Davis v Breadstreet Holdings Corp.
2012 NY Slip Op 30870(U)
March 30, 2012
Sup Ct, NY County
Docket Number: 117455/06
Judge: Judith J. Gische
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SCANNED ON 4/5/2012

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Davis

Plaintiff (s),

INDEX NO. 117455-06

MOTION DATE

Breadstreet

MOTION SEQ. NO. 004

Defendant(s).

The following papers, numbered 1 to ____ were read on this motion to/for ____________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR - 5 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 04 2012

HON. JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

---X

GLENN DAVIS and MICHELLE DAVIS,

Plaintiffs,

-against-

BREADSTREET HOLDINGS CORPORATION, 350 PARK INVESTORS LLC, 350 PARK INVESTORS CORPORATION, HENEGAN CONSTRUCTION CO., INC., NASTASI & ASSOCIATES, INC. and ZIFF BROTHERS INVESTMENTS, L.L.C.,

Defendants.

---X

Decision/Order
Index №.: 117455/06
Seq. Nos. 004, 005 and 006

Present:
Hon. Judith J. Gische
J.S.C.

HENEGAN CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

ADCO ELECTRICAL CORP. and NASTASI & ASSOCIATES, INC.,

Third-Party Defendants.

---X

T.P. Index No.:
590486/07

BREADSTREET HOLDINGS CORPORATION, 350 PARK INVESTORS LLC SUCCESSOR BY CONVERSION TO 350 PARK INVESTORS CORPORATION,

Second Third-Party Plaintiffs,

-against-

ZIFF BROTHERS INVESTMENTS, LLC

Second Third-Party Defendants.

---X

Second T.P. Index No.:
490524/07

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these motions:

Papers	Numbered
Motion Seq. No. 004	
DEFs 350 PARK, HENEGAN, ZIFF's n/motion (CPLR 3212) w/LEB affirm, exhs	1
PLTFs' opposition w/DB affirm, exhs	2

DEF NASTASI's partial opposition w/ABS affd 3
DEFs 350 PARK, HENEGAN, ZIFF's reply to PLTF w/LEB affirm 4
DEFs 350 PARK, HENEGAN, ZIFF's reply to NASTASI w/LEB affirm 5

Motion Seq. No. 005
PLTFs' n/motion (CPLR 3212) w/DB affirm in support, exhs 6
DEFs 350 PARK, HENEGAN, ZIFF's opposition w/LEB affirm in support, exhs 7
PLTFs' reply w/DB 8

Motion Seq. No. 006
DEF NASTASI's n/motion (CPLR 3212) w/ABS affirm, exhs 9
PLTFs' opposition w/DB affirm, exhs 10
DEFs 350 PARK, HENEGAN, ZIFF's partial opposition w/LEB affirm 11
DEF NASTASI's reply w/ABS affid 12

Other:
Transcript of OA 12/8/11 13

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.;

This is an action based upon alleged violations of the New York State Labor Laws ("Labor Law § ___") sections 240 [1], [2], and [3], 241 [6], 200 and common law negligence. Issue was joined and plaintiff filed his note of issue April 14, 2011. The summary judgment motions presently before the court were brought timely (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). Defendant/second third-party plaintiff 350 Park Investors LLC (350 Park), defendant/third-party plaintiff Henegan Construction Co., Inc. (Henegan), and defendant/second third-party defendant Ziff Brothers Investments, LLC (Ziff) move collectively, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against them; alternatively, 350 Park, Henegan, and Ziff move for summary judgment on their contractual indemnification claims against defendant/second third-party defendant Nastasi &

Associates, Inc. (Nastasi) (motion seq. no 004). Plaintiffs move for partial summary judgment against 350 Park Investors and Henegan as to liability under Labor Law § 240 (1) (motion seq. no. 005). Finally, Nastasi moves for summary judgment dismissing all claims and cross claims as against it (motion seq. no. 006). The motions are consolidated for decision in this decision/order.

Background

On July 12, 2006, the day of his accident, plaintiff Glenn Davis (Davis) was working as an electrician for third-party defendant ADCO Electrical Corp. (ADCO) at a renovation project inside a building, owned by 350 Park, and located in midtown Manhattan. The project involved the renovation of seven floors of the building for an incoming tenant, Ziff. Ziff retained Henegan as the general contractor, and Henegan hired Nastasi as the carpentry subcontractor and ADCO as the electrical subcontractor.

On the day of his accident, Davis, with the help of an apprentice electrician, was installing brackets on the ceiling of the third floor to support soffit lighting (Davis Deposition, at 26-29). Davis stepped off an eight-foot ladder, onto stacked sheetrock in order to gain access to the next area where the brackets had to be installed. The top piece of sheetrock, which was cantilevered and unsupported from beneath where Davis stepped onto it, dislodged and Davis fell to the ground, injuring his ankle (*Id.* at 73-78). The sheetrock was placed there by Nastasi, as it anticipated using the material to build ceilings and walls.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Plaintiffs' Claims Against Nastasi

Nastasi argues that plaintiffs' Labor Law § 200 and common-law negligence claims should be dismissed, as against it, because it did not control Davis's work. Nastasi submits Davis's deposition testimony, in which Davis states that he took direction only from other ADCO employees (Davis Deposition, at 32-33, 37-38). Davis does not contest that Nastasi did not supervise his work. As Davis's accident was caused by the method and manner of his work, liability cannot be imposed on Nastasi under Labor Law § 200 and common-law negligence "unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). Since the parties agree that Nastasi did not exercise supervisory control over plaintiff's work, Nastasi is entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims as against it. As these are plaintiffs' only claims against Nastasi, the complaint is dismissed as against Nastasi.

II. Labor Law § 240 (1)

Plaintiffs move for summary judgment on their Labor Law § 240 (1) claims as against 350 Park, the property owner, and Henegan, the construction manager, on the subject renovation project. Initially, 350 Park and Henegan's argument that plaintiffs' expert affidavit from Kathleen Hopkins (Hopkins) should be precluded, is denied. There is no evidence that any delay

in making expert disclosure was intentional or wilful (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711 [2d Dept 2007] [holding that CPLR 3101 (d) (1) (i) does not "mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" [internal quotation marks and citation omitted]).

Plaintiffs make a prima facie showing of entitlement to partial summary judgment as to liability under section 240 (1) against 350 Park and Henegan by presenting evidence that Davis was injured as a result of their failure to provide "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Plaintiffs submit Davis's deposition testimony, in which he testified that he was installing brackets in the ceiling, approximately 10 feet from the ground, and that he was not provided any safety device that would allow him to reach the ceiling above the sheetrock without stepping on the sheetrock which, plainly, is not an adequate safety device (*see* Davis Deposition, at 69-78).

More specifically, Davis testified that piles of sheetrock littered the third floor and obstructed his work in many areas, and that while no one instructed him to stand on the sheetrock in order to perform his work, his ADCO supervisors, as well as Henegan's supervisor, and Nastasi's foreman all observed him working from on top of piles of sheetrock, and placing his ladder on top of the sheetrock in order to reach the ceiling (*id.* at 67-70). John Del Vecchio, Nastasi's foreman, could not remember if he was on the third floor on the day of Davis's accident, but he stated that it is "a common thing" for workers to stand on a pile of sheetrock in

order to carry out their work (Del Vecchio Deposition, at 46).

Davis also testified that his supervisors, as well as those of Henegan and Nastasi, observed his work in order to see if he could do it fast enough to enable the particular coordination of trades that the supervisors had agreed upon (Davis Deposition, at 73), and that it would have taken approximately two days for Nastasi to have moved all of the sheetrock from places where he needed to place his ladder to do the bracket installation he had been assigned (*id.* at 165). Nastasi's Del Vecchio testified that, if moved by hand by three workers, each pile of sheetrock would take three men 20 minutes to move (Del Vechio Deposition, at 33). More generally, Del Vecchio stated that Nastasi tries to place sheetrock piles in areas that will not obstruct work because "[w]e don't like moving it" (*id.* at 75). Finally, plaintiffs' expert, Hopkins, opines in his sworn affidavit that in the absence of moving the stored materials out of Davis's way, the proper safety device would have been a "a scissorlift scaffold with a cantilevered platform" that could have extended over the stored materials (Hopkins Affidavit, ¶ 12).

In opposition, 350 Park and Henegan argue that they are not liable, as Davis was the sole proximate cause of his accident. Defendants submit deposition testimony from Nastasi's Del Vecchio, Steven Valenti (Valenti), a superintendent for Henegan, and Fee Yee (Yee), a foreman for Henegan, and each of them deny ever seeing any workers placing a ladder on top of a pile of sheetrock. None of them, however, testifies to having witnessed plaintiff's accident (Valenti Deposition, at 86; Valenti Deposition, at 53, 73; Yee Deposition, at 84-86).

Defendants also submit the deposition testimony of ADCO's foreman, James McKinley (McKinley), who testified that, generally, he had occasionally seen workers standing on piles of

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sheetrock to do work (McKinley Deposition, at 33-34), but that he did not see plaintiff do so at the subject renovation project. He also testified that the proper procedure would have been to ask Henegan to move the sheetrock rather than to try to work on top of it (*id.* at 64-65). Moreover, in a sworn affidavit submitted by defendants, Yee, Henegan's foreman states that an a-frame dolly, and a pallet jack were both present on the worksite, and that one could have been used by Henegan employees to move the sheetrock piles (Yee Affidavit, ¶ 13; *see also* Valenti Affidavit, ¶ 13). Finally, defendants submit a sworn affidavit from ADCO's foreman, McKinley, in which he states that while he does not recall witnessing Davis's accident, he was working nearby. McKinley states the accident occurred on a table with a piece of sheetrock on top of it, rather than a pile of sheetrock (McKinley Affidavit, ¶¶ 10, 13-17). McKinley added that he was unaware of any time constraints on Davis and that he did not rush him along as he did his job (*id.*, ¶¶ 29-30, 34).

None of this testimony raises an issue of fact as to whether Davis was the sole proximate cause of his accident. There is no testimony that Davis knew he was expected, or was instructed, to have Henegan move the sheetrock out of his way rather than work around the sheetrock, and/or perform his work atop the sheetrock when necessary (*see Torres v Our Townhouse, LLC*, 91 AD3d 549, 549 [1st Dept 2012] [holding that the sole proximate cause defense not applicable where there was no evidence presented that plaintiff knew he was expected to use a safety device while performing his work], citing *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Moreover, whether plaintiff stepped onto a sheetrock pile or a table covered by sheetrock in order to reach the ceiling is immaterial to the question of whether defendants violated the statute because neither is an adequate safety device.

As plaintiff has made a *prima facie* showing that his accident was proximately caused by a violation of Labor Law § 240 (1), but defendants have failed to rebut that showing by raising material issues of fact, plaintiff is entitled to partial summary judgment against 350 Park and Henegan as to liability under Labor Law § 240 (1). Consequently, the branch of defendants' motion that seeks dismissal of plaintiff's Labor Law § 240 (1) motion is denied.

III. Plaintiff's Other Claims Against 350 Park, Henegan, and Ziff

A. Labor Law §§ 240 (2) and 240 (3)

Plaintiffs have not addressed 350 Park, Henegan, and Ziff's argument that these sections of the Labor Law are inapplicable. As plaintiffs' "failure to address this issue in its responding brief indicates an intention to abandon [these] [bases] of liability" (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]), plaintiffs' claims under Labor Law §§ 240 (2) and 240 (3) are hereby severed and dismissed.

B. Labor Law § 200

350 Park, Henegan, and Ziff argue that plaintiffs' Labor Law § 200 and common-law negligence claims must be dismissed as against them, because they did not have supervisory control over Davis's work. Defendants submit Davis's deposition testimony, in which he states that he took direction only from other ADCO employees (Plaintiff's Deposition, at 32-33, 37-38). As plaintiffs fail to rebut this prima facie showing of entitlement to judgment as a matter of law, 350 Park, Henegan, and Ziff are entitled to summary judgment in their favor, dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against them.

C. Labor Law § 241 (6)

Plaintiffs claim that defendants violated the following provisions of the Industrial Code

and that those code violations were a proximate cause of Davis's injuries: 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-1.7 (f), and 12 NYCRR 23-2.1 (a) (1).

12 NYCRR 23-1.7 (f), entitled "Vertical passage," is plainly not applicable since Davis's accident did not involve "[s]tairways, ramps or runways." Similarly, 12 NYCRR 23-2.1 (a) (1) is not applicable since the accident took place on an open area in the third floor of the building, rather than a "passageway, walkway, stairway or other thoroughfare" (*see Barrios v Boston Props. LLC*, 55 AD3d 339, 340 [1st Dept 2008]).

Defendants, however, fail to make a prima facie showing of entitlement to judgment with respect to 12 NYCRR 23-1.7 (e) (2). The regulation, which applies to "[t]ripping and other hazards" in "[w]orking areas" provides that "[t]he parts of floors, platforms, and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

350 Park, Henegan, and Ziff argue, relying on *Isola v JWP Forest Elec. Corp.* (267 AD2d 157 [1st Dept 1999]), that the sheetrock was not a scattered material for purposes of this regulation, since Nastasi intentionally placed it on the floor in furtherance of its work. Defendants, however, have failed to show, conclusively, that the sheetrock was an "integral part of the work being performed," i.e., plaintiff's installation of brackets for soffit lighting (*Orlino v 2 Gold, LLC*, 63 AD3d 541, 541 [1st Dept 2009]). *Isola*, in contrast, involved an electrical conduit that was to become part of the floor on which it was lying, and the plaintiff was working on constructing the floor (*Isola*, 267 AD2d at 157-158).

Since defendants fail to make a prima facie showing with respect to the inapplicability of

12 NYCRR 23-1.7 (e) (2), the branch of 350 Park, Henegan, and Ziff's motion that seeks dismissal of plaintiff's Labor Law § 241 (6) must be denied.

IV. Contractual Indemnification

350 Park, Henegan, and Ziff contend that they are entitled to contractual indemnification from Nastasi. Henegan and Nastasi executed a purchase order dated April 3, 2009, which contains the following indemnification provision:

> To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless Owner, Construction Manager, Owner's consultants, the building landlord ... from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance of Subcontractor's Work, provide (*sic*) that such claim, damage, loss or expense is attributable to bodily injury ... regardless of whether or not it is caused in part by a party indemnified hereunder ... (Henegan-Nastasi Purchase Order, "General Requirements," § 6).

Under the purchasing agreement, Ziff is the "Owner," 350 Park is "the building landlord," and Henegan is the "Construction Manager" (Henegan-Nastasi Purchase Order, at 1). Here, Davis's accident plainly arose out of Nastasi's work, because Davis fell when he tried to step on Nastasi's sheetrock and the sheetrock gave way. The cases that Nastasi relies on in urging a different result, such as *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]) and *Pepe v Center for Jewish History, Inc.* (59 AD3d 277 [1st Dept 2009]) are unpersuasive, as those cases involved more tenuous causal links than the one between Nastasi leaving sheetrock around the worksite and plaintiff falling because of it. As the indemnification provision is triggered, the branch of 350 Park, Henegan, and Ziff's motion that seeks contractual indemnification against Nastasi is granted. As a consequence, the branch of Nastasi's motion that seeks dismissal of 350 Park, Henegan, and Ziff's claims against it are denied.

CONCLUSION

In accordance with the foregoing,

It is hereby

ORDERED that the branch of defendant/second third-party plaintiff 350 Park Investors LLC, defendant/third-party plaintiff Henegan Construction Co., and defendant/second third-party defendant Ziff Brothers Investments, LLC's motion (motion seq. no. 004) seeking dismissal of plaintiffs' complaint is granted only to the extent that plaintiffs' Labor Law §§ 200, 240 (2), and 240 (3) claims are dismissed; and it is further

ORDERED that the branch of defendant/second third-party plaintiff 350 Park Investors LLC, defendant/third-party plaintiff Henegan Construction Co., and defendant/second third-party defendant Ziff Brothers Investments, LLC's motion that seeks summary judgment on their contractual indemnification claim against defendant Nastasi & Associates, Inc. is granted; and it is further

ORDERED that plaintiffs' motion for partial summary judgment as to liability under Labor Law § 240 (1) as against defendant/second third-party plaintiff 350 Park Investors LLC and defendant/third-party plaintiff Henegan Construction Co. (motion seq. no. 005) is granted; and it is further

ORDERED that defendant/third-party defendant Nastasi & Associates, Inc.'s motion for summary judgment (motion seq. no. 006) is granted only to the extent that plaintiffs' complaint is dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that this case is ready to be tried since the note of issue has been filed; the

plaintiff shall serve a copy of this decision and order on the Mediator assigned to this case as well as to the Office of Trial Support so the case can be scheduled for trial after the next scheduled mediation (May 4, 2012); and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 30, 2012

So Ordered:

Hon. Judith J. Gische, JSC

FILED
APR - 5 2012
COUNTY CLERK'S OFFICE
NEW YORK