

Bordonaro v E.C. Provini Co., Inc.

2025 NY Slip Op 30274(U)

January 24, 2025

Supreme Court, New York County

Docket Number: Index No. 157409/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 157409/2020

STEVEN BORDONARO,

MOTION DATE 04/02/2024

Plaintiff,

MOTION SEQ. NO. 008

- v -

E.C. PROVINI CO., INC., BATH & BODY WORKS, LLC, L BRANDS, INC, 441 LEXINGTON AVENUE CO. LIMITED PARTNERSHIP, L BRANDS STORE DESIGN & CONSTRUCTION, INC., ELITE DELIVERY SYSTEMS, LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

E.C. PROVINI CO., INC.

Third-Party
Index No. 596019/2020

Plaintiff,

-against-

CBI DRYWALL, CORP., ELITE DELIVERY SYSTEMS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 187, 188, 189, 190, 191, 192, 193, 194, 220, 225, 227, 228, 229, 230, 231, 232, 233, 234, 245, 246, 253, 254, 255

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of September 26, 2024, Third-Party Defendant CBI Drywall Corp.'s ("CBI") motion for summary judgment dismissing Plaintiff's Complaint and Third-Party Plaintiff E.C. Provini Co., Inc.'s ("Provini") Third-Party Complaint and all "counterclaims" asserted against it is granted in part and denied in part.

I. Background

On August 1, 2019, CBI employed Plaintiff as a carpenter at the Bath and Body Works at 441 Lexington Avenue (the "Site") (NYSCEF Doc. 176 at 13-14; 37; 50). Provini was the general

contractor (*Id.* at 56). On the date of Plaintiff's accident, he was unloading cabinets and counters from a truck using a pallet jack (*Id.* at 107-108).¹ Plaintiff used a pallet jack to move a thousand-pound cabinet out of the truck (*Id.* at 209). Plaintiff lost control, and the weight of the cabinet pushed Plaintiff off the truck (*Id.* at 218-9; 232). As a result, Plaintiff allegedly fractured his left leg and tore his left rotator cuff. He now sues for damages pursuant to New York Labor Law §§ 240(1), 241(6), and 200. In this motion, CBI seeks dismissal of Plaintiff's Complaint, Provini's Third-Party Complaint, and all crossclaims asserted against it.

II. Discussion

A. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

B. Labor Law § 240(1)

The branch of the motion seeking dismissal of Plaintiff's Labor Law § 240(1) cause of action is denied. The Court of Appeals has instructed Courts to interpret Labor Law §240(1) liberally to accomplish its purpose of ensuring workers are properly protected against elevation

¹ Plaintiff referred in his deposition to the device as a “pump jack.” However, multiple other parties, the Industrial Code, and First Department precedent refer to an instrument known as a “pallet jack.” It is this Court's understanding that the pump jack or “pump truck” used by Plaintiff is a kind of pallet jack and the terms are used interchangeably.

related hazards (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). The First Department recently analyzed the insufficiency of pallet jacks as a safety device when workers move large loads from the back of trucks (*see Schoendorf v 589 Fifth TIC I LLC*, 206 AD3d 416, 417 [1st Dept 2022]) and found that a pallet jack was insufficient in view of the weight of the elevator platform and the force it was able to generate (*Id.* citing *Ali v Sloan-Kettering Inst. For Cancer Research*, 176 AD3d 561 [1st Dept 2019]; *see also Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491 [1st Dept 2017]). While CBI relies on the Court of Appeals case *Toefer v Long Is. R.R.*, 4 NY3d 399 (2005), they fail to apply the “force of gravity” test described in subsequent Court of Appeals case law (*see Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009]; *see also Ali v Sloan-Kettering, supra*). Here, it is Plaintiff’s testimony that the force of gravity on the thousand-pound cabinet pushed him off the truck. Plaintiff and other witnesses testified that the accident could have been prevented had a forklift been provided, and that it was not infeasible to have a forklift on site (NYSCEF Doc. 180 at 42; 48-49).

C. Labor Law §241(6)

CBI’s motion seeking dismissal of Plaintiff’s Labor Law § 241(6) claim is granted in part and denied in part. Here, Plaintiff asserts a violation of Labor Law § 241(6) predicated on a violation of Industrial Code 23-1.5(c).² However, there is no evidence that the pallet jacks used by Plaintiff were defective – rather Plaintiff argues that the pallet jacks were insufficient, and he should have been provided a forklift. Because there is no evidence that the pallet jacks were defective, Industrial Code 23-1.5(c) is inapplicable. Moreover, Plaintiff’s Labor Law § 241(6)

² 12 NYCRR 23-1.5(c) states that “(1) [n]o employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition. (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon. (3) 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 damages.”

claim predicated on a violation of Industrial Code 23-1.27 is dismissed as the First Department has already found that section does not apply to pallet jacks (*Wegner v State Street Bank & Trust Co. of Connecticut Nat. Ass'n*, 298 AD2d 211 [1st Dept 2002]).

However, the motion is denied as it related to Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-9.8. Certain sections of this provision apply to pallet jacks and prohibit pallet jacks from being operated on uneven surfaces which would "make upsetting likely" (*see* 12 NYCRR § 23-9.8[d] and [e]). Here, CBI has not met its burden on summary judgment to show that there were no violations of 12 NYCRR § 23-9.8. Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-6.1³ likewise survives as there is an issue of fact as to whether the cabinet was an "excess load" pursuant to § 23-6.1(d).

D. Labor Law § 200

The branch of the motion seeking dismissal of Plaintiff's Labor Law § 200 claim is denied. Where a plaintiff's injury is caused by a dangerous condition, liability attaches if the owner or general contractor had actual or constructive notice of it (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). On the other hand, where an injury was caused by the manner and means of the work, including the equipment used, and owner or general contractor may be liable if they exercised supervisory control over the injury producing work (*id.*). CBI played a role in the manner and means of Plaintiff's work. There is an issue of fact as to whether CBI's instruction to Plaintiff to unload the materials without a forklift caused Plaintiff's accident.

³ In pertinent part, 12 NYCRR 23-6.1(d) provides that "[m]aterial hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer."

E. Third-Party Complaint and Crossclaims

CBI's motion for summary judgment dismissing Provini's Third-Party Complaint is denied as premature. (*York v Tappan Zee Constructors, LLC*, 224 AD3d 527, 529 [1st Dept 2024]; *Bradley v NYU Langone Hospitals*, 223 AD3d 509, 511-512 [1st Dept 2024]).

CBI's motion for summary judgment dismissing Defendants Bath & Body Works, LLC, L Brands, Inc., 441 Lexington Avenue Co. Limited Partnership, and Gordon Property Group's contractual indemnification claims asserted against it is granted. Contracts imposing obligations to indemnify must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed (*Needham & Company LLC v UPHealth Holdings, Inc.*, 212 AD3d 561 [1st Dept 2023]; *Tavarez v LIC Dev. Owner, L.P.*, 205 AD3d 565 [1st Dept 2022]). The contract executed between CBI Drywall, Corp. and the general contractor, E.C. Provini Co., Inc. lists the owner to be indemnified only as L Brands Store Design & Construction, Inc. (NYSCEF Doc. 202 at ¶ 1.1). While the indemnification clause mentions E.C. Provini Co. and the owner, it makes no reference to any of the other named Defendants.

While Bath & Body Works, LLC, L Brands, Inc., 441 Lexington Avenue Co. Limited Partnership, and Gordon Property Group attempt to incorporate the terms of other contracts to bring them within the definition of "owner" to obtain contractual indemnification, incorporation clauses which incorporate a prime contract clause by reference into a subcontract may not bind a subcontractor to an indemnification agreement found in the prime contract (*Waitkus v Metropolitan Housing Partners*, 50 AD3d 260, 261 [1st Dept 2008]). Moreover, the subcontract executed between Provini and CBI contains an entire agreement clause which states there are no other agreements or understandings made between Provini and CBI aside from the subcontractor agreement (*id.* at ¶ 28.1). Therefore, these claims for contractual indemnification are dismissed.

Accordingly, it is hereby,

ORDERED Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Plaintiff's Complaint and Third-Party Plaintiff E.C. Provini Co., Inc.'s Third-Party Complaint and all "counterclaims" asserted against it is granted in part and denied in part; and it is further

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Plaintiff's Labor Law § 240(1) claim is denied; and it is further

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claims predicated on violations of Industrial Code §§ 23-1.5 and 1.27 are granted, and these claims are dismissed; and it is further

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claims predicated on violations of Industrial Code §§ 23-9.8 and 23-6.1 are denied; and it is further

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Plaintiff's Labor Law § 200 claim is denied; and it is further

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Defendant/Third-Party Plaintiff E.C. Provini Co., Inc.'s Third-Party Complaint is denied; and it is further

ORDERED that Third-Party Defendant CBI Drywall Corp.'s motion for summary judgment dismissing Defendants Bath & Body Works, LLC, L Brands, Inc., 441 Lexington Avenue Co. Limited Partnership, and Gordon Property Group's claims for contractual indemnification asserted against it is granted, and these claims are hereby dismissed; and it is further

ORDERED that within ten days of entry, counsel for Third-Party Defendant shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

<u>1/24/2025</u> DATE		<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE