SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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CESAR PEREZ

Plaintiff,

v

MOCAL ENTERPRISES, INC., MASTERPIECE U.S., INC., and POWERS BRIDGING & SCAFFOLDING, INC.,

Defendants.
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Index No. 161850/2013

DECISION AND ORDER

MOT SEQ 002, 003, 004

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from an accident at a construction site, the defendant site supervisor Masterpiece U.S., Inc. (Masterpiece), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on its cross claim against the defendant owner Mocal Enterprises, Inc. (Mocal) for contractual indemnification. The plaintiff, Cesar Perez, cross-moves for summary judgment on his Labor Law § 240(1) claim against Masterpiece and Mocal (SEQ 002).

The defendant Powers Bridging & Scaffolding, Inc. (Powers), separately moves for summary judgment dismissing the complaint and all cross claims as against it (SEQ 003).

Mocal separately moves for summary judgment dismissing the

complaint and all cross claims as against it, and on its cross claim for contractual indemnification against Masterpiece (SEQ 004).

Masterpiece's motion is denied. The plaintiff's cross motion is granted. Powers's motion is granted. Mocal's motion is granted to the extent that the Labor Law § 200 and common-law negligence claim is dismissed as against it, and its motion is otherwise denied.

II. BACKGROUND

While working for Deniem Group, Inc., Perez was injured when he and a coworker attempted to push an A-frame hand truck loaded with 15 panels of sheet rock up a makeshift ramp connecting the street to the sidewalk adjacent to Mocal's building. Perez alleges that, as he and the coworker pushed the hand truck up the ramp, one or more of the wheels became stuck on the uneven ramp, the hand truck tipped over, and the 15 panels of sheet rock fell from the hand truck and onto his leg. Perez asserts one cause of action, alleging that all of defendants are liable for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6).

III. DISCUSSION

A. LABOR LAW §240(1)

> "Labor Law § 240(1) imposes on owners, general contractors and their agents a nondelegable duty to

> provide safety devices to protect against elevation-related hazards on construction sites, and they will be absolutely liable for any violation that results in injury regardless of whether they supervised or controlled the work."

Ragubir v Gibraltar Mgt. Co., Inc., 146 AD3d 563, 564 (1st Dept. 2017). The documentary evidence establishes that Masterpiece was Mocal's statutory agent, and Masterpiece's submissions fail to rebut that conclusion. See Rizzo v Hellman Elec. Corp., 281 AD2d 258 (1st Dept. 2001). To establish liability based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001]) or "required securing for the purposes of the undertaking" (Outar v City of New York, 5 NY3d 731, 732 [2005]), and that it fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute." Narducci, supra, at 268; see Fabrizi v 1095 Ave. of Ams., LLC, 22 NY3d 658 (2014).

> "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of . . . a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured."

Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (1991).

The question for the court here is whether Perez's injuries "'flow[ed] directly from the application of the force of gravity to the [panels].'" Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 10 (2011), quoting Runner v New York Stock Exch.,

Inc., 13 NY3d 599, 604 (2009). In determining whether an elevation differential is physically significant or de minimis, the court must consider not only the height differential itself, but also the mass or weight of the falling object and the amount of force it was capable of generating, even over the course of a relatively short descent. See Wilinski, supra. Considering the amount of force that the panels of sheet rock were capable of generating, the height differential here cannot be viewed as de minimis. See Humphrey v Park View Fifth Ave. Assoc., LLC, 113 AD3d 558 (1st Dept. 2014); Agresti v Silverstein Props., Inc., 104 AD3d 409 (1st Dept. 2013).

Perez not only raised a triable issue of fact as to whether the panels of sheet rock fell due to the absence or inadequacy of a safety device of the kind enumerated in the statute, but established his prima facie entitlement to judgment as a matter of law against Mocal and Masterpiece in connection with that issue. See McAllister v 200 Park, L.P., 92 AD3d 927 (2nd Dept. 2012); Cantineri v Carrere, 60 AD3d 1331 (4th Dept. 2009). Specifically, his deposition testimony, the photos of the ramp, and other documentary evidence establish that the hand truck and ramp combination was inadequate to hoist the sheet rock into its desired location. Since Mocal and Masterpiece neither established their own entitlement to judgment as a matter of law, nor raised a triable issue of fact as to whether this combination

was adequate to the task, there is thus no basis for dismissing the Labor Law § 240(1) claim against them.

Powers, on the other hand, established that it was neither an owner, general contractor, nor statutory agent and, hence, demonstrated its prima facie entitlement to judgment as a matter of law. Since no party opposed its motion, it is entitled to summary judgment dismissing the Labor Law § 240(1) claim as against it.

B. LABOR LAW § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners, general contractors, and their agents "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998) (citation and internal quotation marks omitted); see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, "concrete" regulation implementing the Industrial Code, rather than generalized regulations for worker safety. Ross, supra, at 505. Labor Law § 241(6) requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate and that the violation was a proximate

cause of his or her injuries. See Zimmer v Chemung County Performing Arts, 65 NY2d 513 (1985).

Industrial Code section 23-1.28(b)(12 NYCRR 23-1.28[b]) provides, in relevant part, that "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles." This regulation is concrete and specific enough to impose liability under Labor Law § 241(6) if violated. See Freitas v New York City Tr. Auth., 249 AD2d 184 (1st Dept. 1998). The submissions of Mocal and Masterpiece reveal the existence of triable issues of fact as to whether they violated that Industrial Code provision by failing to provide a free-running hand-propelled vehicle. Hence, they failed to make the necessary prima facie showing as to their entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) claim insofar as predicated on that provision.

Although 12 NYCRR 23-1-5(c)(1) and (2) are general safety provisions, and not specific, positive commands (see Gasques v State of New York, 15 NY3d 869 [2010] [as to(c)(1)]; Dann v City of Syracuse, 231 AD2d 855 [4th Dept. 1996] [as to (c)(2)]), 12 NYCRR 23-1-5(c)(3) is sufficiently specific to support a Labor Law § 241(6) claim (see Becerra v Promenade Apts. Inc., 126 AD3d 557 [1st Dept. 2015]), as it requires that "[a]ll . . . equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if

damaged." Mocal's and Masterpiece's submissions, which include deposition transcripts in which witnesses asserted that the wheels of the hand truck had gotten stuck on a prior occasion shortly before the subject accident, reflect the existence of triable issues of fact as to whether 12 NYCRR 23-1-5(c)(3) was violated. Hence, they failed to make the necessary prima facie showing as to their entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) claim insofar as predicated on that provision.

Powers, however, showed that it was not an entity to which Labor Law § 241(6) was applicable and, since no opposition to its motion was submitted, it must be awarded summary judgment dismissing the Labor Law § 241(6) claim insofar as asserted against it.

C. LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE

"Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work." Hartshorne v Pengat Tech. Inspections, Inc., 112 AD3d 888, 889 (2nd Dept. 2013); see Comes v New York State Elec. & Gas Corp., 82 NY2d 876 (1993). An owner, general contractor, or site supervisor may only be held liable under Labor Law § 200 and the common law for an allegedly dangerous condition upon which a plaintiff falls if it had control over the work site,

created or had actual or constructive notice of the condition, and had the opportunity to remedy it. See Korostynskyy v 416 Kings Hway, LLC, 136 AD3d 758 (2nd Dept. 2016). However, where an accident at a construction site arises from the means and methods of work employed by the plaintiff at the site, an owner, general contractor, or site supervisor may be held liable for violation of Labor Law § 200 or common-law negligence where it had the authority to supervise the work that led to the accident. See Ortega v Puccia, 57 AD3d 54 (2nd Dept. 2008); see also Rizzuto v L.A. Wenger Contr. Co., supra; Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981); Wunderlich v Turner Constr. Co., 147 AD3d 598 (1st Dept. 2017). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant "bears the responsibility for the manner in which the work is performed." Ortega v Puccia, supra, at 61; see Marquez v L & M Dev. Partners, Inc., 141 AD3d 694 (2nd Dept 2016).

The instant accident implicates a dangerous premises condition inasmuch as it is alleged that the ramp on which the hand truck tipped over was unsafe. It also implicates the means and methods of work inasmuch as it is alleged that the hand truck was defective or inadequate.

All three defendants established their prima facie entitlement to judgment as a matter of law dismissing the common-

law negligence and Labor Law § 200 claim by showing that they either did not have control over the work site or, if they did, they did not create or have actual or constructive notice of a dangerous condition. They also demonstrated, prima facie, that they did not have authority to supervise or control the injury-causing work.

Although the plaintiff raises a triable issue of fact as to whether Mocal, as owner, controlled the work site, he fails to raise a triable issue of fact as to whether Mocal created or had actual or constructive notice of the condition of the ramp. Since he also fails to address the question of whether Mocal had authority to supervise his work, the common-law negligence and Labor Law § 200 claim must be dismissed as against it. The plaintiff did, however, raise a triable issue of fact as to whether Masterpiece, as site supervisor, had authority to supervise his work or had constructive notice of the condition of the ramp. Evidence, including deposition testimony, as well as section 8.2.1 of the contract between Mocal and Masterpiece, which obligates Masterpiece to "supervise and direct the Work," is sufficient to deny summary judgment with respect to the common-law negligence and Labor Law § 200 claim as against Masterpiece.

Powers established its prima facie entitlement to judgment as a matter of law dismissing the common-law negligence and Labor

Law § 200 claim as against it, and since no party opposes its motion, summary judgment must be awarded to it dismissing this claim as against it.

D. CONTRACTUAL INDEMNIFICATION

Mocal and Masterpiece entered into mutual indemnification agreements. In connection with claims to recover for personal injuries, Mocal agreed to indemnify Masterpiece from any losses and liability "arising in whole or in part and in any manner from injury . . . [to a] person . . . resulting from the acts, omissions, breach or default" of Mocal "in connection with the performance of any work" at Mocal's property (emphasis added). Masterpiece agreed to indemnify Mocal in connection with personal injury claims "[t]o the fullest extent permitted by law and to the extent . . . not covered by General Liability insurance . . . from and against claims, damages, losses and expenses. . . arising out of or resulting from performance of the Work."

Contractual indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept. 2014),

quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973). As the Court of Appeals recently held, a provision that indemnifies a party from a loss "arising out of" work is fundamentally different from and necessarily broader than a provision that indemnifies a party from a loss "caused by" or "resulting from" a party's conduct. Burlington Ins. Co. v NYC Tr. Auth., 29 NY3d 313, 323-324 (2017). The indemnification provision protecting Masterpiece requires it to show that its liability resulted from Mocal's acts or omissions and, hence, Masterpiece must establish that Mocal's acts or omissions were a proximate cause of the plaintiff's injuries. Conversely, the indemnification provision protecting Mocal only requires proof that the plaintiff's injuries arose from the subject work.

Mocal correctly contends that the plaintiff was injured in the course of performing interior build-out work, and that the work was undertaken pursuant to a change order made under a contract that included the relevant indemnification provision. Thus, the court rejects Masterpiece's contention that the indemnification provision upon which Mocal relies was inapplicable to the plaintiff's since there was no separate contract respecting the interior build-out work.

The indemnification provisions in the two contracts do not purport to completely indemnify the relevant obligee for its own negligent acts and, hence, are enforceable. See General

Obligations Law § 5-322.1(1); Miranda v Norstar Bldg. Corp., 79 AD3d 42 (3rd Dept. 2010).

Nonetheless, a contractual indemnification is available to a party only where that party is itself free from fault in the happening of the underlying accident. See General Obligations Law § 5-322.1(1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013).

Inasmuch as the court has already determined that Mocal's omissions in failing to provide equipment sufficient to protect the plaintiff from gravity-related hazards were a proximate cause of the accident, Masterpiece will prevail on its cross claim for contractual indemnification against Mocal, but only in the event that Masterpiece is found not to be at fault in the happening of the accident. Since the court has also already determined that the liability to be imposed upon Mocal arises from the work at the project site, Mocal will prevail on its cross claim for contractual indemnification against Masterpiece, but only in the event that Mocal is found not to be at fault in the happening of the accident.

Since the court's determination of liability on the Labor Law § 240(1) claim does not implicate the issue of any party's fault, and there has been no finding as to whether either Masterpiece or Mocal is at fault in the happening of the

accident, summary judgment must be denied as premature to both of those parties in connection with their respective cross claims for contractual indemnification. See Shaughnessy v Huntington Hosp. Assn., 147 AD3d 994 (2nd Dept. 2017).

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of the defendant Masterpiece U.S., Inc., for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on its cross claim for contractual indemnification against the defendant Mocal Enterprises, Inc.(SEQ 002), is denied; and it is further,

ORDERED that the plaintiff's cross motion for summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1) as against the defendants Masterpiece U.S., Inc., and Mocal Enterprises, Inc.(SEQ 002), is granted; and it is further,

ORDERED that the motion of the defendant Powers Bridging & Scaffolding, Inc., for summary judgment dismissing the complaint and all cross claims insofar as asserted against it (SEQ 003)is granted, without opposition; and it is further,

ORDERED that the motion of the defendant Mocal Enterprises, Inc., for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and on its cross claim for

contractual indemnification against the defendant Masterpiece U.S., Inc. (004), is granted only to the extent that the plaintiff's common-law negligence and Labor Law § 200 claims are dismissed as asserted against it, and its motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: November 27, 2017

ENTER: _____

J.S.C.

HON. NANCY M. BANNON