Supreme Court of the State of New York
County of Kings

Part LL1M

Index Number 530642/2021
Seqs. 003, 004, 005, 006

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	2–4
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Exhibits	Var.
Other	

LUIS GUAMANQUISPE,

Plaintiff,

against

HARRISON REALTY II LLC, GALAXY DEVELOPERS LLC, AND CIP SERVICES LLC,

Defendants.

HARRISON REALTY II LLC AND GALAXY DEVELOPERS LLC,

Third-Party Plaintiffs,

against

CIP SERVICES LLC AND HKA ENTERPRISES LLC,

Defendants.

Based on the foregoing papers, plaintiff's motion for summary judgment (Seq. 003), defendants Harrison Realty II LLC (Harrison)'s and Galaxy Developers LLC (Galaxy)'s motion for summary judgment (Seq. 004), and CIP Services LLC (CIP)'s duplicate cross-motions to vacate the note of issue (Seqs. 005 and 006) are decided as follows:

Introduction

Plaintiff commenced this action to recover for damages he claims to have sustained on June 15, 2021 when he was struck by a falling object at a construction site located at 269 Wallabout Street, Brooklyn, NY (the premises). It is undisputed that Harrison owned the

premises and that Galaxy was the construction manager at the site. CIP was the concrete super-structure contractor. HKA Enterprises LLC (HKA) was sub-contracted by CIP, and HKA employed the plaintiff.

Factual Background

Plaintiff testified as follows: On the date of his accident, plaintiff was working on the tenth floor of a new construction project (Gumanquispe first EBT at 45). Plaintiff was working with a team hoisting plywood up to workers on platforms approximately two floor levels above (*id.*). The tenth floor was the top normal floor of the building, and the subsequent "floors" appear to have been platforms installed while building a large concrete bulkhead on top of the building (Gumanqispe second EBT at 28). Plaintiff's task was to tie a rope around sheets of plywood and other workers would pull it up (Guamanquispe first EBT at 46). While tying a sheet of plywood, plaintiff heard a noise "and from that pointed [sic] on, [he doesn't] remember anything else" (*id.* at 52). Plaintiff regained consciousness at the hospital (*id.* at 52).

Plaintiff further testified: Plaintiff's co-worker, Luis Allaica, told him what happened after the fact (Guamanquispe first EBT at 55). Mr. Allaica told plaintiff that the plywood hit an aluminum rib,[1] causing "all of that [to come] undone," and that the rib fell on plaintiff's head (*id.* at 55, 57). The metal piece that fell was attached to the plywood platforms plaintiff's co-workers were standing on (Guamanquispe second EBT at 33). Plaintiff identified the rib that allegedly hit him in the head, claiming that Mr. Allaica had previously sent plaintiff the picture and told plaintiff that was the metal that hit him (*id.* at 36). Plaintiff did not return to work (Guamanquispe first EBT at 60).

[1] Plaintiff, testifying in Spanish, first used the English word "sheetrock," and when asked to clarify in Spanish, said that the plywood hit the "ring" or "rim."

Daniel O'Donoghue, senior project manager for Galaxy Developers, testified on behalf of Galaxy. Mr. O'Donoghue did not witness Mr. Guamanquispe's accident but stated that he responded to the scene just after it occurred, which he believed was sometime between 10:45 and 11:15 a.m. (O'Donoghue EBT at 39, 53–54). Mr. O'Donoghue claims that he observed Mr. Guamanquispe bleeding from a laceration on his forehead when he arrived on the roof (*id.* at 57–58). Mr. O'Donoghue testified that he was told by other workers that Mr. Guamanquispe had been working on the roof level when he was struck in the head by a falling metal rib that was part of the formwork that CIP used as shoring/support for concrete floors, columns and shear walls (*id.* at 62, 65). Mr. O'Donoghue, when presented with the photograph depicting the object plaintiff claimed struck him, identified a 6-foot long metal rib used for shoring (*id.* at 98–99).

Mr. O'Donoghue further testified that he believed Mr. Guamanquispe was injured during the process of stripping and demobilizing the bulkhead, and he believed that something was being manually passed down to him from a higher level to a lower level, as opposed to something being hoisted up at that time (O'Donoghue EBT at 112–113).

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)

Labor Law ' 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites

(*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from Agravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured@ (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]).

In the instant action, plaintiff admits that he was knocked unconscious and was subsequently told by his co-worker about the circumstances that surrounded his accident, including what object struck him. Mr. Allaica was not deposed and plaintiff has not provided an affidavit from anyone with actual knowledge to corroborate how his accident occurred. Plaintiff did not see the object that struck him and, since he acknowledges that he regained consciousness at the hospital, does not claim to have seen the rib lying on the ground after it struck him.

These facts are analogous to those in *Hemmings v St. Marks Housing Assoc.*, 272 AD2d 442 (2d Dept 2000). In *Hemmings*, the plaintiff claimed that he was struck by a falling beam and knocked unconscious. Plaintiff relied on his deposition testimony, which was derived from information his co-workers shared with him after he regained consciousness (*id.* at 443). The Appellate Division held that, since "none of these alleged witnesses to the accident was deposed, and the plaintiff did not submit affidavits from these witnesses to corroborate how the accident occurred," he was not entitled to summary judgment (*id.* at 443–444; *see also Podobedov v E. Coast Const. Group, Inc.*, 133 AD3d 733, 736 [2d Dept 2015] ["[plaintiff's] mere belief" about what struck him when "he did not see the falling object, how it fell, or where it fell from" was insufficient to support his motion for summary judgment]).

To the extent that Mr. O'Donoghue adopts the hearsay statements that plaintiff was struck by a shoring rib, Mr. O'Donoghue also provides a materially different account of how the rib came to strike the plaintiff. On that account, plaintiff was part of the crew stripping the

bulkhead, not forming it, and was receiving ribs that were passed down from above by hand. Although it is true that a plaintiff can obtain summary judgment where multiple versions of an accident exist in the record, all versions must contain a statutory violation which was a proximate cause of plaintiff's accident (*Leconte v 80 East End Owners Corp.*, 80 AD3d 669 [2d Dept 2011]). Here, there are questions of fact about defendants' statutory liability under Mr. O'Donoghue's . "The fall of an object carried by hand . . . does not implicate the special protections afforded by Labor Law § 240(1)" (*Outar v City of New York*, 286 AD2d 671, 673 [2d Dept 2001], affd, 5 NY3d 731 [2005] [citing *Rodriguez v Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841]; *see also Kim v Franklin BH, LLC*, 214 AD3d 857 [2d Dept 2023]), and Mr. O'Donoghue's account does not allege a height from which the ribs were being passed. Since plaintiff has not demonstrated as a matter of law that every version of events alleged constitutes a violation of the Labor Law 240 (1), his motion must be denied.

Defendants also seek summary judgment, contending that plaintiff has not provided sufficient evidence that he was struck by a falling object and that, on plaintiff's account of the event, the plywood striking the rib was a superseding cause. However, if plaintiff's account of events were true, the rib was foreseeably exposed to being struck by hoisted material and therefore required securing for the purpose of the undertaking. Although plaintiff has not made out his own prima facie case for summary judgment, he has made a sufficient showing, through circumstantial evidence and the hearsay statements which may be considered in opposition to a motion for summary judgment, to resist summary judgment on his Labor Law § 240 (1) claim (*see Podobedov*, 133 AD3d at 735; *see also Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762–763 [2d Dept 2006]) . Defendants' motion is therefore denied as to this claim.

Labor Law 241 (6)

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]). Although plaintiff pled a number of Industrial Code violations, plaintiff only opposes defendants' motion for summary judgment on his claim as predicated upon 12 NYCRR 23-2.2 and 6.1 (h). Plaintiff does not address 12 NYCRR 23-1.5, 1.7, 1.8, 2.1, or 6.1 (c), (d), and (e)—therefore, these allegations are dismissed.

Rule 23-2.2 requires concrete "forms, shores, and reshores" to properly constructed and braced. Here, plaintiff claims to have been struck by a metal rib that was part of a reshore for the bulkhead. There is a question of fact whether plaintiff's versions of events is true and, if it is, whether the reshore was improperly constructed, contributing the falling object.

Rule 23-6.1 (h) requires the use of tag lines to control hoisted loads that are prone to "twisting or swinging." Again, there is a question of fact about whether plaintiff's account of events is accurate. If it is, the plaintiff did testify that the wind was catching the pieces of plywood while they were being lifted—there is a question of fact whether a tag line could have been used and would have prevented the plywood from striking the reshore, causing the rib to fall.

In light of the questions of fact about how the accident occurred, and therefore whether these Industrial Code provisions were violated, both plaintiff's and defendants' motions for summary judgment are denied.

Labor Law § 200

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]). "When a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." (*id.* at [internal citations omitted]). The law requires only that a party have the authority to control the means and methods of the work; that party does not need to have actually exercised that authority (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–319 [1981]).

Defendants contend that they did not have the authority to control plaintiff's work, and therefore plaintiff's Labor Law § 200 claim should be dismissed. This argument appears to be sound as it applies to Harrison, and plaintiff does not oppose the motion as to Harrison. As to Galaxy, however, the AIA contract between Galaxy and Harrison obliges Galaxy to "supervise and direct the Work" (AIA contract at § 3.3.1). That duty cannot be delegated, even if the contractor hires sub-contractors to assist in its accomplishment (*Tomyuk v. Junefield Assoc.*, 57 AD3d 518, 520 (2d Dept. 2008]). Additionally, Mr. O'Donoghue testified that Galaxy had an office trailer on site, and Joseph Witriol was employed to oversee the building (O'Donoghue EBT at 29, 70–71). Galaxy personnel further had the authority to stop work and give corrective instructions if they observed something unsafe (*id.* at 110–111). Taken together, Galaxy has not

demonstrated that it did not have authority over plaintiff's work as a matter of law, and Galaxy's motion for summary judgment on plaintiff's Labor Law § 200 claim is denied.

Indemnification

Contractual Indemnification

"The right to contractual indemnification depends upon the specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]).

HKA argues that Harrison is not entitled to contractual indemnification because HKA's insurer tendered under a reservation as to indemnification, and is currently providing a defense under the primary policy (*N. Star Reins. Corp. v Cont. Ins. Co.*, 82 NY2d 281, 287 [1993]). Therefore, the contractual indemnification claim violates the anti-subrogation doctrine. At this point, because the outcome of HKA's insurer (Ace American Insurance Company, or Ace)'s reservation is not clear, the contractual indemnification claim is not ripe for summary judgment. If Ace were to decline to indemnify Harrison and Galaxy once damages were assessed, then the contractual indemnification claims would need to be resolved. As it is, Ace is providing a defense and no damages have accrued.

Similarly, CIP's insurer, Colony Insurance Company (Colony), tendered a defense to Harrison and Galaxy with a reservation of rights as to their indemnification. The same logic applies here as applied above—absent an accrual of damages, and in light of Colony's provision of a defense from the primary policy, Harrison's and Galaxy's claim for contractual indemnification from CIP is not ripe for summary judgment.

Therefore, Harrison's and Galaxy's motion for summary judgment is denied as to their contractual indemnification claims. Since HKA and CIP both purchased insurance and that

insurance is currently providing a defense, and because the issue of indemnification has not yet been decided, Harrison's and Galaxy's motion is also denied as to the breach of contract claims.

Common-Law Indemnification and Contribution

"The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]).

"To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries. The critical requirement is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Eisman v Vil. of E. Hills*, 149 AD3d 806, 808–809 [2d Dept 2017] [internal citations omitted).

A predicate to both common-law indemnification and contribution is demonstrating the putative indemnitor was negligent. Here, Harrison has demonstrated that it did not have authority over the specific work that plaintiff was doing at the time of his alleged accident. Harrison is therefore entitled to summary judgment dismissing the contribution and common-law indemnification claims against it. Galaxy, however, had a contractual responsibility to work at the site and therefore still potentially bears liability under Labor Law § 200. Therefore, Galaxy's motion to dismiss these cross- and counter-claims is denied due to material questions of fact about its negligence.

Conclusion

Plaintiff's motion for summary judgment (Seq. 003) is denied.

Defendants Harrison's and Galaxy's motion for summary judgment (Seq. 004) is granted to the extent of dismissing the above indicated Industrial Code provisions and plaintiff's Labor Law § 200 claim against Harrison, and dismissing the cross- and counter-claims for contribution and common-law indemnification against Harrison; the remainder of the motion is denied.

CIP's motion to vacate the note of issue (Seq. 005) is referred to CCP, and is returnable on November 6, 2024.

CIP's duplicate motion (Seq. 006) is denied as moot.

This constitutes the decision and order of the court.

October 23, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court