

Reyes v Broadway 26 Waterview LLC

2025 NY Slip Op 31077(U)

April 1, 2025

Supreme Court, Kings County

Docket Number: Index No. 519089/2019

Judge: Gina Abadi

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.

defendant/third-party plaintiff Broadway 26 Waterview LLC (Broadway). Concurrently, Broadway moves for an order, pursuant to CPLR § 3212(b): (1) granting it summary judgment for contractual indemnification against third-party defendant E and G Modica Contracting Inc. (Modica);¹ and (2) dismissing plaintiff's Labor Law § 200/common-law negligence claims against it.²

On August 2, 2019, plaintiff, a plasterer employed by Modica, was allegedly injured when the Baker scaffold on which he was then performing his wall-plastering work in a commercial building owned by Broadway, shifted or moved underneath him, causing him to fall approximately six feet to the concrete floor below. The scaffold was owned by Modica and was provided by it for plaintiff to perform his work. Plaintiff received all of his work instructions exclusively from Modica's more senior workers.

Before the accident, Broadway had retained Modica to perform plastering and other renovation work, pursuant to: (1) the Proposal, dated July 6, 2019, from Modica and Broadway; and (2) Purchase Order Number 002600-50310, dated July 11, 2019, from Broadway to Modica (collectively, the contract).³ Plaintiff's plastering at the time of the

¹ In the course of this case, plaintiff discontinued all his direct claims against Modica (NYSCEF Doc No. 44).

² Although Broadway's Notice of Motion broadly seeks (in ¶¶ 1 and 2 thereof) summary judgment on all of its third-party causes of action against Modica, as well as dismissal of all cross-claims against it (NYSCEF Doc No. 145), Broadway's accompanying motion papers, as well as its reply in further support of its motion, make it clear that Broadway seeks only two types of relief: (1) summary judgment on its contractual indemnification claim against Modica; and (2) dismissal of plaintiff's Labor Law § 200/common-law negligence claims against it. *See* Broadway's Affirmation in Support, ¶¶ 47-60; Broadway's Memorandum of Law, ¶¶ 5-14; Broadway's Affirmation in Reply, ¶¶ 8-12 (NYSCEF Doc Nos. 155, 156, and 179, respectively).

³ The Proposal, which is signed by both Modica and Broadway, is annexed as Exhibit A to Modica's Notice to Admit to Broadway (NYSCEF Doc No. 139). The Purchase Order, which is not signed by either Modica or Broadway, is annexed as Exhibit B to Modica's aforementioned Notice to Admit (NYSCEF Doc No. 140). Broadway's failure to respond to Modica's Notice to Admit, which (in ¶ 1 at NYSCEF Doc No. 155) requested that Broadway admit that the Proposal and Purchase Order "constitute all parts of the agreement existing between Broadway . . . and . . . Modica . . . to perform the construction project . . . in progress at the time of the alleged incident on August 2, 2019," constituted Broadway's statutory admission that the Proposal and Purchase Order formed and unified the parties' (footnote continued)

accident was part of Modica's work under the contract. Modica completed the work under the contract later in the year of the accident, and Broadway paid Modica for its work in accordance with the contract.

Plaintiff commenced this action against Broadway (among others) alleging, inter alia, a violation of Labor Law § 240 (1). Broadway impleaded Modica for, inter alia, contractual indemnification. After discovery, plaintiff moved for summary judgment on the issue of liability against Broadway on his Labor Law § 240 (1) claim. Separately, Broadway moved for summary judgment on its contractual indemnification claim against Modica and for dismissal of plaintiff's Labor Law § 200/common-law negligence claims against it.

Plaintiff's Motion

"Labor Law § 240 (1) imposes upon owners . . . a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites." *Guaman v 178 Ct. St., LLC*, 200 AD3d 655, 657 (2d Dept 2021). "[T]o prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries." *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 (2d Dept 2007). "A worker's comparative negligence is not a defense to a cause of action under Labor Law § 240 (1) and does not effect a reduction

contract. See CPLR 3123(b). Likewise, Modica's service of the aforementioned Notice to Admit on Broadway constituted its own implied admission that the Proposal and Purchase Order formed and unified its contract with Broadway. Modica's belated hypothesizing (in ¶ 44 of its Memorandum in Opposition to Broadway's Motion at NYSCEF Doc No. 169) that "if [it] knew that all the pages of its attachments to its [N]otice to [A]dmit . . . were part of the contract between [it] and Broadway, it would not [have] need[ed] a notice to admit as it would be able to obtain an affidavit from [its] agent . . . to authenticate the documents," overlooks the undisputed fact that Broadway was unable in the course of this action to depose Modica's owner Matt/Matteo Zocco who signed the Proposal on Modica's behalf (NYSCEF Doc No. 154 [an e-mail chain between respective counsel to Broadway and Modica]).

in liability.” *Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1024 (2d Dept 2018). “Although a motion for summary judgment should not be granted where the facts are in dispute, the dispute must relate to *material* issues.” *Carrion v City of New York*, 111 AD3d 872, 873 (2d Dept 2013) (internal citations and quotation marks omitted; emphasis in the original).

Here, plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on so much of his amended complaint as alleged that Broadway violated Labor Law § 240 (1) through the submission of two sessions of his deposition testimony, which demonstrated that the scaffold failed to afford him proper protection for the work being performed, and that this failure was a proximate cause of his fall from the scaffold and his ensuing injuries. *See Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1382 (2d Dept 2023); *Masmalaj v New York City Economic Dev. Corp.*, 197 AD3d 1292, 1293 (2d Dept 2021); *Carrion*, 111 AD3d at 873. “The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in [his] favor.” *Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 (2d Dept 2011).

In opposition, Broadway and Modica (collectively, defendants) failed to raise a material issue of fact. “The defendant[s] did not offer any evidence, other than mere speculation, to refute the plaintiff[’s] showing or to raise a bona fide issue as to how the accident occurred.” *Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 (2d Dept 2001).

See Wilson, 219 AD3d at 1382; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1094 (2d Dept 2018); *Carrion*, 111 AD3d at 873; *Campbell*, 80 AD3d at 722.⁴

Contrary to defendants' contentions, it is irrelevant whether plaintiff's scaffold was defective, or not. The crucial point is that, at the time and place of the accident, plaintiff's scaffold was unsecured and inadequate to provide him with proper protection for the work he was then performing. Modica's contention that its status as a mere contractor (rather than as a general contractor) somehow changes the nature of Broadway's liability to plaintiff, misses the mark by a wide margin.⁵ Broadway's statutory liability as the building owner to plaintiff attaches by virtue of his use of a scaffold to perform the contracted-for work, irrespective of whether Modica was the project's contractor, general contractor, or someone else.⁶ Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, as more fully set forth in the decretal paragraphs below.

Broadway's Motion

As noted, Broadway initially seeks summary judgment on its contractual indemnification claim against Modica. As a general matter, "a party who has been held liable to an injured worker solely on the basis of the statutory liability imposed by

⁴ See also *Lopes v County of Suffolk*, ___ AD3d ___, 2025 NY Slip Op 01619, *2 (2d Dept 2025); *Yaucan v Hawthorne Vil, LLC*, 155 AD3d 924, 926 (2d Dept 2017); *Guaman v New Sprout Presbyt. Church of New York*, 33 AD3d 758, 759 (2d Dept 2006); *deSousa v Dayton T. Brown, Inc.*, 280 AD2d 447, 448 (2d Dept 2001); *Singh v Eisen*, 260 AD2d 363, 363 (2d Dept 1999).

⁵ Modica's Memorandum of Law in Opposition to Plaintiff's Motion, ¶¶ 36-37 (NYSCEF Doc No. 165).

⁶ Modica's reference (in ¶¶ 35 and 38 of its Memorandum of Law in Opposition Plaintiff's Motion) to *Crawford v Leimzider*, 100 AD2d 568 (2d Dept 1984), along with its separately filed keycite printout for that case (NYSCEF Doc No. 164), are inapposite to the facts of this case.

section 240 (1), without any fault on its part, is entitled to recover under a contract of indemnity.” *Jara v Costco Wholesale Corp.*, 178 AD3d 687, 690 (2d Dept 2019) (internal quotation marks and alterations omitted). “A party’s right to contractual indemnification depends upon the specific language of the relevant contract.” *Goodlow v 724 Fifth Ave. Realty, LLC*, 127 AD3d 1138, 1140 (2d Dept 2015). In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor.” *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 (2d Dept 2009). “Upon a party’s prima facie showing of entitlement to contractual indemnification, the burden shifts to the party opposing the motion, who must raise a triable issue of fact as to the enforceability of the contractual indemnification clause.” *Mejia v Cohn*, 188 AD3d 1035, 1038 (2d Dept 2020).

Here, the express language of the Purchase Order (in ¶ 10) obligates Modica to indemnify Broadway, among other things, for all liability arising from personal injuries “directly or indirectly arising or alleged to arise out of or in connection with or due to [Modica’s] performance or failure to perform any provisions of the Purchase Order.” It is undisputed that plaintiff’s alleged injuries resulted from the performance of the contracted-for work under the Purchase Order. *See De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 607 (2d Dept 2017). Broadway also demonstrated that it was not negligent, that it did not commit any tortious acts with respect to the happening of plaintiff’s accident, and that it did not direct, control, or supervise the manner in which plaintiff performed his work. *See Mejia*, 188 AD3d at 1038; *Jara*, 178 AD3d at 691. Broadway thus established its prima facie entitlement to judgment as a matter of law on its claim for contractual indemnification

against Modica. *See Jara*, 178 AD3d at 691; *Marulanda v Vance Assoc., LLC*, 160 AD3d 711, 712-713 (2018); *Shea v Bloomberg, L.P.*, 124 AD3d 621, 623 (2d Dept 2015).⁷

In opposition, Modica failed to raise a triable issue of fact. Contrary to Modica's contention, the Purchase Order, in conjunction with the Proposal, formed and unified the parties' contract. Although the Purchase Order (unlike the Proposal) was not signed by either party, the parties' course of conduct (including Modica's performance of the contracted-for work and Broadway's payment therefor) serves as the "objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005], *rearg denied* 5 NY3d 746 [2005]), and "corroborated the existence and terms of the [contract]." *Nash v Walker Mem. Baptist Church, Inc.*, 220 AD3d 595, 596 (1st Dept 2023).⁸ Thus, Broadway is entitled to contractual indemnification from Modica, as more fully set forth in the decretal paragraphs below.

The remaining branch of Broadway's motion for dismissal of plaintiff's claims sounding in Labor Law § 200/common-law negligence need not detain the Court. "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed at a work site, an owner . . . of real property must have authority to exercise supervision and control over the work at the site." *Gallelo v MARJ Distributors, Inc.*,

⁷ *See also Alfieri v ABB, Inc.*, 227 AD3d 941, 942 (2d Dept 2024); *Cedillo v Nautilus Realty Ltd. Partnership*, 219 AD3d 1300, 1302 (2d Dept 2023).

⁸ Modica's reliance on *Guthorn v Village of Saranac Lake*, 169 AD3d 1298, 1299 (3d Dept 2019), is misplaced because the purported indemnification agreement in that case "was not signed and executed until after [the plaintiff's] accident and . . . was never intended [to] . . . apply retroactively." Modica's citations to the deposition testimony of Broadway's superintendent in an attempt to raise doubt as to whether Broadway sent the entire Purchase Order to Modica does not excuse the latter from submitting its own proof (for example, by way of its owner's affidavit in opposition). *See* Modica's Memorandum of Law in Opposition to Broadway's Motion, ¶¶ 30 and 38-39, respectively (NYSCEF Doc No. 169).

50 AD3d 734, 735 (2d Dept 2008). “However, the right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence.” *Torres v City of New York*, 127 AD3d 1163, 1165 (2d Dept 2015) (internal quotation marks and alterations omitted).

Here, Broadway established, as a matter of law, that it did not have the authority to control, direct, or supervise the method or manner in which the work was performed, nor did it control or supervise plaintiff’s work. *See Torres*, 127 AD3d at 1165. In opposition to this branch of Broadway’s motion, neither plaintiff nor Modica addressed the merits of plaintiff’s Labor Law § 200/common-law negligence claims in their respective opposition or reply papers.

The Court considered the parties’ remaining contentions and found them either unavailing or moot in light of its determination.

Accordingly, it is

ORDERED that in Seq. No. 6, plaintiff’s motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim against Broadway is granted; and it is further

ORDERED that in Seq. No. 7, Broadway’s motion for summary judgment on its contractual indemnification claim against Modica and for dismissal of plaintiff’s Labor Law § 200/common-law negligence claims against it is granted to the extent set forth herein; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Decision and Order of this Court.

ENTER



HON. GINA ABADI
J. S. C.