SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

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Hector Rodriguez

Plaintiff

Decision and Order

Index No. 305618/11

-against-

Heritage Hills Society, Ltd. and
M.J.C. Construction Corp.,

Defendants

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The following papers numbered 1-5 read on defendant Heritage Hills Society, Ltd. 's (Heritage Hills) motion for summary judgment dismissing the common law negligence/ Labor Law § 200 claims and awarding judgment on its cross-claims , and the cross-motion of plaintiff for an award of summary judgment on the issue of liability with respect to his Labor Law § 240(1) claim

Notice of Motion ,Affirmation and Affidavit in Support, Exhibits A-K	1
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Facts and Procedural Background

Plaintiff seeks damages for injuries alleged to have been sustained in a fall at a workplace that occurred on November 18, 2010 in the administration building of the defendant condominium community located in Somers, Westchester County, New York. At the time, plaintiff was employed as a fire sprinkler fitter for non-party Hudson Valley Fire Protection Company Inc. ("Hudson Valley"). He alleges that defendants were negligent in permitting a recessed trap door located in the floor of a hallway closet to remain open causing him to fall approximately four feet into the crawl space below.

This action was commenced in June 2011 asserting that plaintiff's injuries were caused by the negligence of the owner and the general contractor, M.J.C. Construction Corp. ("M.J.C."). Causative violations of Labor Law §§ 220, 240(1) and 241(6) are also asserted.

Issue was joined with the service of Heritage Hill's answer in October 2011, in which was asserted a cross-claim for contribution. In its answer to the amended complaint Heritage Hills also asserted cross-claims for contractual indemnification as well as a for breach of the contract's obligation to procure liability insurance on behalf of Heritage Hills.

The Note of Issue was filed on June 28, 2013.

Motion /Cross-Motion and Contentions of the Parties

Heritage Hills seeks an award of summary judgment dismissing as asserted against it the common law negligence and Labor Law § 200 claims, as well as dispositive relief as against M.J.C. on the cross-claims for contractual defense and indemnification and breach of the insurance procurement obligations.

In support of the first branch of the motion, the owner contends that there is no issue of fact that it had supervisory control over the means and methods of plaintiff's work.

With respect to the remaining relief sought, defendant argues that there is no issue of fact that the claimed accident arose out of the performance of contracted work at the site, specifically, the plaintiff's actions in ascertaining whether a sprinkler head in the closet

needed to be changed, and that under such circumstances, the contract between the parties requires M.J.C. to indemnify the owner . Nor, it is argued, is there any issue of fact that the owner supervised or controlled plaintiff's work or that of the contractor, or that it was negligent in causing plaintiff's injuries. Finally, as defendant maintains that there "is no evidence to suggest that M.J.C .named Heritage Hills on its policy as an additional insured " an award of summary judgment lies on this claim , as well.

The motion is supported by the pleadings; the bills of particular; a copy of the 08/04/10 construction contract between the owner and M.J.C., as well as transcripts of the deposition testimony of plaintiff, and of his employer ; Heritage Hills' facility manager, and the president of the condominiums' governing body, as well as that of M.J.C.'s owner.

In **opposition,** M.J.C . argues that there are material issues of fact as to whether the indemnification obligation was triggered inasmuch as it is unresolved here whether the incident arose out of the contracted work , and whether the owner was negligent. Specifically, defendant contends that not only was there no work being performed in the closet where the incident occurred, there was no work being performed in that entire wing of the building , and the owner was supposed to take measure to lock the doors of that wing. As the incident occurred in a "private area of the building that was supposed to be locked off by Heritage ", there is an issue of fact as to whether the claim arises out of the "performance of the work." Also unresolved is the issue of whether Heritage has demonstrated as a matter of law its freedom from negligence as th owner acknowledged

its responsibility to ensure that the door to the subject location was locked during construction hours. In addition, to the extent plaintiff contends that inadequate lighting caused and/or contributed to the accident, it is also unresolved as to whether Heritage was negligent in failing to ensure there was sufficient lighting inside the closet.

M.J.C. also argues that summary judgment on the remaining cross-claim should be denied because at the time of the accident, it maintained a comprehensive general liability policy containing an additional insured endorsement. Moreover, as Heritage Hills obtained its own liability insurance, if a breach of M.J.C's obligations were to be found, pursuant to the authority of Inchaustegui v. 665 5th Ave. Ltd. Partnership, 268 A.D.2d 121,123 [1st Dept. 2000], Heritage's damages would be limited to out-of-pocket expenses.

In **opposition, plaintiff** maintains that to the extent plaintiff testified that at times his work would be directed by the owner's employee, an engineer, there are unresolved issues of fact as to whether Heritage was involved in the supervision and control of plaintiff's work.

In **reply**, Heritage Hills maintains that evidence that plaintiff mistakenly performed his job by checking for the sprinkler in the subject closet where no renovation work was to be performed, does not create an issue of fact as to whether he was nevertheless then performing the work of M.J.C.'s subcontract that specifically called for the installation, relocation, and changing of sprinkler heads[1]. Heritage Hills repeats its assertion that it

[1] RODRIGUEZ EBT: 58

has demonstrated that it should be awarded summary judgment on its cross-claim for defense and indemnification as there is no triable issue of fact as to its lack of negligence , supervision, and control with regard to plaintiff's accident . Concerning the specific arguments addressed to any negligence stemming from the claim of inadequate lighting in the closet, Heritage Hills contends that plaintiff does not assert such a claim in the pleadings or the bills of particulars. With respect to the assertion of negligence in "locking " the door to the location of the accident, the owner notes that access to the subject closet containing the crawl space was necessary for the HVAC[2] workers to reach equipment installed in the crawl space, and that M.J.C.'s principal testified that he had access to the keys and that the contractor was responsible for allowing the workers into the job site.

Concerning the insurance procurement claim, the owner argues that while the policy annexed to the papers in opposition contains an additional insured endorsement , there is no showing that Heritage Hills was named as an additional insured on the policy, and as such, at the very least, the owner is owed the premiums it paid to procure its own policy.

2) By notice dated November 19, 2013 **plaintiff** cross-moves for an order granting summary judgment on his Labor Law § 240(1) claim . The motion is supported by counsel's affirmation .

Plaintiff contends that summary judgment is warranted as there is no issue of fact

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[2]Heating, ventilation and air conditioning.

that he sustained his injures as a result of falling four feet through the unsecured trap door .

Both defendants maintain that the cross-motion should be denied as untimely, made more than three weeks after the deadline for such a motion, and unsupported by any explanation , much less showing of "good cause" for the late filing, and seeking relief not "nearly identical" to that of defendant's motion.

Alternatively, Heritage Hills argues that upon consideration of the substantive arguments addressed in the cross-motion , it should be denied because plaintiff was not required to be in the closet to perform the contract work , and the elevation risk between the closet floor and the crawl space is not the type of elevation risk contemplated by the statute necessitating work place protection, nor was the crawl space a foreseeable risk for which a designated safety device would

be required.

M.J.C. argues that the motion should be denied on its merits as there remain triable issues of fact as to whether plaintiff was engaged in construction work at the time of the accident because the evidence demonstrates that there was no foreseeable work-related reason for plaintiff to be in the closet at the time of the accident.

Contract

It is here undisputed that at the time of the accident there was in effect a contract between Heritage Hills, as owner, and M.J.C. Construction for work defined as

"construction and services required by the Contract Documents" [§ 6.2], and that pursuant to its terms, the contractor was required to provide general liability and other insurance[3], and that to obtain an endoresment to its general liability insurance policy to cover the Contractor's indemnification obligations set forth below.

> § 8.12 INDEMNIFICATION
> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their consultants and agents and employees of any of them from and against claims, damages, losses and expenses , including not limited to attorneys' fees , arising out of or resulting from performance of the Work.

The contract also provided the following with respect to operations at the renovation site.

> § 8.9 USE OF SITE
> The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits, the Contract Documents and the Owner.

Also pertinent here is the following concerning the supervision of the work.

> § 8.3 SUPERVISION AND CONSTRUCTION PROCEDURES
> §8.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention . The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work, provided said methods , etc., are in keeping with standard practices recognized by the Architect.

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[3]Article 5

Discussion and Conclusions

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727). " Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d

350 [2008] , *reargden.* 10 N.Y.3d 885).

Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. (Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

Labor Law § 200 and Common Law Negligence Claim

To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site, a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition.

Upon review of the record here it is the finding of this court that Heritage Hills has demonstrated as a matter of law that it did not supervise and/or exercise control over the means and methods of plaintiff's work, and therefore cannot be held liable for plaintiff's injuries under Labor Law § 200 (Torkel v NYU Hosps. Ctr., 63 AD3d 587, 883 NYS2d 8 [1st Dept 2009]). Indeed, M.J.C.'s principal clearly testified that the supervision of the subcontractors was "100%" the contractor's job with the owner having no "status" in this role [MAURNO EBT: 35:16-19]. In opposition to this showing, neither the plaintiff nor co-defendant come forward with probative evidence to raise a material issue of fact that the

owner directed the installation and/or relocation, or changing of sprinkler heads. The fact that plaintiff consulted with the owner's engineer "maybe once" to locate a location for pipe installation [RODRIGUEZ EBT: 61] , is insufficient to raise an issue of fact that Heritage had the authority to control the activity bringing about the injury.

Nor, for purposes of any claim of common law negligence claim , is there any evidence to raise an issue of fact that the "trap door" was caused to remain in the upright position due to a defect , or that before the accident, Heritage Hills knew or should have known of any dangerous causative condition . It is submitted that any claim of negligence devolving from perceived security lapses in "closing off" access to the closet , is unavailing here without evidence linking such security measures to the owner's duty to warn of a known latent defect on the premises . The undisputed evidence reveals that security measures were taken for reasons unrelated to a "trap door" inspection , with the access door to the closet area being locked to safeguard stored equipment [BENEDICT EBT: 24], and any "walk-throughs" by the owner's security company being conducted during the renovation process , being made to ensure that the premises were secured , and there was no threat of fire [KNOX EBT: 101-103].

Cross-Claims

Contractual Indemnification

The right to contractual indemnification depends upon the specific language of the contract" (Reisman v Bay Shore Union Free School Dist., 74 AD3d 772, 773, 902 NYS2d 167

[2d Dept. 2010]). "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 NY2d 774, 777, 515 N.E.2d 902, 521 N.Y.S.2d 216 [1987]

Pursuant to the terms of the contractual indemnification provision at issue M.J.C. is required to indemnify Heritage Hills against " claims, damages, losses and expenses , including not limited to attorneys' fees , arising out of or resulting from performance of the Work." Under the circumstances here, including the broad language of the contractual commitment, as well as the undisputed evidence that at the time of the accident plaintiff was engaged in assessing the location of a sprinkler head in the closet, it is the finding of this court that as a matter of law, plaintiff's alleged injuries arose out of, or resulted from his performance of Hudson Valley's subcontract work for M.J.C (see, Alleva v. United Parcel Service, 112 A.D.3d 543,545 ; 978 NYS2d 32 [1st Dept. 2013]; see also, Brown v. Two Exchange Plaza Partners, 76 N.Y.2d 172, 178, 556 N.E.2d 430 [1990]; 23 NY Jur Contribution, Indemnity, and Subrogation § 81]). In opposition , the co-defendant fails to raise a material issue of fact with respect to this showing.

Breach of Contract Claim

Article 5 of the contract entitled "Insurance " provides that M.J.C. shall provide Contractor's general liability and other insurance in requisite minimum amounts of $1,000,000. per occurrence, and $2,000,000. aggregate . In § 3 thereof, the contractor was

obligated "to obtain an endorsement to its general liability insurance policy to cover " indemnification obligations , and Heritage Hills was to be named as an additional insured on all policies. As such, there is no issue of fact that the agreement expressly and specifically stated a requirement for M.J.C. not only to purchase liability insurance in connection with the renovation, but to name the owner as an additional insured (see, Trapani v. 10 Arial Way Assocs., 301 A.D.2d 644, 647,755 N.Y.S.2d 396 [2d Dept. 2003]; Christ the King Regional High School v. Zurich Ins. Co. of N. Am., 91 A.D.3d 806, 807-808, 937 N.Y.S.2d 290 [2d Dept. 2012] *lv den.* 19 N.Y.3d 806, 973 N.E.2d 202 [2012]).

In opposition to the owner' s prima facie showing of the breach of this obligation, M.J.C. offers no competent proof that it complied with its obligations to name Heritage Hills as an additional insured on the Southwest Marine and General Insurance Company policy, and as such, a final determination on the issue of liability for the failure to procure insurance is warranted, and in light of the owner's acknowledgment that it procured its own policy of insurance, upon an assessment , the measure of damages shall be limited to Heritage Hills' "out-of-pocket expenses (notably, the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums. " Inchaustegui v 666 5th Ave. Ltd. Partnership 96 NY2d 111, 114 749 NE2d 196, 725 NYS2d 627 [2001])

Cross- Motion

It is the further finding of this court that plaintiff's cross-motion seeking dispostive relief should be denied as untimely without any assertion , much less, showing of good cause for the delay (see, CPLR 3212(a); Brill v.City of New York , 2 NY3d 648, 814 N.E.2d 431 [2004])

Absent such a showing the court has no discretion to entertain the cross-motion. Moreover, to the extent defendant's timely motion addressed the Labor Law § 200 claim, and the cross-motion, any search of the record is limited to those claims, and not the statutory claim addressed herein (see, Filannino v. Triborough Bridge and Tunnel Authority, 49 A.D.3d 320, 855 NYS2d 54 [1st Dept. 2008].

Accordingly, it is

ORDERED that the motion for summary judgment is granted, and the cross-motion is denied.

This constitutes the decision and order of this court.

Dated: ~~December 31, 2014~~ 1/5/15

Howard H. Sherman