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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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FRANKLIN ANDRADE,

Plaintiff,

Index No.: 151057/2013

-against-

DECISION AND ORDER

350 BLEECKER STREET APARTMENT CORP., TUDOR REALTY SERVICES CORP., CEPRINE CONSTRUCTION INC. and L.A. NEW YORK RESTORATION CORP.,

Defendants.

----------x Motion Seq. No. 002

350 BLEECKER STREET APARTMENT CORP., TUDOR REALTY SERVICES CORP.,

Third-Party Plaintiffs,

-against-

B&H RESTORATION, INC.,

Third-Party Defendant.

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DEBRA A. JAMES, J.S.C.:

Plaintiff, a construction masonry worker alleges that he suffered injuries when he fell from a loose plank resting between two A-frame ladders at the fourth rung and seeks damages arising out of such injuries pursuant to Labor Law §§ 240(1), 241(6), and 200.

Plaintiff now moves, under CPLR 3212, for partial summary judgment as to liability on his Labor Law § 240(1).

Defendants 350 Bleecker Street Apartment Corp. (350 Bleecker Corp.) and Tudor Realty Services Corp. (Tudor Realty) cross-move for summary judgment dismissing plaintiff's Labor Law § 200 and common law claim, and for summary judgment on their contractual indemnity claims against third party defendant B&H Restoration, Inc.

350 Bleecker Street Corp. was the fee owner of the building known as 350 Bleecker Street, New York, New York, a residential cooperative apartment building (premises). At the time of his accident, plaintiff, as an employee of third party defendant B&H Restoration, Inc. (B&H), was performing facade work at the premises. Defendant Tudor Realty was the managing agent of the premises.

Plaintiff Franklin Andrade (Andrade) alleges that on January 17, 2013, he was injured when as he rested his right foot and placed his left foot on a wooden plank between the fourth rung of two A-frame ladders in order to use a scraper to clean underneath the exterior fire escape stairs of the premises, the plank broke and he fell approximately four feet to the ground.

Third party defendant B&H opposes plaintiff's motion, arguing that plaintiff was the sole proximate cause of his accident as he failed to use available safety devices,

specifically the safety harness and lifelines that according to the deposition testimony of B&H's foreman were available in the B&H tool shed at the worksite.

"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 A.I. Indus., Inc., 10 NY3d 733, 735 [2008], quoting Alvarez, 68 NY2d at 324).

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> All contractors and owners and their agents ... 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.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (Bland v Manocherian, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (Matter of East 51st St. Crane Collapse Litig., 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Section 240 (1) in this case concerns whether plaintiff was the sole proximate cause of his accident and/or there is an issue fact whether or not he was.

A worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for

no good reason chose not to do so, causing an accident" (Gallagher v New York Post, 14 NY3d 83, 88 [2010]; see also Miranda v NYC Partnership Hous. Dev. Fund Co., Inc., 122 AD3d 445, 445-446 [1st Dept 2014]).

In Cahill v Triborough Bridge & Tunnel Auth. (4 NY3d 35, 40 [2004]), the Court of Appeals held that there was sufficient evidence that formed the basis of the jury's finding that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that for no good reason he chose not to do so; and that if he had not made that choice he would not have been injured", and therefore, as a recalcitrant worker, plaintiff was not entitled to recover under Labor Law § 240(1). Where defendants conduct was not the cause of the accident, but plaintiff's was the sole proximate cause, plaintiff may not recover under Labor Law § 240(1).

However, here, contrary to Cahill, defendants offer no evidence that refutes the testimony of the B&H foreman that Andrade and the other B&H workers were not using safety harnesses on the date of the accident and that the he instructed Andrade that no harness was necessary because Andrade was working on the first floor. The B&H foreman, having seen Andrade working

without wearing a harness immediately prior to the accident, voiced no objection. Moreover, defendants come forward with no factual or legal argument that refutes the opinion of plaintiff's expert that a baker style scaffold was the standard and appropriate safety device for the task assigned to Andrade, which took place only four feet above the ground, as the lifeline with harness would not be adequate since the standard lanyard would not engage to arrest a fall of less than six feet. On that basis, the court rejects B&H's argument that Andrade was the sole proximate cause of his accident. Defendants 350 Bleecker Corp. and Tudor Realty violated the statute as the A-frame ladder and plank set up for Andrade to carry out his assignment were insufficient to protect plaintiff from his fall while he was engaged in covered activity (see Collins v West 13th Street, 12 AD3d 902 [1st Dept 2009] [worker was entitled to summary judgment where he fell from a make-shift scaffold that he personally constructed, which consisted of plywood on top of an A-frame ladder resting on the top of a knee wall that was the same height of the ladder since no appropriate safety devices were available].

II. Labor Law § 200

With respect to defendants' cross motion as to plaintiff's Labor Law 200 and common law negligence claims, the court shall grant summary judgment dismissing such claims.

The law is that "A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed. The right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law §200 or for common-law negligence." Torres v Perry St. Dev. Corp., 104 AD3d 672, 676 [2d Dept 2013].

Here, the testimony of Andrade and the B&H foreman establishes that plaintiff was under the supervision and control of his employer B&H, who solely supervised and controlled the means and methods of Andrade's work, including providing him with any safety equipment. Tudor Realty's deponent testified that no employee of either Tudor Realty or 350 Bleecker Corp. was responsible for inspecting or supervising Andrade's work. As there is no evidence that defendants exercised any control or that there was an inherently dangerous condition in the premises

that caused Andrade's injuries, no liability may be imposed under Labor Law 200 or in negligence against the cross moving defendants, and those claims shall be dismissed.

Defendants/third party plaintiffs 350 Bleecker Corp. and Tudor Realty are correct that as their liability pursuant to Labor Law § 241(1) is purely vicarious and statutory, and the Labor Law § 200 claims dismissed, defendants/third party plaintiffs are entitled to summary judgment on their contractual indemnity claims against B&H (see Macedo v J.D. Posillico, Inc., 68 AD3d 508, 510 [1st Dept 2009]). Under § 9.12 of the Agreement between 350 Bleecker Corp. and B&H, B&H is obligated to indemnify defendants 350 Bleecker Corp. and Tudor Realty as clearly Andrade's "claims, damages, losses and expenses, including but not limited to attorneys' fees, aris[e] out of or result[] from performance of [B&H's] Work".

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment pursuant to CPLR 3212 as to liability under (a) Labor Law § 240 (1) is granted; and it is further

ORDERED that defendants' cross motion pursuant to CPLR 3212 for summary judgment dismissing plaintiff's claim under Labor Law § 200 is granted; and it is further

ORDERED that defendants'/third party plaintiffs' cross motion pursuant to CPLR 3212 for summary judgment as to liability on their third party claim against third party defendant B&H Restoration, Inc. For contractual indemnification is granted

ORDERED that the parties are directed to appear for a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, New York on January 12, 2016, 2:30 PM.

Dated: November 24, 2015 ENTER

J.S.C.

DEBRA A. JAMES