Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Valentin Tudor,

Plaintiff,

-against-

Empire State Land Associates, LLC and Hunter Roberts Construction, LLC.,

Defendants.

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Empire State Land Associates, LLC and Hunter Roberts Construction, LLC.,

Third-Party Plaintiffs,

-against-

ALP Stone INC.,

Third-Party Defendant,

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Index No.: 2984/09
Motion Date: 1/3/13
Motion Cal. No.: 126
Motion Seq. No.: 4

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting summary judgment in favor of the defendants, Empire State Land Associates, LLC and Hunter Roberts Construction, LLC for contractual indemnification against the defendant, ALP Stone Inc.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants Empire State Land Associates, LLC ("Empire State") and Hunter Roberts

Construction, LLC ("Hunter Roberts") move for an order pursuant to CPLR §3212 granting summary judgment for contractual indemnity against third-party defendant Alp Stone, Inc. ("Alp Stone").

Facts

The underlying action arises from personal injuries allegedly sustained by plaintiff Valentin Tudor ("Tudor"), an employee of Alp Stone, while working as a marble worker at the work site located at the Empire State Building. Empire State entered into a contract with Hunter Roberts to perform two projects at the work site; Hunter Roberts then subcontracted with Alp Stone to perform the marble work for the projects.

The contract states, in relevant part, that:

> "To the extent permitted by law, and to the extent not caused in whole or in party by an indemnities' own negligence, the Subcontractor shall indemnify, defend and hold harmless Hunter Roberts, the Owner and their respective members…from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with or are claimed to arise out of or be connected with the performance of Work by the Subcontractor."

On December 23, 2008, David Sneddon ("Sneddon"), a Hunter Roberts supervisor, allegedly directed Tudor to move his work, which consisted of cutting metal bars and beams, into a separate room (hereinafter "New Area") from where he had previously worked. Tudor allegedly voiced concerns about performing his work in the New Area because it lacked a carpentry horse to place the metal bars, forcing Tudor to cut the bars from a kneeling position. The New Area consisted of three temporary walls and a plywood floor and provided little room for kneeling. Sneddon allegedly instructed Tudor to work in the New Area because Sneddon did not have the key to access the area where Tudor previously worked and the work was to be conducted at night due to Sneddon's concern about noise and smoke in the lobby area and that Alp Stone was

behind schedule. In the process of cutting the bars from the kneeling position, the blade Tudor used to cut the bars went through the bar and plywood floor, jumping back at him and causing the accident.

Mark Greenberg, the Hunter Project Manager at the time of the accident, testified at his deposition that work was not supposed to be done in the New Area and that the New Area was an unsafe location for work.

On February 4, 2009, Tudor filed a complaint against Empire State and Hunter Roberts. On January 15, 2010, Empire State and Hunter Roberts filed a cross-claim against Alp Stone on contractual indemnification grounds.

Contentions

Empire State and Hunter Roberts argue that Alp Stone is contractually obligated to indemnify them for Tudor's injuries. Alp Stone argues that summary judgment as to contractual indemnification must be denied because there is a question of fact regarding Hunter Roberts' negligence contributing to the accident.

Discussion

Empire State and Hunter Roberts argue that the contract obligates Alp Stone to indemnify them for all injuries "arising out" of the project. Alp Stone relies on General Obligations Law ("GOL") § 5-322.1 for its contention that public policy bars enforcement of the contract.

GOL § 5-322.1 states, relevant part, that:

> "Agreement…purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

GOL § 5-322.1 therefore is an exception to the general rule that indemnification contracts will be upheld if the agreement between the parties connotes an "intention to indemnify [which] can be clearly implied form the language and purposes of the entire agreement." (*Hogland v. Subley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 159 [1977], quoting *Margolin v. New York Life Insurance Co.,* 32 N.Y.2d 149, 153 [1973].) The terms in the contract at bar reflect the agreement in *Armento v. Broadway Mall Properties*, 70 A.D.3d 614, 615 (2d Dept. 2010), which made the subcontractor responsible for "maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." However, the court refused to enforce the provision for contractual indemnification because contractor's negligence was a substantial factor in causing the accident.. (*Id.*) "Any construction contract purporting to indemnify a party for its own negligence is void and unenforceable" (Id. at 616.) "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its own negligence contributed to the accident, it cannot be indemnified therefore." *(Cava Construction Co., Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662 [2nd Dept. 2010])

Alp Stone does not dispute the terms of the general contract nor make any claims of negligence against Empire State. Thus, Empire State is indemnified for any liability pertaining to Tudor's injuries. The issue, therefore, is whether there is a question of fact exists as to Hunter Roberts' negligence with respect to the accident.

Alp Stone alleges that Hunter Roberts committed violations of Labor Law sections 200 and 241(6), which gave rise to the accident causing Tudor's injuries. Labor Law § 200 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 [1993].)

Labor Law § 200 states, in pertinent part, that:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places."

To recover under Labor Law § 241(6), which pertains specifically to construction sites, an owner or general contractor must have "violated an Industrial Code provision which sets forth specific, applicable safety standards." (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 A.D.3d 1043 [2nd Dept. 2012]; *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.3d 494, 503-505 [1993].) The provision at issue, Industrial Code Section 23-1.12, states, in relevant part, that "every portable, power-driven, hand-operated saw…shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating."

Since a motion for summary judgment is considered a drastic remedy, it should only be granted when "no material and triable issue of fact is presented." (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y. 3d 395, 404. Summary judgment should not be granted if "there is any doubt as to the existence of such issues…or where the issue is arguable." (*Id.*). A party moving for summary judgment on a claim under Labor Law § 200 has the initial burden of "making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence." (*Ventimiglia*, 96 A.D.3d at 1046; *Rodriguez v. BCRE 230 Riverdale, LLC*, 91 A.D.3d 933, 935 [2nd Dept. 2012].) Similarly, the party moving for summary judgment also has the initial burden under Labor Law §241(6). (*Ventimiglia*, 96 A.D.3d at 1047).

Here, Hunter Roberts fails to meet its prima facie burden that there is no triable issue of fact pursuant to Labor Law section 240 or 241(6). Alp Stone contends that Sneddon's directions to Tudor placed him in a dangerous position that contributed directly to his injury. In doing so,

Alp Stone argues that Sneddon's actions show he was "concerned with expedience and not safety, and therefore amounts to negligence." In opposition, Hunter Roberts argues that Sneddon's action are tantamount to "general supervision" and thus are not sufficient to raise a question of fact to his negligence.

Hunter Roberts reliance on this proposition is misplaced and the authority relied upon is inapposite. In *Centennial Construction Enters v East N.Y. Renovation Corp.*, the Second Department found that the general contractor was not liable for the plaintiff's injuries because it did not control or supervise the plaintiff's work, holding that "[t]he fact that an employee of the [general contractor] inspected the work site each day and was authorized to stop the work in the event that he observed an unsafe condition was insufficient to establish liability." [79 A.D.3d 690, 692 (2nd Dept. 2010)]; *accord Cabrera v. Board of Education*, 33 A.D.3d 641 (2d Dept. 2006). Here, it is alleged that an employee of the contractor, Hunter Roberts, not only controlled and supervised the plaintiff's work, but directly ordered him to work in an unsafe area causing the injury.

Conclusion

For the reasons set forth above, defendants motion for an order pursuant to CPLR § 3212 granting summary judgment on its cross-claim against Alp Stone upon the grounds of contractual indemnification is granted as to Empire State and denied in as to Hunter Roberts Construction.

Dated: March 22, 2013

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Bernice D. Siegal, J. S. C.