Vasquez v 720 Fifth Sub A LLC
2024 NY Slip Op 34928(U)
July 29, 2024
Supreme Court, Bronx County
Docket Number: Index No. 33263/2019E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

---X

Victor M. Vasquez

-against-

720 Fifth Sub A LLC & L&Z Restoration

Index №. 33263/2019E

Hon. **Paul L. Alpert**

Justice Supreme Court

---X

720 Fifth Sub A LLC

-against-

L&Z Restoration Corp.

---X

The following papers numbered 1 to __________ were read on this motion (Seq. No. 5) for ____________________ noticed on ____________________.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice: __________
Dated: __________

The plaintiffs motion is decided in accordance with the annexed decision and order of the court.

Dated: 7/29/24

Hon. ____________________
HON. PAUL ALPERT **J.S.C.**

1. CHECK ONE.. ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.. ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26
---X
Index No.: 33263/2019E

Victor M. Vasquez,

Plaintiff,

DECISION/ORDER

-against-

720 Fifth Sub A LLC & L&Z Restoration Corp.,

Defendants.
---X
720 Fifth Sub A LLC,

Third-Party Plaintiff,
-against-

L&Z Restoration Corp.,

Third-Party Defendant.
---X

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

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits	**1**
Memorandum of Law in Support	**2**
Affirmation in Opposition	**3**
Notice of Cross Motion	**4**
Affirmation in Support of Cross Motion & in Opposition to Motion & Exhibits	**5**
Affirmation in Opposition to Cross Motion	**6**
Affirmation in Reply & Exhibits	**7**

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

The plaintiff commenced this action for personal injuries following an accident that occurred on July 17, 2019, when he was performing construction related tasks as a part of his employment on a pipe scaffold and fell approximately twenty feet onto the ground below. The plaintiff moves for summary judgment pursuant to CPLR § 3212 against defendant 720 Fifth Sub A LLC (hereinafter "720 Fifth") on the issue of liability for violation of Labor Law 240(1). The

defendant/third-party defendant L&Z Restoration Corp. (hereinafter "L&Z Restoration") opposes the motion. The defendant/third-party plaintiff 720 Fifth opposes the plaintiffs motion and cross moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the plaintiffs Labor Law 200 and common-law negligence claims. 720 Fifth further moves for an order pursuant to CPLR 3212 on the third-party contractual indemnification claim against L&Z Restoration.

The plaintiffs accident occurred at the building located at 720 Fifth Avenue, New York, New York. The building is owned by defendant 720 Fifth. The plaintiff was working for L&Z Restoration at the time of his accident. L&Z Restoration was hired to perform façade repairs between the 10th and 12th floors of the subject building.

On the day of Mr. Vasquez's accident, he was employed as a helper for L&Z Restoration for approximately a month and a half (Plaintiffs Motion, Exhibit C, page 23 lines 5-25). L&Z Restoration specializes in restoration and renovation (page 25 lines 3-7). At this job site, L&Z Restoration was hired to renovate stone (page 47 lines 18-20). This entailed removing old stone and placing new stones for a portion of the building (page 47 line 23- page 48 line 6). Mr. Vasquez's supervisor were Mr. Rojas and Mr. Flores (page 54 lines 12-15). Mr. Vasquez worked forty hours a week from 8:30 a.m. to 5:00 p.m. (page 24 lines 9-18). Mr. Vasquez's accident occurred at approximately 2:00 p.m. (page 37 lines 12-17). The accident occurred on the terrace of the tenth floor (page 38 lines 3-11).

Mr. Rojas instructed the plaintiff to get some tools and to secure a support pipe scaffolding (page 95 lines 4-11). Mr. Vasquez subsequently went downstairs to the shanty to get the tools and came back to the tenth floor terrace (page 97 lines 20-25). When he got to the tenth floor terrace, he unhooked his tail from the safety line to go inside of the building on the tenth

floor to obtain the required tools (page 98 lines 5-14). Mr. Vasquez testified that he secured the pipe and was tied to the safety line (page 100 lines 3-10). After he secured the pipe, he took a step and the pipe scaffolding wobbled and he hit his knee (page 103 lines 3-15). Mr. Vasquez fell approximately twenty feet (page 116 lines 2-6).

Mr. Vasquez stated he was wearing a safety harness at the time of his accident (page 41 lines 8-10). Mr. Vasquez's harness was attached to the safety line through a lanyard and hook (page 41 line 18- page 42 line 4). It was attached to the back of the harness (page 42 lines 5-8). The equipment that Mr. Vasquez required was provided to him by L&Z restoration (page 54 lines 17-19). He would always wear his harness on the pipe scaffold (page 69 lines 7-11). Mr. Vasquez maintains that he was always secured through the safety line (page 94 lines 20-23).

Zbigniew Jakubiak is the owner of L&Z Restoration (Plaintiffs motion, Exhibit I, page 9 line 25- page 10 line 11). The project at the subject building spanned three to four months (page 20 lines 11-16). The project manager was Konrad Lata (page 21 lines 2-6). The foreman assigned to the project was Pedro Flores (page 21 lines 15-19). L&Z Restoration was responsible for the safety of L&Z workers (page 29 lines 3-5). L&Z Restoration provides safety lines (page 29 lines 6-10). The workers were to determine where the safety lines would be (page 29 lines 21-24).

The owner of the building did not provide any equipment to the L&Z Restoration workers to perform the work (page 30 lines 9-12). The owner of the building did not direct or supervise the L&Z Restoration workers when they were performing the work nor did they inspect the work (page 30 lines 13-20). Mr. Jukabiak would visit the project once a week to inspect the work and he would attend meetings (page 33 lines 15-22). Konrad Lata had safety meetings with L&Z Restoration workers daily before work (page 36 line 8- page 37 line 2).

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).

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). "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).

The plaintiff argues that he was engaged in a covered activity and that the defendants failed to provide a proper scaffold. The plaintiff further argues that the defendant failed to ensure that a proper fall protection system was in place as the safety lines were inadequate. In support of the motion, the plaintiff relies on *Ging v. F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415. In *Ging*, the First Department found that the plaintiff was entitled to summary judgment on his labor law 240(1) claim after falling from a structural steel tube that suddenly shifted. The Court noted that while the plaintiff had a safety harness and lanyard at the time of his accident, he did not have a place to tie off. However, this case can be distinguished from the instant matter as the testimony provided demonstrates that there was a place for the plaintiff to tie off.

The supervisor of the construction of the scaffolding during the time of the plaintiffs accident was Mr. Flores, the foreman (page 39 lines 4-8). Mr. Flores was employed by L&Z Restoration. He testified that the workers had to be tied off from the rope, they must wear a harness and be secured by a safety line (page 39 lines 15-23). L&Z Restoration workers were responsible for providing their own harnesses (page 40 lines 10-12). He never received any complaints from the workers about the access to the safety line or of the inability of the workers to tie off (page 41 lines 19-22). Mr. Flores would also prepare daily reports for the project (page 42 lines 23-25). Daily reports are for safety of equipment and condition of equipment (page 43 lines 8-15).

In opposition, 720 Fifth argues that there are issues of fact as to whether the plaintiff was a proximate cause of the accident. "The burden then shifts to defendants to establish that 'there was no statutory violation and that the plaintiff's own acts and omissions were the sole cause of

the accident'" (*Kosavick v. Tishman Constr. Corp. of N.Y.*, 50 AD3d 287,288, quoting, *Blake*, 1 NY3d at 289).

Mr. Flores was to ensure that people were following safety protocols (Plaintiffs motion, Exhibit K, page 15 lines 10-19). Mr. Flores was responsible for the work being performed and reported to his supervisor Konrad Lata (page 28 lines 8-17). At the time of the plaintiff's accident, Mr. Flores was in the office (page 53 lines 2-3). When he came out to the terrace he saw the plaintiff on the floor and called an ambulance (page 53 lines 8-18). There were safety devices at the jobsite to prevent the workers from falling, there was a safety line and a safety harness (page 61 line 21- page 62 line 4). There was a safety harness on the jobsite in case someone needed it (page 63 lines 9-13). The safety lines were provided by L&Z (page 63 lines 14-16).

Mr. Flores observed photos of Mr. Vasquez after his accident. Mr. Flores testified that he did not see Mr. Vasquez tied off to the safety line and it should have been attached (page 120 lines 13-16). "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 603). "An injured worker's failure to use safety devices will not constitute the sole proximate cause of the accident unless the worker knew that he or she was expected to use them but for no good reason chose not to do so" (*Anderson v. MSG Holdings, L.P.*, 146 AD3d 401, 404). Merely falling from a scaffold does not by itself establish a claim under Labor Law § 240(1), which requires both a violation of the statute and causation (*James Mejia v. Super P57 LLC*, 186 N.Y.S. 3d 204).

There remains an issue of fact as to whether the plaintiff was tied off at the time of his accident. The testimony of the plaintiff that he was tied off at the time of his accident contradicts the testimony of Mr. Flores. In opposition, the defendants have displayed that there were safety devices on site of the plaintiff to use. In *Gonzalez v. Rodless Props., L.P.*, 37 AD3d 180, the First Department found that proper safety devices were provided and "the workers own recalcitrant conduct may have been the sole proximate cause of his injury." Similar to the instant matter, Mr. Flores testified that there were always safety protocols and devices on site if the workers did not have any. Moreover, as the defendant points out in opposition, the plaintiffs motion was filed after the dispositive motion deadline, 156 days after the note of issue was filed and the plaintiff did not demonstrate good cause for the delay. Accordingly, the plaintiffs motion for summary judgment on the issue of liability for the violation of Labor Law 240(1) is denied.

The defendant/third-party plaintiff, 720 Fifth cross moves for summary judgment dismissing the plaintiffs claims of Labor Law 200 and common law negligence pursuant to CPLR 3212. 720 Fifth further moves for summary judgment on its third party claim against L&Z Restoration. The plaintiff does not oppose the motion. The plaintiff discontinued the action as against L&Z Restoration via stipulation on January 21, 2022 (see Exhibit G). 720 Fifth's third-party claims against L&Z Restoration remain.

Labor Law § 200 codifies landowners' and general contractors, common law duty to maintain a safe workplace (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505). Cases involving labor law § 200 fall into two broad categories, those where workers are injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed (*Torres v. City of New York*, 127 AD3d 1163, 1165).

Where a claim is based on defects or dangers arising from a subcontractors methods or materials, liability cannot be imposed on an owner or general contractor unless it is show that it exercised some supervisory control over the work (*Hughes v. Tishman Const. Corp.*, 40 AD3d 305). 720 Fifth demonstrated that it did not exercise supervisory control over the plaintiff's work. 720 Fifth established this through the testimony of Mr. Jakubiak who stated that the owner of the building had no involvement in determining how the work was going to be performed, nor did the owner of the building provide any equipment to L&Z Restoration workers to perform the work. The plaintiff further corroborates this testimony through his own statements that the only people that were giving him any instructions were from L&Z Restoration.

720 Fifth alternatively demonstrates that it did not create any alleged defective condition and lacked notice of any defective condition. 720 Fifth maintains that the plaintiff failed to identify any defective condition at the building and that there were no complaints made to the owners of the building. Moreover, the evidence demonstrates that 720 Fifth did not construct the scaffolding and safety lines. Accordingly, 720 Fifth's motion for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs labor law 200 and common law negligence claim is granted.

Lastly, 720 Fifth argues that L&Z Restoration owes it contractual indemnification. In support of this, 720 Fifth points to the indemnification clause in their contract. The right to contractual indemnification depends upon the specific language of the contract (*Ging v. F.J. Sciame Construction Co. Inc.*, 193 AD3d 415). "A party is entitled to full contractual indemnification provided that the 'intention to indemnify 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 774, quoting, *Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153).

720 Fifth submits the indemnification clause within the contract in support of the motion. The indemnification clause states "To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself). Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.1." 720 Fifth demonstrated that the accident arose out of L&Z Restorations work as Mr. Vasquez was employed by L&Z Restoration.

In opposition, L&Z maintains that the cross motion for summary judgment must be denied because it is untimely and that the court decided that 720 Fifth has not shown good cause for an extension of the dispositive motion deadline. This argument is unavailing. Pursuant to CPLR 3212(a) a summary judgment motion shall be made no later than 120 days after filing of the note of issue (see *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 AD3d 280). The motion requires denial unless the defendants demonstrate good cause of the delay (see *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726). A court may address a late motion, without the showing of a reasonable excuse, where it has pending before it a timely motion, and an untimely, but correctly labeled, cross-motion that is based upon the same issues as raised in the main motion (*Kershaw v. Hosp for Special Surgery*, 114 AD3d 75 87). In support of the motion, 720 Fifth maintains that counsel did not take over for 720 Fifth until after the Note of Issue was filed. Counsel then moved to vacate the note of issue and extend the time to file dispositive

motions. This court then issued a case scheduling order setting forth discovery deadlines. The case scheduling order was then vacated by this court. 720 Fifth maintains that there was a mistake in understanding that discovery had been reopened. The court will consider 720 Fifth's branch of the motion against L&Z Restoration.

Where the party seeking contractual indemnification is free from fault, a conditional judgment that it 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 negligence. Therefore, the motion for summary judgment pursuant to CPLR § 3212 on the contractual indemnification claim is premature.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the plaintiffs motion for summary judgment is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants/third-party plaintiffs cross-motion to dismiss the plaintiffs complaint pursuant to Labor law 200 and common law negligence is granted and it is further,

ORDERED AND ADJUDGED, that the defendants/third-party plaintiffs cross-motion for contractual indemnity is denied, and it is further,

ORDERED AND ADJUDGED, that the plaintiff 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: July 29, 2024

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