Ruiz v New York State Urban Dev. Corp.
2024 NY Slip Op 33979(U)
November 7, 2024
Supreme Court, Kings County
Docket Number: Index No. 505375/2017
Judge: Wayne Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of November 2024.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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EDGARDO RUIZ,

Plaintiff,

Index No. 505375/2017

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P HUDSON MERIDIAN CONSTRUCTION GROUP BROOKLYN PIER 1 HOTEL OWNER, LP, and CONSTRUCTION REALTY SAFETY GROUP, INC.,

MS #12, 13, 14, 15, 16

DECISION and ORDER

Defendants.

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NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP and BROOKLYN PIER 1 RESIDENTIAL OWNERS, LP,

Third-Party Plaintiffs,

-against-

CONSTRUCTION STAFFING SOLUTIONS, LLC and TEAMCSS LIMITED LIABILITY COMPANY,

Third-Party Defendants

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NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP and BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P,

Second Third Party Plaintiffs,

-against-

TRADE OFF CONSTRUCTION SERVICES, and TRADE OFF LLC,

Second Third Party Defendants.

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The following papers read on this motion:	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	326-352,353-393, 394-431, 432-473, 474-510, 523-524
Cross-motions Affidavits (Affirmations) and Exhibits	
Answering Affidavit (Affirmation)	525-550, 551-576, 577-578, 580-588, 589-597, 598-606, 607-615, 616-624, 626-639, 640-653, 654-662, 663-672
Reply Affidavit (Affirmation)	673-674, 675, 677, 678-681, 682
Supplemental Affidavit (Affirmation)	

Plaintiff alleges that he was injured when a temporary construction fence fell over onto him. He alleges that while he was in the process of installing a door to a frame that was attached to the fence, the wind blew the fence over onto him and he was struck by the door. The fence was set into Yodock barriers, which are plastic barriers into which the poles of the fence can be inserted. The Yodock barriers must be filled with water or sand to keep them stable, and Plaintiff alleges that they were not filled with water or sand. The Plaintiff asserted claims pursuant to Labor Law §§240(1), 241(6) and 200.

The Plaintiff seeks summary judgment on his §240(1) and §200 claims and the various Defendants seek summary judgment dismissing his complaint, as well as summary judgment on various cross-claims.

Labor Law §240(1)

Plaintiff's allegations make out a prima facie case under §240(1), as the construction fence was an object that had to be secured by being filled with ballast such as water and sand and according to Plaintiff they were not filled (*Outar v. City of New*

York, 5 NY3d 731, [2005]; *Podobedov v. E. Coast Const. Grp., Inc.*, 133 AD3d 733, [2d Dept 2015]).

The sand or water used as ballast is a safety device within the meaning of §240(1) as its purpose is to weigh down the base to which the fence is attached so it will not fall over.

The fact that the fence was at the same elevation as Plaintiff is not a bar to a §240(1) claim. The relevant inquiry is whether the harm flows directly from the application of the force of gravity to the object (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]; *Runner v. New York Stock Exch., Inc.*, 13 NY3d 599 [2009]; *Spero v 3781 Broadway LLC,* 214 AD3d 546 [1st Dept 2023]; *Kandatyan v. 400 Fifth Realty, LLC*, 155 AD3d 848 [2d Dept 2017]).

The fact that Plaintiff alleges that it was the door that struck him is immaterial as the door was attached to the frame and fence, and they fell as one unit.

Although Plaintiff has made out a prima facie showing for summary judgment on his §240(1) claim, Defendants have raised issues of fact as to how the accident occurred. Defendants argue that there is evidence that Plaintiff was moving the barricade at the time and lost his grip.

It is uncontested that in order to move the barricade, ballast must be emptied from the Yodock bases. If Plaintiff was moving the barricade and lost his grip, that would not be an elevation related accident but an ordinary workplace risk which does not implicate the special protections afforded by Labor Law §240(1) (*Rodriguez v. Margaret Tietz Center for Nursing Care*, 84 NY2d 841, [1994]; *Parker v. Ariel Associates Corp.*, 19 AD3d 670 [2d Dept 2005]).

Defendants point to two documents that indicate Plaintiff was carrying the fence, an "Employer's First Report of Work-Related Injury/Illness Form", and an accident report by Defendant CONSTRUCTION REALTY SAFETY GROUP, INC. (CRSG).

The "Employer's First Report of Work-Related Injury/Illness Form" is a worker compensation form that was filed out by the Controller of Plaintiff's employer. This report constitutes inadmissible hearsay. It contains no witnesses' statements or statements attributed to Plaintiff. The report does not indicate the source of its information as to the cause of accident.

The CRSG accident report was created by Thomas Kotch, a site safety manager for CRSG. The report contains a handwritten notation that "Employee stated that he was assisting moving the Yodock/fence system when the wind blew over the fence and struck him in the back".

The report contains the notation under "Corrective Action Needed/Taken": "Yodock fence system was moved, filled with water and secured."

The report also lists a Daniel Wright as a witness, although upon being deposed, Wright testified that he did not witness the accident.

In deposition, Kotch gave varying accounts as to where he obtained the information as to the cause of the accident. He testified that he did not recall why he listed Wright as a witness and did not know if Wright did in fact witness the accident.

He also testified that "that's the information I got from Dan", but it is unclear from the deposition whether the information he was referring to was the description of the accident or that Wright was a witness to the accident.

Kotch also testified that he received the statement that Plaintiff was moving the Yodock fence system from the Plaintiff.

There remains a question of fact whether the source of the statement as to the cause of the accident was Plaintiff or Wright, or whether Kotch received information from both of them.

Both Plaintiff and Wright were under a business duty to report, while a statement by Plaintiff would be admissible, Wright's statements would not be admissible as he did not have personal knowledge of the facts.

A statement contained in a business record is only admissible where it is demonstrated that the informant has personal knowledge of the act, event or condition and he is under a business duty to report it to the entrant (*Matter of Leon RR*, 48 NY2d 117 [1979]; *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]; *Murray v Dolan*, 77 AD2d 337 [2d Dept 1980]).

As there is a question of fact that must be resolved to determine the admissibility of the CRSG report, it is sufficient to raise a question of fact as to the manner in which the accident happened which precludes granting summary judgment.

However, at trial the proponent of the CRSG report would have to lay a proper foundation to show that the description of the accident in the report came from Plaintiff.

Labor Law §241(6)

Plaintiff's claim pursuant to §241(6) is based on an alleged violation of New York State Industrial Code 23-1.7(a)(1) which states:

> Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

It is clear that the overhead protection required this under section, planks or plywood capable of supporting 100 pounds per square foot, is not relevant to Plaintiff's accident. Therefore, Plaintiff's claim pursuant to §241(6) must be dismissed.

Labor Law §200

Labor Law §200 claims fall into two categories, first, dangerous or defective conditions at a worksite, and second the means and methods with which the work was performed.

Plaintiff alleges that his injury was caused because the Yodock barriers were not filled with water or sand to make them stable. This would constitute a dangerous condition. If it turns out that Plaintiff was carrying the barriers at the time of the accident, then the lack of sand or water would not have been a dangerous condition (*See Berman-Rey v. Gomez,* 153 AD3d 653 [2d Dept 2017]).

Where there is a dangerous condition at the site, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (*Wilson v Bergon Construction Corp.,* 219 AD3d 1380 [2d Dept 2023]; *Ortega v. Puccia*, 57 AD3d 54, [2d Dept. 2008]).

As discussed above, there are questions of fact as to how the accident occurred that preclude granting Plaintiff summary judgment on his claims pursuant to Labor Law §200.

Similarly, as to Plaintiff's version of events, Defendant owners, lessees and general contractor have not met their burden for summary judgment of showing that they did not have actual or constructive notice of the lack of water or sand in the Yodock barriers.

There was testimony from Thomas Kotch Of CRSG that the barriers were inspected daily and that because the Yodock bases were translucent one could see from the outside whether they were filled with water or sand.

There was also testimony from Kotch and Dennis O'Connor of CRSG that the general contractor Defendant HUSDSON MERIDIAN had been told of a continuing problem with the Yodock bases not being filled and the issue had been raised at a weekly safety meeting.

The safety log of CRSG shows that the barricades were inspected on the date of the accident, however there are notations in the log both that the barriers were "not compliant" and that the barriers were "in place and maintained".

Defendant BROOKLYN PIER 1 HOTEL OWNER, LP

Defendant BROOKLYN PIER 1 HOTEL OWNER, LP argues that it is not a proper Defendant because it was only the lessee of 60 Furman Street, and had no interest in 90 Furman Street, the site of the accident.

However, the contract for the construction fence was between Defendant BROOKLYN PIER 1 HOTEL OWNER, LP, as owner and Defendant TRADE OFF CONSTRUCTION SERVICES as subcontractor. The Scope of Work which is annexed to and made a part of the contract, lists all three buildings, 60, 90, and 130 Furman Street, as within the scope of work.

Further, the contract between HUDSON MERIDIAN and CRSG lists Defendant BROOKLYN PIER 1 HOTEL OWNER, LP, as the owner. These contracts are sufficient to raise questions of fact as to whether Defendant BROOKLYN PIER 1 HOTEL OWNER, LP, was an owner or an agent of the owner of the premises where Plaintiff was injured.

Defendant TRADE OFF

Second-Third-Party Defendants TRADE OFF CONSTRUCTION SERVICES, and TRADE OFF LLC (TRADE OFF) entered into a contract with BROOKLYN PIER 1 HOTEL OWNER, LP, to provide a perimeter fence around the project. The contract also provided that TRADE OFF would indemnify the owner and contractor for claims arising for the acts or omissions of TRADE OFF.

There are questions of fact as to whether the door and fence that fell onto Plaintiff was constructed by TRADE OFF, which preclude granting summary judgement either dismissing the Second Third-Party claims or granting the Second Third-Party Plaintiffs summary judgment on their Third-Party claims for indemnification or failure to procure insurance.

TRADE OFF argues they only put up the perimeter fence and that the fence involved in Plaintiff's accident was an interior fence. TRADE OFF points to the Scope of Work annexed to the contract as exhibit A which provides that TRADE OFF shall:

> Furnish and install 8' tall plywood construction fence along the perimeter of the site as shown on the approved logistics plan and per NYC DOS requirements. At minimum, include 314" plywood panels painted to cover, supported by and properly secured to 4x4" wood posts spaced 8-feet on center maximum, Posts shall extend a minimum of 3-feet below grade and be fully embedded in concrete. Fence shall be constructed in such a manner to be capable of withstanding high winds.

While this section does not call for a chain like fence attached to Yodock barriers, the Site Safety Logistics Plan, which was also made part of the contract, appears to show either plywood or chain link fences on top of water filled Yodock barriers along the sidewalk of Furman Street. Furman Street made up part of the perimeter of the project.

It is unclear from the papers submitted exactly where Plaintiff's accident occurred. Plaintiff testified that he was on the sidewalk when the accident occurred. There was testimony that the fence was located in the courtyard at the time of the accident, however,

there was also testimony by Daniel Wright that one side of the courtyard was adjacent to Furman Street.

Further, there was testimony from Joseph Cuomo of Defendant HUDSON MERIDIAN that at some point TRADE OFF removed that plywood fence and later installed fences with Yodock barriers in the street, to allow for the pouring of the sidewalk.

The photographs submitted are inclusive as to whether the portion of the fence that fell was on the perimeter or the interior of the site.

The Court cannot determine from the papers submitted whether the fence which fell on Plaintiff was installed by TRADE OFF. Therefore, the Court must deny summary judgment dismissing the claims against TRADE OFF, as well as summary judgment on the claims against TRADE OFF for indemnification.

However, TRADE OFF did submit a copy of an insurance policy showing that any party that TRADE OFF was required by contract to insure was covered as an additional insured. Therefore, the claim against TRADE OFF for failure to procure insurance must be dismissed.

Defendant CRSG

Defendant CRSG argues that the complaint should be dismissed against it because it is not a proper Labor Law Defendant. However, CRSG was the site safety manager for the project and Thomas Kotch of CRSG testified that CRSG was responsible for providing site safety coverage at the project. CRSG inspected the site on a daily basis, and filled out daily safety logs in which safety issues were noted. Although CRSG's practice was to notify the general contractor of any safety conditions, CRSG had the authority to stop work if it found a dangerous condition.

The Appellate Division has held under similar circumstances that CRSG's role as a site safety consultant presented questions of fact as to whether they were a statutory agent of the owner for purposes of the Labor Law (*Santos v. Condo 124 LLC and Construction Realty Safety Group Inc.,* 161 AD3d 650 at 653 [1st Dept 2018]). In *Santos v. Condo 124 LLC,* as in the present case, CRSG was a site safety consultant whose duties were to ensure the safety of the project. The Appellate Division held that CRSG's authority to stop work in the event of unsafe practices raised a question of fact whether it was a statutory agent of the owner (*id.; see also Barreto v. MTA,* 25 NY3d 426 [2015]).

Indemnification against CRSG

The contract between CRSG and HUDSON MERIDIAN requires CRSG to indemnify HUSDON MERIDIAN, the owner, listed as BROOKLYN PIER 1 HOTEL OWNER, LP, and their agents from claims arising from the acts or omissions of CRSG.

As there is still a question whether the accident occurred because the Yodock barriers were not filled with water or sand, or whether it occurred while Plaintiff was carrying the barriers, there is still an open question whether the accident occurred because of an act or admission of CRSG. Therefore, neither granting Third-Party Plaintiffs summary judgement on their claim against CSRG for contractual indemnification or dismissal of that claim is warranted.

CSRG submitted a copy of an insurance policy it procured which covers as additional insureds any party CRSG is contractually obligated to provide insurance for, therefore the claims against CRSG for failure to procure insurance must be dismissed.

Defendant TEAMCSS LIMITED LIABILITY COMPANY

As a preliminary matter, Third-Party Defendant TEAMCSS LIMITED LIABILITY COMPANY (TEAM CSS) was Plaintiff's employer, therefore, pursuant to the Workers Compensation Law, the claims against them for common law indemnification and contribution must be dismissed.

The Third-Party Plaintiffs have also pled claims for contractual indemnification and failure to procure insurance against TEAMCSS.

The contract between HUDSON MERIDIAN and TEAMCSS provides that TEAMCSS will indemnify HUDSON MERIDIAN and its owners and agents from claims arising from the acts or omissions of TEAMCSS, its directors, agents and employees.

Defendant TEAMCSS argues that the accident did not arise from any acts and omissions on their part. TEAMCSS states that they did not supervise the Plaintiff or any workers at the site. TEAMCCS further states that their only role was to supply workers to HUDSON MERIDIAN, who then supervised their work.

However, Plaintiff testified that he was supervised on a regular basis by another employee of TEAMCSS at the site and on the time of the accident he was being assisted by another TEAMCSS employee. He also testified that he never dealt with anyone from HUDSON MERIDIAN or any of the other Third-Party Plaintiffs.

In addition to the question of whether Plaintiff was supervised by TEAMCSS employees, Plaintiff himself was an employee of TEAMCSS. Pursuant to the contract, TEAMCSS agreed to indemnify HUDSON MERIDIAN for claims arising from the acts and omissions of its employees, which would include the acts of Plaintiff.

However, the indemnification clause also states that TEAMCSS will indemnify "to the fullest extent permitted by law". This limitation relieves TEAMCSS from having to indemnify HUDSON MERIDIAN for its own negligence. It has not yet been determined

if HUDSON MERIDIAN was negligent, or if they were, to what extent they were. Thus, it would be premature to grant them summary judgment on the claims for contractual indemnification.

Although TEAMCCS sought dismissal of all claims brought against it, it did not address the claims against it for failure to procure insurance in its moving papers.

WHEREFORE, it is ORDERED that Plaintiff's motion (MS 12) for summary judgment on his claims under Labor Law §§240(1) and 200 is DENIED; and it is further,

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) to dismiss Plaintiff's claims pursuant to Labor Law §240(1) is DENIED; and it is further,

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) to dismiss Plaintiff's claims pursuant to Labor Law §241(6) is GRANTED; and it is further,

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) to dismiss Plaintiff's claims pursuant to Labor Law §200 is DENIED; and it is further,

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) to dismiss Plaintiff's claims against Defendant BROOKLYN PIER 1 HOTEL OWNER, LP is DENIED; and it is further,

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) for summary judgment on their claims for contractual indemnification against Second Third-Party Defendants TRADE OFF CONSTRUCTION SERVICES and TRADE OFF LLC is DENIED; and it is further,

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) for summary judgment on their claims for contractual indemnification against Third-Party Defendant CONSTRUCTION REALTY SAFETY GROUP, INC. is DENIED; and it is further.

ORDERED that that portion of the motion of Defendants NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, HUDSON MERIDIAN CONSTRUCTION GROUP, BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P, and, BROOKLYN PIER 1 HOTEL OWNER, LP (MS 13) for summary judgment on their claims for contractual indemnification against Third-Party Defendant TEAMCSS LIMITED LIABILITY COMPANY is DENIED; and it is further,

ORDERED that that part of the motion of Second Third-Party Defendants TRADE OFF CONSTRUCTION SERVICES and TRADE OFF LLC (MS 14) to dismiss the claims against it for contractual and common law indemnification is DENIED; and it is further,

ORDERED that that part of the motion of Second Third-Party Defendants TRADE OFF CONSTRUCTION SERVICES and TRADE OFF LLC (MS 14) to dismiss the claims against it for failure to procure insurance is GRANTED; and it is further,

ORDERED that that part of the motion of Defendant CONSTRUCTION REALTY SAFETY GROUP, INC. (MS 15) to dismiss Plaintiffs claims pursuant to Labor Law §241(6) is GRANTED; and it is further,

ORDERED that that part of the motion of Defendant CONSTRUCTION REALTY SAFETY GROUP, INC. (MS 15) to dismiss Plaintiffs claims pursuant to Labor Law §§240(1) and 200 is DENIED; and it is further,

ORDERED that that part of the motion of Defendant CONSTRUCTION REALTY SAFETY GROUP, INC. (MS 15) to dismiss the claims against it for contractual indemnification, common law indemnification and contribution is DENIED; and it is further,

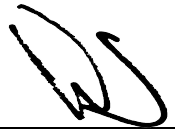
ORDERED that that part of the motion of Defendant CONSTRUCTION REALTY SAFETY GROUP, INC. (MS 15) to dismiss the claims against it for failure to procure insurance is GRANTED; and it is further,

ORDERED that that part of the motion of Defendant TEAMCSS LIMITED LIABILITY COMPANY (MS16) to dismiss the claims against it for common law indemnification and contribution is GRANTED; and it is further,

ORDERED that that part of the motion of Defendant TEAMCSS LIMITED LIABILITY COMPANY (MS16) to dismiss the claims against it for contractual indemnification, and failure to procure insurance is DENIED.

This constitutes the Decision and Order of this Court.

E N T E R:



JSC