

Jafargian v IAC/Interactivecorp
2012 NY Slip Op 31863(U)
July 12, 2012
Sup Ct, New York County
Docket Number: 111069/08
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Jafargian, Steve
-v-
IAC, et. al

INDEX NO. 111069/08
MOTION DATE _____
MOTION SEQ. NO. 004

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with
the accompanying decision/order

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

FILED

JUL 17 2012

NEW YORK
COUNTY CLERK

Dated: 7/12/12

Saliann Scarpulla
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
STEVE JAFARGIAN,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 111069/08

IAC/INTERACTIVECORP, IAC/GEORGETOWN 19TH
STREET, LLC, THE GEORGETOWN COMPANY, LLC,
TURNER CONSTRUCTION COMPANY, JOEL M.
SILVERMAN AND ASSOCIATES, LLC, HTRF
VENTURES, LLC, and GEORGETOWN 19TH STREET
DEVELOPMENT, LLC,

FILED

2008

Defendants,

NEW YORK
COUNTY CLERK'S OFFICE

-----X

For Plaintiff:
Barry McTiernan & Moore
2 Rector Street
New York, NY 10006

For Defendants HTRF Venutres, LLC and Georgetown 19th
Street Development, LLC:
London Fischer LLP
59 Maiden Lane
New York, NY 10038

For Defendant Turner Construction Company:
Brown Gavalas & Fromm LLP
355 Lexington Avenue
Brooklyn, NY 10017

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Affs in Opp 2, 3
- Replies 4, 5

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants HTRF Ventures, LLC (“HTRF Ventures”) and Georgetown 19th Street Development, LLC (“Georgetown”) (collectively “defendants”) move for (1) summary judgment dismissing the plaintiff Steve Jafargian’s (“Jafarigan”) Labor Law §240 cause of action asserted against them, and (2)

summary judgment on their second cross claim for contractual indemnification against the codefendant Turner Construction Company (“Turner”), or, in the alternative, for conditional judgment on the second cross claim.

This case arises out of two separate work-site accidents, at a building under construction at 555 West 18th Street, in Manhattan. HTRF Ventures was the owner of the work-site. Georgetown was the developer of the project, and Turner was the construction manager. The accidents occurred during the course of Jafargian’s employment for Urban Foundation Engineering LLC (“Urban”). On August 19, 2005, Jafargian slipped on some rebar, and on August 26, 2005, Jafargian tripped on wood debris described as two-by-four cut-offs. Jafargian alleged that he sustained lower back pain and stiffness and asserted causes of action for common law negligence, and for violation of Labor Law §§200, 240(1), and 241(6).

Defendants HTRF Ventures and Georgetown now move for summary judgment, arguing that Labor Law §240 does not apply to this case because Jafargian did not fall as the result of a gravity related risk. They further argue that they are entitled to contractual indemnification from Turner.

In opposition, Jafargian argues that summary judgment is premature, further discovery is necessary, Labor Law §240(1) does apply because he fell from an elevated ramp, and that even if the Labor Law §240(1) claim is dismissed, Jafargian’s other claims are preserved. In opposition, Turner argues that summary judgment is premature as there

has been no finding of negligence against either Turner or Urban to trigger indemnification.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case. *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York Univ. Med. C'tr.*, 64 N.Y.2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Labor Law §240(1) provides that building owners and contractors:

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.

Whether a plaintiff is entitled to recovery under Labor Law §240(1) requires a determination of whether the injury resulted from the type of elevation related hazard to which the statute applies. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513

(1991). The reach of Labor Law §240(1) includes such specific gravity-related accidents as a worker falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993). Section 240(1) applies to both "falling worker" and "falling object" cases. *Quattrocchi v. F.J. Sciamè Constr. Corp.*, 44 A.D.3d 377, 379 (1st Dept. 2007) *aff'd* 11 N.Y.3d 757 (2008). In deciding the applicability of Labor Law §240(1) to a construction site accident, the key is whether the worker's injuries were the direct result of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599 (2009).

Here, HTRF Ventures and Georgetown have established that Jafargian's injuries were not proximately caused by the type of elevation related hazard to which Labor Law §240(1) applies. In opposition, Jafargian fails to submit any evidence sufficient to raise an issue of fact. Therefore, the motion for summary judgment dismissing the Labor Law §240(1) claim asserted against HTRF Ventures and Georgetown is granted.

Turning to the indemnification issue, paragraph 6.9.1 of Turner's construction manager agreement with the defendants provides:

To the fullest extent permitted by law, the Construction Manager hereby agrees to defend, indemnify and hold harmless ... the indemnitees..., from and against all liability, damages, losses, demands, claims and actions for personal injury, bodily injury (including death) to any person, including the Construction Manager, Trade Contractor, Sub-trade Contractor or any of their employees, and property damage (to property that is other than the Work itself), including damages flowing or arising therefrom, to the extent resulting from the negligent or wrongful acts or omissions of the

Construction Manager, Trade Contractor, Sub-trade Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable...

Labor Law §200 codifies an owner's and general contractor's common-law duty to provide workers with a safe place to work. *Rizzutto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998). Labor Law §241(6) requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. Because Labor Law §241(6) imposes a non-delegable duty on property owners, a plaintiff need not show that the defendants exercised supervision or control over the worksite in order to establish a right of recovery. Nonetheless, comparative negligence remains a cognizable affirmative defense to a Labor Law §241(6) cause of action. *St. Louis v. Town of N. Elba*, 16 N.Y.3d 411 (2011).

The motion for summary judgment on the defendants' contractual indemnification cross claim against Turner is denied. The contract between the parties requires Turner to indemnify the defendants for claims arising out the performance of Turner's work, but only to the extent caused by the negligent acts or omissions of Turner, its sub-contractors, or anyone directly or indirectly employed by them. Thus, the indemnification provision is triggered if the accident was caused by the negligence of either Turner, Urban, or their employees. The motion papers are devoid of proof of either Turner or Urban's negligence and therefore, the defendants are not entitled to summary judgment on their

indemnification claim at this time. *Cole v Homes for the Homeless Inst., Inc.*, 93 A.D.3d 593 (1st Dept. 2012).

Accordingly, it is hereby

ORDERED that defendants IITRF Ventures, LLC and Georgetown 19th Street Development, LLC's motion for summary judgment dismissing the plaintiff Steve Jafargian's Labor Law §240(1) cause of action asserted against them is granted, and that cause of action asserted against them is dismissed; and it is further

ORDERED that defendants IITRF Ventures, LLC and Georgetown 19th Street Development, LLC's motion for summary judgment on their second cross claim for contractual indemnification against Turner Construction Company or, in the alternative, for an order granting a conditional judgment on the second cross claim, is denied as premature.

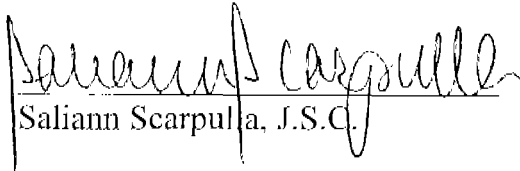
This constitutes the decision and order of the court.

Dated: New York, New York
July 2, 2012

FILED
JUL 2 2012
CLERK OF THE COURT

ENTER:

CLERK OF THE COURT


Saliann Scarpulla, J.S.C.