

McKenna v Teachers Ins. & Annuity Assoc. of Am.

2024 NY Slip Op 32599(U)

July 29, 2024

Supreme Court, New York County

Docket Number: Index No. 161091/2019

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO
Justice

PART 33M

-----X
FINTAN MCKENNA,

Plaintiff,

- v -

INDEX NO. 161091/2019
MOTION DATE 07/14/2023
MOTION SEQ. NO. 003

TEACHERS INSURANCE AND ANNUITY ASSOC. OF
AMERICA FOR THE BENEFIT OF ITS REAL ESTATE
ACCOUNT, WEWORK REAL ESTATE LLC, WEWORK
CONSTRUCTION LLC, WEWORK COMPANIES INC, OC
DEVELOPMENT MANAGEMENT, 21 PENN PLAZA
TENANT LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X
OCCG LLC, s/h/a "OC DEVELOPMENT MANAGEMENT"

Third-Party
Index No. 595732/2020

Third-Party Plaintiff,

-against-

ANDREW JAMES INTERIORS, INC.

Third-Party Defendant.

-----X
TEACHERS INSURANCE AND ANNUITY ASSOC. OF
AMERICA FOR THE BENEFIT OF ITS REAL ESTATE
ACCOUNT,

Second Third-Party
Index No. 595903/2020

Second Third-Party Plaintiff,

-against-

21 PENN PLAZA TENANT, LLC,

Second Third-Party Defendant.

-----X
WEWORK CONSTRUCTION LLC, WEWORK
COMPANIES INC., and 21 PENN PLAZA TENANT, LLC,

Third Third-Party
Index No. 595855/2022

Third Third-Party Plaintiffs,

-against-

ANDREW JAMES INTERIORS, INC.,

Third Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 176, 177

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, and after final submission on April 9, 2024, Defendants Teachers Insurance and Annuity Assoc. of America for the benefit of its real estate account (“TIAA”), OCGP LLC, s/h/a “OC Development Management” (“OCGP”) and Third-Party Defendant Andrew James Interiors, Inc.’s (“AJI”) (together, “Movants”) motion for summary judgment dismissing all claims, cross-claims and third-party claims against them is granted in part and denied in part.

Defendants/Third Third-Party Plaintiffs WeWork Construction LLC, WeWork Companies, Inc. (together, the “WeWork Defendants”)¹ and 21 Penn Plaza Tenant LLC’s (“21 Penn”) (the WeWork Defendants and 21 Penn are collectively referred to as “Cross-Movants”) cross-motion for: (1) summary judgment dismissing Plaintiff Fintan McKenna’s (“Plaintiff”) Complaint and (2) summary judgment against AJI on the contractual indemnification claim set forth in the Third Third-Party Complaint, is granted in part and denied in part.

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¹ All claims, cross-claims and counterclaims asserted against the WeWork Defendants were discontinued with prejudice pursuant to the Stipulation of Discontinuance dated November 30, 2023 (NYSCEF Doc. 178). On February 10, 2020, OCGP filed a third-party action against Plaintiff’s employer, AJI, which was discontinued on February 4, 2021 (NYSCEF Doc. 127 at 17). On November 3, 2020, TIAA filed a second third-party action against 21 Penn which was discontinued on January 12, 2021 (NYSCEF Doc. 128 at 24). For the sake of clarity, the Court encourages the parties to amend the caption herein to reflect these discontinuances.

I. Background and Procedural History

The underlying action involves personal injuries allegedly sustained by Plaintiff on January 28, 2019 in the course of his employment with AJI at a construction site located on the 12th floor of 21 Penn Plaza, New York, NY 10001 (the “Building”) (NYSCEF Doc. 125). Plaintiff claims that he injured his back when the nail gun he was operating, which he alleges was not in proper operating condition, jammed and “kicked back” causing Plaintiff “to twist” (NYSCEF Doc. 125 at ¶ 90).

It is undisputed that in January 2019, the Building was owned by TIAA (NYSCEF Doc. 134 at 31). The 12th floor where the accident occurred was leased to 21 Penn by TIAA (NYSCEF Doc. *Id.* at 37-38, 103-104). At the time of Plaintiff’s accident, TIAA was conducting construction work on the 12th floor of the Building in preparation for delivering the 12th floor to 21 Penn (NYSCEF Doc. 134 at 71). The General Contractor for the construction work was OCGP (NYSCEF Doc. 135 at 129, 172). OCGP retained AJI as a carpentry subcontractor (NYSCEF Doc. 137 at 142). In January 2019 AJI employed Plaintiff to perform work at the Building as a journeyman carpenter (NYSCEF Doc. 133 at 21-22). The WeWork Defendants did not contract with any parties in connection with the construction work being performed on the 12th floor of the Building.

In the Complaint Plaintiff asserts causes of action against Defendants TIAA, 21 Penn, OCGP and the WeWork Defendants for (1) common law negligence; (2) violation of Labor Law § 200; (3) violation of labor Law § 240; (4) violation of Labor Law § 241(6); and (5) violations of

Sections 23-1.5(c)(1), 23-1.5(c)(3) and 23-9.2(a) of the New York State Industrial Code (the “Industrial Code”) (NYSCEF Doc. 125)².

On January 5, 2022 Plaintiff filed a Supplemental Summons and Amended Complaint adding 21 Penn as a direct Defendant (NSYCEF Doc. 130). On October 31, 2022 Cross-Movants filed a Third Third-Party Complaint against AJI asserting causes of action for (1) breach of contract for failure to procure insurance; and (2) contractual indemnification (NYSCEF Doc. 152).

On July 7, 2023 Movants brought the instant motion for summary judgment dismissing all claims, cross-claims and third-party claims asserted against them (NSYCEF Doc. 123). On July 31, 2023, Cross-Movants cross-moved for (1) summary judgment dismissing Plaintiff’s Complaint; and (2) summary judgment in favor of Cross-Movants and against AJI on the contractual indemnification claim asserted in the Third Third-Party Complaint (NYSCEF Doc. 148).

II. Discussion

a. Summary Judgment Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact

² While violations of Industrial Code Provisions may form the basis for Labor Law § 241(6) liability, such violations “do not constitute a cause of action in and of themselves” (*Amendola v Rheedlen 125th St., L.L.C.*, 2012 N.Y. Misc. LEXIS 208 (Sup Ct, NY County 2012)).

which require a trial. (See e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

b. Plaintiff's Common Law Negligence, Labor Law § 200 and Labor Law § 240 Claims are Dismissed as Abandoned

It is well established that where a plaintiff fails to oppose portions of a motion for summary judgment seeking dismissal of certain claims, those claims are deemed abandoned (see *Josephson LLC v Column Fin., Inc.*, 94 AD3d 479, 480 [1st Dept 2013] holding that “Plaintiffs abandoned their remaining claims by failing to oppose the parts of defendants’ motion that sought summary judgment dismissing those claims”). Here, Plaintiff does not oppose the portions of the instant motion or cross-motion which seek summary judgment dismissing Plaintiff’s common law negligence, Labor Law § 200 and Labor Law § 240 claims (NYSCEF Doc. 164 at ¶ 2). As such, Plaintiff’s common law negligence, Labor Law § 200 and Labor Law § 240 claims are hereby dismissed as abandoned.

c. Movants’ and Cross-Movants’ Motions for Summary Judgment Dismissing Plaintiff’s Labor Law § 241(6) Claim are Granted in Part and Denied in Part

Labor Law § 241(6) “imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers” (*Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 488 [1st Dept 2018]). To state a claim under § 241(6) “the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code” (*Id.*). Here, Plaintiff’s claim pursuant to § 241(6) is predicated on alleged violations of Industrial Code Sections: 12 NYCRR 23-1.5(c)(1), 23-1.5(c)(3) and 23-9.2(a) (NYSCEF Doc. 125).

i. 12 NYCRR 23-1.5(c)(1)

Plaintiff fails to oppose the portions of the present motion and cross-motion which seek to dismiss Plaintiff's Labor Law § 241(6) claim predicated on alleged violations of 12 NYCRR 23-1.5(c)(1). Moreover, it is well established that a violation of 12 NYCRR 23-1.5(c)(1) is "insufficient as [a] predicate[] for Labor Law §241(6) liability, since [it] sets forth general rather than specific standards of conduct" (*McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016]). Thus, NYCRR 23-1.5(c)(1) is insufficient to serve as a basis for Plaintiff's Labor Law 241(6) claim. Accordingly, Movants' and Cross-Movants' motions for summary judgment dismissing Plaintiff's Labor Law 241(6) claim predicated on violation of Industrial Code Section 12 NYCRR 23-1.5(c)(1) are granted.

ii. 12 NYCRR 23-9.2(a)

12 NYCRR 23-9.2(a) states in relevant part that:

[a]ll power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.

It has been held that a hand-held power grinder is not the type of heavy machinery to which 12 NYCRR 23-9.2(a) applies (*see Cabrera v Revere Condominium*, 91 AD3d 695, 697 [2d Dept 2012]). Upon review, the Court finds that the subject nail gun is similar to a hand-held power grinder and thus is not the type of power-operated equipment covered by 12 NYCRR 23-9.2(a). Accordingly, as NYCRR 23-9.2(a) is inapplicable to the facts at bar and insufficient to serve as a basis for Plaintiff's Labor Law 241(6) claim, Movants' and Cross-Movants' motions for summary judgment dismissing Plaintiffs Labor Law 241(6) claim predicated on violation of Industrial Code Section 12 NYCRR 23-9.2(a) are granted.

iii. 12 NYCRR 23-1.5(c)(3)

12 NYCRR 23-1.5(c)(3) states that “[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.”

While Cross-Movants argue that 12 NYCRR 23-1.5(c)(3) only imposes workplace safety responsibilities on “work site employers” and is thus inapplicable to them (NYSCEF Doc. 146 at ¶ 58), this argument is unavailing.

The remaining arguments of Movants and Cross-Movants for dismissal of Plaintiff’s 241(6) claim predicated on 12-1.5(c)(3) are centered on the contention that there is no evidence of any defect in the subject nail gun and because Plaintiff testified that he operated the nail gun for approximately 15 minutes before its alleged malfunction, Plaintiff cannot reasonably claim that the nail gun was not in proper operating condition at the time of his accident (NYSCEF Doc. 146 at ¶ 59; NYSCEF Doc. 124 at ¶ ¶ 11, 29). However, viewing the facts in the light most favorable to the non-moving party, Plaintiff’s testimony that the nail gun was “scuffed” and “dusty” (NYSCEF Doc. 133 at 87) and “battered” and “beat up” (NYSCEF Doc. 167 at ¶ 22) is sufficient to raise a question of fact regarding whether the nail gun was in sound and operable condition. As such, Movants’ and Cross-Movants’ motions for summary judgment dismissing Plaintiff’s Labor Law 241(6) claims predicated on violations of Industrial Code Section 12 NYCRR 23-1.5(c)(3) are denied.

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d. Movants Motion for Summary Judgment Dismissing the Contractual Indemnification and Breach of Contract Claims Asserted Against AJI in the Third Third-Party Complaint is Denied

In the Third Third-Party Complaint, 21 Penn and the WeWork Defendants assert claims against AJI for (1) breach of contract for failure to procure insurance, and (2) contractual indemnification (NYSCEF Doc. 127).

For the reasons outlined below, Movants' motion for summary judgment dismissing the Third Third-Party claims against AJI is denied.

i. Movants' Motion for Summary Judgment Dismissing Cross-Movants' Claim Against AJI for Contractual Indemnification is Denied

On August 31, 2017, OCGP as "Contractor" and WW BuildCo LLC and 21 Penn as "Developer"³ entered into a Construction Services Agreement (the "CS Agreement") (NYSCEF Doc. 135 at 63). Pursuant to the CS Agreement and subsequent Rider dated January 1, 2018 (the "Rider") (*Id.* at 172), OCGP is contractually required to indemnify 21 Penn and its affiliates⁴.

Section 12.1 of the CS Agreement states that Contractor and its affiliates, agents and sureties shall, jointly and severally defend, indemnify and hold harmless Developer, its affiliates, and their respective directors, officers, present and former employees agents, equity holders, representatives and sureties, from and against any and all liabilities pertaining to personal injury caused by or arising from the acts or omissions of any Contractor party (NYSCEF Doc. 135 at 90).

On February 1, 2018, OCGP as "Contractor" and AJI as "Subcontractor" entered into a Master Subcontract Agreement ("MSA") (NYSCEF Doc. 44). Section 13.1 of the MSA states that AJI agrees to indemnify and hold harmless OCGP "as well as any other parties that Contractor is

³ The CS Agreement defines "Developer" as WWBuildCo LLC "together with the applicable party identified in the applicable Work Order (NSYCEF Doc. 135 at 63). The applicable Work Order (*Id.* at 130) lists 21 Penn as Developer.

⁴ WeWork Companies Inc. is the sole member of 21 Penn and WeWork Construction LLC (NYSCEF Doc. 153 at 14).

required under the Subcontract Documents to defend, indemnify and hold harmless...from and against any and all claims...caused by, arising out of, resulting from, related to or occurring in connection with the performance of the Subcontract Work..." (*Id.* at 15). Notably, AJI's duty to indemnify is not contingent upon AJI's negligence.

As it is undisputed that Plaintiff was performing work at the Building on behalf of AJI and pursuant to AJI's subcontract with OCGP at the time of his injury, Plaintiff's alleged injuries arose out of AJI's performance of the Subcontract Work. As such, in the event that 21 Penn is shown to be free from negligence, AJI is contractually obligated to indemnify 21 Penn for liabilities pertaining to Plaintiff's alleged injuries. With respect to the WeWork Defendants, remaining questions of fact regarding whether the WeWork Defendants are affiliates of 21 Penn preclude an award of summary judgment as to the WeWork Defendants contractual indemnification obligation at this stage. Accordingly, Movants' motion for summary judgment dismissing the Third Third-Party claim against AJI for contractual indemnification is denied.

ii. Movants' Motion to Dismiss Cross-Movants' Breach of Contract Claim against AJI is Denied

Pursuant to the Exhibit B of the MSA, AJI, as Subcontractor, is obligated to procure commercial general liability (CGL) coverage including, as additional insureds, OCGP, as well as all parties that OCGP is required to indemnify (NYSCEF Doc. 44 at 41). As discussed above, to the extent that 21 Penn was not negligent, OCGP, and thus AJI, are contractually obligated to indemnify 21 Penn for liabilities pertaining to Plaintiff's alleged injuries. Further, issues of fact remain regarding whether the WeWork Defendants are entitled to indemnification as 21 Penn's affiliate.

While Movants seek summary judgment dismissing Cross-Movants' breach of contract claim against AJI for failure to procure insurance, Movants have failed to annex a copy of any

insurance policy allegedly procured by AJI and failed to demonstrate, as a matter of law, that they were not required to procure insurance. As such, Movants' motion for summary judgment dismissing the Third Third-Party claim against AJI for breach of contract for failure to procure insurance is denied.

e. Cross-Movants' Motion for Summary Judgment on their Contractual Indemnification Claim Against AJI is Denied

Preliminarily, while Movants argue that Cross-Movants' cross-motion should be denied as "technically deficient," for failure to adhere to the word limitation imposed by Rule 202.8-b, the Court elects, pursuant to CPLR 2001, to disregard this error and decide the motion on the merits.

It is well established that "[a]n issue of fact as to the indemnitee's negligence bars recovery in indemnification" (*Singh v N.Y. City Transit Auth.*, 17 AD3d 262, 263 [1st Dept 2005]). Here, as discussed above, the Court finds that questions of fact remain regarding 21 Penn's negligence. Further, questions of fact remain as to whether the WeWork Defendants are affiliates of 21 Penn entitled to indemnification.

The Court of Appeals has held that the intention to indemnify must be clearly implied from the contract language and surrounding circumstances (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). As the WeWork Defendants are not named in the indemnification provisions, the Court finds that Cross-Movants have failed to establish that the intent to indemnify the WeWork Defendants is clearly implied by the contract language. Further, while Kurt Wehner, CFO of WeWork Companies LLC asserts that "WeWork Companies Inc. was the sole member of 21 Penn Plaza Tenant LLC and WeWork Construction LLC," this testimony is insufficient to conclusively establish the WeWork Defendants as affiliates of 21 Penn as a matter of law. As questions of fact remain regarding 21 Penn's negligence and the WeWork Defendants' status as

affiliates of 21 Penn, Cross-Movants' cross-motion for summary judgment on their contractual indemnification claim against AJI is denied.

Accordingly, it is hereby,

ORDERED that the portions of the motion and cross-motion seeking summary judgment dismissing Plaintiff Fintan McKenna's claims for common law negligence, violation of Labor Law § 200, and violation of labor Law § 240 are granted; and it is further

ORDERED that the portions of the motion and cross-motion seeking summary judgment dismissing Plaintiff Fintan McKenna's claims for violation of Labor Law § 241(6) predicated on violations of Industrial Code Sections 23-1.5(c)(1) and 23-9.2(a) are granted; and it is further

ORDERED that the portions of the motion and cross-motion seeking summary judgment dismissing Plaintiff Fintan McKenna's claims for violation of Labor Law § 241(6) predicated on violations of Industrial Code Section 23-1.5(c)(3) are denied; and it is further

ORDERED that Defendants Teachers Insurance and Annuity Assoc. of America for the benefit of its real estate account, OCGP LLC, s/h/a "OC Development Management" and Third-Party Defendant Andrew James Interiors, Inc.'s motion for summary judgment dismissing all claims against Third-Party Defendant Andrew James Interiors, Inc. is denied; and it is further

ORDERED that Defendants/Third Third-Party Plaintiffs WeWork Construction LLC, WeWork Companies, Inc. and 21 Penn Plaza Tenant LLC's cross-motion seeking summary judgment against Third-Party Defendant Andrew James Interiors, Inc. on the contractual indemnification claim set forth in the Third Third-Party Complaint is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendants Teachers Insurance and Annuity Assoc. of America for the benefit of its real estate account, OCGP LLC, s/h/a "OC

