Reinoso v Alchemy 15th Devs. LLC
2017 NY Slip Op 30920(U)
April 24, 2017
Supreme Court, Bronx County
Docket Number: 300232/2012
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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LUIS REINOSO,

Plaintiff,

- against -

ALCHEMY 15TH DEVELOPERS LLC, AGA 15TH STREET, L.L.C., SKYWARD CM LLC and A.S.A.R. INTERNATIONAL CORP.,

Defendants.

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AGA 15TH STREET L.L.C. and SKYWARD CM LLC,

Third-Party Plaintiffs,

- against -

LJC DISMANTLING CORP.,

Third-Party Defendant.

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DECISION AND ORDER

Index No. 300232/2012

Third-Party Index No. 84105/2013

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated September 29, 2016 of defendants/third-party plaintiffs Alchemy 15th Developers LLC, AGA 15th Street, L.L.C. and Skyward CM LLC and the affirmation and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated January 20, 2017 and the exhibit submitted therewith; the affirmation in opposition dated March 16, 2017 of third-party defendant LJC Dismantling Corp.; the reply affirmation dated March 31, 2017 of defendants/third-party plaintiffs Alchemy 15th Developers LLC, AGA 15th Street, L.L.C. and Skyward CM LLC and the exhibits submitted therewith; and due deliberation; the court finds:

Plaintiff, an employee of third-party defendant LJC Dismantling Corp. ("LJC"), brings this action to recover damages for injuries sustained on August 29, 2011 when a rock struck his leg. AGA

15th Street, L.L.C. ("AGA") owned the property at 31-35 West 15 th Street and hired LJC to perform asbestos removal and demolish the existing building. Defendants/third-party plaintiffs AGA, Alchemy 15th Developers LLC ("Alchemy"), and Skyward CM LLC ("Skyward") now move pursuant to CPLR 3212 for summary judgment dismissing the complaint and for summary judgment on their third-party claims for contractual and common law indemnification against LJC. Submitted on the motion are deposition transcripts, the contract between AGA and LJC, and Workers' Compensation forms among other exhibits. Plaintiff alleges violations of Labor Law §§ 200, 240(1), 241(6) and 242(a). There is no subsection (a) to Labor Law § 242.

As a preliminary matter, plaintiff has withdrawn his Labor Law § 200 and lost wages claims. Accordingly, that branch of the motion on those claims is denied as moot. The court also *sua sponte* amends the caption. *See* CPLR 2001; *Albilia v. Hillcrest General Hospital*, 124 A.D.2d 499, 508 N.Y.S.2d 10 (1st Dep't 1986). The order (Hon. Anil C. Singh, J.S.C.) consolidating plaintiff's Bronx County and New York County actions omitted AGA and Skyward in the amended third-party caption although both had commenced a third-party action against LJC. When plaintiff moved to add a party defendant, his proposed caption omitted Alchemy as a third-party plaintiffs. There is no prejudice to any party. The third-party complaints are nearly identical, and it is apparent that those claims were never withdrawn or discontinued.

Plaintiff testified that the building had been razed to the ground before the accident. The site was covered in debris consisting of wood, metal and masonry. An excavator with a bucket attached to its arm moved the debris from one side to another, and plaintiff and 8 to 10 others removed wood and metal from the debris by hand. He was squatting down with his back to the excavator when he felt something strike his leg. He turned and saw a square stone measuring 6 feet long, 4 feet wide, and 1 foot thick on his foot. Plaintiff believed the stone came from "in the machine supposedly" because "when I felt the impact . . . I looked up and I saw the arm of the machine was up with materials, and

supposedly it fell down from there." There were no rocks of comparable size in the area where he was working and none of the debris he was sifting through shifted or moved. He did not know if his co-workers, who were within two feet of him, witnessed the accident. Before the accident, the arm of the excavator was 10 to 12 feet away from him. The excavator was moving rocks but he did not see it holding or moving the rock that struck him. Denny, the excavator operator, "came down to apologize" and said "I am sorry, that was not my intention to do that." At his third deposition, he testified that the rock fell from a height.

Supervisor Brian Wilhelm ("Wilhelm") testified that LCJ was in the final cleanup stage in August 2011. Cleanup involved picking lumber out of the debris for carting and recycling. The excavator bucket facilitated the work by gently spreading, pushing and turning the material into small piles for the laborers to sort through by hand. Wilhelm, who did not witness the accident, testified that "a piece of masonry must have rolled and hit Luis in the leg" while the excavator was spreading material. He identified Alchemy as the general contractor on the job.

Joel Breitkopf ("Breitkopf"), who testified for movants, had no knowledge of how the accident occurred. Alchemy was an authorized signatory on AGA's contract with LCJ, and Breitkopf signed the contract. AGA had an ownership interest in Skyward. Skyward provided construction management services as an advisor but hired non-party Alchemy Administrative, LLC ("Alchemy Administrative") to provide those services. Michael Filler ("Filler') was a site superintendent employed by Alchemy Administrative on the project.

Movants also submit plaintiff's C-3 form and three employer C-2 forms. Plaintiff admitted that his signature appeared on the C-3 and that he provided the information contained in the document. The C-3 stated that "[t]he arm of a crane struck a large slab of stone and the stone hit [plaintiff]." The C-2 Wilhelm prepared stated that plaintiff's "foot got caught between bricks and the force of the spreaded [*sic*] material closed his foot between the bricks." Wilhelm testified that he could not recall if the stone

was on the ground when it caught on plaintiff's foot, if it fell out of the bucket or if it simply shifted because he "wasn't there." The C-2 erroneously identified him as an eyewitness. Filler signed a C-2 that stated "a large piece of concrete rubble rolled out of the bucket" and struck plaintiff. Wilhelm did not know who gave Filler that information and Filler never told him this version.

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers from risks inherent in elevated work sites. *See McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011). In a falling object case, plaintiff "must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.'" *Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 663, 8 N.E.3d 791, 794, 985 N.Y.S.2d 416, 419 (2014) (internal citations omitted). Movants have not shown that the work did not involve an elevation-related risk. They contend that plaintiff's claim the rock fell from a height is speculative. This may be sufficient to deny a motion in plaintiff's favor, *see Podobedov v. East Coast Constr. Group, Inc.*, 133 A.D.3d 733, 21 N.Y.S.3d 128 (2d Dep't 2015), but a moving party cannot rely on the gaps it perceives in plaintiff's proof to demonstrate its entitlement to summary judgment. *See Furment v. Ziad Food Corp.*, 104 A.D.3d 562, 960 N.Y.S.2d 648 (1st Dep't 2013). Wilhelm lacked personal knowledge because he was not an eyewitness. *See Santos v. ACA Waste Servs., Inc.*, 103 A.D.3d 788, 959 N.Y.S.2d 729 (2d Dep't 2013). The Worker's Compensation forms, to the extent they are admissible, offered differing versions of the accident. According to Filler's form, the rock rolled out of the bucket onto plaintiff's foot. Plaintiff had testified the arm was "up" with material. Wilhelm's form revealed that the plaintiff's foot was caught in between two bricks. Although plaintiff did not describe the height of the arm or bucket above the ground, movants offered no evidence from operator Danny Aviolo, who completed his own report, or from plaintiff's co-workers to show that the rock did not fall from a height. This branch of the motion is denied.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection to their employees and to comply with specific rules promulgated by the Commissioner of the Department of Labor. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). The injury must have occurred "in an area 'in which construction, excavation or demolition work is being performed.'" *Rhodes-Evans v. 111 Chelsea LLC*, 44 A.D.3d 430, 433, 843 N.Y.S.2d 237, 242 (1st Dep't 2007). Plaintiff must show there was a violation of a regulation which set forth a specific standard conduct, *see Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 923 N.Y.S.2d 74 (1st Dep't 2011), and that the violation was a proximate cause of the injury. *See Egan v. Monadnock Constr., Inc.*, 43 A.D.3d 692, 841 N.Y.S.2d 547 (1st Dep't 2007), *lv denied*, 10 N.Y.3d 706, 886 N.E.2d 804, 857 N.Y.S.2d 39 (2008).

Plaintiff alleges violations of numerous OSHA regulations and Industrial Code sections in his bill of particulars. OSHA standards, though, may not serve as predicates. *See Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247, 690 N.Y.S.2d 226 (1st Dep't 1990). In any event, he has abandoned his reliance on them by failing to address them in his opposition. *See Rodriguez v. Dormitory Auth. of the State of N.Y.*, 104 A.D.3d 529, 962 N.Y.S.2d 102 (1st Dep't 2013).

The majority of the Industrial Code sections are inapplicable or are too general to support the claim. Plaintiff did not sustain an injury to his eye and he was not working in an area with wet footing. He was wearing a hard hat. The accident did not involve a hazardous opening; a slipping or tripping hazard; a lighting issue; demolition by hand or machine; or concrete work. He was not working in a shaft or in an area normally subject to falling objects. The work did not require a catch platform; a material hoist; a mobile crane; a tower crane; or a derrick. As for 12 NYCRR §§ 23-1.7(a)(i)(2) and 23-8.5, the first subsection does not exist and the second was repealed. With the exception of 12 NYCRR §§ 23-9.1, 23-9.2(c), 23-9.4(e)(1) and 23-9.5(c), plaintiff has abandoned his reliance on all other regulations. *See Rodriguez v. Dormitory Auth. of the State of N.Y., supra. Movants are entitled*

to dismissal of plaintiff's Labor Law § 241(6) claim insofar as it is based upon 12 NYCRR §§ 23-1.2(e) (finding of fact); 23-1.5 (general responsibility of employers); 23-1.5(a) (health and safety protection required); 23-1.5(b) (general requirement of competency); 23-1.7 (protection from general hazards); 23-1.7(a) (overhead hazards) and 23-1.7(a)(1) and (a)(i)(2); 23-1.7(b) (falling hazards); 23-1.7(d) (slipping hazards); 23-1.7(e) (tripping and other hazards) and (e)(2); 23-1.8 (personal protective equipment) and 23-1.8(a), (c)(1) and (2); 23-1.30 (illumination); 23-1.32 (imminent danger); 23-1.33(a) (protection of persons passing by construction, demolition or excavation operations); 23-2.2 (concrete work); 23-2.5(a) (protection of persons in shafts); 23-2.6(a) (catch platforms); 23-3.2 (general requirements for demolition); 23-3.3 (demolition by hand) (b) through (m); 23-3.4 (mechanical methods of demolition); 23-6.1 (general requirements for material hoisting) and 23-6.1(a), (b), and (c)(1); 23-6.2 (rigging, rope and chains for material hoists); 23-6.3 (material platform or bucket hoists) and 23-6.3(a); 23-8.1 (general provisions for mobile cranes, tower cranes and derricks); 23-8.2 (special provisions for mobile cranes); 23-8.3 (special provisions for tower cranes); 23-8.4 (special provisions for derricks); 23-8.5; 23-9.2 (general requirements) subsections (a), (b)(1), (b)(2), (g), (h)(2); 23-9.4 (power shovels and backhoes) subsections (a), (b)(1), (b)(2), (b)(3), (c), (d)(1), (d)(2), (f), (h)(1), (h)(3), (h)(4), and (h)(5); 23-9.5(f) (stopping or parking excavating machines); and 29 CFR 1926.550, 1926.552, 1926.600, 1926.602, 1910.178, 1926.20, 1926.200, 1926.201 and 1926.202.

Section § 23-9.1 (application of this subpart) and Section 23-9.2(c) (loading) are general provisions. *See Penaranda v. 4933 Realty, LLC*, 118 A.D.3d 596, 991 N.Y.S.2d 30 (1st Dep't 2014); *Fisher v. WNY Bus Parts, Inc.*, 12 A.D.3d 1138, 785 N.Y.S.2d 229 (4th Dep't 2004). Section 23-9.5(c), which governs the operation of excavating machines, is inapplicable. *See Martinez v. Hitachi Constr. Mach. Co., Ltd.*, 15 Misc.3d 244, 829 N.Y.S.2d 814 (Sup. Ct. Bronx County 2006). The regulation provides that "[n]o person other than the pitman and excavating crew shall be permitted to stand . . . within range of the swing of the dipper bucket while the shovel is in operation." As a member of the

excavating crew, *see Mingle v. Barone Dev. Corp.*, 283 A.D.2d 1028, 723 N.Y.S.2d 803 (4th Dep't 2001), plaintiff was permitted to stand within range of the bucket.

Section 23-9.4(e)(1) (attachment of load) states that "[a]ny load handled by such equipment shall be suspended from the bucket or bucket arm by means of wire rope having a safety factor of four." It is a sufficient predicate. *See Padilla v. Frances Schervier Hous. Dev. Fund Corp.*, 303 A.D.2d 194, 758 N.Y.S.2d 3 (1st Dep't 2003). Movants argue the section applies to power shovels and backhoes, not excavators. The court, though, must "take into consideration the function of a piece of equipment, and not merely the name when determining the applicability" of Section 23-9.4. *St. Louis v. Town of N. Elba*, 16 N.Y.3d 411, 415, 947 N.E.2d 1169, 1172, 923 N.Y.S.2d 391, 394 (2011). Section 23-9.4 has been applied to excavators. *See Kropp v. Town of Shandaken*, 91 A.D.3d 1087, 937 N.Y.S.2d 345 (3d Dep't 2012). A question of fact exists whether there was a violation of Section 23-9.4(e)(1) and whether that violation was a proximate cause of the injury. *See Marcinkowski v. City of New York*, 2011 NY Slip Op 31209(U), 2011 N.Y. Misc. LEXIS 2166 (Sup. Ct. New York County May 2, 2011).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777, 515 N.E.2d 902, 904, 521 N.Y.S.2d 216, 217 (1987) (internal citations omitted). The AIA Document A101/CMa-1992 Standard Form of Agreement lists AGA as the owner, Alchemy as AGA's authorized signatory, Skyward as the construction manager, and LJC as the contractor. Section 9.1.2 incorporates the general conditions in AIA Document A201/CMa-1992 as part of the contract. The indemnification provision, which appears in Section 3.18 of the general conditions, provides for indemnification "[t]o the fullest extent permitted by law" for claims arising out of LJC's work but only to the extent that LJC was negligent. A contract addendum contains a hold harmless clause that provides for full indemnification without regard to movants' negligence. The clauses appear to conflict and movants have not stated

which clause applies. The addendum, though, indicates that its provisions control. Movants contend they are entitled to indemnification but summary judgment, even conditional summary judgment, is premature as there has been no determination made on the fault of any party. *See Francescon v. Gucci Am., Inc.*, 71 A.D.3d 528, 897 N.Y.S.2d 73 (1st Dep't 2010); *see also Erickson v. Cross Ready Mix, Inc.*, 75 A.D.3d 519, 906 N.Y.S.2d 284 (2d Dep't 2010).

A party seeking common-law indemnification must show "(1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 10, 940 N.Y.S.2d 21, 28 (1st Dep't 2012) (internal citation omitted). Summary judgment on the common-law indemnification claim is also premature. *See Pueng Fung v. 20 W. 37th St. Owners, LLC*, 74 A.D.3d 635, 903 N.Y.S.2d 392 (1st Dep't 2010). Movants also failed to allege that plaintiff sustained a grave injury. *See Maggio v. 24 W. 57 APF, LLC*, 134 A.D.3d 621, 24 N.Y.S.3d 1 (1st Dep't 2015).

Accordingly, it is

ORDERED, that the motion of defendants/third-party plaintiffs Alchemy 15th Developers LLC, AGA 15th Street, L.L.C. and Skyward CM LLC for summary judgment dismissing plaintiff's complaint is granted to the extent of dismissing the Labor Law § 241(6) claim predicated upon 12 NYCRR §§ 23-1.2(e); 23-1.5 and 23-1.5(a) and (b); 23-1.7 and 23-1.7(a), (a)(1), (a)(i)(2), (b), (d), (e) and (e)(2); 23-1.8 and 23-1.8(a), (c)(1) and (2); 23-1.30; 23-1.32; 23-1.33(a); 23-2.2; 23-2.5(a); 23-2.6(a); 23-3.2; 23-3.3(b) through (m); 23-3.4; 23-6.1(a), (b), and (c)(1); 23-6.2; 23-6.3 and 23-6.3(a); 23-8.1; 23-8.2; 23-8.3; 23-8.4; 23-8.5; 23-9.1; 23-9.2 and 23-9.2(a), (b)(1), (b)(2), (c), (g), (h)(2); 23-9.4(a), (b)(1), (b)(2), (b)(3), (c), (d)(1), (d)(2), (f), (h)(1), (h)(3), (h)(4), and (h)(5); 23-9.5(c) and (f); and 29 CFR 1926.550, 1926.552, 1926.600, 1926.602, 1910.178, 1926.20, 1926.200, 1926.201 and 1926.202 and is otherwise denied as to the Labor Law § 240(1) claim and the Labor Law § 241(6) claim based on 12 NYCRR §

23-9.4(e)(1) and denied as moot as to the Labor Law § 200 and lost wages claims in light of plaintiff's withdrawal of the latter two claims; and is further

ORDERED, that the motion of defendants/third-party plaintiffs Alchemy 15th Developers LLC, AGA 15th Street, L.L.C. and Skyward CM LLC for summary judgment on their third-party claims for contractual and common-law indemnification against third-party defendant LJC Dismantling Corp. is denied as premature; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants/third-party plaintiffs Alchemy 15th Developers LLC, AGA 15th Street, L.L.C. and Skyward CM LLC dismissing plaintiff's Labor Law § 241(6) claim insofar as it is predicated upon 12 NYCRR §§ 23-1.2(e); 23-1.5 and 23-1.5(a) and (b); 23-1.7 and 23-1.7(a), (a)(1), (a)(i)(2), (b), (d), (e) and (e)(2); 23-1.8 and 23-1.8(a), (c)(1) and (2); 23-1.30; 23-1.32; 23-1.33(a); 23-2.2; 23-2.5(a); 23-2.6(a); 23-3.2; 23-3.3(b) through (m); 23-3.4; 23-6.1 and 23-6.1(a), (b), and (c)(1); 23-6.2; 23-6.3 and 23-6.3(a); 23-8.1; 23-8.2; 23-8.3; 23-8.4; 23-8.5; 23-9.1; 23-9.2 and 23-9.2(a), (b)(1), (b)(2), (c), (g), (h)(2); 23-9.4(a), (b)(1), (b)(2), (b)(3), (c), (d)(1), (d)(2), (f), (h)(1), (h)(3), (h)(4), and (h)(5); 23-9.5(c) and (f); and 29 CFR 1926.550, 1926.552, 1926.600, 1926.602, 1910.178, 1926.20, 1926.200, 1926.201 and 1926.202 and dismissing plaintiff's Labor Law § 200 claim and his claim for lost wages; and it is further

ORDERED, that the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
LUIS REINOSO,

Index No. 300232/2012

Plaintiff,

- against -

ALCHEMY 15TH DEVELOPERS LLC, AGA 15TH STREET, L.L.C., SKYWARD CM LLC and A.S.A.R. INTERNATIONAL CORP.,

Defendants.

----------X

ALCHEMY 15TH DEVELOPERS LLC, AGA 15TH STREET, L.L.C., and SKYWARD CM LLC,

Third-Party Index No. 84102/2013

Third-Party Plaintiffs,

- against -

LJC DISMANTLING CORP.,

Third-Party Defendant.

----------X

This constitutes the decision and order of the court.

Dated: April 24, 2017

Lucindo Suarez, J.S.C.