Eweda v 970 Madison Ave. LLC
2017 NY Slip Op 30807(U)
April 21, 2017
Supreme Court, New York County
Docket Number: 151331/2012
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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RAFAT EWEDA,

Plaintiff,

DECISION/ORDER
Index No. 151331/2012

-against-

970 MADISON AVENUE LLC, PHOENIX MADISON AVENUE, L.P., JUDSON REALTY, LLC and IL GUFO USA, INC.,

Defendants.

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IL GUFO USA, INC.,

Third-Party Plaintiff,

-against-

MICHILLI, INC.,

Third-Party Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiff Rafat Eweda commenced the instant action seeking to recover damages for injuries he allegedly sustained while performing work on a construction site. He now moves for an Order pursuant to CPLR § 3212 granting him partial summary judgment against defendants 970 Madison Avenue LLC ("970"), Phoenix Madison Avenue, L.P. ("Phoenix"), Judson Realty, LLC ("Judson") and Il Gufo USA, Inc. ("Il Gufo") as to the issue of liability on his Labor Law § 240(1) claim. 970 and Judson separately move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint and any cross-claims asserted against them and for summary judgment on their cross-claim for contractual indemnification against Phoenix and Il Gufo and on their cross-claim for common law indemnification against Il Gufo. Phoenix and Il Gufo also move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's Labor Law § 200 and 241(6) and common law negligence claims

and for summary judgment on their claim for contractual indemnification from third-party defendant Michilli, Inc. ("Michilli"). These motions are consolidated for the purpose of disposition. For the reasons set forth below, plaintiff's motion is granted in part and denied in part and the motions of 970 and Judson and Phoenix and Il Gufo are granted in part and denied in part.

The relevant facts are as follows. At the time of his accident, plaintiff was employed by Michilli as a laborer and was working on the renovation or construction of a portion of a building located at 962 Madison Avenue, New York, New York (hereinafter referred to as the "premises," the "building" or the "Project"). 970 was the out-of-possession owner of the premises. Phoenix leased the premises from 970 and Il Gufo leased a portion of the building from Phoenix. Judson was the managing agent for the building. Il Gufo hired Michilli as the general contractor on the Project, which consisted of the renovation or construction of the premises leased by Il Gufo to house a clothing store.

Plaintiff testified during his deposition that on November 14, 2011, he climbed a straight ladder leading from the first floor to the second floor of the premises to retrieve sheetrock from the second floor. He testified that he was unable to use the stairs because other trades were performing work on the stairs. Further, plaintiff testified that he was instructed to use the ladder by his supervisor, Ian Ronk ("Ronk"), an employee of Michilli, who allegedly set up the ladder for plaintiff and was holding the bottom of the ladder as plaintiff began climbing. The ladder was not otherwise secured. However, plaintiff testified that when he was on the seventh or eighth step of the ladder, Ronk walked away and the ladder slid out and landed on the ground, causing plaintiff to fall and sustain injuries. In contrast to plaintiff's testimony, Ronk testified during his deposition that he did not instruct plaintiff to use the ladder or set up the ladder himself. Instead, he testified that he only became aware that plaintiff was using the ladder to climb from the first floor to the second floor when he observed that plaintiff was climbing the ladder, which was set up at a dangerous angle, and then saw the ladder slide out and plaintiff fall a second or two later.

The court first considers the portion of 970's and Judson's motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims as against 970 on the ground that 970 is not an "owner" for purposes of Labor Law liability because it only owns the land underlying the building where the

accident occurred rather than the building itself. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In a case wherein the underlying land and the condominium unit in which the plaintiff's accident occurred were owned by different parties, the Court of Appeals held that the defendant that owned the underlying land was not an "owner" for purposes of Labor Law liability because said defendant had no ownership interest in the condominium unit and there was no lessor-lessee relationship between said defendant and the owners of the condominium unit. *Guryev v. Tomchinsky*, 20 N.Y.3d 194, 199-200 (2012).

In the present case, the court finds that 970 has failed to make a *prima facie* showing that it is not an "owner" for purposes of Labor Law liability based on its argument that it only owns the land underlying the building where the accident occurred rather than the building itself. Despite 970's claim that it only owns the land underlying the building and that Phoenix is the owner of the building, the evidence provided by 970 shows that 970 owns the building where the accident occurred and that 970 leases the building to Phoenix. Specifically, the deed for the premises dated November 15, 2001 transferred the underlying land and the "buildings and improvements" thereon from GSL Enterprises Inc. to 970 as owner. Further, the original lease for the premises, which was assigned to 970 as owner and Phoenix as tenant by previous owners and tenants and which is described by 970 as the "ground lease," expressly includes "all buildings and improvements" as part of the demised premises. In addition, section 20.01 of the ground lease between 970 and Phoenix provides that "[a]ny building and improvement now on or hereafter erected on the land of the Demised Premises…shall become the property of Landlord [970] upon completion or installation, without payment or offset and shall be deemed included in the Demised Premises."

To the extent that 970 contends that its ownership of the premises alone is insufficient to impose Labor Law liability, such contention is unavailing. Although there must be "some nexus between the owner and the worker" for an out-of-possession owner of the premises who did not contract for the injury-producing work to be liable as an "owner" pursuant to the Labor Law, it is well-established that there is such a nexus where the party leasing the premises contracted for the work. *See Morton v. State of New York*, 15 N.Y.3d 50, 56 (2010); *Sanatass v. Consolidated Inv. Co., Inc.*, 10 N.Y.3d 333, 341-42 (2008) (holding that there was a nexus between the property owner and the plaintiff where the property owner leased the property to a tenant, who in turn hired plaintiff's firm). In the present case, the court finds that there is a nexus between 970 and plaintiff as a result of which 970 is liable as an "owner" pursuant to the Labor Law as 970 leased the premises where the accident occurred to Phoenix, which in turn leased the premises to Il Gufo, the party that contracted for the work.

The court next considers the portion of 970's and Judson's motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims as against Judson on the ground that Judson, the managing agent for the building, is not an "agent" for purposes of Labor Law liability. An agency relationship exists for the purposes of Labor Law liability "only when work is delegated to a third party who obtains the authority to supervise and control the job." *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 293 (2003) (holding that the defendant was not an "agent" for purposes of Labor Law liability as it did not "involve itself with the details of how individual contractors would perform their jobs," did not supervise the contractor and did not instruct workers on how to perform repairs). "Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute." *Id.*

In the present case, Judson has made a *prima facie* showing that it is not an "agent" for purposes of Labor Law liability as no work related to the Project was delegated to it and it did not obtain the authority to supervise and control the Project. Specifically, Judson has submitted the deposition testimony of Christine Kevilly ("Kevilly"), its representative, that Judson had no responsibility for or involvement in the Project.

In opposition, plaintiff has failed to raise an issue of fact as to whether Judson is an "agent" for purposes of Labor Law liability. Plaintiff's argument that Kevilly's testimony that the building superintendent, an employee of Judson, may have visited the Project raises an issue of fact is without merit. Kevilly did not testify that the superintendent may have visited the Project because Judson was delegated any work related to the Project or to supervise or control the Project. Instead, she testified that she did not send the superintendent to the Project and that to the best of her knowledge, he did not visit the Project. Thus, the portion of 970's and Judson's motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims as against Judson is granted.

The court next considers plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim. Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, 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.

Labor Law § 240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well-settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1)." *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1st Dept 1998), citing *Schultze v. 585 W. 214th St. Owners Corp.*, 228 A.D.2d 381 (1st Dept 1996). Further, "[i]t is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or

to protect plaintiff from falling were absent." *Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 291 (1st Dept 2002).

Owners and contractors are subject to absolute liability under Labor Law § 240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452, 462 (1985).. Only where the plaintiff's actions were the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550, 551 (2006).

In the present case, plaintiff has established his *prima facie* right to partial summary judgment on his Labor Law § 240(1) claim against 970, Phoenix and Il Gufo as, under either plaintiff's or Ronk's account of the accident, plaintiff has shown that he fell from a ladder that was not properly secured and that defendants failed to provide any adequate safety device to prevent plaintiff from falling to the ground after the ladder he was standing on slid out. Here, plaintiff's injury clearly occurred due to a gravity-related hazard as plaintiff fell from a ladder after it slid out. There is no explanation for the accident other than the fact that the ladder was improperly secured, thus causing it to slide out and causing plaintiff to fall and become injured. The fact that the ladder slid out and plaintiff fell to the floor below is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1).

In opposition, 970, Phoenix and Il Gufo have failed to raise an issue of fact sufficient to defeat plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim. Their argument that plaintiff's motion should be denied on the ground that plaintiff was the sole proximate cause of the accident because he improperly chose to use the ladder instead of the stairs is without merit. Although plaintiff testified during his deposition that he was not instructed that he could not use the stairs and that there were no signs indicating that he could not use the stairs, he clearly testified that the stairs were not accessible because other trades were performing work thereon. Moreover, said defendants have failed to provide any evidence that the stairs were in fact accessible.

Further, said defendants' argument that plaintiff's motion should be denied on the ground that Ronk's deposition testimony that the ladder was set up at a dangerous angle raises an issue of fact as to whether plaintiff was the sole proximate cause of the accident is without merit. Ronk did not testify that he

saw plaintiff set up the ladder at a dangerous angle. Instead, he testified that he did not see who set up the ladder and only saw that the ladder was at a dangerous angle a second or two before the accident. Moreover, even if said defendants had submitted evidence that plaintiff himself set up the ladder at the allegedly dangerous angle, it is well-settled that a plaintiff worker will not be found to be the sole proximate cause of an accident based on "the manner in which plaintiff set up...the ladder...where there is no dispute that the ladder was unsecured and no other safety devices were provided." *Vega v. Rotner Management Corp.*, 40 A.D.3d 473, 473-74 (1st Dept 2007).

In addition, 970, Phoenix and Il Gufo have failed to raise an issue of fact based on the argument that plaintiff has not provided any evidence that the ladder he was using at the time of his accident was defective. It is well settled that a plaintiff is not required to show that a ladder was defective in some way as part of his *prima facie* case for summary judgment. *See McCarthy v. Turner Constr. Inc.*, 52 A.D.3d 333 (1st Dept 2008).

970, Phoenix and Il Gufo have also failed to raise an issue of fact based on the argument that the ladder was not defective as plaintiff tested the ladder and found it to be stable as he began climbing it. Evidence that the ladder was structurally sound and not defective is not relevant to the issue of whether it was properly placed or safe. *See Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135 (4th Dept 2008).

The court next considers the portions of defendants' motions for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143 (1st Dept 2012). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." *Id.* at

143-44. "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work." *Id.* at 144.

In the present case, the court grants the portions of defendants' motions for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims. Initially, this court finds that the proper standard to apply is the "manner and means of the work" standard as the court finds that plaintiff's accident was caused by his use of an unsecured ladder to access the second floor of the premises. In applying the "manner and means of the work" standard, the court finds that defendants are entitled to summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims as they all have established that they did not exercise supervisory control over plaintiff while he was performing the work. Plaintiff testified during his deposition that he did not receive instruction from any of the defendants' employees but rather only received instruction from Michilli, his employer. The mere fact that certain of defendants' employees, including the superintendent of the building, may have had the authority to supervise the work being performed on the Project or may have visited the Project is insufficient to establish liability under Labor Law § 200. *See Griffin v. Clinton Green South, LLC*, 98 A.D.3d 41 (1st Dept 2012) ("[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200") (internal citations omitted).

The court next considers the portions of defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241(6) claim. As discussed above, the court has found that Judson is entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim as against it on the ground that it is not an "agent" for purposes of Labor Law liability. Pursuant to Labor Law § 241(6),

> All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide

> reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

As an initial matter, the court grants the portions of defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.16, 12 NYCRR § 23-1.32, 12 NYCRR §§ 23-3.2 and 23-3.3 as against 970, Phoenix and Il Gufo without opposition.

The court finds that 970, Phoenix and Il Gufo are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.21, which sets forth various requirements for ladders, as none of the requirements for ladders set forth in said provision are applicable here. To the extent that plaintiff contends that 12 NYCRR § 23-1.21(b)(4)(i) is applicable, such contention is unavailing. 12 NYCRR § 23-1.21(b)(4)(i) only applies where a ladder is used as a regular means of access between floors. Here, plaintiff testified during his deposition that he had previously used the stairs to reach the second floor and only used the ladder because the stairs were temporarily inaccessible. Further, to the extent that plaintiff contends that 12 NYCRR § 23-1.21(b)(4)(iv) is applicable, such contention is also unavailing. 12 NYCRR § 23-1.21(b)(4)(iv) provides that "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means." However, plaintiff testified that he climbed the ladder to reach the second floor, not that he was performing work from the ladder. Further, it is undisputed that the ladder did not slip to the side but rather slipped away from the wall.

However, the court finds that 970, Phoenix and Il Gufo are not entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(f) as said defendants have failed to establish as a matter of law that they did not violate said provision. Pursuant to 12 NYCRR § 23-1.7(f), "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Here, plaintiff testified that the stairs leading up to the second floor were inaccessible, as a result of which he had to use a ladder that was unsecured and ultimately slid out and caused him to fall. Thus, 970, Phoenix and Il Gufo are not entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23-1.7(f).

The portion of 970's and Judson's motion for summary judgment on their cross-claim for common law indemnification against Phoenix and Il Gufo is denied. A claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999).

As an initial matter, 970 has not asserted any cross-claim for common law indemnification against Phoenix or Il Gufo in its answer and thus is not entitled to summary judgment. Further, Judson has failed to establish its entitlement to summary judgment on its cross-claim for common law indemnification as the court has determined that Phoenix and Il Gufo are not liable for negligence with regard to the accident.

The portion of 970's and Judson's motion for summary judgment on their cross-claim for contractual indemnification against Phoenix and Il Gufo is also denied. A party is entitled to contractual

indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2nd Dept 2008).

As an initial matter, 970 has not asserted any cross-claim for contractual indemnification against Phoenix or Il Gufo in its answer and thus is not entitled to summary judgment. Further, Judson has failed to establish its entitlement to summary judgment on its cross-claim for contractual indemnification as Judson has failed to provide any contract wherein Phoenix or Il Gufo agree to indemnify Judson. The lease between Judson, as agent for Phoenix, and Il Gufo requires Il Gufo to indemnify Phoenix for claims resulting from Il Gufo's breach of the lease or negligence, not to indemnify Judson. Further, the lease between 970 and Phoenix requires Phoenix to indemnify 970 for various claims, not to indemnify Judson.

The portion of 970's and Judson's motion for summary judgment dismissing any cross-claims against them is denied as 970 and Judson have failed to provide any analysis as to why these cross-claims should be dismissed.

The portion of Phoenix's and Il Gufo's motion for summary judgment on their claim for contractual indemnification against Michilli is denied. As an initial matter, Phoenix has not asserted any claims against Michilli in its answer or in the third-party action. Further, Il Gufo has failed to establish its entitlement to summary judgment on its claim for contractual indemnification. Il Gufo has submitted an unsigned copy of its contract with Michilli containing an indemnification provision that is only triggered by the negligence of Michilli, its subcontractors or their employees. An indemnification provision in an unsigned contract is enforceable where "it is evident from the totality of circumstances that the parties intended to be bound" by the contract. *Flores v. Lower East Side Service Center, Inc.*, 4 N.Y.3d 363, 371 (2005) (holding that a party was bound by an indemnification provision in an unsigned contract where it acted in conformity with the contractual requirements, obtained an insurance policy naming the alleged indemnitee as an additional insured and purchased bonds referencing a contract between the parties). Il Gufo contends that the contract containing the indemnification provision is enforceable based on Michilli's alleged performance of the work in accordance with the contract and purchase of insurance naming Il Gufo as an additional insured.

However, even assuming *arguendo* that the unsigned contract between Il Gufo and Michilli is enforceable, Il Gufo's motion must be denied as premature as no determination has yet been made as to whether the accident was caused by the negligence of Michilli, its subcontractors or their employees.

Accordingly, plaintiff's motion for partial summary judgment on his Labor Law 240(1) claim is granted as against 970, Phoenix and Il Gufo. 970's and Judson's motion is granted to the extent that plaintiff's complaint is dismissed as against Judson and plaintiff's common law negligence and Labor Law § 200 claims and plaintiff's Labor Law 241(6) claim predicated on any Industrial Code provision other than 12 NYCRR § 23-1.7(f) are dismissed as against 970 but the motion is otherwise denied. Further, Phoenix's and Il Gufo's motion is granted to the extent that plaintiff's common law negligence and Labor Law § 200 claims and plaintiff's Labor Law 241(6) claim predicated on any Industrial Code provision other than 12 NYCRR § 23-1.7(f) are dismissed but the motion is otherwise denied. This constitutes the decision and order of the court.

DATE : 4/21/17

KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.