SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

MICHAEL D'ELIA,

Plaintiff,

-against-

FORTY SEVENTH FIFTH COMPANY LLC, KENART REALTIES, INC., EBRO CONSTRUCTION CORP., IRON WORKS BY YSL INC. and YSL CONSULTING INDUSTRIES INC.,

Defendants.

----------X

DECISION/ORDER

Index No.: 160633/2015

Mot Seq. 003

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendants Iron Works by YSL Inc. ("Iron Works") and YSL Consulting Industries Inc. ("YSL Consulting") (collectively "Defendants") now move pursuant to CPLR 3212 for summary dismissal of the Compliant of the now deceased Plaintiff, Michael D'Elia ("Plaintiff"), and the cross-claims of co-defendants, Forty Seventh Fifth Company LLC and Kenart Realties, Inc. ("co-defendants"). The Court notes that in response to Defendants' motion to dismiss, Plaintiff and co-defendants do not oppose the branch of the motion to dismiss the Complaint and all cross-claims against defendant YSL Consulting Industries Inc., and thus, the Complaint and cross-claims are dismissed as against defendant YSL Consulting Industries Inc.

Factual Background

Plaintiff claims that on September 16, 2015, he fell from an elevated height as a floor collapsed while he was performing demolition work at the premises, located at 580

Fifth Avenue, New York, New York. At the time of the accident, Plaintiff was employed by the general contractor of the premises, non-party FM Kelly Construction Group ("FM Kelly"). The Complaint alleges common law negligence and claims under Labor Law §§200, 240(1) and 241(6). In turn, co-defendants filed cross-claims for common law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance.

Defendants' Motion

In support of their motion, Defendants argue that it did not owe Plaintiff a duty of care. Defendants submit the affidavit of Marat Lempert ("Lempert"), the president of defendant YSL Consulting and vice president of Iron Works, indicating that Defendants did not perform any work in or around the premises on the date of Plaintiff's accident and that Defendants did not supervise or control the work performed at the premises (Podolsky Aff, Ex., G, Lempert Aff., ¶¶9, 12). Defendants further argue that they did not assume a duty for the work performed by any other contractors who were performing work on the interior of the property. Defendants also argue that they did not launch a force or instrument of harm, displace FM Kelly's duty to safely maintain the premises and that Plaintiff did not rely of Defendants continued performance.

Defendants also submit the March 13, 2015 Subcontract Agreement, wherein Iron Works contracted with FM Kelly Construction Group, Inc. to perform structural steel work on the premises (*id*, Ex. F). Defendants argue that the Subcontract Agreement required Iron Works to perform iron-work on the mezzanine floor after the demolition of the mezzanine floor. Defendants contend that since Plaintiff was injured during the demolition of the mezzanine floor, Iron Works had not yet been required to perform.

Finally, Defendants argue that the indemnification provision contained in the Subcontract Agreement does not require Defendants to indemnify another party for its negligence.

Plaintiff's Opposition[1]

In support of its opposition, Plaintiff argues that Defendants failed to meet their *prima facie* burden, since neither Defendants' affidavit nor the Subcontract Contract rule out that Iron Works performed some work before the accident or that some work was performed on some other area of the premises, and not the mezzanine floor. Further, Plaintiff affirms that he observed workers performing what appeared to be iron work in the area where his accident occurred (Wagner Aff., Ex., B, Plaintiff Aff.).

Plaintiff further argues that Defendants' motion for summary judgment is premature and that further discovery is required in order to determine whether Iron Works performed work at the premises prior to Plaintiff's accident, as Plaintiff's affidavit demonstrates that iron work was performed prior to his accident. Moreover, Plaintiff contends that the Subcontract Agreement indicates that a work schedule outlining when Iron Works commenced work, but that it has not been exchanged.

Defendants' Reply

In reply to Plaintiff's opposition, Defendants argue that Plaintiff failed to demonstrate an issue of fact, since Iron Works was not responsible for Plaintiff's injuries. Specifically, Defendants argue that plaintiffs fall occurred because he was demolishing the mezzanine floor on which he was standing and that it is not possible that any work was performed on the mezzanine floor prior to the day of Plaintiff's accident because "it is general knowledge that steel work cannot be done until the demolition portion of the

[1] Co-defendants Forty Seventh Fifth Company LLC and Kenart Realties, Inc. submit an opposition indicating that they adopt the arguments made by Plaintiff in its entirety.

project is complete" (Podolsky Opp. Aff., E-File Doc. No. 66, ¶19). Further, Defendants argue that Iron Works did not participate in the demolition work. Defendants also argue that further discovery would not yield relevant evidence, since FM Kelly was responsible for controlling and supervising Plaintiff's work and for providing Plaintiff with protective equipment.

In further support for the branch of their motion to dismiss the cross-claims of the co-defendants, Defendants contend that co-defendants failed to address the motion to dismiss the cross-claims. Further, Defendants argue that Iron Works did not contract with the co-defendants, and that co-defendants failed to submit evidence that there was a contractual relationship. Additionally, Defendants argue that Plaintiff and co-defendants failed to oppose Defendants' motion to dismiss the Labor Law claims.

Discussion

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Wayburn v. Madison Land Ltd. P'ship.*, 282 A.D.2d 301 [1st Dept 2001]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*id.*).

YSL Consulting

YSL Consulting made a *prima facie* showing of entitlement to judgment through the affidavit of Lempert. Lempert, the president of YSL Consulting, as well as a vice president of Iron Works, stated that YSL Consulting had no involvement on the subject project. No party raises an issue of fact warranting denial of summary judgment as to YSL Consulting, or even opposes such relief. Accordingly, the branch of the motion that seeks dismissal of claims and cross claims as against YSL Consulting must be granted.

Labor Law §§ 240 (1) and 241 (6)

Labor Law § 240 (1) places a nondelegable duty on "contractors and owners and their agents" to provide safety devices to construction workers involved construction work that involves gravity-related risks (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Labor Law § 241 (6) similarly places a nondelegable duty on "contractors and owners and their agents" to "comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]).

Here, Lempert's affidavit establishes that Iron Works was a subcontractor hired to perform structural steel work, rather than an owner or general contractor on the subject project (Lempert aff, ¶ 7). It is uncontested that Plaintiff's employer, codefendant FM Kelly, was the general contractor on this project. Thus, as a threshold matter, Iron Works, a subcontractor, can only be held liable under Labor Law sections 240 (1) and 241 (6) if it was a statutory agent.

Whether a subcontractor may be considered a statutory agent hinges on the question of control:

> "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured. 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. Thus, a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right"

(*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] [internal quotation marks and citation omitted]).

Iron Works was not a statutory agent. First, as Plaintiff was an employee of the general contractor, FM Kelly, it would defy logic that a subcontractor had supervisory control over a general contractor's work. Second, Lempert stated that Iron Works was not present at the jobsite on the day of plaintiff's accident (Lempert aff, ¶ 9). As Iron Works neither had nor exercised authority over plaintiff's demolition work, it was not a statutory agent. Thus, as Iron Work was not a general contractor or an owner, or an agent of either, it is not subject to liability under Labor Law sections 240 (1) or 241 (6), and the branch of the motion seeking dismissal of both must be granted.

Labor Law § 200 and Common-law Negligence

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 NY2d 876, 877 [1993]). As Iron Works was not an owner or general contractor on the subject project, Plaintiff's Labor Law § 200 claim as against it must be dismissed (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 554 [1st Dept 2009]). However, a subcontractor, such as Iron Works, may be liable in common-law negligence where it created a defect that later causes an accident (see *id.* [holding that the subcontractor who installed a catwalk with an alleged defect

could be liable in common-law negligence even though the Labor Law § 200 claim against it was dismissed]).

Plaintiff argues that the motion should be dismissed so that discovery can go forward on the question of whether Iron Works created the subject defect. To defeat a motion for summary judgment due to incomplete discovery, there must be "some evidentiary basis . . . offered to suggest that discovery may lead to relevant evidence" (*DaSilva v. Haks Eng'rs, Architects & Land Surveyors, P.C.*, 125 A.D.3d 480, 482 [1st Dept 2015]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953 [1st Dept 2009], quoting *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 760 [2d Dept 2006]).

Here, Plaintiff makes such a showing. In his own affidavit, Plaintiff states that before the date of his accident, he observed workers at the premise performing iron work near the area where his accident occurred (Wagner Aff., Ex., B, Plaintiff Aff., ¶4). Plaintiff recalled observing those workers "removing steel I-beams and replacing them with new steel I-beams" and welding metal plates in the area where his accident took place (*id.*). He further affirms that none of those workers performing iron work were employed by his employer, FM Kelly, and that none of those workers wore uniforms identifying the company they worked for (*id.*, ¶4).

This testimony suggests that further discovery may lead to relevant evidence as to whether Iron Works was performed work in the area where Plaintiff's accident occurred and whether such work created a dangerous condition. As more discovery is needed on

this issue, the branch of Iron Works' motion that seeks dismissal of Plaintiff's Labor Law common-law negligence claims as against it must be denied as premature.

Cross Claims Against Iron Works

As more discovery is needed to resolve the issue as to whether Iron Works created the condition that caused Plaintiff's accident, an issue of fact remains as to the cross claims for common-law indemnification and contribution (*see Chevalier v. 368 E. 148th St. Assocs., LLC*, 80 A.D.3d 411, 414 [1st Dept 2011] [dismissal of contribution and indemnification cross-claims denied, where issue of fact regarding indemnitee's negligence exists]). Thus, the branch of the motion seeking dismissal of these cross claims must be denied.

As to contractual indemnification, the court initially notes that Iron Works argument that these claims should be dismissed because there was no contractual relationship between itself and co-defendants is submitted for the first time in its reply. Thus, it is not considered by the Court (*see Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 452 [1st Dept 2012] ["[T]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"]).

In any event, the Subcontract Agreement requires that Iron Works indemnify the owner or contractor for claims arising from its work. Specifically, Section 8 of the Subcontractor Agreement entitled "Indemnity," indicates that: "[S]ubcontractor agrees to indemnify, defend and hold harmless Owner, Contractor and any additional indemnitees required to be named pursuant to the Owner/Contractor Agreement, . . . from any claims . . . arising out of or in connection with, or as a result of or consequence of,

Subcontractor's performance of the Work under this Agreement." As a question remains as to whether the accident arose out of Iron Work's performance of the contract, the branch of the motion that seeks dismissal of cross claims against Iron Works for contractual indemnity must be denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendants Iron Works by YSL Inc. (Iron Works) and YSL Consulting Industries (YSL Consulting) is resolved as follows:

- The branch seeking dismissal of the Complaint and all cross-claims as against defendant YSL Consulting is granted;
- The branch seeking dismissal of Plaintiff's Labor Law §§ 200, 240(1) and 241(6) claims as against Iron Works is granted;
- The branches seeking dismissal of Plaintiff's common-law negligence claims, as well as all cross claims as against Iron Works, are denied;

and it is further

ORDERED that the Clerk enter judgment accordingly. It is further

ORDERED that the case is severed and the remaining parties shall appear for an in-court conference to on June 12, 2018 at 2:30 p.m. it is further

ORDERED that of Defendants Iron Works and YSL Consulting shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

Dated: May 22, 2018

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.