Supreme Court of the State of New York
County of Kings

Index Number 515886/2022
Seqs. 001, 002, 003

Part LL1 M

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	1–3
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	4–7
Replying Affidavits	8–10
Exhibits	Var.
Other	

RYAN GIRARD,

Plaintiff,

against

THE PAY-O-MATIC CORP., PAY-O-MATIC CHECK CASHING CORP., AND 247 SOUTH CONDUIT CORP.,

Defendants.

THE PAY-O-MATIC CORP. AND PAY-O-MATIC CHECK CASHING CORP.

Third-Party Plaintiffs,

against

METRO MECHANICAL LLC,

Third-Party Defendant.

247 SOUTH CONDUIT CORP.,

Second Third-Party Plaintiffs,

against

METRO MECHANICAL LLC,

Second Third-Party Defendant.

Based on the foregoing papers, plaintiff's motion for summary judgment (Seq. 001), Pay-O-Matic Corp. and Pay-O-Matic Check Cashing Corp. (Pay-O-Matic)'s motion for summary

judgment (Seq. 002), and 247 South Conduit Corp. (South Conduit)'s motion for summary judgment (Seq. 003) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on January 6, 2022. It is undisputed that plaintiff was employed by third-party defendant Metro Mechanical LLC (Metro). Pay-O-Matic hired Metro to perform HVAC maintenance and repair work at the premises located at 247-12 South Conduit Avenue, Rosedale, NY (the premises). Pay-O-Matic leased the premises from South Conduit.

The following is undisputed: On the date of the alleged accident, Metro dispatched plaintiff to the premises to repair a broken HVAC system. The HVAC system was located on top of the roof of the premises. There was no way to access the roof from inside the building and no permanent, fixed ladder on the exterior of the building. Plaintiff used a twenty-four foot extension ladder, which he purchased but for which his employer had reimbursed him, to climb onto the roof. Plaintiff inspected, erected, and positioned the ladder himself. There was no place for plaintiff to tie the ladder off to the top of the parapet wall. Plaintiff ascended and descended the ladder several times, drove to the store to purchase parts, and was ascending the ladder again to install the new parts when the feet "kicked out" and the ladder fell to the right, causing plaintiff to fall to the ground.

Plaintiff testified that, pursuant to his OSHA training, he set the feet of the ladder four feet away from the base of the building (Girard EBT at 39, 47). Additionally, plaintiff testified that the ground was flat and level (Girard EBT at 34).

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 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)]).

Here, plaintiff testified he was performing covered work which required him to work at an elevated height. During the course of his work, the ladder plaintiff was using failed and he fell to the ground. South Conduit was the owner of the premises and Pay-O-Matic hired plaintiff's employer, making both parties statutory defendants under the Labor Law (*see Copertino v Ward*, 100 AD2d 565 [2d Dept 1984]). Based on that testimony, plaintiff has established his prima facie entitlement to summary judgment under Labor Law § 240 (1).

In opposition, and in support of Pay-O-Matic's own motion for summary judgment, defendants contend that plaintiff was the sole proximate cause of his accident. First, defendants argue that the plaintiff was intoxicated at the time of his accident, as evidenced by his post-accident hospital records. The records indicate that plaintiff was positive for both cannabis and opioids at the hospital, as well as testing positive for Covid-19. However, in *Moran v 200 Varick*

St. Assoc., LLC the Appellate Division held that intoxication was not a defense to Labor Law § 240 (1) liability where there was also a statutory violation which caused plaintiff's accident (80 AD3d 581, 582 [2d Dept 2011]). Defendants acknowledge *Moran*, but argue that this case is distinguishable. Defendants claim that, here, plaintiff's intoxication caused the ladder to be improperly set up and, therefore, that plaintiff's conduct was the sole proximate cause of the accident.

Pay-O-Matic also points to the affidavit from its engineer, John Whitty, P.E., who claims that his analysis of photographs (which are not identified and therefore not authenticated) and "geospatial reasoning" indicate that the ladder was not placed far enough from the wall and that the parking lot was slightly sloped (Whitty aff. at 9). Pay-O-Matic argues that, taken together, this shows plaintiff's intoxication caused him to improperly construct the ladder, and that he was the sole proximate cause for the ladder's failure.

This argument is unavailing. Mr. Whitty's own affidavit admits that the ladder would not have fallen if it had been tied off (Whitty aff. at 9–10), and Mr. Whitty does not claim that there was a place to tie off the ladder. Indeed, Mr. Whitty likely could not have made such a claim since he does not claim to have visited the site and the authenticated photographs do not show the top of the ladder. The absence of a place for plaintiff to secure his extension ladder, and by extension the fact plaintiff was obliged to work on an unsecured adder, constitutes a violation of Labor Law § 240 (1). Therefore, *Moran* applies—intoxication is not a defense under Labor Law § 240 (1) where there is a violation of the statute. Defendants' own papers essentially concede that the plaintiff was not the *sole* proximate cause of his accident, and Mr. Whitty's report does not contradict plaintiff's claim. Additionally, both plaintiff and co-defendant South Conduit argue that Mr. Whitty's affidavit's admissibility is questionable. Mr. Whitty never claims to

have visited the site himself to take measurements or observations, and neither the photographs nor the "Eagleview geospatial report" on which he relies are authenticated. Mr. Whitty does not explain how he could have reached the opinions he provides using the authenticated photographs and video, which do not show the top of the ladder and do not provide a sufficient view of the bottom that Mr. Whitty could have determined how far it was placed from the wall. Therefore, Mr. Whitty's affidavit appears to amount to little more than speculation which, as noted above, even *arguendo* does not rebut plaintiff's prima facie showing under Labor Law § 240 (1).

Therefore, since plaintiff has provided sufficient evidence to make out a prima face case for summary judgment and defendants have not rebutted that showing with admissible evidence, the court is obliged to grant plaintiff's motion for summary judgment under Labor Law § 240 (1); defendants' motion is denied.

Labor Law § 241 (6) & § 200

South Conduit and Pay-O-Matic seek summary judgment on plaintiff's Labor Law §§ 241 (6) and 200 causes of action. Plaintiff does not oppose Pay-O-Matic's motion on these claims and explicitly withdraws these claims against South Conduit. Therefore, Pay-O-Matic's and South Conduit's motions for summary judgment are granted as to plaintiff's Labor Law §§ 241 (6) and 200 causes of action.

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]).

As an initial matter, Pay-O-Matic discontinued its third-party action against Metro via stipulation of discontinuance on May 17, 2024.

Pay-O-Matic contends that the indemnification clause contained in its lease with South Conduit, in favor of South Conduit, violates New York General Obligations Law § 5-321. The provision reads:

> [Tenant shall] "forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgements arisng from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant" or tenants guests, agents, etc., or "thing growing out of the occupation of the demised premises or of the streets, sidewalks, or vaults adjacent thereto" (lease at ¶ 2). The lease also contains an obligation for indemnification for any causes of action arising out of tenant's "alterations" (lease at ¶ 20.7).

Although the lease does not contain a "savings provision" excusing the tenant from indemnifying the landlord for the landlord's own negligence, such a provision is not necessary in this case. Where two sophisticated business entities negotiate an agreement at arm's length to "allocat[e] risk of liability to third parties between themselves," and the agreement contains an insurance procurement obligation, it does not violate GOL § 5-321 (*Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 419 (2006); *see also Bilska v Truszkowksi*, 171 AD3d 685 [2d Dept 2019]). As all evidence indicates this lease was negotiated at arm's length by sophisticated parties, and contains an insurance procurement obligation, it does not violate the GOL.

Finding that the indemnification provision is valid, the next question is whether there is any bar to indemnification due to negligence. Plaintiff withdrew his negligence claims against both defendants, and therefore the court has not reached the issue of whether either South Conduit's or Pay-O-Matic's negligence caused the plaintiff's accident. Indeed, because

questions of negligence are ordinarily fact-specific, they do not usually warrant summary judgment (*see Ugarriza v Schmieder*, 46 NY2d 471 [1979]). In the absence of a negligence finding, the contractual indemnification obligations flow as the parties intended. Pay-O-Matic hired Metro, and it was during the course of Metro's work done at Pay-O-Matic's request that plaintiff was injured. Those facts fall under the circumstances contemplated by Pay-O-Matic's lease with South Conduit. Therefore, Pay-O-Matic is under an obligation for contractual indemnification.

In light of that determination, South Conduit's motion for summary judgment on its claims against Metro must be denied as these claims are potentially barred by the anti-subrogation doctrine. South Conduit is entitled to indemnification from Pay-O-Matic, and Pay-O-Matic sought indemnification from Metro. Pay-O-Matic discontinued its action against Metro, but it is not clear if Metro provided consideration for that discontinuance, which would in essence be indemnification that passes through Pay-O-Matic to South Conduit. Since Metro would, on those facts, be indirectly indemnifying South Conduit, South Conduit cannot maintain a direct action against Metro (*see North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 NY2d 281, 295–296 [1993]).

Therefore, South Conduit's motion for summary judgment on its claims against Metro is denied.

Conclusion

Plaintiff's motion for summary judgment (Seq. 001) is granted.

Pay-O-Matic's motion for summary judgment (Seq. 002) is granted as to plaintiff's Labor Law §§ 241 (6) and 200 claims; the motion is otherwise denied.

South Conduit's motion (Seq. 003) is granted as to plaintiff's Labor Law §§ 241 (6) and 200 claims and its contractual indemnification claim against Pay-O-Matic; the motion is otherwise denied.

This constitutes the decision and order of the court.

September 30, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court