

Velecela v Boston Props. Mgt. Inc.
2024 NY Slip Op 35562(U)
February 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 715843/2020
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

-----x IAS PART 20

JOSE VELECELA,

Index No.: 715843/2020

Plaintiff,

Motion Seq. No.: 13

-against-

Motion Date: 8.16.2023

BOSTON PROPERTIES MANAGEMENT INC., AKA
BOSTON PROPERTIES INC. AKA BOSTON PROPERTIES
LLC. BOSTON PROPERTIES, INC., BOSTON PROPERTIES
LIMITED PARTNERSHIP, 601 LEXINGTON AVENUE
CONDOMINIUM, BP/CGCENTER I LLC and
BP/CGCENTER II LLC,

Motion Cal. No.: 38

Defendants.

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BOSTON PROPERTIES MANAGEMENT INC., AKA
BOSTON PROPERTIES INC., AKA BOSTON
PROPERTIES LLC.,

First Third-Party Plaintiff,

-against-

MALATESTA PALADINO, INC.,

First Third-Party Defendant.

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MALATESTA PALADINO, INC.,

Second Third-Party Plaintiff,

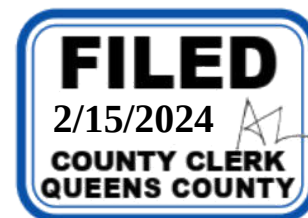
-against-

4 STAR WATERPROOFING D/B/A 4 STAR
CONTRACTING INC., and 4 STAR CONTRACTING INC.,

Second Third-Party Defendant.

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The papers bearing NYSCEF Doc. Nos. 137-158, 159, 200, 207 and 210-214 were read on: (1) the motion filed by the defendants, Boston Properties Management Inc. a/k/a Boston Properties Inc. a/k/a Boston Properties LLC ("Boston Properties"), Boston Properties, Inc., Boston



Properties Limited Partnership, 601 Lexington Avenue Condominium, BP/CGCenter I LLC and BP/CGCenter II LLC (collectively, the “Defendants”), for partial summary judgment; and (2) the cross-motion filed by the plaintiff, Jose Velecela (the “Plaintiff”), for partial summary judgment.

The Plaintiff, a construction worker, commenced this cause seeking to recover damages for personal injuries allegedly sustained in a work-related accident that occurred on August 24, 2015 (the “Accident”).

Presently before the Court are two motions. The motion seeks: (1) summary judgment in favor of the Defendants dismissing the Plaintiff’s common law negligence and Labor Law § 200 claims, as well as certain predicates of his Labor Law § 241 [6] claims; and (2) summary judgment in favor of Boston Properties on its third-party claims against Malatesta Paladino, Inc. (“Malatesta”) for contractual indemnity, common-law indemnification and breach of contract for failure to procure insurance. The Plaintiff’s cross-motion seeks summary judgment on his Labor Law § 240 [6] claim against Boston Properties.

For the following reasons, the motion is granted in part and denied in part, and the cross-motion is denied.

I. Background

The Accident occurred at 601 Lexington Avenue, New York, New York (the “Premises”). The Premises, a corporate condominium, are commonly known as the Citibank Building.

Boston Properties owns and manages the Premises through various corporate entities it controls.

Boston Properties hired Malatesta as an on-call contractor for various jobs at the Premises. The on-call agreement was memorialized in a contract known as a Master Services Agreement.

After the Master Services Agreement was entered into, individual purchase orders were issued between Boston Properties and Malatesta for various, specific jobs at the Premises.

In the summer of 2015, the structural steel in the triangle crown atop the Premises was to be inspected and potentially repaired. Boston Properties retained Malatesta, pursuant to a purchase order issued under the Master Services Agreement, to provide labor and material for scaffolding to be erected and moved in the crown. The scaffolding was erected so that the engineers from Boston Properties’ structural engineering company, Thorton Tomasetti, could inspect the structural steel in the crown.

Malatesta subcontracted the physical labor of erecting the scaffolding to 4-Star Contracting Inc. (“4 Star Contracting”). The latter installed and moved scaffolding inside the triangle crown in August 2015.

The scaffold that was used was a swing scaffold suspended from cables. The cables would

be connected to steel in the top of the crown and dropped down to the scaffold platform. The scaffold had electric motors, which allowed the platform to ride up or down the cables.

On the date of the Accident, 4 Star Contracting was in the process of relocating the scaffold platform to another location in the crown. Two 4-Star Contracting employees were sent to the top of the crown to loosen and hold the ropes/cables while the platform was moved. The Plaintiff and Luis Romero (“Romero”), another 4 Star Contracting employee and the Plaintiff’s supervisor, remained with the scaffold platform. The Plaintiff and Romero were operating the motors on either end of the platform while the ropes/cables were moved up. However, as they were doing so, the platform got stuck on a beam.

Romero then left the platform intending to assist fellow 4-Star Contracting employees with the ropes/cables to help loosen the stuck platform. After Romero left the platform, the Plaintiff activated a motor. The scaffold platform then swung and moved, coming into contact with a structural steel beam and pinning the Plaintiff’s hand between the motor of the scaffold platform and the steel beam.

Boston Properties did not supervise or control 4 Star Contracting’s scaffold work.

II. Discussion

A. The Defendants’ Motion as to the Plaintiff

(i) The Labor Law § 200 and Common-Law Negligence Claims

The Plaintiff does not oppose the Defendants’ application for summary judgment dismissing his Labor Law § 200 and common law negligence claims. “Where a party fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant’s papers may be deemed admitted as there is, in effect, a concession that no question of fact exists” (*144 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 761-62 [2d Dept 2019] [citations omitted]). Accordingly, as the Plaintiff has abandoned his Labor Law § 200 and common law negligence claims, same are dismissed (*see Faith v Town of Goshen*, 167 AD3d 986 [2d Dept 2018]; *Ramirez v Brentwood Union Free Sch. Dist.*, 164 AD3d 702 [2d Dept 2018]).

(ii) The Labor Law § 240 [6] Claim

The Plaintiff does not oppose the Defendants’ application for summary judgment dismissing the Labor Law § 241 [6] claims predicated upon Industrial Code 12 NYCRR § 23-1.5 (c) (general responsibility of employers); 12 NYCRR § 23-1.7 (b) (protection from general hazard); and 12 NYCRR § 23-2.1 (b) (maintenance and housekeeping). The claims predicated upon the subject Industrial Code provisions are thus dismissed as abandoned (*see 144 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757; *Faith v Town of Goshen*, 167 AD3d 986).

The Defendants are not entitled to dismissal of the Labor Law § 241 [6] claim predicated upon 12 NYCRR § 23-5.1 (h). Here, they fail to eliminate triable issues of fact as to whether they violated this Industrial Code provision and whether such violation was a proximate cause of the

Accident (*see Ochoa v JEM Real Estate Co. LLC*, ___ AD3d ___, 2024 NY Slip Op 00194 [2d Dept 2024]).

The Defendants are also not entitled to dismissal of the Labor Law § 241 [6] claim predicated upon 12 NYCRR § 23-5.3 (e) because they did not seek summary judgment disposition relative thereto in their original moving papers. They may not utilize reply papers to obtain this relief.

B. Boston Properties' Motion for Summary Judgment Against Malatesta

The Defendants seek summary judgment on their common-law indemnification, breach of contract for failure to procure insurance and contractual indemnification claims against Malatesta.

(i) Common-Law Indemnification

Boston Properties' claim against Malatesta predicated upon common-law indemnification was dismissed by this Court's Order relative to Malatesta's prior motion for summary judgment (*see* NYSCEF Doc. No. 222). This determination renders Boston Properties' present application on this issue academic. The Court will nonetheless address why Boston Properties is not entitled to summary judgment against Malatesta on a common-law indemnification theory.

"Implied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. Generally, it is available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer. Common-law indemnity imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity" (*Safier v Wakefern Food Corp.*, 220 AD3d 956, 958 [2d Dept 2023] [internal quotation marks and citations omitted]).

A common-law indemnification claim against a contractor must be dismissed when it is shown that the contractor was not actively negligent and that it did not supervise the work of a subcontractor (*see id.*).

Common-law indemnification is not warranted "by [m]ere authority to supervise a subcontractor ... as indemnification may only be imposed against a contractor who exercises actual supervision (*see id.*) [citation omitted]).

The foregoing principles were set forth as follows in *Balcazar v Commet 380, Inc.*, 199 AD3d 403, 404-405 [1st Dept 2021]:

Ergonomic's motion for summary judgment dismissing Owner Defendants' third-party claims for common-law indemnification and contribution should have been granted. There was no evidence that Ergonomic was negligent or that it exercised actual supervision or control over the injury-producing work. Ergonomic did not perform any of the physical work and was not onsite at the time of the accident. To

the extent it might have had authority to supervise the injury producing work, it never exercised such authority, but rather, had subcontracted such contractual duties to Quick, which actually directed and supervised the work. The fact that Ergonomic scheduled and coordinated Quick's and Atlas's work is insufficient to give rise to liability, as the coordinating and scheduling of trades at work sites do not rise to the level of supervision and control necessary to impose liability under a negligence theory [citations omitted]).

The entire steel renovation project was subcontracted by Malatesta to 4 Star Contracting. Malatesta did not provide any employees, laborers, equipment, materials, or scaffolds. Malatesta did not inspect, supervise, or control the work of 4 Star Contracting. Malatesta employees were not at the Premises at the time of the Accident. Malatesta did not perform any of the work that the Plaintiff implicates as the cause of the Accident.

The record thus discloses that Malatesta was not negligent with respect to the Accident and that it did not exercise actual supervision and control over the injury-producing work. Boston Properties is thus not entitled to common-law indemnification claim against Malatesta.

(ii) Insurance Procurement

Boston Properties' claim against Malatesta based on breach of contract for failure to procure insurance was also dismissed on Malatesta's motion for summary judgment (*see* NYSCEF Doc. No. 222). This determination renders Boston Properties' present application on this issue academic. Nonetheless, the Court will address why there is no valid claim for failure to obtain insurance.

Malatesta, as required by the agreement with Boston Properties, procured an insurance policy from The Travelers Indemnity Company ("The Travelers") that contains a Blanket Additional Insured (Contractors)-New York endorsement, which states, *inter alia*, as follows:

"WHO IS INSURED - (Section II) is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by "your work" for that additional insured.

The Travelers is not providing Boston Properties with a defense and indemnity in this cause, indicating as follows in a letter dated May 5, 2021: "[w]e do not know the loss to have been caused by Malatesta Paladino Inc.'s work or that of anyone on its behalf, nor do we know there to be such allegation by plaintiff. As such, we are unable to provide additional insured coverage to Boston Properties Management Inc. a/k/a Boston Properties, Inc. and/or Boston Properties, LLC at this time."

Although The Travelers has declined to provide coverage to Boston Properties, this does not give rise to a claim against Malatesta for failure to procure insurance. The case of *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004], is controlling on this issue: “[t]he record establishes that Property Resources purchased a liability policy from CGU/American Employers Insurance Company, with a blanket endorsement for contractually designated additional insureds. Based on this coverage, we find Morse Diesel’s claim that Property Resources breached its obligation to procure insurance untenable. The insurer’s refusal to indemnify Morse Diesel under the coverage purchased by Property Resources does not alter this conclusion” [citations omitted]; see *Payne v NSH Community Servs., Inc.*, 203 AD3d 546 [1st Dept 2022]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090 [2d Dept 2018]).

(i) **Contractual Indemnification**

Boston Properties contends that it is entitled to summary judgment on its contractual indemnification cause of action against Malatesta. Preliminarily, in connection with Malatesta’s prior motion for summary judgment, the Court rejected Malatesta’s argument that the indemnification clause in the agreement between the parties is unenforceable because it is violative of GOL § 5-322.1 (see *Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]; *Merrick v Macerich Company*, ___ AD3d ___, 2023 NY Slip Op 00234 [1st Dept 2024]; *Yang v City of New York*, 207 AD3d 791 [2d Dept 2022]).

The indemnification clause in the agreement between Boston Properties and Malatesta states as follows:

8.4 Indemnity CONTRACTOR Shall Indemnify Defend and Hold Harmless The Owner Entities from any claims, demands, debts, suites, losses, damages, fines, penalties, liabilities, costs, and expenses, including attorney’s fees, expenses, Court costs or causes of action whatsoever of every name in nature, both in law and equity i) arising from or claimed to have arisen from the omission, fault, act, negligence, or misconduct of CONTRACTOR or CONTRACTOR’S subcontractors of any tier, licensees, invitees, agents, servants or employees, or (ii) resulting from the failure of CONTRACTOR to perform and discharge its covenants and obligations under this Agreement. CONTRACTOR agrees that the obligation assumed herein shall survive the expiration of this Agreement. CONTRACTOR shall require all subcontractors of any tier to provide a similar indemnity to the Owner Entities.

The application for contractual indemnification is denied as premature. Malatesta has been determined not to have been negligent; thus, the indemnification agreement is not triggered on this ground. There has been no finding that the Plaintiff’s causes of action arise out of the omission, fault, act, negligence, or misconduct of Malatesta’s subcontractor, 4 Star Contracting. Boston Properties also fails to show that Malatesta failed to perform and discharge its covenants and obligations under the agreement. It should be noted on this issue that Boston Properties argues in opposition to the Plaintiff’s cross-motion for partial summary judgment that the Plaintiff was the sole proximate cause of the Accident.

It should be further noted that the Plaintiff does not allege the Accident was caused by any omission, fault, act, negligence, or misconduct committed by either Malatesta or 4 Star Contracting, or that Malatesta failed to perform its covenants and obligations under the agreement. Here, neither Malatesta nor 4 Star Contracting have been sued by the Plaintiff. The indemnification provision is thus not triggered for these additional reasons.

C. The Plaintiff's Cross-Motion for Summary Judgment

The Plaintiff cross-moves for partial summary judgment against Boston Properties on his Labor Law 241 [6] cause of action predicated upon 12 NYCRR §§ 23-5.1 (h) and 23.5.8 (c) (1).

“Labor Law § 241[6] imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers. To establish liability under Labor Law § 241[6], a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (*Guaman v 178 Court Street, LLC*, 200 AD3d 655, 657 [2d Dept 2021]).

The record reveals that there are triable issues of fact as to whether 12 NYCRR §§ 23-5.1 (h) and 23.5.8 (c) (1) were violated and whether any such violation was a proximate cause of the Accident. Here, Romero, the Plaintiff's supervisor, testified at his deposition that he specifically directed the Plaintiff not to touch anything while he went to determine why there was an issue with the ropes. However, immediately after Romero left the platform where he and the Plaintiff had been standing, the Plaintiff activated the scaffold motor, causing the scaffold platform to move and the Accident. This testimony raises a triable issue of fact as to whether the Accident was caused by violation of 12 NYCRR §§ 23-5.1 (h) and 23.5.8 (c) (1) or whether the sole proximate cause of the Accident was the Plaintiff's decision, allegedly taken contrary to Romero's directive, to turn the scaffold motor on (*see Sutherland v Tutor Perini Bldg. Corp.*, 207 AD3d 159 [1st Dept 2022]; *Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588 [1st Dept 2018]). The Plaintiff's motion for partial summary judgment is therefore denied.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff's claims predicated upon Labor Law § 200 and common law negligence against the Defendants are dismissed; and it is further,

ORDERED, that the Plaintiff's Labor Law § 241 [6] claim predicated upon Industrial Code 12 NYCRR §§ 23-1.5 (c); 12 NYCRR § 23-1.7 (b); and 12 NYCRR § 23-2.1 (b) against the Defendants is dismissed; and it is further,

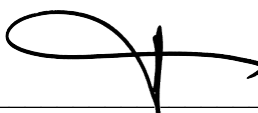
ORDERED, that the Defendants' motion as directed to the Plaintiff is otherwise denied; and it is further,

ORDERED, that the branch of the motion for summary judgment in favor of Boston Properties against Malatesta is denied; and it is further,

ORDERED, that the Plaintiff's cross-motion for summary judgment against Boston Properties is denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
February 13, 2024



MOJGAN C. LANCMAN, J.S.C.

