Bonaerge v Leighton House Condominium
2014 NY Slip Op 32095(U)
July 10, 2014
Sup Ct, Bronx County
Docket Number: 83726/2010
Judge: Lucindo Suarez
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 FILED Jul 17 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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LINARES BONAERGE,

Plaintiff,

- against -

LEIGHTON HOUSE CONDOMINIUM, COOPER SQUARE REALTY INC., 1695 FIRST AVENUE ASSOCIATES, LP, TOWER BUILDING SERVICES INC., and INTEGRATED CONSTRUCTION SERVICES INC.,

Defendants.

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INTEGRATED CONSTRUCTION SERVICES INC.,

Third-Party Plaintiff,

- against -

ROCKLEDGE SCAFFOLD CORP.,

Third-Party Defendant.

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DECISION AND ORDER

Index No. 306511/2009

Third-Party Index No. 83726/2010

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated December 31, 2013 of defendant/third-party plaintiff Integrated Construction Services Inc. and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof; the affirmation in opposition dated February 24, 2014 of third-party defendant Rockledge Scaffold Corp. and the exhibits annexed thereto; the reply affirmation dated March 5, 2014 of defendant/third-party plaintiff Integrated Construction Services Inc.; the notice of cross-motion dated January 31, 2014 of third-party defendant Rockledge Scaffold Corp. and the affirmation and exhibits submitted in support thereof; the affirmation in opposition and reply affirmation dated June 13, 2014

of third-party defendant Rockledge Scaffold Corp. and the affidavits and exhibits annexed thereto; the notice of cross-motion dated April 7, 2014 of defendants Leighton House Condominium and Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc. and the affirmation, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated May 23, 2014 and the exhibits annexed thereto; the affirmation in partial opposition dated June 13, 2014 of third-party defendant Rockledge Scaffold Corp.; the reply affirmation dated June 25, 2014 of defendants Leighton House Condominium and Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc.; plaintiff's notice of cross-motion dated April 8, 2014 and the affirmation, affidavits and exhibits submitted in support thereof; the affirmation in opposition dated June 13, 2014 of defendants Leighton House Condominium and Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc.; plaintiff's reply affirmation dated June 24, 2014 and the exhibits annexed thereto; and due deliberation; the court finds:

Plaintiff, an employee of third-party defendant Rockledge Scaffold Corp. ("Rockledge"), commenced this Labor Law action to recover damages for injuries sustained when he was struck by a header beam while dismantling a sidewalk bridge. The accident occurred on October 3, 2005 at 356 East 88th Street owned Leighton House Condominium ("Leighton").[1] Defendant Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc. ("Cooper") managed the premises pursuant to an agreement with Leighton. Leighton hired defendant/third-party plaintiff Integrated Construction Services Inc. ("Integrated") to perform exterior masonry work, and Integrated retained Rockledge to provide the sidewalk bridge. Integrated now moves pursuant to CPLR 3212 for summary judgment on its third-party complaint seeking contractual indemnification against Rockledge. Rockledge cross-moves for summary judgment dismissing plaintiff's complaint and all third-party claims against it.[2]

[1] The project documents identify the location as 360 East 88th Street in New York County.

[2] Plaintiff did not assert any direct claims against Rockledge.

Leighton/Cooper cross-move for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them and for summary judgment on their contractual and common-law indemnification claims against Integrated. Plaintiff cross-moves for partial summary judgment against Leighton, Cooper and Integrated on his Labor Law § 240(1) cause of action and for an order pursuant to CPLR 3025 granting him leave to amend his verified bill of particulars to assert 12 NYCRR § 23-5.1(h) as a predicate for his Labor Law § 241(6) cause of action. The action against defendant Tower Building Services Inc. was discontinued by stipulation filed April 13, 2011, and plaintiff has obtained a default judgment against defendant 1695 First Avenue Associates, LP. Submitted on the motion and cross-motions are the pleadings, deposition transcripts, and the agreements between Leighton/Cooper, Leighton/Integrated, and Integrated/Rockledge. Plaintiff also offers an affidavit from his expert, Certified Site Safety Manager Kathleen Hopkins ("Hopkins"), and an affidavit from co-worker Francisco Nunez. Rockledge in reply offers an affidavit from John Harrington ("Harrington") and expert Henry Naughton, P.E. Rockledge's expert affidavit will not be considered. *See Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dep't 2012) Rockledge did not disclose its expert until its reply, and the affidavit lacks a certificate of conformity as required by CPLR 2309(c).

Plaintiff worked as part of a crew dismantling a sidewalk bridge. One component of the bridge was an eight-foot long, two hundred pound header beam connected on each end to a metal leg or pole. The beam/legs formed an inverted "U" with the beam running horizontally beneath the upper portion of the bridge eight feet above the sidewalk and the legs standing vertically on the sidewalk. Plaintiff, his foreman Mello, and co-worker Byron were tasked with lowering the "U" to the ground. Mello and Byron each held one leg and tipped the "U" backwards. Mello told plaintiff to "catch" the beam with his hands and help lower the "U" to the ground. Plaintiff stood with his arms outstretched and raised to shoulder height. The beam came "too fast" and he was unable to grab it. The beam was heavy and it slipped, striking plaintiff on the chest and left knee.

Integrated's president Henry Gonzalez ("Gonzalez") was not involved in dismantling the bridge but based upon his observations on other projects, three or four workers lowered the header beam and legs by hand to the ground. Leighton did not to direct or control the disassembly of the sidewalk bridge.

Harrington, Rockledge's controller, stated that dismantling a sidewalk bridge involved removing plywood panels, wood planking, junior beams, corrugated tin floors, and four-by-four pieces first before any header beams and supports were removed. He described the header beam as a steel I-beam, and clamps connected the header beam to two metal supports. Dismantling an eight-foot bridge usually required four to five workers. Two workers held onto each support, with the beam attached, and lowered the frame to the ground where it was dismantled. Depending on the length of the beam, another worker would stand at the middle of the beam to help. No pulleys, ropes or slings were used. Rockledge retained Pro Safety Services to give monthly toolbox talks concerning safety, and Pro Safety Services instructed Rockledge employees on how to dismantle a sidewalk bridge.

Anthony Tamboni, Leighton's residential manager, was not involved with the project. He never dealt with any of the workers who erected or disassembled the sidewalk bridge. Joe Scholes ("Scholes") served as the property manager for Leighton from 2002 to 2008 pursuant to an agreement between Leighton and Cooper but he was not present at the site daily. He could not recall how Integrated was selected but recognized his signature on Leighton's contract with Integrated.

Addressing Cooper's cross-motion first, Cooper moves for dismissal on the ground that it cannot be held liable as Leighton's statutory agent. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981). "Statutory agency turns on the authority to supervise and control the employee." *Voultepsis v. Gumley-Haft-Klierer, Inc.*, 60 A.D.3d 524, 525, 875 N.Y.S.2d 74, 76 (1st Dep't 2009) (citation omitted). The management agreement between Leighton and Cooper reveals that Cooper was not required to undertake any supervisory responsibilities for capital improvements or repairs unless provided for in a separate agreement. No separate agreement has been

produced, and there has been no showing that Cooper supervised plaintiff's work. *See Parra v. Allright Parking Mgt., Inc.*, 59 A.D.3d 346, 873 N.Y.S.2d 623 (1st Dep't 2009). Plaintiff did not address this branch of the cross-motion in his opposition. Accordingly, Cooper's cross-motion for summary judgment dismissing plaintiff's complaint against it is granted.

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. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 953 N.E.2d 794, 798, 929 N.Y.S.2d 556, 561 (2011). The statute applies to both falling worker and falling object cases. *See Harris v. City of New York*, 83 A.D.3d 104, 923 N.Y.S.2d 2 (1st Dep't 2011). Plaintiff must demonstrate both a violation of the statute and that the violation was a proximate cause of the injury. *See Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 922 N.E.2d 865, 866-867, 895 N.Y.S.2d 279, 280-281 (2009). The doctrine of comparative negligence is not applicable. *See Lopez v. Boston Props., Inc.*, 41 A.D.3d 259, 838 N.Y.S.2d 527 (1st Dep't 2007). The statute applies when a scaffold is in the process of being dismantled or constructed. *See Metus v. Ladies Mile Inc.*, 51 A.D.3d 537, 858 N.Y.S.2d 142 (1st Dep't 2008).

Movants contend that plaintiff was not subjected to an elevation-related risk. The testimony, though, establishes that the beam was being lowered from a height of eight feet. The fact that the beam was being lowered when it struck plaintiff does not remove the case from the statute's protection, *see Brinson v. Kulback's & Assoc.*, 296 A.D.2d 850, 744 N.Y.S.2d 621(4th Dep't 2002), and it cannot be said that the height differential was minimal. *See Marrero v. 2075 Holding Co. LLC*, 106 A.D.3d 408, 964 N.Y.S.2d 144 (1st Dep't 2013). Hopkins avers that a device of the type identified the statute could have prevented the accident. Even if plaintiff's co-workers lowered the beam "slowly," plaintiff was

not provided with a safety device to check the beam's descent. Thus, plaintiff's cross-motion for judgment on liability on his Labor Law § 240(1) cause of action is granted, and the motion and cross-motions of Integrated, Leighton and Rockledge for dismissal on this cause of action are denied.

"In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct." *Ortega v. Everest Realty LLC,* 84 A.D.3d 542, 544, 923 N.Y.S.2d 74, 77 (1st Dep't 2011). Plaintiff bases his claim on violations of 12 NYCRR §§ 23-1.4(b)(12) and (b)(17), 23-1.5(a) and (b), 23-1.7, 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.20, 23-1.25, 23-1.30, 23-2.1, 23-3.3 and seeks leave to add 12 NYCRR § 23-5.1(h). Movants have shown that the majority of the predicates cited are either too general or inapplicable to the facts, and plaintiff has failed to raise a triable issue of fact in opposition. Sections 23-1.4(b)(12) and 23-1.4(b)(17) define "competent" and "designated person" and do not set forth a specific standard of conduct. Section 23-1.5(a) and (b) pertains to the general responsibility of employers and is insufficient. *See Carty v. Port Auth. of N.Y. & N.J.*, 32 A.D.3d 732, 821 N.Y.S.2d 178 (1st Dep't 2006), *lv denied*, 8 N.Y.3d 814, 870 N.E.2d 694, 839 N.Y.S.2d 453 (2007). Section 23-1.7 (a) (overhead protection) is inapplicable since the masonry work was complete, and barricades would have interfered with plaintiff's work. *See Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 948 N.Y.S.2d 8 (1st Dep't 2012). The other subsections in Section 23-1.7 concern falling, drowning, slipping and tripping hazards. Plaintiff was not involved in work requiring protective eye wear, a respirator, or waterproof clothing as described in Section 23-1.8. Sections 23-1.11 (lumber and nail fastenings), 23-1.20 (chutes), 23-1.25 (welding and flame cutting operations), 23-1.30 (illumination), 23-2.1 (maintenance and housekeeping) are all inapplicable. Sections 23-1.15 (safety railing), 23-1.16 (safety belts, harnesses, tail lines and lifelines) and 23-1.17 (life nets) do not apply because those devices were not provided to plaintiff. *See Dzieran v. 1800 Boston Rd., LLC*, 25 A.D.3d 336, 808 N.Y.S.2d 36 (1st Dep't 2006). Section 23-1.18 does not set forth a specific procedure for the

disassembly of sidewalk sheds. Occupational Safety and Health regulations are also insufficient. *See Greenwood v. Shearson, Lehman & Hutton*, 238 A.D.2d 311, 656 N.Y.S.2d 295 (2d Dep't 1997). Plaintiff has abandoned his reliance on these predicates since he did not address them in his opposition. *See Cardenas v. One State St., LLC*, 68 A.D.3d 436, 890 N.Y.S.2d 41 (1st Dep't 2009).

Section 23-3.3(b)(3), (c), and (h), cited by Hopkins, is inapplicable. Demolition work is defined as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." *See* 12 NYCRR § 23-1.4(b)(16). The overall project involved exterior masonry work, which does not constitute demolition work. *See Solis v. 32 Sixth Ave. Co. LLC*, 38 A.D.3d 389, 832 N.Y.S.2d 524 (1st Dep't 2007). Plaintiff was not engaged in the demolition of walls and partitions that were "left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." *See* 12 NYCRR § 23-3.3(b)(3). The work did not require ongoing inspections to detect hazards resulting from weakened or deteriorated floors or walls or from loosened material, and Section 23-3.3(c) does not apply to material being loosened deliberately. *See Garcia v. 225 E. 57th St. Owners, Inc.*, 96 A.D.3d 88, 942 N.Y.S.2d 533 (1st Dep't 2012). Section 23-3.3(h) is unavailing as plaintiff was not engaged in the demolition by hand of structural steel. No structural steel was being dropped from a building or other structure, *see Malloy v. Madison Forty-Five Co.*, 13 A.D.3d 55, 786 N.Y.S.2d 433 (1st Dep't 2004), and the lowering of the header beam from its horizontal position does not implicate that provision. *See Eastern Bldg. & Restoration, Inc.*, 96 A.D.3d 1123, 946 N.Y.S.2d 298 (3d Dep't 2012).

Plaintiff also cross-moves for leave to add 12 NYCRR § 23-5.1(h) as a predicate. Generally, leave to amend shall be freely given. *See Reilly v. Newireen Assocs.*, 303 A.D.2d 214, 756 N.Y.S.2d 192 (1st Dep't), *lv denied*, 100 N.Y.2d 508, 795 N.E.2d 1244, 764 N.Y.S.2d 235 (2003). Plaintiff, though, has offered no reason for the delay, *see Lupo v. Pro Foods, LLC*, 68 A.D.3d 607, 891 N.Y.S.2d 372 (1st Dep't 2009), nor has he shown any merit to his claim. Section 23-5.1(h) provides that "[e]very

scaffold shall be erected and removed under the supervision of a designated person," and his testimony demonstrates that Mello was present and directed his work. *See Canosa v. Holy Name of Mary R.C. Church*, 83 A.D.3d 635, 920 N.Y.S.2d 390 (2d Dep't 2011); *Atkinson v. State of New York*, 49 A.D.3d 988, 854 N.Y.S.2d 556 (3d Dep't 2008).

Labor Law § 200 codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site. *See Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993). Liability may be imposed where defendant supervised and controlled the injury-producing work, *see Suconota v. Knickerbocker Props., LLC*, 116 A.D.3d 508, 984 N.Y.S.2d 27 (1st Dep't 2014), or where defendant had actual or constructive notice of the specific defect or hazardous condition that caused the accident. *See Mitchell v. N.Y. Univ.*, 12 A.D.3d 200, 784 N.Y.S.2d 104 (1st Dep't 2004). Leighton has established that the accident occurred as the result of the means and methods of plaintiff's work over which it had no control. *See Suconota v. Knickerbocker Props., LLC, supra.*; *Doodnath v. Morgan Contr. Corp.*, 101 A.D.3d 477, 956 N.Y.S.2d 11 (1st Dep't 2012). Plaintiff did not address this branch of the cross-motion in his opposition.

Integrated also moves for summary judgment on its third-party complaint for contractual indemnification from Rockledge. An intention to indemnify must be clearly implied from the language and purpose of the agreement. *See Campos v. 68 E. 86th St. Owners Corp.*, 117 A.D.3d 593, — N.Y.S.2d — (2014). Paragraph 11 of the Integrated/Rockledge contract reads that Rockledge "agrees to indemnify, defend and hold the Customer, its directors, officers, partners, agents and employees harmless from and against all claims, damages, losses, suits, judgments, actions and expenses (including attorney's fees and costs) caused directly and solely by Rockledge" or its employees. Plaintiff's claim clearly falls within the scope of the indemnification provision. *See Suconota v. Knickerbocker Props., LLC, supra.* Contrary to Rockledge's contention, the motion is not premature. The subject provision does not insulate Integrated from its own negligence, and there has been no showing that Integrated's

negligence caused the accident. The court notes that Rockledge in opposition to plaintiff's cross-motion sought the dismissal of all claims seeking common-law indemnification and contribution against it on the ground that plaintiff did not suffer a grave injury. None of the pleadings contain any cross-claims against Rockledge, and Workers' Compensation Law § 11 does not bar Integrated's claim for contractual indemnification. *See Fiorentino v. Atlas Park LLC*, 95 A.D.3d 424, 944 N.Y.S.2d 60 (1st Dep't 2012).

Leighton/Cooper also move for summary judgment on its cross-claim seeking contractual and common-law indemnification from Integrated. Paragraph 8.13.1 of the supplement to the Leighton/Integrated contract provides that Integrated "shall indemnify and hold harmless the Owner . . . from and against all reasonable claims, damages, losses and expenses . . . (2) attributable to bodily injury . . . but only to the extent caused in whole or in part by negligent act(s) or omission(s) of the Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." The provision also includes indemnification for Leighton's managing agent, Cooper. Leighton's liability under Labor Law § 240(1) is purely vicarious, and the "saving" language "to the fullest extent permitted by law" renders the provision enforceable. *See Guzman v. 170 W. End Ave. Assoc.*, 115 A.D.3d 462, 981 N.Y.S.2d 678 (1st Dep't 2014). Thus, Leighton and Cooper are entitled to judgment on their cross-claim for contractual indemnification against Integrated.

Common-law indemnification is available where (1) a party is 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 over the work. *See Naughton v. City of New York*, 94 A.D.3d 1, 940 N.Y.S.2d 21 (1st Dep't 2012). Since Leighton and Cooper have not shown that Integrated actually supervised plaintiff's work, this branch of the cross-motion is denied.

Accordingly, it is

ORDERED, that the motion of defendant/third-party plaintiff Integrated Construction Services Inc. for summary judgment on its third-party complaint seeking contractual indemnification against third-party defendant Rockledge Scaffold Corp. is granted; and it is further

ORDERED, that the cross-motion of third-party defendant Rockledge Scaffold Corp. for dismissal of plaintiff's complaint and the third-party claims is granted to the extent of dismissing plaintiff's Labor Law §§ 200 and 241(6) causes of action and is otherwise denied; and it is further

ORDERED, that the cross-motion of defendants Leighton House Condominium and Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc. for summary judgment dismissing plaintiff's complaint and for judgment on their cross-claims for contractual and common-law indemnification against defendant/third-party plaintiff Integrated Construction Services Inc. is granted to the extent of granting dismissal of plaintiff's Labor Law §§ 200 and 241(6) and common-law negligence causes of action against defendant Leighton House Condominium; granting summary judgment in favor of defendants Leighton House Condominium and Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc. on their cross-claim for contractual indemnification against defendant/third-party plaintiff Integrated Construction Services Inc.; and granting dismissal of plaintiff's complaint in its entirety against defendant Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc.; and it is further

ORDERED, that plaintiff's cross-motion for summary judgment on liability on his Labor Law § 240 cause of action and for leave to amend his amended bill of particulars is granted to the extent of granting judgment on the issue of the liability of defendants Leighton House Condominium and Integrated Construction Services Inc. on his Labor Law § 240 cause of action and denying plaintiff leave to amend his verified bill of particulars; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant/third-party plaintiff Integrated Construction Services Inc. on its cause of action for contractual indemnification against third-party defendant Rockledge Scaffold Corp.; and it is further

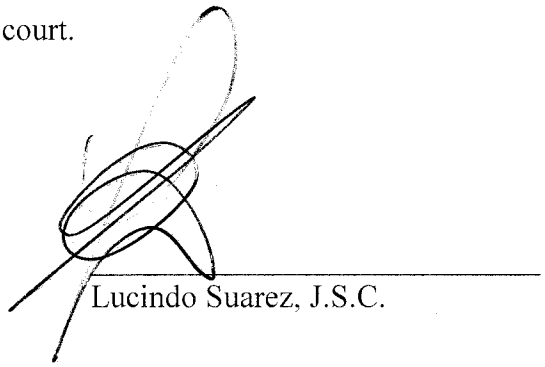
ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Leighton House Condominium dismissing plaintiff's Labor Law §§ 200 and 241(6) and common-law negligence causes of action against it; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Leighton House Condominium and Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc. on their cross-claim for contractual indemnification against defendant/third-party plaintiff Integrated Construction Services Inc.; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Cooper Square Realty, Inc. s/h/a Cooper Square Realty Inc. dismissing plaintiff's complaint against it.

This constitutes the decision and order of the court.

Dated: July 10, 2014



Lucindo Suarez, J.S.C.