Quinn v City of New York
2024 NY Slip Op 35034(U)
March 5, 2024
Supreme Court, Queens County
Docket Number: Index No. 718810/20
Judge: Kevin J. Kerrigan
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.

Amended Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Gerard Quinn,

Index Number: 718810/20

Plaintiff,

Motion Date: 1/29/24

- against -

Motion Seq. No.: 2

The City of New York, New York City Housing Authority, LIC 73 Owner, LLC and Topline Drywall Inc.,

Defendants.

----------X

The following papers numbered E59-E65, E68-E87 & E90-E91 read on this motion by Defendants, New York City Housing Authority, LIC 73 Owner, LLC for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law	E59-65
Affirmation in Opposition	E68
Affirmation in Opposition-Exhibits	E69-87
Reply-Memorandum of Law	E90-91

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants, New York City Housing Authority (NYCHA) and LIC 73 Owner, LLC (LIC 73) for summary judgment is decided as follows. The branch of the motion for summary judgment by NYCHA pursuant to Labor Law §200, §240, and §241 is granted in all respects. The branch of the motion by LIC 73 for summary judgement is granted with respect to the causes of action pursuant to Labor Law §200 and §241(6), there being no opposition. The branch of the motion by LIC 73 for summary judgement is denied with respect to the cause of action pursuant to Labor Law §240(1). The branch of the motion by NYCHA and LIC 73 to dismiss Topline's claim for contractual indemnification/contribution is granted, there being

no opposition. The branch of the motion for summary judgment on the contractual indemnification claims asserted against Topline is denied.

Plaintiff allegedly sustained injuries when he fell from a six foot A-frame ladder while working at a construction site located at 23-02 49th Avenue in Queens County on August 12, 2019. At the time, Plaintiff was employed by the general contractor, non-party Archstone Builders LLC (Archstone). It is undisputed that Defendant LIC 73 owned the subject building, that the Defendant NYCHA was a tenant of the premises, and that the Defendant Topline contracted with Archstone to provide labor and materials for the carpentry/drywall work. Plaintiff's summons and complaint contains allegations for causes of action pursuant to Labor Law §200, §240, and §241.

NYCHA argues that it is entitled to summary judgment for the following reasons. First, Plaintiff is not a "Labor Law plaintiff," because the work he was engaged was not protected by the Labor Law. Second, Plaintiff's accident arose out of the means and methods of Plaintiff's and his employer's work and Movants did not exercise supervision or control over the work. Third, the underlying Industrial Code Regulations pursuant to Labor Law §241(6) are inapplicable, and therefore, were not violated. Finally, Movants contend they are entitled to contractual indemnity from Defendant Topline Drywall Inc. (Topline) since the accident arose out of Topline's work and/or breach of contract.

Plaintiff testified that on the date of incident, he was a laborer employed by Archstone. The incident occurred at a building which was undergoing renovation. Plaintiff arrived at the job site at 6:45AM on the date of incident. He proceeded to his "shanty" on the second floor to put on his work boots and then proceeded to the Archstone shanty on the vacant third floor. He was tasked with removing and returning rented duct work, which was a part of a temporary air conditioning unit. Plaintiff determined he would require a ladder to remove the duct work. He proceeded to the fourth floor to obtain the ladder and perform the work. He observed a ladder leaning against the wall, which contained the word "Topline" written on it. There were two electricians present in the room also working on ladders. He took the ladder and moved it into position to begin his work. He opened the legs and locked the spreaders. He did not observe any issues with the ladder. Plaintiff began reaching overhead to remove the duct work when the ladder shifted and he was suddenly on the ground. He testified that the ladder shifted and fell to the left. Plaintiff fell with the ladder, landing on his left side. At the time of the incident,

no one was holding or securing the ladder. The accident report provides that the subject ladder "lost its footing," causing it to tip over.

During the construction project, Plaintiff's direct supervisor was Michael White. However on the date of the incident, White was on vacation and the Assistant Superintendent, Charlie McGleenan acted as the supervisor. McGleenan was employed by Archstone on the date of the incident and oversaw day-to-day activities. McGleenan testified that Archstone had a "platform ladder policy," whereby subcontractors were required to use platform ladders. He was unsure when the policy was first implemented or how it was enforced, but claimed it was being enforced on the date of incident. Per McGleenan, subcontractors were informed of the policy via email. The specific ladder Plaintiff was using at the time of the incident was owned by Topline. He was unsure whether Archstone employees were permitted to use the ladder owned by Topline. He was unsure whether Archstone had its own ladders specifically for use by Archstone employees.

Stephen Kim testified on behalf of Innobo Property Group (IPG), a real estate investment company. Per Kim, LIC 73 owned the subject building at the time of the incident. IPG, LIC 73, and a company named "Westbrook" had a partnership agreement to manage the building. Kim described the project as "tenant improvement work" to be done for NYCHA. Archstone was hired by LIC 73. The subject property was a six-story industrial warehouse. NYCHA occupied four of the six floors. Per Kim, NYCHA "drove the process and the scope of the work" for the project. Kim was unsure whether NYCHA directed, supervised, or controlled the construction work performed by Archstone. Kim denied that LIC 73 directed, supervised, or controlled the work.

John Rettagliata testified on behalf of NYCHA. Rettagliata is the deputy director of NYCHA's Department of Real Estate Services. He indicated that his unit is responsible for overseeing several departments, including "Special Planning." The Special Planning team is responsible for the planning and layout of NYCHA's leased office spaces. Rettagliata's role with respect to these projects is to interface with the landlord. With regard to this project, NYCHA had leased the subject premises since approximately early 2000. NYCHA was working with the landlord for construction and build-out of the third and fourth floors, which would accommodate its central office operations. The landlord is referred to as IPG in the lease. IPG was responsible for hiring the contractors. During construction, NYCHA had one of its staff present daily. The

individual was Edward Balisky, who was a part of the Special Planning team. Balisky would coordinate with the landlord. He did not direct or control the means of the construction, nor did NYCHA have the authority to stop work. NYCHA had no laborers on the job site. NYCHA did not supply tools or equipment for the construction. NYCHA was not responsible for job site safety. NYCHA did conduct regular walkthroughs outside the job site to ensure that protection and barriers were in place.

Marco Antonio Ambrosio Hernandez testified on behalf of non-party, Topline. Hernandez is employed by Topline as a foreman. Topline performed framing, sheet rock, and taping for the job. Archstone was the general contractor on the job. Hernandez reported to Michael White for daily tasks. The Topline policy regarding ladders is as follows. If a person chooses to use a ladder to work with on a particular day, he must return it and "tie it off." This was generally done near a column in an open space on the fourth floor. At the beginning of the job, laborers could use any type of ladder. At the end of the job, Archstone required the use of platform ladders. Topline did not adopt this policy, nor did Topline instruct other contractors' workers not to use Topline ladders. Hernandez was never instructed that Plaintiff was not permitted to use Topline ladders.

LIC 73 and Archstone entered into a contractor wherein Archstone was to act as the general contractor for the subject project. Archstone and Topline subsequently entered into a contract, wherein Archstone issued a purchase order to Topline to provide all of the labor and materials for the scope of the carpentry/drywall work. The indemnification portion of the contract provides, inter alia, that Topline is to indemnify and hold harmless ASB (presumably Archstone Builders), the building owner, and landlord from all claims relating to and arising out of the performance of work.

Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343 [1998]). Where the unsafe condition of the work site was caused by the methods used by the contractor in performing the work, it must be established that the owner or contractor had supervisory control over the performance of the work in order to be liable under §200 (see Griffin v. NYC Transit Auth., 16 A.D.3d 202 [1st Dept. 2005]; Rippolo v. Mitsubishi Motor Sales of America Inc, 278 A.D.2d 149 [1st Dept. 2000]). To the extent that Plaintiff claims liability based upon a dangerous or defective condition, Defendant must establish that it did not create, or have actual or constructive

notice of, the alleged condition (see Pilch v. Board of Educatuion of City of New York, 27 A.D.3d 711 [2d Dept. 2006]).

Labor Law §240(1) imposes liability upon owners or contractors who fail, inter alia, to furnish ladders that are "so constructed, placed and operated as to give proper protection to a person so employed" in the "erection, demolition, repairing, altering, painting, or cleaning of a building or structure" (see Labor Law §240(1)).

In order to establish a cause of action pursuant to §241(6), it must be demonstrated that the owner (or agent of the owner) or contractor violated a specific rule or regulation of the Industrial Code and that such violation was a substantial factor in causing plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 A.D.3d 648 [2d Dept. 2004]).

Summary Judgment as to NYCHA

In denying the Plaintiff's motion for summary judgment by order issued February 5, 2024, the Court addressed the applicability of §240(1) to NYCHA as an tenant of the premises. Indeed, the Court found that it was clear that NYCHA was not an owner or a contractor of the subject premises. Rather, NYCHA was merely a tenant. While true that an "owner" under §240(1) is not limited to titleholders, NYCHA's involvement in the property did not rise to the required level, such that §240(1) would apply to it. Rettagliata specifically testified that NYCHA did not control the means of construction. It had no authority to stop work. It did not hire laborers. It did not supply tools or equipment. It was not responsible for job site safety. Plaintiff also testified that he never interacted with anyone from NYCHA regarding performance of the work. Thus, it cannot be said that NYCHA, as a tenant in possession, exercised the degree of control required by law that would warrant application of §240(1). With regard to Plaintiff's Labor Law §200 and §241(6) claims, the same reasoning applies, as that sections similarly only apply to owners and contractors. Accordingly, the cause of action as against NYCHA pursuant to Labor Law §240(1), §200, and §241(6) must be dismissed.

Summary Judgment as to LIC 73

LIC 73 contends that it is entitled to summary judgment pursuant to §200 because it did not supervise, direct, or control the means or methods of Plaintiff's work. It is undisputed here that the alleged accident was caused by the means and methods of the work. Thus, LIC 73 may only be found liable if it had supervisory control over the performance of the work. It is

generally accepted that an owner has supervisory control over the work for purposes of §200 when he "bears the responsibility for the manner in which the work is performed" (see Poulin v. Ultimate Homes, Inc., 166 A.D.3d 667 [2d Dept. 2018][citing Ortega v. Puccia, 57 A.D.3d 54 [2d Dept. 2008]). A "general supervisory authority," meaning overseeing the general progress of the work and conducting inspections is insufficient to impose liability under §200 (see id.).

Here, LIC 73 owned the subject premises. Kim testified that LIC 73 hired Archstone to act as the general contractor for the project. Beyond that, LIC 73 had no involvement in the performance of the work. It did not hire subcontractors. It did not supervise or control the work. IPG, in its role managing the building, did have communications with Archstone. The communications generally revolved around the progress of the project. There was never any conversation with Archstone regarding the method of the work. Plaintiff also testified regarding his familiarity with LIC 73, or lack thereof. He indicated that he had never heard of the entity, nor had he ever encountered anyone from LIC 73 at the job site. Plaintiff testified that he only received instructions regarding the scope of this work from his superintendent, Michael White. At the time that White was on vacation, he took instruction from Charlie McGleenan. Accordingly, there is no evidence that LIC 73 supervised or controlled Plaintiff's work, and summary judgment is warranted as a matter of law. The Court notes that Plaintiff does not oppose the instant branch of the motion.

LIC 73 contends that it is entitled to summary judgment pursuant to §240(1) and §241(6) because the construction work in the area of the alleged accident had not yet begun. Neither section protect workers who are engaged in routine maintenance. The Court similarly addressed this issue in the its order issued February 5, 2024, which denied Plaintiff's motion for summary judgment and found a question of fact existed. The same analysis is applicable here, and warrants denial of the motion pursuant to §240(1) and §241(6). Both sections solely apply to erection, demolition, repairing, altering, painting, or cleaning of a building or structure. Here, Plaintiff was tasked with removing duct work prior to construction of this specific floor. His testimony raises a question regarding whether construction or even demolition had begun yet. Plaintiff testified that the project had commenced floor by floor. When one floor was completed, the job moved to the next. At one point he testified that he was "getting [the floor] ready to have [it] demoed." At another point he indicated that demolition had begun, in that the electricians had began removing lights and "demo guys" had removed some equipment."

However, he conceded that none of aforementioned materials had been removed yet. In Shipzel, the plaintiff was tasked with removing acoustic tiles from a ceiling prior to renovation (see Shipzel v. Reo Realty & Constr. Co., 288 A.D.2d 291 [2d Dept. 2001]). The Court found the subsequent testimony that the work constituted demolition unavailing, and granted defendant's motion for summary judgment. Here, the Plaintiff's testimony creates a question of fact regarding whether he was engaged in erection, demolition, repairing, altering, painting, or cleaning. Additionally, the testimony of Rettagliata and McGleenan both raise an issue of fact in the same respect. Specifically, whether the work Plaintiff was engaged in was in furtherance of the construction, and thus qualified as protected work under §240(1). Accordingly, the branch of the motion for summary judgment pursuant to Labor Law §240(1) and §241(6) on the basis that the work was not protected is denied. Notwithstanding the forgoing, the motion is granted pursuant to §241(6) on other grounds, and without opposition (see infra.).

LIC 73 contends that it is entitled to summary judgment pursuant to §241(6) because none of the Industrial Code regulations plead are applicable. Plaintiff does not opposes this branch of the motion.

Plaintiff alleged in his bill of particulars that the Defendants violated the following sections of the Industrial Code: 23-1.5(c)(3); 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21(b)(4)(iv) and (v), 23-1.32, and 23-1.33.

Section 23-1.5(c)(3) of the Industrial Code provides "Condition of equipment and safeguards. All 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." Movant avers that since Plaintiff testified that he did not observe any issues with the ladder, and appeared to be in good shape, the section is inapplicable. In opposition, Plaintiff does not contest dismissal of the claim pursuant to §241(6) predicated on this section. Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.5(c)(3).

Section 23-1.7 of the Industrial Code is entitled "protection from general hazards." Section (a) is inapplicable, as it applies solely to overhead hazards. Section (b) is inapplicable, as it applies solely to specific falling hazards involving openings, bridges, or highways. Section (c) is inapplicable, as it involves

drowning hazards. Section (d) is inapplicable, as there has been no testimony that any condition such as ice, snow, water, grease, or other foreign substance that would have caused slippery footing existed here. Section (e) is inapplicable, as there is no evidence that this accident involved a tripping hazard. Section (f) is inapplicable, as this accident did not involve a stairway, ramp, or runway. Section (g) is inapplicable because this accident did not involve contaminated air or oxygen. Finally, section (h) is inapplicable, as this accident did not involve any corrosive substance. Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.7.

Section 23-1.15 is entitled "safety railing." The section specifies the requirements of safety railings whenever required under the Industrial Code. Plaintiff has not alleged violation of any Industrial Code section that requires the use of a safety railing. Thus, Section 23-1.15 is inapplicable. Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.15.

Section 23-1.16 is entitled "safety belts, harnesses, tail lines and lifelines." The forgoing section is inapplicable to the facts of this case, as Plaintiff never alleged that he had been provided a safety belt (see Smith v. Cari LLC, 50 A.D.3d 879 [2d Dept. 2008]). Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.16.

Section 23-1.17 is entitled "life nets." The forgoing is inapplicable to the facts of this case, as the section only applies to life nets in use during construction (see Kwang Ho Kim v. D&W Shin Realty Corp., 47 A.D.3d 616 [2d Dept. 2008]). Indeed, there has been no allegation by Plaintiff regarding the use of life nets. Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.17.

Section 23-1.21(b)(4) is entitled "installation and use" and falls under the "general requirements for ladders" under the section "ladders and ladderways." Section 23-1.21(b)(4)(iv) provides, in part, that when the work is performed between six and ten feet above the ladder footing, a leaning ladder must be held in place by a person stationed at the foot of the ladder. This applies unless the upper end of the ladder is secured against slide slip by its position or by mechanical means. This section

is clearly inapplicable based on the sort of ladder that was being used. Plaintiff unequivocally stated that the ladder was an A-frame ladder, which was opened, as opposed to a leaning ladder (see generally Rivera v. Suydam 379 LLC, 216 A.D.3d 495 [2d Dept. 2023]). Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.21(b)(4)(iv).

Section 23-1.21(b)(4)(v) requires that the upper end of a ladder, which is leaning against a slippery surface, must be secured against slide slip while work is being performed. There is no allegation that the ladder was leaning against anything. Nor has been there any allegations that it was placed on a slippery surface (see generally Ennis v. Noble Constr. Group, LLC, 207 A.D.3d 703 [2d Dept. 2022]). Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.21(b)(4)(v).

Section 23-1.32 is entitled "imminent danger-notice, warning and avoidance." In order to apply, Plaintiff must have alleged that written notice of the purported imminent danger was given to the commissioner or to an appropriate employee, owner, contractor, or his agent (see Mancini v. Pedra Constr., 293 A.D.2d 453 [2d Dept. 2002]). There is no evidence on this record that anyone at LIC 73 received written notice of any issue with the subject ladder. Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.32.

Section 23-1.33 is entitled "protection of persons passing by construction, demolition, or excavation purposes." The section explicitly states that it does not apply to any city in the State of New York which has a population of one million or more persons. Thus, this section is not applicable. Accordingly, summary judgment is granted with respect to the cause of action under Labor Law §241(6), insofar as it is predicated on Section 23-1.33

The branch of the motion to dismiss Topline's claim for contractual indemnification/contribution is granted, there appearing no opposition. Movants aver they are entitled to dismissal of Topline's cross-claim because they were not negligent and because Topline is not a statutory defendant, meaning it cannot face statutory or vicarious liability for the alleged accident. In partial opposition, Topline concedes that the Movants are entitled to dismissal of Topline's claim of common law indemnification. Accordingly, that branch of the motion is granted, there appearing no opposition.

The branch of the motion for summary judgment on NYCHA and LIC 73's contractual indemnification claim as against Topline is denied. The Archstone/Topline agreement provides that Topline is to indemnify Archstone, the building owner, and the landlord, from all claims relating to and arising out of the performance of its work. Plaintiff was an Archstone employee. The crux of the Movants' argument is that because the ladder involved in the accident was owned by Topline, Topline breached the contract. The Court notes that there is nothing in the contract regarding the furnishing of equipment by Topline to Archstone. There is a question as to whether the accident was a result of Topline's work merely because the Plaintiff chose to use a ladder owned by Topline while completing work for Archstone. Moreover, since there has been no finding that Topline was negligent or that its negligence caused the Plaintiff's injuries, summary judgment on the contractual indemnification claim is premature (see Gomez v. Sharon Baptist Bd. Of Directors, Inc., 55 A.D.3d 446 [1s Dept. 2008]).

Accordingly, the branch of the motion for summary judgment by NYCHA pursuant to Labor Law §200, §240, and §241 is granted in all respects. The branch of the motion by LIC 73 for summary judgement is granted with respect to the causes of action pursuant to Labor Law §200 and §241(6), there being no opposition. The branch of the motion by LIC 73 for summary judgement is denied with respect to the cause of action pursuant to Labor Law §240(1). The branch of the motion by NYCHA and LIC 73 to dismiss Topline's claim for contractual indemnification/contribution is granted, there being no opposition. The branch of the motion for summary judgment on NYCHA and LIC 73's contractual indemnification claim as against Topline is denied.

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

Dated: March 5, 2024

KEVIN J. KERRIGAN, J.S.C.