Supreme Court of the State of New York
County of Kings

Part LL1

JERZY GARBACZ,

Plaintiff,

against

ARC NYC123WILLIAM, LLC, JOKR US CORP., JOKR FULFILLMENT SERVICES, LLC, JOKR – 4 DUTCH STREET, LLC, SAFETY BUILDING CLEANING CORP. d/b/a SAFETY FACILITIES SERVICES,

Defendants.

JOKR US CORP., JOKR FULFILLMENT SERVICES, LLC, AND JOKR - 4 DUTCH STREET, LLC,

Third-Party Plaintiffs,

against

APOLLO ELECTRIC NYG I,

Third-Party Defendant.

SAFETY BUILDING CLEANING CORP. d/b/a SAFETY FACILITIES SERVICES,

Second Third-Party Plaintiff,

against

APOLLO ELECTRIC NYG, INC.,

Second Third-Party Defendant.

ARC NYC123WILLIAM, LLC,

Third Third-Party Plaintiff,

against

Index Number 528855/2021
Seqs. 003–008

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–6
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	6–17
Replying Affidavits	18–25
Exhibits	
Other	

[* 1]

APOLLO ELECTRIC NYG, INC.,

Third Third-Party Defendant.

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 003), Jokr US Corp., Jokr Fulfillment Services, LLC, and Jokr – 4 Dutch Street, LLC (Jokr)'s motion for summary judgment (Seq. 004), Arc NYC123William, LLC (Arc)'s motion for summary judgment (Seq. 005), Safety Building Cleaning Corp. d/b/a Safety Facilities Services (Safety)'s motion for summary judgment (Seq. 006), Apollo Electric NYG Inc. (Apollo)'s motion for summary judgment (Seq. 007), and Safety's cross-motion on plaintiff's Labor Law § 240 (1) claim (Seq. 008) are decided as follows:

Procedural Posture & Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on September 7, 2021 in the basement of 4 Dutch Street, New York, NY. The following facts are undisputed: The premises was owned by Arc. Jokr was a commercial tenant of the premises. Jokr retained Safety as its "primary cleaning vendor" (Skye Volkening-Jeffrey, Jokr representative, EBT at 24). On the date of plaintiff's accident, Jokr contacted Safety about a light that was not working at the premises (*id.* at 35–36). Safety contacted Apollo to come to the premises and fix the light (Jerzy Wasilewski, Apollo representative, EBT at 27). Apollo sent plaintiff to the site to perform the work (*id.*)

Plaintiff had the authority to decide what work needed to be done when he was dispatched to the site (Garbacz EBT at 61). Plaintiff retrieved a ladder from his truck and climbed the ladder to troubleshoot the inoperative light (*id.* at 69–71). The plaintiff testified that he was only provided with cloth gloves (*id.* at 45). Mr. Wasilewski testified that plaintiff was provided with electricians' gloves (Wasilewski EBT at 78). Plaintiff admitted that he did not test

the line and did not turn off the power before he began to inspect the premises. While plaintiff was running a cord connected to the light through his hands, he touched a spot "wrapped in old electrical tape" and experienced a "no let go" electric shock (Garbacz EBT at 69–71). A "few seconds" after being electrocuted, "the ladder rocked" and plaintiff "fell down" with the ladder on top of him (*id.* at 45, 85–86).

Arc representative Liridon Rama testified that Arc employed four in-house engineers (Rama EBT at 27). Arc was supposed to be notified by the tenant when electrical work was being done at the premises so that one of the engineers could de-energize the system (*id.* at 28–29). It is undisputed that Arc was not notified that this work was being done at the premises.

Mr. Wasilewski further testified that a week later, on September 14, 2021, another Apollo employee returned to the site to finish the project plaintiff had begun (Wasilewski EBT at 52. Mr. Wasilewski testified that a report from September 14th "says that [Apollo] replaced [the fixture] because it say [sic] providing one and installing lighting fixture" (*id.* at 53). Mr. Wasilewski denied actual knowledge of who went to the site and who performed the work (*id.* at 53–54).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure or absence of a safety device enumerated by the statute (*e.g.* a ladder) is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

As an initial matter, the protections of Labor Law § 240 (1) apply when an individual is performing activity covered by the statute (*Joblon v Solow*, 91 NY2d 457, 465 [1998]). The "merely investigatory inspection phase" before performing a covered task is not covered work; however "the question whether a particular inspection falls within [240 (1)] must be determined on a case-by-case basis, depending on the context of the work" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 883 [2d Dept 2003]). In the Second Department, fixing component parts within a light fixture, like the ballast, is not covered work (*Guevera v Simon Prop. Group, Inc.*, 134 AD3d 899 [2d Dept 2015]). Conversely, replacing an overhead light fixture is covered work, and not routine maintenance (*Eisenstein v Board of Mgrs. Of Oaks at La Tourette Condo. Sections I-IV*, 43 AD3d 987, 987–988 [2d Dept 2007]).

Here, the plaintiff was engaged in initial inspection of the site and it is undisputed that he had authority to either repair or replace the light fixture. Mr. Wasilewski testified that the fixture was ultimately replaced on September 14 following the occurrence. In the absence of any testimony that there was an intervening event that changed the condition of the light and created a novel requirement that the fixture be replaced, it can reasonably be inferred that the plaintiff would have replaced the fixture on September 7 if he had not been electrocuted. The plaintiff was, therefore, performing a component of a covered task at the time of his accident.

Furthermore, plaintiff testified that the ladder he was on "moved" before he fell. This testimony is sufficient to show that the ladder was *a* proximate cause of the plaintiff's accident (*see Lacey v Turner Const. Co.*, 275 AD2d 734 [2d Dept 2000]). This testimony differentiates the instant action from the two Court of Appeals cases relied on by defendants. In *Nazario v 222 Broadway, LLC*, there was no evidence that the ladder failed, and therefore a question of fact as to whether plaintiff fell because of the electric shock or because of an inadequate safety device (28 NY3d 1054 [2016]). In *Cutaia v Board of Managers of 160/170 Varick Street Condominium*, the plaintiff lost consciousness and was unable to provide knowledgeable testimony about what caused him to fall. Here, the plaintiff testified that an enumerated safety device failed; the fact that there was an additional proximate cause does not rebut plaintiff's *prima facie* showing. While the conflict between plaintiff's testimony and Mr. Wasilewski's testimony as to whether plaintiff was provided with electricians' gloves is not immaterial in the abstract, it is insufficient to raise a material issue of fact as to whether the plaintiff was the sole proximate cause of his accident in light of the unrebutted testimony that a statutory violation, the ladder moving, was *a* proximate cause of plaintiff's accident (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *see also Keen v Tishman Construction Corporation of New York*, 233 AD3d 1001 [2d Dept 2024]). Furthermore, the record is clear that Arc was supposed to supply an electrician to de-energize the system before electrical work was performed and that Jokr failed to notify Arc of the electrical work being performed. The result was that the system remained energized while plaintiff was working, which was also *a* proximate cause of the plaintiff's electrocution and subsequent fall from the ladder.

Therefore, plaintiff's motion is therefore granted with respect to his Labor Law § 240 (1).

Labor Law § 241 (6)

Like Labor Law § 240 (1), a plaintiff must show that he was performing covered work in order to recover under Labor Law § 241 (6). However, covered work under Labor Law § 241 (1) is narrower than under § 240 (1), including only "construction, excavation, and demolition" (*Irizarry v State of New York*, 35 AD3d 665 [2d Dept 2006]). The plaintiff contends that *Eisenstein, supra*, extends § 241 (6) to the replacement of light fixtures. This is incorrect, as *Eisenstein* only addresses Labor Law § 240 (1). Therefore, in the absence of any evidence that plaintiff was engaged in construction, excavation, or demolition, defendants' motions are granted with respect to plaintiff's Labor Law § 241 (6) claim (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]).

Labor Law § 200

As an initial matter, plaintiff does not oppose Arc's motion with respect to plaintiff's Labor Law § 200 claim. Arc's motion is therefore granted and the Labor Law § 200 claim against it is dismissed.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (id.).

In the instant action, defendants contend that the plaintiff cannot recover for injuries he sustained due to the dangerous condition that plaintiff was hired to remediate. However, the cases cited by defendants involve trip-and-fall scenarios where a plaintiff was required to keep an area free from debris and subsequently tripped on debris in that area (*see e.g. Annicaro v Corporate Suites, Inc.*, 98 AD3d 542 [2d Dept 2012]). Here, plaintiff testified that he was electrocuted when he touched a portion of cord that was wrapped in old electrical tape. No party testified with actual knowledge about what entity wrapped the cord with tape or for how long the condition had existed. There are, therefore, questions of fact about whether defendants caused or created the condition and whether the defendants had actual or constructive notice of the condition. Defendants' motions, besides Arc's, are denied as to Labor Law § 200.

Contractual Indemnification

To prevail on the claim for contractual indemnification, the sub-contractor must show that they are not liable for indemnification in this instance based on the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York,* 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "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" (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]).

Arc and Jokr entered into a commercial lease on June 21, 2021. The lease required the tenant to indemnify the landlord for claims "arising from or in connection with" the conduct, management, or any work done or condition created by the tenant (lease at article 21). Since the plaintiff did not oppose Arc's motion on his Labor Law § 200 claim and since there is no evidence of Arc's active negligence, and since the accident occurred at the premises leased by

Jokr during the course of work performed for Jokr's benefit, Arc's motion for defense and contractual indemnification against Jokr is granted.

Apollo and Safety entered into a sub-contract on March 11, 2021. Apollo agreed to "indemnify, defend and hold Contractor [Safety] . . . and any Client(s) identified in a SOW [statement of work] (the Contractor Indemnitees) harmless" for damages "arising out of or in connection" with the statement of work (sub-contract at Part 12).

Jokr contends that it was a client of Safety and that the emails from Safety to Apollo constitute a statement of work. Notably, the sub-contract does not define "statement of work," and Mr. Wasilewsky testified that he did not know what "SOW" stood for (Wasilesky EBT at 44). Purchase orders can constitute contracts sufficient to trigger contractual indemnification provisions (*see Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715 [2d Dept 2006]). Safety makes two arguments of its own. First, Safety argues that there was no contract in place between itself and Jokr at the time of the accident, and that the contract in question was signed after the accident and back-dated. However, the correspondence in the record indicates that Sam Herzfeld, Safety's principal, consented to the retroactive applicability. Therefore, Safety's first argument is unavailing (*Stabile v Viener*, 291 AD2d 395 [2d Dept 2002]). Second, Safety contends that it is ambiguous whether the emails constitute a "statement of work," and since that term is not defined by the contract or by the parties, a jury is required to determine if the emails constitute a statement of work.

Ultimately, there are questions of fact about Jokr, Safety, and Apollos' negligence, which preclude any of these parties receiving summary judgment on their contractual indemnification claims (*see Dos Santos, supra*). Therefore, these parties' motions are denied.

Common-Law Indemnification

Since, as determined above, there are questions of fact as to Jokr, Safety, and Apollo's negligence, summary judgment on any claims for common-law indemnification are premature and must be denied (*McCarthy v Turner Const., Inc.*, 17 NY3d 369 [2011]).

Conclusion

Plaintiff's motion for summary judgment (Seq. 003) is granted to the extent of his Labor Law § 240 (1) claim; the motion is otherwise denied.

Jokr's motion for summary judgment (Seq. 004) is granted to the extent of plaintiff's Labor Law § 241 (6) claim; the motion is otherwise denied.

Arc's motion for summary judgment (Seq. 005) is granted to the extent of plaintiff's Labor Law § 241 (6) claim and on its contractual indemnification claim; the motion is otherwise denied.

Safety's motion for summary judgment (Seq. 006) is denied.

Apollo's motion for summary judgment (Seq. 007) is denied.

Safety's cross-motion as to plaintiff's Labor Law § 240 (1) claim (Seq. 008) is denied.

This constitutes the decision and order of the court.

March 25, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court