

Arita v FDS Assoc., LLC
2025 NY Slip Op 35306(U)
August 8, 2025
Supreme Court, Bronx County
Docket Number: Index No. 22999/2019E
Judge: Myrna Socorro
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

#23

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9**

-----X
ARTURO ARITA,

Plaintiff

Index No. 22999/2019E

Motion Seq No. 2 & 3

-against-

FDS ASSOCIATES, LLC,

Defendant.

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

-----X
FDS ASSOCIATES, LLC,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

-----X
The following e-filed documents, listed by NYSCEF document #38-108 were read on this motion for summary judgment which was orally argued and marked submitted on June 25, 2024

According to the plaintiff, at the time of the accident on January 26, 2019: plaintiff was employed by non-party Kingsbridge Heights Community Center (“Kingsbridge”) as a custodian at a pre-K school building; plaintiff was engaged in work in the gymnasium of the building that involved opening up a wall to run electric cable for the installation of an already mounted television, and to move the electrical outlet to a different position and then placing drywall to cover the opening in the wall with plastering and painting work; plaintiff used an A-frame ladder to perform the work; plaintiff was scraping compound onto the wall and was on the third rung from the top of the ladder, when the ladder moved, which caused him to fall.

The subject building was owned by FDS Associates LLC (“FDS”). At the time of the accident, the subject property was being licensed to third-party defendant The City of New York (“The City”).

In motion sequence #2, plaintiff moves for partial summary judgment on his Labor Law §240(1) claim against FDS on the ground that the subject ladder was not properly secured and/or was an inadequate safety device for the plaintiff to work at an elevation.

FDS opposes the motion on the ground that plaintiff was not engaged in construction, demolition or excavation work covered under the statute. FDS argues that at the time of the accident, plaintiff was performing routine maintenance work, that is, he was working to hide wires of a wall mounted

television and was within the scope of his employment as a janitor. FDS argues that there was no construction or renovation work going on in the subject building and that the work plaintiff was doing of hiding the wires is not the type of work contemplated by the statute since it did not significantly alter, modify, or change any building or structure. Moreover, FDS argues that if this Court determines that the work performed was a repair within the meaning of Labor Law §240(1), then the City as Licensee is deemed the “owner” under Labor Law and the City had the sole authority to operate and maintain the premises.

The City also opposes plaintiff’s motion for summary judgment on the ground that there was no ongoing construction or renovation work and argues that plaintiff was involved in routine maintenance work at the time of the accident.

In motion sequence #3, FDS moves for summary judgment against The City on its common law and contractual indemnification claims pursuant to a license agreement between the parties. FDS argues that The City as licensee took possession of the subject premises and that they are entitled to indemnification. FDS also moves for summary judgment to dismiss plaintiff’s Labor Law §200, §240(1) and §241(6) claims.

As a preliminary matter, this Court notes that plaintiff does not oppose the branch of the motion that seeks to dismiss his Labor Law §200/common law negligence and §241(6) claims. Accordingly, this branch of FDS’ motion is granted as unopposed and plaintiff’s Labor Law §200 and §241(6) claims are hereby dismissed.

The City opposes FDS’ branch of the motion that seeks summary judgment on its indemnification claims.

Summary Judgment

The court’s function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC*, 157 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st Dept. 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]*; *Friends of Thayer Lake LLC v. Brown*, 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [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 & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima facie showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 (1985).

Once the movant has made a prima facie showing, 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 Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]).

Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

“Owners of a one- or two-family dwelling used as a residence are exempt from liability under Labor Law §§ 240(1) and 241(6) unless they directed or controlled the work being performed.” *Abdou v Rampaul*, 147 AD3d 885, 885-86 [2d Dept 2017].

The issue to decide herein is whether the type of work plaintiff was engaged at the time of the accident constituted an alteration within the meaning of Labor Law §240(1). It is FDS’ and The City’s position that the work plaintiff was engaged in constituted routine maintenance work and therefore not within the purview of Labor Law §240(1).

“For work to qualify as ‘altering’ within the meaning of Labor Law §240(1), it must not be ‘simple, routine’ (*Joblon*, 91 NY2d 45at 465), cosmetic, or decorative (*Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005]), and it must effect ‘a significant physical change to the configuration or composition of the building or structure’ (*Joblon*, 91 NY2d at 465), including significantly changing the way an important component of the building functions (*Belding*, 14 NY3d at 753). The change need not be permanent to qualify as an alteration (*Saint*, 25 NY3d at 127-128).” *Mananghaya v Bronx-Lebanon Hosp. Ctr.*, 165 AD3d 117, 124 [1st Dept 2018].

In *Joblon v. Solow*, 91 N.Y.2d 457 (1998), the plaintiff, an electrician, was instructed to install an electric wall clock in the building’s mail room. Because the mail room did not have an outlet that could accommodate the clock, plaintiff and his coworker had to extend the electrical wiring from an adjacent utility room through a concrete block wall separating the rooms. The Court of Appeals held that plaintiff who fell off from a ladder while chiseling a hole in the wall with a hammer and chisel, and then routing a wire through the hole to bring electrical power into the adjacent room to support the wall clock, was engaged in “altering” within the meaning of Labor Law §240(1).

Here in this action, plaintiff testified as follows:

Q. What were you doing in the gym at the time of the incident?

A. I was working on a project and then what I was doing was running an electric cable into the upper part of the wall in order to connect a t.v.

Q. Now, in running the cable, was it on the outside of the wall or the inside of the wall?

A. Inside of the wall.

Q. So did you open the wall?

A. Correct.

Q. What did the wall consist of, what material? Was it drywall, block, something else?

A. Drywall

...

Q. ...[H]ave you ever done that type of work, meaning hiding cables in the wall for a mounted television prior to the day of this incident?

A. No.

...

Q. So I asked you earlier what the wall was comprised of and you had said drywall. So was there plaster over the drywall?

A. So there's a material called sheetrock and I had to cut in the sheetrock to saw those cables.

Q. Then what were you plastering? Were you painting and caulking? That's what I'm trying to figure out. After you closed the wall up, are you plastering?

A. Sealing the walls where I had made a hole, you use the plaster and then you use compound.

...

Q. How high was the wall in the area where you were working?

A. About ten feet.

Q. And did the cut that you made to put the wires in the wall go the entire length of the wall all ten feet or was it halfway up or something else?

A. From the floor to the top it would be about eight feet, nine feet.

...

Q. ...[W]hat was his specific instructions to you to do the work?

A. To place the outlets higher so that it would be out of the reach of the children.

Thus, based on plaintiff's uncontroverted testimony, plaintiff had to re-route wires inside a wall, which required plaintiff to cut through sheetrock so that the wall could be opened about 8 to 9 feet and then plaintiff had to seal up the hole with plaster and compound. Additionally, plaintiff was further instructed to move the outlet higher up to avoid children reaching them.

Therefore, relying on the holding in *Joblon, supra*, this Court finds that the type of work plaintiff was engaged in at the time of the accident was an alteration within the meaning of Labor Law §2401(1) and not routine maintenance work.

Furthermore, this Court finds that plaintiff established his *prima facie* burden of a Labor Law 240(1) violation as he demonstrated through his testimony that FDS failed to properly secure the subject ladder, to ensure that it remained steady and erect while being used, which served as a proximate cause of the accident. *See Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650 [1st Dept 2021]; *Merino v Continental Towers Condominium*, 159 AD3d 471 [1st Dept 2018]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept 1999]. "It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker." *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]].

In opposition, FDS failed to raise triable issues of fact. While FDS argues that it did not owe a duty to plaintiff because The City had executed a license agreement with FDS and took control over the property, it is undisputed that FDS was the owner of the subject premises and therefore subject to the requirements of Labor Law §240(1).

Indemnification

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.” *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987]. “In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant.” *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999].

Article 17 of the License Agreement between FDS and The City provides:

Licensors and Licensee shall each indemnify and hold harmless the other party from and against any and all liability, fines, suits, claims, demands, expenses and actions of any kind or nature arising by reason of injury to person or property occurring on or about the Licensed Premises, the Building, or the real property of which they form a part, occasioned in whole or in part by its acts or omissions or the acts or omissions of any person present by its license and/or permission, express or implied, or by reason of Licensor or Licensee performing preventive maintenance pursuant to a maintenance contract.

Pursuant to the License Agreement, at the time of the accident, The City was the Licensee and therefore had authority to operate and maintain the subject premises. *See Perez v Beach Concerts, Inc.*, 154 AD3d 602 [1st Dept 2017]. There is no evidence of negligence by FDS in the record. Per the terms of agreement, The City agreed to hold harmless and indemnify FDS for any liability “occasioned in whole or in part by its acts or omissions...” Therefore, based upon the foregoing and pending the determination of whether plaintiff’s injuries were “occasioned in whole or in part by its [The City] acts or omissions,” FDS is entitled to a conditional grant of judgment on their claim for indemnification against The City. *See Devlin v AECOM*, 224 AD3d 437 [1st Dept 2024]; *see also Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194 [1st Dept 2006].

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby

ORDERED, that the branch of motion by plaintiff (motion seq. #2) seeking judgment on his Labor Law §240(1) claim is **GRANTED**; and it is further

ORDERED, that the branch of motion by FDS (motion seq. #3) seeking judgment to dismiss plaintiff's Labor Law §240(1) claim is **DENIED**; and it is further

ORDERED, that the branch of motion by FDS (motion seq. #3) seeking judgment to dismiss plaintiff's Labor Law §241(6) claim is **GRANTED**; and it is further

ORDERED, that the branch of motion by FDS (motion seq. #3) seeking judgment to dismiss plaintiff's Labor Law §200/common law negligence claim is **GRANTED**; and it is further


ORDERED, that the branch of motion by FDS (motion seq. #3) seeking indemnification against The City is **GRANTED TO AN EXTENT** in that FDS is awarded a conditional judgment; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the date of this Decision and Order

This constitutes the decision and order of this court.

Dated: August 8, 2025



HON. MYRNA SOCORRO, J.S.C.