

Gallardo v Hudson Yards N. Tower Tenant LLC

2025 NY Slip Op 32779(U)

July 31, 2025

Supreme Court, New York County

Docket Number: Index No. 157430/2018

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

JAVIER GALLARDO,

Plaintiff,

- v -

HUDSON YARDS NORTH TOWER TENANT LLC., HUDSON YARDS CONSTRUCTION LLC., TISHMAN CONSTRUCTION CORPORATION, METROPOLITAN TRANSPORTATION AUTHORITY, THE CITY OF NEW YORK, and INTERSTATE DRYWALL COMPANY, INC.,

Defendants.

-----X

HUDSON YARDS NORTH TOWER TENANT LLC., HUDSON YARDS CONSTRUCTION LLC., TISHMAN CONSTRUCTION CORPORATION, METROPOLITAN TRANSPORTATION AUTHORITY, and THE CITY OF NEW YORK,

Third-Party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP.,

Third-Party Defendant.

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DECISION + ORDER ON MOTION

Third-Party Index No. 595981/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 125, 136, 137, 138, 139, 140, 141, 144, 146, 148

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 142, 143, 145, 147, 149

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

INTRODUCTION

This action arises from a workplace accident suffered by plaintiff Javier Gallardo in May 2017 when he allegedly tripped over the raised edge of a plywood ramp while working as a

master electrician at a construction project located at Hudson Yards in Manhattan (the “Project”). The Project is owned by defendant Hudson Yards North Tower Tenant LLC (“Hudson Yards Tenant”) and sits on land leased from defendant Metropolitan Transportation Authority (“MTA”). Hudson Yards Tenant retained defendant Hudson Yards Construction LLC (“Hudson Yards Construction”) as its executive construction manager, which in turn retained defendant Tishman Construction Corporation (“Tishman”) as the general contractor on the Project. Hudson Yards Construction also retained defendant Interstate Drywall Company, Inc. (“Interstate Drywall”) as a subcontractor to provide temporary protection at the Project site, as well as Gallardo’s employer, third-party defendant Five Star Electric Corp. (“Five Star”), as an electrical subcontractor on the Project.

Gallardo now moves pursuant to CPLR 3212 for partial summary judgment as to liability on his Labor Law § 241(6) cause of action predicated upon a violation of Industrial Code § 23-1.7(e)(1) (MOT SEQ 003). Defendants oppose the motion. Separately, defendants/third-party plaintiffs Hudson Yards Tenant, Hudson Yards Construction, Tishman, MTA, and The City of New York (“NYC”) move pursuant to CPLR 3212 for summary judgment on their contractual indemnification and breach of contract claims against Five Star and to dismiss Five Star’s cross-claims for contribution and common-law and contractual indemnification (MOT SEQ 004). Five Star opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint, which cross-motion is in turn opposed by defendants/third-party plaintiffs. For the reasons that follow, the motions and cross-motion are granted in part.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing

papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The court's function on these motions is limited to "issue finding," not "issue determination" (*see id.* at 505).

PLAINTIFF'S MOTION (MOT SEQ 003)

Labor Law § 241(6) imposes a non-delegable duty on contractors and owners to ensure that "[a]ll areas in which construction, excavation or demolition work is being performed" is "so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein . . ." The scope of the duty imposed by Labor Law § 241(6) is defined by the safety rules set forth in the Industrial Code (*see Garcia v 225 E. 57th Owners, Inc.*, 96 AD3d 88, 91 [1st Dept. 2012], citing *Ross*, 81 NY2d at 501-02). Thus, to establish liability under this provision, a plaintiff must "specifically plead and prove the violation of an applicable Industrial Code regulation" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept. 2007]).

Here, Gallardo's motion seeks summary judgment on his Labor Law § 241(6) claim based solely on defendant's alleged violation of Industrial Code § 23-1.7(e)(1), which provides, in pertinent part, that "all passageways shall be kept free from . . . [any] obstructions or conditions that could cause tripping." Gallardo's motion is denied to the extent it seeks partial summary judgment as against defendant NYC, which is nowhere even mentioned in his moving papers. The motion is granted, however, as against the remaining defendants.

In support of his motion, Gallardo submits, *inter alia*, several contracts related to the Project, an incident report, photographs of the ramp over which he tripped, and deposition transcripts for himself and the defendants' witnesses. By these submissions, Gallardo demonstrates his *prima facie* entitlement to summary judgment as to liability on his Labor Law § 241(6) claim. The contracts submitted establish the relationship and role of each of the non-NYC defendants with respect to the Project. The remaining submissions demonstrate that, while walking from a hoist on the twenty-second floor of the Project to the Five Star shanty to pick up tools, Gallardo suffered injuries to his right knee when he tripped over the raised edge of a temporary wooden ramp installed by Interstate Drywall. The subject ramp served as a

passageway for workers, allowing them to traverse and transport equipment over pipes used for pumping cement that ran across the floor. A metal plate was secured to the edge of the subject ramp where it met the floor. This plate was supposed to cover the entire width of the ramp's edge and was intended to prevent the ramp's edge from becoming a tripping hazard by creating a smooth transition from the floor to the ramp. Here, however, the metal plate was too short to cover the entire width of the ramp, leaving exposed a portion of the ramp's raised edge, over which Gallardo tripped and fell. The evidence submitted thus demonstrates, *prima facie*, Gallardo's entitlement to judgment as a matter of law on his Labor Law § 241(6) claim by establishing that, while performing work on the Project, Gallardo fell over a tripping hazard, in the form of the ramp's raised edge (*see Tompkins v Turner Constr. Co.*, 221 AD3d 745, 746 [2nd Dept. 2023] [raised piece of Masonite board constituted tripping hazard]), in a passageway (*see Fitzgerald v Marriott Int'l, Inc.*, 156 AD3d 458, 458–59 [1st Dept. 2017] [ramp constituted a “passageway” under Industrial Code § 23-1.7(e)(1)]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept. 2008]), and that this unsafe condition was the proximate cause of his resulting injuries.

Defendants fail to raise a triable issue of fact in opposition. Their argument that Interstate Drywall is not a proper Labor Law defendant, as it is neither an owner or general contractor with respect to the Project, is unavailing. It is undisputed that Interstate Drywall built and installed the temporary ramp involved in Gallardo's accident pursuant to its contract with Hudson Yards Construction to provide temporary protection at the Project site. As such, it is a statutory “agent” within the purview of the Labor Law because it unquestionably supervised and controlled the work to construct and install the ramp that proximately caused Gallardo's injuries (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–18 [1981]; *Tighe v Hennegan Const. Co.*, 48 AD3d 201, 202 [1st Dept. 2008]; *Bove v New York City Hous. Auth.*, 181 AD2d 427, 427–28 [1st Dept. 1992]). Similarly unavailing is defendants' contention that there is a triable issue of fact as to whether the raised edge of the ramp left exposed by the too-short metal plate constituted a tripping hazard. Richard Tiberi, a Tishman safety manager on the Project, and Peter Joseph Campbell, Interstate Drywall's superintendent on the Project, both expressly testified that the raised edge of the subject ramp left exposed by the too-short metal plate constituted a tripping hazard, and that they each would have sought to remedy this unsafe

condition had they discovered it by directing the installation of a metal plate of sufficient size to cover the entire width of the ramp's edge.

Defendants also contend that Gallardo's motion must be denied because the subject ramp was an integral part of the construction. However, the "integral to the work" doctrine "does not . . . absolve a defendant of liability for the use of an avoidable dangerous condition or for failure to mitigate the danger . . . if preventive measures would not make it impossible to complete the work" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 321 [2024]). Here, while the subject ramp may have been integral to facilitating the movement of workers and equipment around the work site, it is undisputed that the tripping hazard posed by the exposed raised edge of the ramp could have been avoided without impeding work on the Project by simply installing a metal plate large enough to cover the entire width of the ramp's edge rather than just a portion of it (*see id.* ["integral to the work" doctrine inapplicable in case involving worker who slipped on plastic covering because, although some form of cover was "integral" to the work, a different less slippery cover could have been used]; *Murphy v 80 Pine, LLC*, 208 AD3d 492, 497 [2nd Dept. 2022]).

Defendants' final argument in opposition—that there is a triable issue of fact as to whether Gallardo was the sole proximate cause of his injuries—fares no better. It is well established that contributory negligence is not a defense to liability under Labor Law § 241(6) (*see Maza v Univ. Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept. 2004] ["Negligence on plaintiff's part may require an apportionment of liability but does not absolve defendants of their own liability under section 241(6)"]). Gallardo's purported negligence is thus a defense to the Labor Law § 241(6) claim only if it is the *sole* proximate cause of his injuries. However, as already discussed, Gallardo's un rebutted submissions establish that the subject ramp was constructed in such a way as to leave exposed an unsafe tripping hazard, that defendants failed to employ readily available preventive measures to avoid this unsafe condition, and that this hazard was a proximate cause of his injuries. As such, Gallardo could not have been the sole proximate cause of his own injuries.

Therefore, Gallardo's motion for partial summary judgment as to liability on his Labor Law § 241(6) cause of action is granted except as to defendant NYC.

THIRD-PARTY PLAINTIFFS' MOTION (MOT SEQ 004)

Third-party plaintiffs move for summary judgment against Five Star on their third cause of action for contractual indemnification and fourth cause of action for breach of contract for failure to procure insurance, and to dismiss Five Star's cross-claims for contribution and common-law and contractual indemnification.

In support of their motion, third-party plaintiffs submit, *inter alia*, the contract between Hudson Yards Construction and Five Star, which suffices to demonstrate their *prima facie* entitlement to summary judgment on their third cause of action for contractual indemnification. Section 12.2 of the contract provides, in pertinent part, that, “[t]o the fullest extent permitted by law” Five Star shall indemnify third-party plaintiffs for, among other things, any losses, claims, causes of action, lawsuits, costs, damages, and expenses, including attorneys’ fees and disbursements, “arising or alleged to arise from or in connection with” Five Star’s or its employees’ performance of work on the Project or performance under the contract. Section 12.2 further provides that this indemnity obligation “shall arise regardless of any claimed liability on the part of an Indemnitee, provided, however, [Five Star] shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitee’s negligence.” This broad indemnity provision was triggered by Gallardo’s commencement of this action, in which he seeks damages for injuries he sustained while performing Five Star’s work at the Project (*see Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept. 2021]; *Paulino v Bradhurst Assocs., LLC*, 144 AD3d 430, 430–31 [1st Dept. 2016]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept. 2015]; *Fuger v Amsterdam House for Continuing Care Ret. Cmty., Inc.*, 117 AD3d 649, 650 [1st Dept. 2014]; *see also Hunter Roberts Const. Grp., LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [2010]).

In opposition, Five Star fails to raise a triable issue of fact with respect to the contractual indemnity claim. Five Star contends Gallardo’s injuries did not “arise from or in connection with” its performance of work on the Project pursuant to its contract because Gallardo was simply traversing the work site, and not performing electrical work, when he was injured, and because Five Star had no part in the construction, installation, or maintenance of the ramp on which Gallardo tripped and fell. This contention is unavailing. Five Star’s contract “could not be performed . . . unless [Five Star’s] employees could reach and leave their workplaces on the job

site[.]” and thus Gallardo’s injuries, “occurring during such a movement, must be deemed as a matter of law to have arisen out of the work” (*O’Connor v Serge Elevator Co.*, 58 NY2d 655, 657-58 [1982]).

Similarly unavailing is Five Star’s contention that the contract’s indemnification clause purports to indemnify third-party plaintiffs for their own negligence, in contravention of General Obligations Law (“GOL”) 5-322.1. To the contrary, the contract provides for indemnification only “[t]o the fullest extent permitted by law” and expressly states that Five Star “shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitee’s negligence.” The contract is thus not in violation of GOL 5-322.1, as it implicitly provides for only partial indemnification if one or more of third-party plaintiffs is found to have been negligent, and then only for liability not attributable to third-party plaintiffs’ own fault (*see Dutton v Charles Pankow Builders, Ltd.*, 296 AD2d 321, 322 [1st Dept. 2002]; *see also Sanchez v 404 Park Partners, LP*, 168 AD3d 491, 493 [1st Dept. 2019]).

The court notes, however, that no determination has yet been made as to Gallardo’s Labor Law § 200 and negligence claims, and thus the alleged negligence of defendants/third-party plaintiffs remains an issue for resolution at trial. It does not follow, however, that third-party plaintiffs’ present motion for summary judgment on their third-party claim for contractual indemnification is premature. Rather, summary judgment on the contractual indemnification claim must be granted conditionally, subject to a determination at trial as to whether Gallardo’s injuries were caused in part by the negligence of one or more of the defendants/third-party plaintiffs (*see Sanchez*, 168 AD3d at 493; *Aramburu*, 126 AD3d at 500-01; *Fuger*, 117 AD3d at 650-51). Additionally, it does not avail Five Star to argue that Gallardo’s accident was caused solely by the negligence of one or more of the third-party plaintiffs given the court’s determination herein that “it was caused at least in part by [a] violation of Labor Law § [241(6)], which imposes absolute liability” (*Aramburu*, 126 AD3d at 500-01, quoting *Fuger*, 117 AD3d at 650-51).

Therefore, that part of third-party plaintiffs’ motion seeking summary judgment on their third cause of action for contractual indemnification is conditionally granted, subject to a determination at trial as to the issue of third-party plaintiffs’ alleged negligence.

The remainder of third-party plaintiffs' motion is denied. Although third-party plaintiffs state in their notice of motion that they seek summary judgment on their fourth cause of action alleging breach of contract claim for failure to procure insurance, they fail to address the breach of contract claim in their motion papers. Moreover, Five Star, in opposition, submits a certificate of insurance and an additional insured endorsement, which demonstrate that Five Star did, in fact, obtain the additional insured coverage required by its contract with Hudson Yards Construction. As to the branch of the motion that seeks summary judgment dismissing Five Star's cross-claims, third-party plaintiffs fail to demonstrate their *prima facie* entitlement to such relief. Their motion papers entirely fail to address Five Star's contractual indemnity cross-claim, and as to the cross-claims for contribution and common-law indemnity, they offer only a conclusory assertion that there is no evidence demonstrating their negligence, and thus no basis upon which to hold them liable for contribution or common-law indemnification. It is well established, however, that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept. 2016]; see *Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516, 516 [1st Dept. 2016]; *Sabalza v Salgado*, 85 AD3d 436, 437-38 [1st Dept. 2011]).

Therefore, third-party plaintiffs' motion is denied to the extent it seeks summary judgment on the breach of contract claim against Five Star and to dismiss Five Star's cross-claims.

FIVE STAR'S CROSS-MOTION (MOT SEQ 004)

Five Star's cross-motion for summary judgment dismissing the third-party complaint is granted only to the extent of dismissing third-party plaintiffs' fourth cause of action alleging breach of contract for failure to procure insurance. As already discussed, Five Star's submissions demonstrate that it did, in fact, obtain the additional insured coverage required by its contract. No triable issue of fact is raised in opposition, as this part of the cross-motion is unopposed, third-party plaintiffs having limited their opposition to that part of the cross-motion that seeks the dismissal of their contractual indemnity claim.

Five Star's cross-motion is denied to the extent it seeks the dismissal of third-party plaintiffs' first and second causes of action for contribution and common-law indemnification.

Although this part of the cross-motion is also unopposed, Five Star fails to demonstrate its *prima facie* entitlement to summary judgment dismissing these claims. It contends these causes of action must be dismissed because Gallardo did not suffer a “grave injury” within the meaning of Section 11 of the Workers Compensation Law (*see Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 582 [1998]). However, it fails to submit evidence sufficient to demonstrate, *prima facie*, that the injuries alleged by Gallardo do not constitute “grave injuries” within the meaning of the statute.

The remaining portion of Five Star’s cross-motion that seeks summary judgment dismissing third-party plaintiffs’ third cause of action for contractual indemnification is denied in light of the grant of third-party plaintiffs’ motion to the extent that it seeks summary judgment in their favor on the same claim.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff’s motion for partial summary judgment pursuant to CPLR 3212 as to liability on his Labor Law § 241(6) cause of action (MOT SEQ 003) is granted only as against defendants Hudson Yards North Tower Tenant LLC, Hudson Yards Construction LLC, Tishman Construction Corporation, Metropolitan Transportation Authority, and Interstate Drywall Company, Inc., and the motion is otherwise denied; and it is further

ORDERED that third-party plaintiffs’ motion (MOT SEQ 004) is conditionally granted to the extent that third-party defendant Five Star Electric Corp. shall fully indemnify third-party plaintiffs Hudson Yards North Tower Tenant LLC, Hudson Yards Construction LLC, Tishman Construction Corporation, Metropolitan Transportation Authority, and The City Of New York, subject to a determination at trial as to the issue of third-party plaintiffs’ alleged negligence, and the motion is otherwise denied; and it is further

ORDERED that third-party defendant’s cross-motion (MOT SEQ 004) is granted to the extent it seeks summary judgment dismissing the fourth cause of action in the third-party complaint, which cause of action is hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



7/31/2025

DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE