Feliz v Triborough Bridge & Tunnel Auth.
2017 NY Slip Op 32767(U)
December 5, 2017
Supreme Court, Queens County
Docket Number: 15372/2014
Judge: Robert J. McDonald

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT J. MCDONALD IA Part 34
Justice

RONALD FELIZ, x

Plaintiff,

- against -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, E.E. CRUZ & COMPANY, INC., GC COM CONSTRUCTION COMPANY, INC., IMPERIAL IRON WORKS INC. and EL SOL CONTRACTING AND CONSTRUCTION CORPORATION/EL SOL LIMITED ENTERPRISES, INC., A JOINT VENTURE,

Defendants.
x

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, and EL SOL CONTRACTING AND CONSTRUCTION CORPORATION/EL SOL LIMITED ENTERPRISES, INC., A JOINT VENTURE,

Third-Party Plaintiffs,

- against -

NUCO PAINTING CORP.,

Third-Party Defendant.
x

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, and EL SOL CONTRACTING/EL SOL LIMITED ENTERPRISES, jv i/s/h/a EL SOL CONTRACTING AND CONSTRUCTION CORPORATION/EL SOL LIMITED ENTERPRISES, INC., A JOINT VENTURE,

Second Third-Party Plaintiffs,

Index Number 15372 2014

Motion Date August 25, 2017
October 13, 2017

Motion Seq. Nos. 4, 5

- against -

AMMANN & WHITNEY CONSULTING ENGINEERS, P.C.,

Second Third-Party Defendant.
x

The following papers numbered 1 to 51 read on this motion (#4) by plaintiff pursuant to CPLR 3042 and/or 3043 granting plaintiff permission to supplement or amend his bill of particulars and pursuant to CPLR 3212 summary judgment on the issue of liability on its causes of action under Labor Law §§ 240(1) and 241(6); on the cross motion by GCCOM Construction Company, Inc. (GCCOM) pursuant to CPLR 3212 for summary judgment dismissing the complaint; on the cross motion by third-party defendant Nuco Painting Corp. (Nuco) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint; on the cross motion by Metropolitan Transportation Authority (MTA) pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims; on the cross motion by Triborough Bride and Tunnel Authority (TBTA), MTA and El Sol Contracting and Construction Corporation/El Sol Limited Enterprises, Inc., A Joint Venture (El Sol) pursuant to CPLR 3212 for summary judgment against third-party defendant Nuco for contractual indemnification and for breach of contract for failure to procure insurance; and on the motion (#5) second third-party defendant Ammann & Whitney Consulting Engineers, P.C. (Ammann & Whitney) pursuant to CPLR 3212 for summary judgment dismissing the second third-party complaint and all cross-claims.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	#4 1-4
	#5 40-43
Notices of Cross Motion - Affidavits - Exhibits..	#4 5-19
Answering Affidavits - Exhibits.....	#4 20-26
	#5 44-47
Reply Affidavits.....	#4 27-39
	#5 48-51

Upon the foregoing papers it is ordered that these motions and cross motions are determined as follows:

This is an action to recover for personal injuries allegedly suffered as a result of a construction site accident that occurred on November 15, 2012. The plaintiff was a painter working on the Throgs Neck Bridge. The plaintiff was injured when he was struck in the back by a lateral bracing beam. Defendant TBTA entered into a contract with El Sol, for El Sol to act as general contractor.

The scope of the work was the removal of structural beams from their connection points, the subsequent removal of lead based paint and rust. Thereafter the connection points were primed and new structural beams were installed into the connection points and the steel was then painted.

The procedure that was normally followed during this removal and replacement of the lateral bracing beam was that the ironworkers from El Sol would remove the beams from the connection points and then to hoist a new beam in the bay from which the old beam was removed. The painters from Nuco would then set up a containment area made up of white plastic vinyl and perform the removal of the lead based paint. Once the painters were finished the ironworkers would then release the beam and move the beam so as to line it up with the connection points and install the beam to in its proper place. The beams were not supposed to be moved while the painters were working in the area.

The plaintiff testified at a 50h hearing and at an examination before trial. He testified that he was employed by Nuco as a painter and was working on the Throgs Neck Bridge when the subject accident occurred. He testified that on the day of the accident he and a co-worker set up a tarp to work in. He testified that after he observed iron workers remove a beam he was told he could work in the area. He testified that he then set up a white plastic tent and he began to work removing paint inside the tent. He testified that he was working for two to three minutes in the tent before the accident occurred. He testified that the accident occurred when he was working removing paint and he felt a beam impact his back. The plaintiff testified that he did not know how the beam struck him or how the accident occurred. He testified that he received his direction from his employer, Nuco.

William Neubauer, a project manager, appeared on behalf of TBTA for an examination before trial. He testified that TBTA is the owner of the Throgs Neck Bridge. He further testified that TBTA contracted with EL Sol to provide labor material and equipment to perform suspended span repairs. He testified that El Sol subcontracted with Nuco to perform work on the subject project. He did not witness the accident. He also testified that Jason Schreck of GCCOM was the project manager for El Sol and had the authority to direct the work of El Sol workers. He testified that he did not know if Mr. Schreck was onsite every day and that Mr. Schreck was only on the bridge infrequently and that Mr. Schreck would typically be in the trailer at the site and he never observed Mr. Schreck direct or control the work being performed by El Sol ironworkers or Nuco painters. He testified that Ammann & Whitney

had one inspector who oversaw the work of Nuco and another inspector who oversaw the steel installation.

James Simpson, a project superintendent, testified on behalf of El Sol. He testified that El Sol entered into a contract with TBTA He testified that work in the subject project involved ironworkers removing and replacing lateral bracing beams on the bridge. During the removal of the beams workers from Nuco would remove existing paint at connection points and then apply new coatings to the beams that were being replaced. He was not present at the time of the plaintiff's alleged accident. He stated that Mr. Schreck worked mainly in the field office doing submittals and job drawings and paper work for the project and did not direct the work of the ironworkers. He further stated that Ammann & Whitney were the eyes and ears of the project.

Jason Schreck testified on behalf of GCCOM that he worked on the subject project handling paper work submittals on behalf of El Sol. He testified that he never directed or controlled the actually work being performed. He testified that he only walked the job site approximately ten times throughout the entire time working on the subject project. On the day of the accident he was not on the bridge but was in the El Sol trailer located approximately three miles from the bridge.

Arthur Caley testified on behalf of Ammann & Whitney. He testified that Ammann & Whitney was hired as an independent contractor. He testified that he was the resident engineer for the project. He testified that Ammann & Whitney would determine the number of construction inspectors necessary for daily work based upon the schedule provided by El Sol. Ammann & Whitney did not schedule the work or evaluate the ability of El Sol to perform it on schedule. He further testified that Ammann & Whitney's primary role was to provide inspectors to make sure the work was being performed in compliance with the contract documents.

As a preliminary matter, the cross motion by the defendant MTA, the cross motion by the defendants TBTA, MTA and El Sol, the cross motion by the defendant Nuco Painting, and the cross motion by defendant GCCOM were not made within 120 days of the filing of the note of issue and none of the defendants sought leave of court or gave a reasonable excuse for the delay in making their cross motion (*see Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]). The cross motions, therefore, are untimely and must be denied as a matter of law. A court has no discretion to entertain even a meritorious summary judgment motion (*John P. Krupski & Bros., Inc. v Town Bd. of Town of Southhold*, 54 AD3d 899 [2d Dept 2008]). The branches of

the cross motion by MTA and GCCOM for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action, however, should be heard as they are made on nearly identical grounds as the timely motion by the plaintiff and will therefore be considered *(see Ellman v Village of Rhinebeck*, 41 AD3d 635 [2d Dept 2007]; *Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]). The remaining cross motions, however, are not made on nearly identical grounds as the timely motion and they will not be considered (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981 [2d Dept 2016]; *Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700 [2d Dept 2013]; *Podlaski v Long Is. Paneling Ctr. of Centereach*, 58 AD3d 825 [2d Dept 2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2d Dept 2008]).

Turning first to the plaintiff's summary judgment motion, on a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Owners and contractors are subject to strict liability under Labor Law § 240. To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury *(Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280 [2003]). Labor Law § 240(1) is applicable in cases where a plaintiff was injured by a load requiring securing for the purposes of the undertaking (Ross v DD 11th Ave., LLC, 109 AD3d 604 [2d Dept 2013]; *Sung Kyu-To*, 84 AD3d at 1060, *Mora v Boston Props., Inc.*, 79 AD3d 1109 [2d Dept 2010]; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004 [2d Dept 2009]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421 [2d Dept 2006]). To have liability under Labor Law § 240(1), however, the injury must be the direct consequence of the application of force of gravity to an object or a person (*Gasques v State of New York*, 15 NY3d 869 [2010]). Here, the plaintiff failed to make a prima facie case. The plaintiff argues that Labor Law § 240(1) applies as the beam struck him when it dropped while being moved. The plaintiff, however, did not establish that the beam fell from above his back and then landed on his back. The plaintiff's counsel argues that the beam swung uncontrollably due to the lack of a tag line and come along and then descended and struck the plaintiff's back. The plaintiff testified, however, that he did not know how the beam struck him. If the accident occurred as alleged by the plaintiff, that the beam struck him when it was being moved when it swung and dropped from an elevated height, then Labor Law § 240(1) would apply. If, however, the accident occurred as the beam was intentionally being moved or swung horizontally and occurred when the beam was at the same level as the plaintiff's back then Labor Law § 240(1) would not apply

(*see Palomeque v Capital Improvement, Servs.*, LLC, 145 AD3d 912 [2d Dept 2016]). The fact that the lateral bracing beam struck him while being moved is not itself a violation of Labor Law § 240(1). There is no evidence that establishes as a matter of law that the beam struck the plaintiff while being hoisted or lowered or due to the force of gravity. Inasmuch as the plaintiff has not actually submitted evidence of how the accident occurred the plaintiff is not entitled to summary judgment as there exists issue of facts as the applicability of Labor Law § 240(1).

Under Labor Law § 241(6) liability is imposed on an owner or contractor for failing to comply with the Industrial Code, even if the owner or contractor did not supervise or control the worksite. To support his claim under Labor Law § 241(6) the plaintiff has alleged violations of 12 NYCRR 23-2.3 and 23-6.1. First, the branch of the plaintiff's motion for leave to amend the bill of particulars to add a violation of 12 NYCRR 23-6.1 is granted. While the plaintiffs did not cite violations of this provisions in his bill of particulars, the identification of this provision does not raise any new factual allegations and does not prejudice the defendants *(see Latino v Nolan & Taylor-Howe Funeral Home*, 300 AD2d 631 [2d Dept 2002]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231 [1st Dept 2000]). Here, as discussed above, the plaintiff failed to submit evidence showing how the accident occurred. The plaintiff, thus failed to establish his prima facie entitlement to summary judgment as he failed to make a prima facie showing that a violation of either of these provisions of the Industrial Code was a proximate cause of the accident.

The court next turns to the branch of the motion by defendant GCCOM for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action. GCCOM established its entitlement to judgment as a matter of law that it is not liable to the plaintiff under Labor Law §§ 240(1) and 241(6) because it was not an owner, general contractor or agent of the owner or general contractor at the time the accident occurred (*Florez v Conlon*, 82 AD3d 831 [2d Dept 2011]). In opposition the plaintiff failed to raise a triable issue of fact. A party will be deemed to be an agent of an owner or a general contractor under the Labor Law if it had supervisory control and authority over work being performed where a plaintiff is injured (*see Bennett v Hucke*, 131 AD3d 993 [2d Dept 2015; *Linkowski v City of New York*, 33 AD3d 971 [2d Dept 2006]). Therefore, to impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Myles v Claxton*, 115 AD3d 654 [2d Dept 2014]; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329 [2d Dept 2005]). In this case, the evidence submitted established that GCCOM role was only one of

general supervision, which is insufficient to impose liability under Labor Law §§ 240(1) and 241(6) (*see Delahaye v Saint Anns School*, 40 AD3d 679 [2d Dept 2007]; *Arementano v Broadway Mall Props., Inc.*, 30 AD3d 450 [2d Dept 2006]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2d Dept 2000]).

The motion by defendant MTA for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action must also be granted. The evidence established that the defendant MTA was neither the owner or general contract of the Throgs Neck Bridge. The defendant TBTA has admitted ownership of the Throgs Neck Bridge. The TBTA is a wholly-owned subsidiary of the MTA, but there is no dispute that they are separate entities. Therefore, the cross motion by the defendant MTA for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action must be dismissed.

Finally, the court turns to the motion by Ammann & Whitney. Here, Ammann & Whitney has established its prima facie entitlement to summary judgment dismissing all of the second third-party cause of action. The cause of action for failure to procure insurance must be dismissed as Ammann & Whitney has established that it property procured insurance in accordance with the contractual requirements. The cause of action for common law indemnification must be dismissed as Ammann & Whitney has established that it was not negligent as Ammann & Whitney did not supervise or control the work of the plaintiff or the El Sol ironworkers. Ammann & Whitney, therefore did not have the authority and degree of control over the activity or control to prevent the accident. Nor did Ammann & Whitney schedule or coordinate the work being done by Nuco and El Sol. Additionally, under the terms of the contract, Ammann & Whitney is only liable for its negligent performance of its services. Inasmuch as Ammann & Whitney has established that it was not negligent in the performance of its duties, the cause of action for contractual indemnification must be dismissed.

Accordingly, the branches of the motion (Sequence #4) by the plaintiff for summary judgment on his causes of action for Labor Law §§ 240(1) and 241(6) are denied. The branch of the motion by plaintiff to amend or supplement the bill of particulars is granted.

The branches of cross motion by the defendant GCCOM for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action are granted and those causes of action are dismissed. The branches of the cross motion by the defendant GCCOM to dismiss the Labor Law § 200 and common law negligence causes of action are denied.

The cross motion by third-party defendant Nuco for summary judgment is denied.

The branches of the cross motion by the defendant MTA dismissing the Labor Law §§ 240(1) and 241(6) causes of action are granted and those causes of action are dismissed. The branches of the cross motion by the defendant MTA to dismiss the Labor Law § 200 and common law negligence causes of action are denied.

The cross motion by defendant/third-party plaintiffs TBTA, MTA and El Sol for summary judgment on its third-party complaint is denied.

The motion (Sequence #5) by second third-party defendant Ammann & Whitney for summary judgment dismissing the second third-party complaint is granted.

Dated: December 5, 2017

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ROBERT J. McDONALD
J.S.C.