

<b>Biscup v E.W. Howell, Co., Inc.</b>
2013 NY Slip Op 33833(U)
March 27, 2013
Supreme Court, New York County
Docket Number: 7101/10
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

SCOTT BISCUP,

Plaintiff,

- against -

E.W. HOWELL, CO., INC.,

Defendant.

TRIAL / IAS PART 30  
NASSAU COUNTY

Action No. 1

Index No. 7101/10

Motion Sequence No. 005, 006

E.W. HOWELL, CO. LLC,

Third Party Plaintiff,

- against -

SBS STEEL, INC. and SUPER STEEL  
STRUCTURES, LLC,

Third Party Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1, 2</u>
Answering Affidavits .....	<u>3, 4</u>
Replying Affidavits .....	<u>5</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The third party defendants SBS Steel, Inc. and Super Steel Structures, LLC move (motion sequence #005) for summary judgment dismissing the plaintiff's Labor Law §§ 240 and 241(6) claims against the defendant/third party plaintiff E.W. Howell, Co., Inc., general contractor. The third party defendants also move to dismiss the third party plaintiff's common

law indemnity and contribution claims against SBS Steel, Inc. as those claims are barred by Workers' Compensation Law § 11 since the plaintiff ironworker was an employee of SBS Steel, Inc. and did not sustain a grave injury. The third party defendants also move to dismiss E.W. Howell, Co., Inc.'s contractual claims against SBS Steel, Inc. because there is no contract between E.W. Howell, Co., Inc. and SBS Steel, Inc. The third party defendants also move to dismiss E.W. Howell, Co., Inc.'s common law indemnity and contribution claims against Super Steel Structures, LLC as without merit because there is no evidence Super Steel Structures, LLC was negligent in causing the plaintiff's alleged accident, did not direct, supervise nor control the plaintiff's work, and did not provide SBS Steel, Inc. with any tools nor equipment. The third party defendants further move to dismiss E.W. Howell, Co., Inc.'s contractual claims against Super Steel Structures, LLC because Super Steel Structures, LLC did not breach its obligation to procure requisite insurance.

E.W. Howell, Co., Inc. opposes the third party defendants SBS Steel, Inc. and Super Steel Structures, LLC's motion (motions sequence #005), but does not oppose their motion seeking to dismiss E.W. Howell, Co., Inc.'s common law indemnity and contribution claims against SBS Steel, Inc. However, E.W. Howell, Co., Inc. opposes Super Steel Structures, LLC's summary judgment assertions because Super Steel Structures, LLC fails to meet its initial burden of proof demonstrating entitlement to summary judgment regarding E.W. Howell, Co., Inc.'s contractual claims against Super Steel Structures, LLC's E.W. Howell, Co., Inc. asserts its third party claim should be granted for contractual indemnification from Super Steel Structures, LLC, including reimbursement of attorneys' fees, costs and expenses.

SBS Steel, Inc. and Super Steel Structures, LLC reply (motion sequence #005) to E.W. Howell, Co., Inc.'s partial opposition to SBS Steel, Inc.'s branch of the motion and opposition to

Super Steel Structures, LLC's branch of the motion for summary judgment. SBS Steel, Inc. and Super Steel Structures, LLC argue E.W. Howell, Co., Inc.'s claims against SBS Steel, Inc. should be dismissed. SBS Steel, Inc. and Super Steel Structures, LLC assert there is no evidence that Super Steel Structures, LLC was negligent in causing the plaintiff's injury nor provided any tools or equipment to SBS Steel, Inc. SBS Steel, Inc. and Super Steel Structures, LLC aver E.W. Howell, Co., Inc. does not oppose their motion summary judgment seeking dismissal of E.W. Howell, Co., Inc.'s contractual claim for failure to procure insurance, so that claim should be dismissed. SBS Steel, Inc. and Super Steel Structures, LLC point out insurance was procured. SBS Steel, Inc. and Super Steel Structures, LLC contend their motion seeking to dismiss E.W. Howell, Co., Inc.'s contractual claim for indemnity against Super Steel Structures, LLC should be granted because there is no evidence Super Steel Structures, LLC was negligent nor caused the plaintiff's accident. SBS Steel, Inc. and Super Steel Structures, LLC maintain E.W. Howell, Co., Inc., as the general contractor, was in control of the construction site and responsible for general site safety, and two witness testified the project site was muddy on the accident date. SBS Steel, Inc. and Super Steel Structures, LLC concede the contract between E.W. Howell, Co., Inc. and Super Steel Structures, LLC does indemnify E.W. Howell, Co., Inc., but limited to the extent any claim, damage or loss was not caused by E.W. Howell, Co., Inc.'s negligence.

The defendant/third party plaintiff E.W. Howell, Co., Inc. moves (motion sequence #006) for summary judgment dismissing the plaintiff's complaint and other claims against it. E.W. Howell, Co., Inc. also moves for summary judgment on its claims for common law indemnity and contribution against SBS Steel, Inc. and Super Steel Structures, LLC. E.W. Howell, Co., Inc. further moves for an award of attorneys' fees, costs and expenses in its favor against SBS

Steel, Inc. and Super Steel Structures, LLC, and to set the matter down for a hearing to determine attorneys' fees, costs and expenses.

The plaintiff opposes both motions (motion sequence ## 005, 006), and submits there are issues of fact regarding his Labor Law §§ 200, 240 and 241(6) claims. The plaintiff contends he testified a crane was necessary to unload the exterior panels from the trailer, but he was forced to unload the materials by hand when he was not provided with the appropriate hoisting device. The plaintiff asserts his injuries were caused by a gravity related risk which was created by the defendant's failure to provide the appropriate hoisting device. The plaintiff submits the third party defendants' witness Dwayne Marsh testified the entire job site was mud, and complained about the condition every day. The plaintiff avers the evidence demonstrates the defendant daily had employees at the job site, so issues of fact exist regarding constructive notice of the alleged defective condition.

SBS Steel, Inc. and Super Steel Structures, LLC partially oppose E.W. Howell, Co., Inc.'s motion (motion sequence #006) to the extent it seeks summary judgment on E.W. Howell, Co., Inc.'s claims for common law indemnity and contribution against SBS Steel, Inc. and Super Steel Structures, LLC. SBS Steel, Inc. and Super Steel Structures, LLC contend there is no evidence of negligence nor causation against SBS Steel, Inc. and Super Steel Structures, LLC. SBS Steel, Inc. and Super Steel Structures, LLC assert, if there was negligence and the negligence was the proximate cause of the alleged accident it was the responsibility of E.W. Howell, Co., Inc. at the work site, and the plaintiff's negligent conduct in jumping off the flatbed trailer. SBS Steel, Inc. and Super Steel Structures, LLC assert E.W. Howell, Co., Inc. controlled the work site as the general contractor, and E.W. Howell, Co., Inc. allowed the project site to become and remain muddy. Super Steel Structures, LLC concedes it did agree under the contract

with E.W. Howell, Co., Inc. to indemnify E.W. Howell, Co., Inc., but that indemnity was limited to the extent such claim, damage or loss was not caused by the negligence of E.W. Howell, Co., Inc. Super Steel Structures, LLC avers E.W. Howell, Co., Inc. is not entitled to contractual indemnity, contribution, attorneys' fees, costs nor expenses.

E.W. Howell, Co., Inc. replies to the opposition of the plaintiff and the third party defendants to its motion (motion sequence #006). E.W. Howell, Co., Inc. contends the cause of the plaintiff's alleged accident and related injury was the plaintiff's mistaken belief a panel was falling and his overreaction in jumping from the flatbed trailer. E.W. Howell, Co., Inc. argues, even if an open construction area was muddy, that condition does not establish E.W. Howell, Co., Inc. was negligent nor violated Labor Law § 200, but rather may have merely furnished the condition for the occurrence not caused the accident. E.W. Howell, Co., Inc. asserts the critical issue is the plaintiff was not provided with the appropriate equipment to move the panels and to perform his work, and there is no evidence E.W. Howell, Co., Inc. directed, supervised or controlled the specific work activity bringing about the alleged accident. E.W. Howell, Co., Inc. avers the Labor Law § 240(1) claim is supported by speculation, self-serving and conclusory testimony and distinguishable legal citation. E.W. Howell, Co., Inc. maintains the plaintiff's version of the accident, that is jumping off the flatbed because of what he supposed about a panel amounts to the sole proximate cause of the alleged accident. E.W. Howell, Co., Inc. points out the plaintiff concedes the Industrial Code § 23-2.1 is inapplicable here as a predicate for Labor Law § 241(6) claim, and should be dismissed. E.W. Howell, Co., Inc. contends the accident arose from Super Steel Structures, LLC's scope of work pursuant to the subcontract with E.W. Howell, Co., Inc., and Super Steel Structures, LLC is obligated to indemnify E.W. Howell, Co., Inc. notwithstanding Super Steel Structures, LLC's assertion E.W. Howell, Co., Inc.'s motion is

premature which is a speculative argument.

The Court determines neither SBS Steel, Inc. nor Super Steel Structures, LLC establish a *prima facie* entitlement to summary judgment as a matter of law on their motion (motion sequence #005) for summary judgment dismissing the plaintiff's Labor Law §§ 240 and 241(6) claims against the defendant/third party plaintiff E.W. Howell, Co., Inc. There are triable issues of fact regarding but not limited to comparative negligence and proximate cause.

The Court determines E.W. Howell, Co., Inc.'s fails to establish a *prima facie* entitlement to summary judgment as a matter of law on that branch of its motion (motion sequence #006) for summary judgment dismissing the plaintiff's complaint and other claims against it except as to the plaintiff's concession regarding the applicability of the Industrial Code § 23-2.1 as a predicate for Labor Law § 241(6) claim which is dismissed. There are no triable issues of fact regarding Industrial Code § 23-2.1 as a predicate for the plaintiff's Labor Law § 241(6) claim hence summary judgment is awarded to E.W. Howell, Co., Inc. solely on that issue. There are triable issues of fact regarding the plaintiff's other claims including but not limited to comparative negligence and proximate cause.

The Court determines E.W. Howell, Co., Inc. fails to establish a *prima facie* entitlement to summary judgment as a matter of law on that branch of its motion (motion sequence #006) for summary judgment on its claims for common law indemnity and contribution and an award of attorneys' fees, costs and expenses against SBS Steel, Inc. In opposition, SBS Steel, Inc. shows there are no triable issues of fact as to SBS Steel, Inc., which is conceded by E.W. Howell, Co., Inc., regarding claims for common law indemnity and contribution and an award of attorneys' fees, costs and expenses against SBS Steel, Inc.

The Court determines E.W. Howell, Co., Inc. prematurely seeks summary judgment on its

claims for common law indemnity and contribution and an award of attorneys' fees, costs and expenses against Super Steel Structures, LLC., and to set the matter down for a hearing to determine attorneys' fees, costs and expenses (*see JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC*, 101 A.D.3d 575, 957 N.Y.S.2d 45 [1st Dept 2012]). It cannot be determined now whether E.W. Howell, Co., Inc.'s claims for common law indemnity and contribution and an award of attorneys' fees, costs and expenses against Super Steel Structures, LLC or the negligence exclusion in the agreement have been triggered.

Accordingly, the third party defendants SBS Steel, Inc. and Super Steel Structures, LLC's motion (motion sequence #005) is granted, except that branch of the motion is denied seeking summary judgment dismissing the plaintiff's Labor Law §§ 240 and 241(6) claims against E.W. Howell, Co., Inc. The defendant/third party plaintiff E.W. Howell, Co., Inc.'s motion (motion sequence #006) is denied except granted in favor of E.W. Howell, Co., Inc. as to the plaintiff's Industrial Code § 23-2.1 as a predicate for Labor Law § 241(6) claim in accord with this decision.

So ordered.

Dated: **March 27, 2013**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION X

**ENTERED**

APR 01 2013

NASSAU COUNTY  
COUNTY CLERK'S OFFICE