Marchetti v AJ Pegno Constr. Corp.
2017 NY Slip Op 30629(U)
March 28, 2017
Supreme Court, Queens County
Docket Number: 21464/09
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** Justice **IAS PART 2**

ANTHONY MARCHETTI AND LIZZETTE MARCHETTI,

Plaintiffs,

-against-

AJ PEGNO CONSTRUCTION CORP., TULLY CONSTRUCTION CO., INC., PEGNO/TULLY JOINT VENTURE, SLATTERY SKANSKA, INC., A PICONE/McCULLAGH JOINT VENTURE, PERINI CORP. d/b/a TUTOR PERINE CORP., SPMP CORP JOINT VENTURE AND SILVERITE CONSTRUCTION CO.,

Defendants.

SLATTERY SKANSKA, INC., A PICONE/McCULLAGH JOINT VENTURE, PERINI CORP. AND SPMO JOINT VENTURE

Third-party Plaintiffs,

-against-

JORDAN PANEL SYSTEMS CORP.,

Third-party Defendant.

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SLATTERY SKANSKA, INC.,
A PICONE/McCULLAGH JOINT VENTURE,
PERINI CORP. AND SPMO JOINT VENTURE

Second Third-party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP.,

Second Third-Party Defendants.

The following papers numbered 1 to 16 read on this motion by defendants/third-party plaintiffs/second third-party plaintiffs Slattery Skanska, Inc., Picone McCullagh Joint Venture, Perini Corp., and SPMP Joint Venture (Skanska defendants) for summary judgment dismissing plaintiffs' claims under Labor Law §§ 240(1), 241(6), and 200 and all cross claims against them; and on this motion by second third-party defendant Five Star Electric Corp. (Five Star) for summary judgment dismissing the second third-party complaint and all cross claims against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1 - 8
Answering Affidavits - Exhibits	9 - 12
Reply Affidavits	13 - 16

Upon the foregoing papers it is ordered that the motion is determined as follows:

On September 14, 2006, plaintiff Anthony Marchetti, a field foreman employed by third-party defendant Jordan Panel Systems Corp. (Jordan Panel), was allegedly injured when he slipped and fell on a temporary wooden ramp at a construction project at the Newtown Creek Waste Water Treatment Facility in Brooklyn, New York. It is undisputed that it was raining at the time of the accident. The Skanska defendants were hired by nonparty the New York City Department of Environmental Protection to act as the general contractor on the project. The Skanska defendants, in turn, contracted with Jordan Panel to install external clotting and roofing components and sheet metal siding to electrical rooms, and Five Star to perform electrical work on the project. Plaintiff, and his wife suing derivatively, subsequently commenced the within action against defendants under Labor Law §§ 240(1),

241(6), and 200. In February 2011, the Skanska defendants instituted a second third-party action against Five Star, alleging contractual indemnification, common-law indemnification, and breach of contract to procure insurance.

Initially, the court notes that, in their opposition papers, plaintiffs voluntarily withdrew their claims under Labor Law § 240(1). As such, that branch of the Skanska defendants' motion for summary judgment dismissing the Labor Law § 240(1) cause of action against them is granted.

To recover under Labor Law § 241(6), a plaintiff must demonstrate a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). In the bill of particulars, plaintiffs alleged violations of 12 NYCRR 23-1.5, 23-1.7(b), (d), (e), and (f), 23-1.15, 23-1.16(a) and (b), 23-1.17, 23-1.21, 23-1.22(b)(1), (b)(2), (b)(3), (b)(4), (c)(1), and (c)(2), and various Occupational Safety and Health Administration (OSHA) regulations.

The Skanska defendants established, prima facie, that Industrial Code provisions 12 NYCRR 23-1.5, 23-1.7(b), (e), and (f), 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22(b)(1), (b)(2), (b)(3), (c)(1), and (c)(2), and OSHA regulations do not support liability under Labor Law § 241(6) or are inapplicable to the facts of the instant case. Industrial Code section 12 NYCRR 23-1.5 is not sufficiently specific to support a cause of action under Labor Law § 241(6) because it merely establishes a general safety standard (*see Carrillo v Circle Manor Apts.*, 131 AD3d 662 [2d Dept 2015]; *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936 [2d Dept 2010]). Likewise, it has been held that the alleged violation of OSHA standards does not provide a basis for liability under Labor Law § 241(6) (*see Shaw v RPA Assoc., LLC*, 75 AD3d 634 [2d Dept 2010]). Industrial Code provision 12 NYCRR 23-1.7(b), which pertains to openings into which a worker may fall, and 12 NYCRR 23-1.7(e), which relates to tripping hazards, are inapplicable to the facts of this case as plaintiff Anthony Marchetti did not testify that he fell into a hazardous opening or that he tripped on the subject ramp. In addition, 12 NYCRR 23-1.7(f) does not apply here because the ramp upon which plaintiff Anthony Marchetti fell was not being used as a means of access to a working level. Industrial Code provisions 12 NYCRR 23-1.15, 23-1.16, and 23-1.17, which set forth standards for safety railings, safety belts, and life nets, respectively, are inapplicable because plaintiff Anthony Marchetti was not provided with any such devices (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2d Dept 2008]). Additionally, 12 NYCRR 23-1.22(b)(1), which relates to ramps and runways constructed for use by motor trucks or heavy vehicles, does not apply here because the subject ramp was not intended for such vehicles. Industrial Code provision 12 NYCRR 23-1.22(b)(2), which requires ramps and runways for the use of persons only shall be at least 18 inches in width and shall be

constructed of planking at least two inches thick full size or metal of equivalent strength, and 12 NYCRR 23-1.22(b)(3), which requires runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks to be at least 48 inches in width, also do not apply here as plaintiffs do not claim that plaintiff Anthony Marchetti's accident occurred because the subject ramp was too narrow. Furthermore, 12 NYCRR 23-1.22(c)(1) and (c)(2), which pertain to platforms, are inapplicable to the facts of this case because plaintiff Anthony Marchetti was not walking on a platform at the time of his accident. Plaintiffs did not submit any opposition to the Skanska defendants' prima facie showing with respect to the aforementioned Industrial Code regulations and, thus, failed to raise a triable issue of fact.

In their opposition papers, plaintiffs predicate their Labor Law § 241(6) claims solely on 12 NYCRR 23-1.7(d) and 23-1.22(b)(4). Specifically, 12 NYCRR 23-1.7(d), which sets forth requirements to protects workers against slipping hazards, provides, "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Industrial Code provision 12 NYCRR 23-1.22(b)(4) provides, "[a]ny runway or ramp constructed for the use of persons only which is located at, or extends to, a height of more than four feet above the ground, grade, floor or equivalent surface shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side." The Skanska defendants failed to establish their prima facie entitlement to judgment as a matter of law that 12 NYCRR 23-1.7(d) is inapplicable here because it is undisputed that it was raining while plaintiff Anthony Marchetti was traversing the ramp upon which he slipped and fell (*see Kwang, 47* AD3d at 619 - 620; *Wrighten v ZHN Contr. Corp.*, 32 AD3d 1019 [2d Dept 2006]; *Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866 [2d Dept 2005]). Similarly, the evidence submitted on the Skanska defendants' summary judgment motion failed to demonstrate, prima facie, that 12 NYCRR 23-1.22(b)(4) is inapplicable to the facts of this case. According to plaintiff Anthony Marchetti's deposition testimony, the ramp upon which he slipped and fell was "approximately four feet off the ground" and did not have any handrails. In addition, nonparty Jesse Fryer, a witness to plaintiff Anthony Marchetti's accident, testified at his deposition that the subject ramp was between three and five feet tall, "closer to 5" feet above the ground, and that the ramp did not have any handrails. In view of the foregoing, plaintiffs' Labor Law § 241(6) claims are dismissed only to the extent that they are premised on a violation of Industrial Code provisions 12 NYCRR 23-1.5, 23-1.7(b), (e), and (f), 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22(b)(1), (b)(2), (b)(3), (c)(1), and (c)(2), and OSHA regulations.

That branch of the Skanska defendants' motion for summary judgment dismissing the Labor Law § 200 claims against them is denied. Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Lane v Fratello Constr. Co.*, 52 AD3d 575 [2d Dept 2008]). Where, as here, a plaintiff's injuries stem from a dangerous condition on the premises and not from the manner in which the work was being performed, a contractor may be liable under Labor Law § 200 if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it (*see Keener v Cinalta Constr. Corp.*, ___ AD3d ___, 2017 NY Slip Op 00293 [2d Dept 2017]; *Rocha v GRT Constr. of N.Y.*, 145 AD3d 926 [2d Dept 2016]). In this case, plaintiffs allege in the bill of particulars that the slippery ramp upon which plaintiff Anthony Marchetti fell constituted a defective condition of the premises. The Skanska defendants failed to establish, prima facie, that they did not have control over the work site and that they did not create or have actual or constructive notice of the alleged dangerous condition of the subject ramp. At his deposition, Paul Haining, the Skanksa defendants' safety engineer, testified that he was "informed that the temporary ramp component that was installed was installed by Five Star to give means of access to roll cable drums on the roadway upon the electrical canopy area." Mr. Haining further stated that he did not recall when the temporary ramp was installed. Meanwhile, Howard Tenzer, Five Star's general foreman, testified at his deposition that Five Star, who was performing electrical work at the site, did not build any ramps at the subject construction project and that only the carpenters built the ramps at the site. Additionally, Mr. Fryer testified at his deposition that he did not know who constructed the subject ramp but that it was present at least one week before plaintiff Anthony Marchetti's accident. Plaintiff Anthony Marchetti also testified at his deposition that he did not know who constructed the ramp or when it was installed. As such, the evidence in the record reveals that there are triable issues of fact, at least, as to who constructed the ramp upon which plaintiff Anthony Marchetti slipped and fell and how long the ramp was present at the work site prior to the subject accident.

Furthermore, that branch of the motion by the Skanska defendants seeking summary dismissal of any cross claims asserted against them is denied because said defendants failed to address those issues in their motion papers and failed to submit any evidence to demonstrate their entitlement to judgment as a matter of law.

Next, the court will address the branch of Five Star's motion for summary judgment dismissing the second third-party cause of action for contractual indemnification against it. The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009]). Here, the indemnification clause contained in section VIII of the contract between the Skanska defendants and Five Star provides, in pertinent part,

> "To the fullest extent permitted by law, the Subcontractor shall indemnify, hold harmless and defend the Contractor, Owner, and all of their agents, directors and employees of any of them from and against all claims, damages, demands, losses, expenses, causes of action, suits or other liabilities (including all costs and reasonable attorney's fees), arising out of or resulting from the performance of Subcontractor's work under the Subcontract, provided any such claim, damage, demand, loss or expense is attributable to bodily injury, personal injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, to the extent caused in whole in or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless whether it is caused in part by a party indemnified hereunder."

As discussed above, the evidence in the record failed to eliminate the existence of triable issues of fact, at least, as to who constructed the subject ramp and, thus, whether plaintiff Anthony Marchetti's accident arise out or of was connected with the performance of Five Star's work on the construction project. Therefore, that branch of Five Star's motion for summary judgment dismissing the second third-party cause of action for contractual indemnification against it is denied.

That branch of Five Star's motion for summary judgment dismissing the second third-party cause of action for common-law indemnification against it is also denied. To establish a claim for common-law indemnification, the party seeking indemnity must prove that it was not negligent and that the proposed indemnitor was guilty of some negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury (*see Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2d Dept 2006]). Here, as previously discussed, triable issues of fact exist as to the alleged negligence of the Skanska defendants and Five Star in the happening of plaintiff Anthony Marchetti's accident (*see Posa v Copiague Pub. School Dist.*, 84 AD3d 770 [2d Dept 2011]).

That branch of Five Star's motion for summary judgment dismissing the second third-party cause of action for breach of contract to procure insurance against it is denied. Five Star failed to address that issue in its moving papers and failed to submit any evidence to demonstrate its entitlement to judgment as a matter of law.

Finally, inasmuch as there are no cross claims asserted against Five Star, that branch of Five Star's summary judgment motion seeking dismissal of all cross claims asserted against it is denied.

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Accordingly, that branch of the Skanska defendants' motion for summary judgment dismissing plaintiffs' claims under Labor Law § 240(1) against them is granted. In addition, that branch of the Skanska defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claims against them is granted only to the extent that they are premised on a violation of Industrial Code provisions 12 NYCRR 23-1.5, 23-1.7(b), (e), and (f), 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22(b)(1), (b)(2), (b)(3), (c)(1), and (c)(2), and OSHA regulations. In all other respects, the Skanska defendants' motion is denied. Five Star's motion for summary judgment dismissing the second third-party complaint against it is denied.

Dated: March 28, 2017

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J.S.C.