 3, 5), 23-1.22, 23-1.23, 23-1.24(a-c), 23-1.25(af), 23-1.27, 23-1.28 (a-e), 23-1.30, 23-2.1(a)(1-2), 23-2.2(a-e), 23-2.3(a-e), 23-2.4, 23-2.5(a)(1-2), 23-2.6, 23-2.7, 23-3.2(a)(1-3)(b), 23-3.3(b)(2-5)(c)(d)(e)(1-3)(f-m), 23-3.4, 23-4.1(a-b), 23-4.2(al), 23-4.3, 23-4.4(a-i), 23-5.1(b-k), 23-5.3(c-h), 23-5.4(a-f), 23-5.5(a-h), 23-5.6(a-g), 23-5.7, 23-5.8(a-h), 23-5.9(a-g), 23-5.10(a)(1-6)(b)(1-6)(c-f), 23-5.11(a-d), 23-5.12, 23-5.13, 23-5.14, 23-5.15, 23-5.16, 23-5.17(b)(c), 23-5.18(a-i), 23-5.19, 23-5.20, 23-5.21, 23-5.22, 23-6.1 (b-k), 23-6.2 (a-d), 23-6.3, 23-7.1, 23-7.2, 23-8.1, 23-8.2, 23-8.3, 23-9.2(a-i), 23-9.4, 23-9.5, 23-9.6, 23-9.7, 23-9.8, 23-9.9, 23-9.10, and 23-9.11. In *Ross v. Curtis-Palmer Hydro-Elec. Co.*, the Court refined the standard of liability under § 241(6) by requiring that the rule or regulation alleged to have been breached be a "specific, positive command" rather than a "reiteration of

common-law standards” which would merely incorporate into the State Industrial Code a general duty of care. The Court in *Ross* distinguished between Code provisions “mandating compliance with concrete specifications and those that establish general safety standards”, cautioning that any other rule would permit recovery under § 241(6) against a non-supervising owner or general contractor merely by application of broad, nonspecific regulatory language and “would seriously distort the scheme of liability that has been developed in our case law” (*see Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82 [1993]).

In this matter, while plaintiff pleaded violations of all subsections of multiple sections of the Industrial Code, after a careful review of all aforementioned sections, the Court finds that all but one of these sections is inapplicable to the instant claim; Industrial Code § 23-2.1(a)(1) is the only section applicable to the facts as alleged herein.

Plaintiff alleges herein that the concrete blocks were stacked on the edge of the scaffold when they fell and struck him. According to 12 CRR-NY 23-2.1(a)(1), “Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.” This provision of the Industrial Code is applicable, and the remaining alleged Industrial Code provisions are dismissed. Thus, defendants’ cross-motion (Mot. Seq. 10) to dismiss plaintiff’s Labor Law § 241(6) claim is hereby denied.

Defendants assert claims against third-party defendant GMJ for common law indemnification, contribution, contractual indemnification, and breach of contract for failure to procure insurance. (Mot. Seq. 10).

To establish a claim for common law indemnification, a party seeking indemnity must prove, not only that the other party is negligent, but also that the party seeking indemnification was not guilty of any negligence (*see Perri v. Gilbert Johnson Enterprises, Ltd.*, 14 A.D.3d 681, 790 N.Y.S.2d 25, 30 [2d Dept. 2005]). To maintain a claim for contribution, a party must show that the party from whom contribution is sought owes a duty to the injured party and that the breach of this duty has contributed to the alleged injuries (*see Raquet v. Braun*, 90 N.Y.2d 177, 183, 659 N.Y.S. 2d 237 [1997]). The record indicates that GMJ had no prior issues with the integrity of the CMU blocks and regularly performed safety checks on the scaffold, including checking the lines, planks, and keeping the supported scaffolds

clean. The record also does not reflect that GMJ created any defective or dangerous condition with respect to the subject scaffold or use of the CMU blocks, nor had any actual or constructive notice of any such condition. Therefore, defendants are not entitled to summary judgment on their common law indemnification and contribution claims (Mot. Seq. 10), and their motion is denied.

The right to contractual indemnification is established by the “specific language of the contract” (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). “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” (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]). In this case, the indemnification language in Article 12 of third-party defendant GMJ’s contract with defendant Leeding requires that GMJ, as the subcontractor, indemnify and hold harmless the owner and contractor for any injuries caused by, arising out of, resulting from, or occurring in connection with the performance of the work by the subcontractor, its subcontractors and suppliers, or their agents, servants, or employees, or anyone else for whom any of the foregoing is liable, whether or not caused in part by the active or passive negligence or other fault of a party indemnified; provided, however, subcontractor’s duty hereunder shall not arise if such claim, cost, expense, or liability is caused by the sole negligence of a party indemnified. The record demonstrates that GMJ controlled the means and methods of the work being performed by plaintiff on the date of the alleged accident, and while working at the jobsite, plaintiff was supervised by a GMJ supervisor named Carlos. The indemnity/hold harmless provisions in the Contract between third-party defendant GMJ’s and defendant Leeding are clear and unambiguous and apply to any claim arising out of the work that GMJ was contracted to perform. The plaintiff’s accident arose out of and happened during his performance of work his employer was contracted to perform and triggered the indemnity obligation. Therefore, defendants’ motion for summary judgment with regard to their contractual indemnification claim (Mot. Seq. 10) is granted.

Defendants are not entitled to summary judgment on their breach of contract claim for failure to procure insurance, as third-party defendant GMJ appropriately maintained both primary and excess liability policies, naming defendant Leeding as an Additional Insured on the Certificate of Liability Insurance for the period of June 18, 2017, through June 18, 2018, pursuant to the terms of their written subcontract agreement. Therefore, defendants’ motion for summary judgment against third-party

defendant GMJ with regard to their breach of contract claim for failure to procure insurance (Mot. Seq. 10) is denied.

As decided herein, plaintiff's motion seeking summary judgment against defendants on the issue of liability under Labor Law § 240(1) (Mot. Seq. 9) is hereby granted, and defendants' cross-motion to dismiss plaintiff's § 240(1) claim (Mot. Seq. 10) is denied.

With regard to defendants' cross-motion (Mot. Seq. 10) to dismiss plaintiff's Labor Law § 200 and common law negligence claims, defendants' motion is granted, and plaintiff's Labor Law § 200 and common law negligence claims are dismissed.

With regard to the cross-motion (Mot. Seq. 10) to dismiss plaintiff's Labor Law § 241(6) claim, defendants' motion is denied.

Defendants' motion for summary judgment on their common law indemnification and contribution claims against third-party defendant GMJ is denied (Mot. Seq. 10).

Defendants' motion for summary judgment with regard to their contractual indemnification claim against third-party defendant GMJ (Mot. Seq. 10) is granted.

Defendants' motion for summary judgment against third-party defendant GMJ on their breach of contract claim for failure to procure insurance (Mot. Seq. 10) is denied.

This constitutes the decision and order of the court.

DATED:

June 24, 2024

ENTER:

KW

HON. KERRY J. WARD

A.J.S.C.

Hon. Kerry J. Ward, A.J.S.C.