

Polanco v Building 89 JD Hous. Dev. Fund Corp.

2024 NY Slip Op 34883(U)

October 7, 2024

Supreme Court, Queens County

Docket Number: Index No. 713312/2020

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

The following numbered papers read on these motions by Defendant/Second Third-Party Plaintiff Transitional Services For New York, Inc. (Transitional) for summary judgment on its cross-claim against Defendant/Third-party Plaintiff, Racanelli Construction Company, Inc. (Racanelli) and its second third-party claim against the Second Third-Party Defendant, Regal Reconstruction Corp. (Regal) and by Plaintiff for summary judgment on the Labor Law claims.

Papers
Numbered

Motion Seq. No. 4

Notice of Motion - Affirmation - Exhibits.....	EF 130-149
Answering Affirmation - Exhibits.....	EF 188-204
Reply Affirmation.....	EF 207

Motion Seq. No. 5

Notice of Motion - Affirmation - Exhibits.....	EF 150-179
Answering Affirmation.....	EF 183-185
Answering Affirmation.....	EF 211-232
Reply Affirmation.....	EF 208

Upon the foregoing papers it is ordered that the motions are determined as follows:

Motion by Defendant/Second Third-Party Plaintiff Transitional Services For New York, Inc. ("Transitional") for summary judgment on its cross-claim against Defendant/Third-party Plaintiff, Racanelli Construction Company, Inc. ("Racanelli") and its second third-party claim against the Second Third-Party Defendant, Regal Reconstruction Corp. ("Regal") is denied. Motion by Plaintiff for summary judgment on the Labor Law claims is granted solely to the extent that the Labor Law §240(1) claim against Defendants and the Labor Law §200 and common law negligence claims against Racanelli are granted, but the remaining branch is denied.

On August 18, 2020, the Plaintiff, Ramon Polanco, commenced this action to recover damages for personal injuries sustained on November 19, 2019, while working on a construction project on premises owned by Transitional for which Racanelli was project manager. In a stipulation dated February 17, 2021, Plaintiff discontinued the action against Defendant, New York City Housing Authority. In a stipulation dated August 4, 2023, Plaintiff discontinued the action against Defendants City of New York, New

York City Housing Development Corporation, and Department of Housing Preservation and Development. On July 2, 2021, Racanelli commenced a third-party action against Plaintiff's employer Regal. On June 28, 2023, Transitional commenced a second third-party action against Regal seeking, among other things, contractual indemnification. Transitional now moves for summary judgment on its cross-claim for contractual indemnification against Racanelli and its second third-party claim for contractual indemnification against Regal. Plaintiff separately moves for summary judgment on the Labor Law §240(1) and §241(6) claims against Defendants and on the common law negligence and Labor Law §200 claim against Racanelli.

The Court first addresses the branch of Plaintiff's motion for summary judgment on the claim pursuant to Labor Law §240(1), which imposes on owners and general contractors a nondelegable duty to provide necessary safety devices for workers subjected to elevation-related hazards (see Saint v Syracuse Supply Co., 25 N.Y.3d 117, 124 [2015]; Soto v J. Crew Inc., 21 N.Y.3d 562, 566 [2013]). Here, Plaintiff's evidence that he was injured while assisting a co-worker carry out a cut beam when a beam he stepped on collapsed and caused him to fall five to ten feet to a debris pile on the basement floor below demonstrates a prima facie Labor Law § 240(1) violation (see Amaro v New York City Sch. Constr. Auth., 229 A.D.3d 746, 748 [2d Dept. 2024]; Ramirez v Metropolitan Transp. Auth., 106 A.D.3d 799, 799 [2d Dept. 2013]). Plaintiff and his supervisor, Nicholas Sarnicola, also testified that there were no tie-off points for a harness, which also constitutes a Labor Law §240(1) violation (see Gamez v New Line Structures & Dev., LLC, 218 A.D.3d 446, 447 [2d Dept. 2023]; Cacanoski v 35 Cedar Place Assoc., LLC, 147 A.D.3d 810, 811-12 [2d Dept. 2017]; see also Garlow v Chappaqua Cent. School Dist., 38 A.D.3d 712, 714 [2d Dept. 2007]). Although Racanelli contends that Sarnicola had not assigned Plaintiff to remove the flooring and had assigned him to remove debris, the record does not support that contention. Sarnicola testified that he had assigned Plaintiff to carry joists and pry up floor (see NY St Cts Elec Filing [NYSCEF] Doc No. 171 at 51), but later testified that he assigned Plaintiff to shovel and keep the area clean for the workers removing flooring (see id. at 78) and that Plaintiff was also responsible for assisting in removal of beams (see id. at 108). Although Transitional contends in opposition that Plaintiff's injury is not subject to the protections of Labor Law §240(1) based on Sarnicola's testimony showed that Plaintiff fell only two to three

feet, Sarnicola did not witness Plaintiff's fall. He also testified that greater fall distances existed in the work area, which is consistent with Plaintiff's testimony that he fell eight to ten feet onto the bottom portion of the debris pile. Therefore, the cases Transitional cites are inapposite (see Bond v York Hunter Constr., 95 N.Y.2d 883 [2000]; Pita v Roosevelt Union Free School. Dist., 156 A.D.3d 833 [2d Dept. 2017]; Biscup v E.W. Howell, Co., Inc., 131 A.D.3d 996 [2d Dept 2015]). Since Defendants do not rebut Plaintiff's evidence of Labor Law § 240(1) violations, Plaintiff's conduct cannot be the sole proximate cause of his injury (see Garzon v Viola, 124 A.D.3d 715, 716-17 [2d Dept. 2015]; Coates v Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 104 A.D.3d 896, 897-98 [2d Dept. 2013]). Therefore, Plaintiff is entitled to summary judgment on the Labor Law § 240(1) claim.

The court next addresses the branch of the motion for summary judgment on the Labor Law § 241(6) claim. To establish liability for violating that statute, Plaintiff must show that a violation of an applicable Industrial Code proximately caused his injuries (see Guoxing Song v CA Plaza, LLC, 208 A.D.3d 760, 761 [2d Dept. 2022]; Ennis v Noble Constr. Group, LLC, 207 A.D.3d 703, 704 [2d Dept. 2022]). To state a Labor Law § 241(6) claim, Plaintiff must allege Defendants' violation of an Industrial Code regulation requiring a specific standard of conduct (see Toussaint v Port Auth. of N.Y. & N.J., 38 N.Y.3d 89, 94-95 [2022]; Kauffman v Turner Constr. Co., 195 A.D.3d 1003, 1005 [2d Dept. 2021]). In the complaint, Plaintiff alleged numerous Industrial Code violations, including 12 NYCRR §§ 23-3.3©, which provides that "[d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means" (see 12 NYCRR § 23-3.3[c]; Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 12 [2011]). Here, Plaintiff testified that the beam broke when he stepped on it but did not indicate whether it broke because of instability from the demolition progress or from the demolition work itself. Since Plaintiff fails to eliminate this factual issue, he does not demonstrate a violation of 12 NYCRR § 23-3.3(c) and entitlement to summary judgment on the Labor Law §241(6) claim (see Carranza v JCL Homes, Inc., 210 A.D.3d 858, 859-60 [2d Dept. 2022]; Majerski, v City of New York, 193 A.D.3d 715, 717-18 [2d Dept. 2021]).

Regarding the Labor Law §200 and common law negligence claims, Plaintiff seeks summary judgment on these claims against Racanelli because it had the authority to control the work of Regal, which was Plaintiff's employer. Transitional does not oppose this branch of the motion. Labor Law §200 codifies the duty of owners and general contractors of a construction site and their agents to maintain site safety (see Rizzuto v L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 [1998]; Comes v New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 [1993]). As relevant here, if Plaintiff's injuries arose from the manner of the work performed, owners and general contractors are liable for a Labor Law §200 violation and common-law negligence upon a showing that they had authority to supervise and control that work (see Hamm v Review Assoc., LLC, 202 A.D.3d 934, 938 [2d Dept. 2022]; Eliassian v G.F. Constr., Inc., 190 A.D.3d 947, 950 [2d Dept. 2021]). To support the motion, Plaintiff relies on the deposition testimony of Sarnicola that Racanelli had the authority to stop unsafe work and had control over the methods and manner of work. In addition, Jerry Tudisco, Racanelli's project manager, testified that Racanelli supervised, directed, and controlled the work at the project. Further, Joseph Center, Transitional's divisional director of facilities operations and development testified that Racanelli could stop the work and had control of the methods and means of work. Racanelli presents no evidence in opposition and confirms the standard for liability under Labor Law §200 and common law negligence as set forth above. Therefore, granting Plaintiff summary judgment on those claims is appropriate (cf. Crichigno v Pacific Park 550 Vanderbilt, LLC, 186 A.D.3d 664, 665-66 [2d Dept. 2020]; Abelleira v City of New York, 120 A.D.3d 1163, 1164 [2d Dept. 2014]).

Finally, turning to Transitional's motion for summary judgment, Transitional contends that its contract with Racanelli and Racanelli's subcontract with Regal entitle it to contractual indemnification, as asserted in its cross-claim against Racanelli and second third-party claim against Regal. In order to recover under its contractual indemnification claims Transitional must demonstrate its freedom from negligence and that it may have only statutory or vicarious liability (see Chuqui v Amna, LLC, 203 A.D.3d 1018, 1023 [2d Dept. 2022]; Zukowski v Powell Cove Estates Home Owners Assn., Inc., 187 A.D.3d 1099, 1102 [2d Dept. 2020]). Even accepting Transitional's arguments that Racanelli's direction and control of the work and obligations to ensure site safety

demonstrates Transitional was not negligent, Transitional, as owner of the site, may be liable for a premises defect. To demonstrate entitlement to summary judgment dismissing Labor Law §200 and common law negligence claims, an owner must demonstrate that it did not create the dangerous condition and lacked actual or constructive notice of it (see Nusio v Legend Autorama, Ltd., 219 A.D.3d 842, 844 [2d Dept. 2023]; Alexandridis v Van Gogh Contr. Co., 180 A.D.3d 969, 972 [2d Dept. 2020]). Since the bill of particulars dated June 8, 2022, alleged both the manner of work and a dangerous condition, Transitional's failure to address the latter fails to meet its burden of demonstrating its non-liability under the Labor Law §200 and common law negligence claims (see Rodriguez v HY 38 Owner, LLC, 192 A.D.3d 839, 842 [2d Dept. 2021]; Garcia v Market Assoc., 123 A.D.3d 661, 665 [2d Dept 2014]). Thus, Transitional did not show it was not negligent and is not entitled to summary judgment on its contractual indemnification claims (see Chugui, 203 A.D.3d at 1023; Zukowski, 187 A.D.3d at 1102). In addition, given the factual issues regarding Transitional's negligence, conditional summary judgment on its contractual indemnification claims is unwarranted (see McDonnell v Sandaro Realty, Inc., 165 A.D.3d 1090, 1096-97 [2d Dept. 2018]; Shaughnessy v Huntington Hosp. Assn., 147 A.D.3d 994, 999 [2d Dept. 2017]).

Accordingly, the branch of Plaintiff's motion for summary judgment on the Labor Law §240(1) claim against Defendants and the Labor Law §200 and common law negligence claims against Racanelli are granted, the remaining branch is denied. Transitional's motion for summary judgment on its contractual indemnification claims is denied.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: October 7, 2024



 KEVIN J. KERRIGAN, J.S.C.

