

Chae v 431 Seventh Eat, LLC
2024 NY Slip Op 35331(U)
March 11, 2024
Supreme Court, Queens County
Docket Number: Index No. 706223/2015
Judge: Carmen R. Velasquez
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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SUNNY CHAE, ET AL.,

Index No. 706223/15

Plaintiffs,

Motion

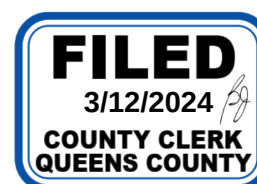
Date: November 13, 2023

-against-

M# 2 & 3

431 SEVENTH EAT, LLC, ET AL.,

Defendants.
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The following papers numbered EF 66-105 read on this motion by the defendant/third-party plaintiff VNO 431 Seventh Avenue, LLC for summary judgment on its third-party claim for contractual indemnification asserted against the third-party defendant Hachoi Corporation; and separate motion by the plaintiffs for partial summary judgment as to liability on their causes of action alleging violations of Labor Law §§ 240(1), 241(6) and 200 against the defendants.

Papers
Numbered

Seq #2

Notice of Motion - Affidavits - ExhibitsEF 78-93
Answering Affidavits - Exhibits EF 96-97
Reply AffidavitsEF 103

Seq #3

Notice of Motion - Affidavits - ExhibitsEF 66-77
Answering Affidavits - ExhibitsEF 95
EF 100-101
Reply Affidavits EF 105

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

This action is based on injuries that the plaintiff Sunny Chae allegedly sustained while performing certain demolition work at a commercial property on Seventh Avenue in Manhattan. The property was owned by the defendant/third-party plaintiff VNO 431 Seventh Avenue, LLC (the landlord). At the time of his accident, the plaintiff was working on the third floor of the property,

which was leased to the third-party defendant Hachoi Corporation (the tenant). The lease which was in effect at the time of the plaintiff's accident contained, among other things, a comprehensive indemnification provision which required the tenant to "save [the landlord] harmless from any damages, claims or suits resulting from any injuries sustained in any portion of the demised premises" and to "indemnify [the landlord] from any loss or damage arising out of any act or omission on the part of the Tenant, its contractors, agents, servants, employees, visitors, or invitees in connection with the demised premises."

According to the plaintiff, his accident occurred when he fell from an 8-foot, A-frame ladder while he was dismantling an archway composed of steel pipes. This ladder was provided by the tenant. As a result of the accident, the plaintiff, and his spouse, suing derivatively, commenced an action against, among others, the landlord in Supreme Court, Queens County under index No. 706223/2015 (the 2015 action). The complaint in the 2015 action asserts, among other things, causes of action predicated on alleged violations of Labor Law §§ 240 (1), 241 (6), and 200. The plaintiffs subsequently commenced a second action against the defendant Studio Meta Design Inc. (Studio Meta) in Supreme Court, Queens County under index No. 700637/2018 (the 2018 action). The 2015 action and the 2018 action were subsequently joined for trial under index No. 706223/2015. In October 2020, the landlord commenced a third-party action against the tenant, asserting, among other things, a claim for contractual indemnification. Discovery now having been completed, the landlord and the plaintiff separately move for summary judgment.

The landlord's motion (Sequence #2)

In support of their motion, the landlord submits, among other things, the pleadings, a copy of the lease which was in effect at the time of the plaintiff's accident, and the transcripts from the depositions of the plaintiff, Hyun Gap Choi, Tu Hwang Yun, and Matthew McAvoy. Choi is the tenant's owner and sole officer. Yun was hired by Choi and was the manager of the bar which occupied the third floor of the property. McAvoy was the vice-president of operations for the landlord's parent company. Based on these submissions, the landlord asserts that it is entitled to summary judgment on its third-party claim for contractual indemnification asserted against the tenant because the lease between the landlord and the tenant required the tenant to defend and indemnify the landlord against any claims which result from property damage or personal injuries at the property. The landlord further asserts that this indemnification clause was triggered here because the plaintiff was performing work for the

tenant when his accident occurred.

A party's right to contractual indemnification is dependent on the specific language of the contract (see *O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances. (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; see *Shea v Bloomberg, L.P.*, 124 AD3d 621, 622 [2d Dept 2015]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). "Thus, an indemnification provision may not apply to injuries caused by work that was performed outside of the contractual scope intended by the parties" (*Burhmaster v CRM Rental Mgt., Inc.*, 166 AD3d 1130, 1134 [3d Dept 2018]; see *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 951 [2d Dept 2015]).

Here, the landlord's submissions are sufficient to establish prima facie entitlement to summary judgment on its third-party contractual indemnification claim against the tenant (see *Mejia v Cohn*, 188 AD3d 1035, 1038-1039 [2d Dept 2020]; *Marulanda v Vance Assoc., LLC*, 160 AD3d 711, 712-713 [2d Dept 2018]). The indemnification clause in the lease is comprehensive, covering "any" claims against the landlord which result from injuries sustained at the property and "any" act or omission of the tenant or its agents. Insofar as the plaintiff was performing work in the leased premises and fell from a ladder which was provided by the tenant, his accident falls under the scope of the lease's indemnification clause.

In opposition, the tenant argues that there is an issue of fact as to whether the plaintiff's injuries arose out of any act or omission of the tenant in connection with the property. The tenant points out that the plaintiff had sole discretion over the manner and performance of his work, including selecting the ladder from which he fell. Thus, the tenant contends that there is an issue of fact as to whether the plaintiff was the sole proximate cause of his accident. This argument, however, is insufficient to raise an issue of fact. When interpreting a contract, it should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases (see *Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]; *Grandfeld II, LLC v Kohl's Dept. Stores, Inc.*, 163 AD3d 782, 784 [2d Dept 2018]). To accept the tenant's argument, the court would have to effectively disregard the portion of the indemnification clause

which requires the tenant to "save [the landlord] harmless from any damages, claims or suits resulting from any injuries sustained in any portion of the demised premises." Yet here, the plaintiff's accident falls squarely within this provision.

In any event, as the landlord correctly notes in its reply papers, the tenant was also required to indemnify the landlord for damages resulting from, among other things, any act of the tenant's contractors, agents, and employees. The deposition testimony demonstrates that Choi hired Yun to manage the bar on the third floor of the property, and Yun, in turn, hired the plaintiff to perform certain demolition and renovation work on the third floor. Thus, even if the plaintiff was the sole proximate cause of his accident, he was an agent and/or employee of the tenant and his accident was covered by the indemnification clause in the lease.

The plaintiffs' motion (Sequence #3)

In support of their separate motion, the plaintiffs submit, among other things, the pleadings, the transcripts from the depositions of the plaintiff and Yun, and the affidavit of Nicholas Bellizzi, their expert engineer. Based on these submissions, the plaintiffs argue that they are entitled to partial summary judgment as to liability on their Labor Law § 240 (1) claim against the defendants because the plaintiff was engaged in an enumerated activity at the time of his accident, and the plaintiff's use of the ladder at issue exposed him to a gravity-related risk which the ladder failed to protect him from. The plaintiffs further assert that they are entitled to partial summary judgment as to liability on their Labor Law § 241 (6) claim against the defendants because the plaintiff's testimony as to how the accident occurred establish prima facie violations of sections 23-1.7, 23-1.21(b)(3)(iv), and 23-1.21(b)(4)(ii) of the Industrial code. Finally, the plaintiffs contend that they are entitled to partial summary judgment as to liability on their Labor Law § 200 claim against the defendants because the ladder from which the plaintiff fell was defective.

Labor Law § 240 (1)

Under Labor Law § 240 (1), [a]ll contractors and owners ... shall furnish or erect, or cause to be furnished or erected ... 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 [construction workers employed on the premises] (Labor Law § 240[1]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494,

499-500 [1993]). Labor Law § 240 (1) imposes on owners or general contractors and their agents a non-delegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). To prevail on a claim under Labor Law § 240 (1), a plaintiff must prove that the defendant violated the statute, and that this violation was a proximate cause of his or her injuries (see *Jones v City of New York*, 166 AD3d 739, 740 [2d Dept 2018]).

Here, the plaintiffs' submissions are insufficient to establish prima facie entitlement to partial summary judgment as to liability on their Labor Law § 240(1) claim (see *Cutaia v Board of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037 [2022]). "A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011] [citation omitted]; see *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 461 [2d Dept 2008]). The plaintiff expressly testified that he examined the ladder and found it to be free from defects, that the base of the ladder had rubber feet which were in good condition, and that the ladder was not unstable.

This branch of the plaintiffs' motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Labor Law § 241 (6)

A Labor Law § 241(6) imposes on owners and contractors a non-delegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). Here, however, the complaint does not allege particular violations of the Industrial Code, and the plaintiffs' bill of particulars were not included with their

motion. In the absence of any evidence that the defendants were on notice of these alleged Industrial Code violations, the plaintiffs may not raise them for the first time in their motion for summary judgment (*cf. Kowalik v Lipschutz*, 81 AD3d 782, 783-784 [2d Dept 2011]).

This branch of the plaintiffs' motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (see *Winegrad*, 64 NY2d at 853).

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions 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 [2d Dept 2015]). Cases involving the manner in which the work is performed include alleged injuries "occasioned by the use of dangerous or defective equipment at the job site" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 48 [2d Dept 2011]).

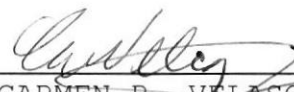
Where an accident was caused by the manner in which the work was performed, recovery against a property owner cannot be had unless it is shown that the [owner] had the authority to supervise or control the performance of the work (*Lazo v Ricci*, 178 AD3d 811, 813 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Conversely, [w]here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2d Dept 2010], quoting *Ortega v Puccia*, 57 AD3d at 61).

Here, the plaintiffs' moving papers appear to implicate the second category of Labor Law § 200 claims, as they suggest that the defective condition at issue was the ladder from which the plaintiff fell. However, for the reasons previously stated, the plaintiffs' submissions failed to demonstrate that the ladder was dangerous or defective. This branch of the plaintiffs' motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (see *Winegrad*, 64 NY2d at 853).

Accordingly, the motion by defendant/third-party plaintiff VNO 431 Seventh Avenue, LLC for summary judgment on its third-party claim for contractual indemnification against the third-party defendant Hachoi Corporation is granted. (Sequence No. 2).

The motion by plaintiff for partial summary judgment on the issue of liability is denied. (Sequence No. 3).

Dated: March 11th, 2024


CARMEN R. VELASQUEZ, J.S.C.

