Supreme Court of the State of New York
County of Kings

Part LL1M

Index Number 519409/2022
Seq. 002–004

DECISION/ORDER

JORGE IGNACIO MEDRANO DIAZ, as Administrator of THE ESTATE OF JORGE IGNACIO MEDRANO UMANA, JORGE IGNACIO MEDRANO DIAZ, individually, JONATHAN ALEXANDER MEDRANO DIAZ, ELOISA DIAZ QUINTANILLA, LESLI CECIBEL MEDRANO DIAZ, MARYURI MARGINE MEDRANO DIAZ,

Plaintiffs,

against

327 HICKS DEVELOPMENT CORP.,

Defendant.

327 HICKS DEVELOPMENT CORP.,

Third-Party Plaintiff,

against

TAFFERA FINE BUILDINGS & FINISHES, INC. AND OLD FORGE SUPPLY CO., INC.,

Third-Party Defendant.

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	1–3
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	4–6
Replying Affidavits	7–8
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment against Hicks (Seq. 002), 327 Hicks Development Corp. (Hicks)'s motion for summary judgment (Seq. 003), and Taffera Fine Buildings & Finishes, Inc. (Taffera)'s motion for summary judgment (Seq. 004) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for the wrongful death of Jorge Ignacio Medrano Umana, which it contends was caused by a fall from a working area on November 13,

2021. It is undisputed that Hicks owned the premises. Taffera was the commercial tenant. Taffera hired Old Forge Supply Co., Inc. (Old Forge), and Old Forge employed the plaintiff.

It is undisputed that the plaintiff was working on demolishing and removing storage shelving from the premises. The storage shelves stood between six and eight feet off the ground, and the space was being renovated for the benefit of Taffera. OSHA investigated and issued a citation three months after the plaintiff's accident. An unrebutted portion of the investigation states that there had been guardrails on the shelving unit the day prior, and that they were removed. No alternative fall protection was provided. This is undisputed.

Plaintiff's co-worker, Esteban Perea, testified as follows: the safety rails had to be removed from the shelves in order to remove the plywood (Perea EBT at 91–92). Plaintiff and Mr. Perea were both standing on the shelf when plaintiff lost consciousness and fell from the shelf to the floor (*id.* at 30). The work could not have been performed from a scaffold adjacent to the shelf because there was not space (*id.* at 93). Mr. Perea testified that he believed a harness was necessary (*id.* at 78–79), but also believes that a harness would not have arrested plaintiff's fall from a height of six feet (*id.* at 98).

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 harness and lanyard) 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)]).

In the instant action, the decedent was engaged in the broader, ongoing project of renovation; therefore, defendants' arguments that the decedent was not performing covered work at the moment of his fall is unavailing (*Prats v Port Authority of New York & New Jersey*, 100 NY2d 878, 881–882 [2003]). Furthermore, the admissible evidence available is that the guard rails had been removed and that no fall arrest system was provided during the period that elevated work was being performed after the rails were removed. In light of a statutory violation which was "a proximate cause" of the accident, the fact that the decedent passed out and fell is not a complete bar to summary judgment on plaintiff's Labor Law § 240 (1) claim (*see Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]; *see also Lajqi v New York City Transit Authority*, 23 AD3d 159 [1st Dept 2005] [medical condition not sole proximate cause]; *Moran v 200 Varick Street Associates, LLC*, 80 AD3d 581 [2d Dept 2011] [plaintiff's intoxication not sole proximate cause]). Unlike *Hucke v Suffolk County Water Authority*, here, there was a statutory violation that was a proximate cause of decedent's accident (119 AD3d 735 [2d Dept 2014]).

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

Labor Law § 241 (6)

Labor Law § 241(6) requires that owners and contractors provide reasonable and adequate protection and safety to workers. Still, a defendant that is liable under Labor Law § 240 (1) may not necessarily be liable under Labor Law § 241 (6). The former imposes liability when plaintiff suffers harm due to any absence of an adequate safety device or the presence of an inadequate safety device. The latter requires the plaintiff to prove that he suffered harm due to the violation of a sufficiently specific section of the Industrial Code (see *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501–502 [1993]).

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). The plaintiff only advances arguments as to Rule 23-1.22 (c) (2). Therefore, defendants' motions are granted with respect to the other Industrial Code provisions without opposition.

Rule 23-1.22 (c) (2) requires safety railings on platforms greater than seven feet. Here, the OSHA citation and Mr. Perea disagree about whether the platform was greater than seven feet; there are also triable issues of material fact as to whether the removal of the guardrails was integral to this stage of the renovation (*see Salazar v Novalex Contracting Corp.*, 18 NY3d 134 [2011]). Therefore, defendants' motion for summary judgment on plaintiff's Labor Law § 241 (6) claim as predicated on Rule 23-1.22 (c) (2) is denied.

Labor Law § 200

Plaintiff does not oppose Hicks' motion with respect to his Labor Law § 200 claim (aff. in opp. to Seq. 003 at ¶ 9); therefore, Hicks' motion is granted with respect to this claim.

Survivorship Claims

Taferra moves to dismiss the survivorship and loss of consortium claims of Eloisa Diaz Quintanilla and Lesli Cecibal Medrano Diaz. Despite arguments concerning the estrangement of the decedent and Ms. Quintanilla, the two were legally married; therefore, there's no disqualification under EPTL § 5-1.2 (*see e.g. Matter of Pilapil*, 172 AD3d 1073 [2d Dept 2019]). Ms. Quintanilla testified that the decedent adopted Ms. Diaz in Guatemala and that her birth certificate was amended (Quintanilla EBT at 20, 114–115). This testimony is, minimally, enough to raise material issues of fact as to the viability of Ms. Diaz's claims; therefore, Taferra's motion is denied.

Indemnification

The right to contractual indemnification is established by 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]). "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" (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Taffera contends that Hicks is not entitled to contractual indemnification because the indemnification clause is overly broad and lacks the saving language required by General Obligations Law § 5-321. However, it is undisputed that this is a commercial lease negotiated "at arm's length by two sophisticated business entities," and that the lease contains an insurance procurement provision (*Great North Insurance Co. v Interior Const. Corp.*, 7 NY3d 412, 418–419 [2006]). Therefore, the indemnification obligation is valid. Hicks, through its representative Jane Osgood, denied knowledge of the work occurring at the premises (Osgood EBT at 51–54),

and this testimony is unrebutted. Therefore, Hicks' motion for contractual indemnification against Taferra is granted.

Taffera' motion for summary judgment on its contractual indemnification claims against Old Forge is denied. Unlike Hicks, there is evidence in the record that a Taffera employee, Kristopher Hernandez, was a supervisor at the site (Robert Taffera EBT at 53–54, 65–66). The use of an errata sheet to make "material or critical" changes to testimony is prohibited (*Torres v Board of Education of City of New York*, 137 AD3d 1256, 1257 [2d Dept 2016]).

Taferra's motion is also denied with respect to its common-law indemnification claims since, as noted above, it has not shown itself free from negligence (*McCarthy v Turner Const., Inc.*, 17 NY3d 369 [2011]).

Breach of Contract

"[A] party seeking damages for breach of an agreement to procure insurance naming it as an additional insured must demonstrate that a contract provision required that such insurance be procured naming it as an additional insured and that the provision was not complied with" (*Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 619 [2d Dept 2024]). Here, Hicks does not dispute that Taferra procured insurance, but instead argues that the insurance carrier is not agreeing to indemnify Hicks. That argument may be properly litigated in a declaratory judgment or other action; it does not demonstrate that Taferra is liable for breach of contract. Therefore, Taferra's motion is granted with respect to Hicks' contractual indemnification claim.

Conclusion

Plaintiff's motion for summary judgment as to Labor Law § 240 (1) (Seq. 002) is granted.

Defendant Hicks' motion for summary judgment (Seq. 003) is granted with respect to plaintiff's Labor Law § 241 (6) as predicated on all alleged Industrial Code violations except Rule 23-1.22 (c) (3), plaintiff's Labor Law § 200 claim, and its contractual indemnification claim against Taferra. Hicks' motion is denied as to common-law indemnification against Taferra and Old Forge because the issue is not yet ripe. The motion is otherwise denied.

Defendant Taferra's motion for summary judgment (Seq. 004) is granted with respect to Hicks' breach of contract claim; the motion is otherwise denied.

This constitutes the decision and order of the court.

July 10, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court