SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 33EFM

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ROBERTO LEBRON,

Plaintiff,

- v -

FRIEZE ART INC., FRIEZE EVENTS INC., KARL'S EVENT SERVICES, KARL'S EVENT RENTAL INCORPORATED,

Defendant.

INDEX NO. 157727/2013

MOTION DATE 08/22/2018, 08/22/2018, 08/22/2018

MOTION SEQ. NO. 004 005 006

DECISION AND ORDER

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 209, 210, 213, 216, 223, 225, 226, 227, 228, 229, 234

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 160, 161, 162, 163, 164, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 211, 214, 217, 221, 222, 230, 231, 235

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 006) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 204, 205, 206, 207, 208, 212, 215, 218, 219, 220, 224, 232, 236

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff was injured on April 30, 2013, at a construction site on Randall's Island in the city, state, and county of New York, where he worked as a laborer for an art fair organized by defendant Frieze Events, Inc. for co-defendant Frieze Art Inc. (collectively, Frieze). The art fair was housed in a large tent which has been described as the largest temporary structure in the world. Plaintiff's employer, Platform International, Inc., was hired to erect partition walls for exhibition space in the tent. Co-defendants Karl's Event Services and Karl's Event Rental, Inc. (collectively, Karl's) provided the tent, marquee, ancillary structures, and equipment including the tent flooring, glass walls, and stairs. Due to the uneven ground at Randall's Island, Karl's built a three-foot high platform to base the tent.

Plaintiff alleges that his injury occurred as he was about to jump off the platform to the ground to go on his lunch break. Before he could jump, a floor board near the edge of the platform cracked under his weight and caused him to fall about three feet to the ground. Plaintiff brings his claims under Labor Law §§ 200, 240(1), and 241(6) against defendants Frieze and Karl's. Frieze seeks indemnification from plaintiff's employer, Platform International, Inc. (Platform) in the third-party action. Karl's and Frieze separately seek indemnification from Production Glue, LLC, the project manager in the second and third third-party action, respectively, alleging that Production Glue failed to cordon off the unfinished construction area.

Three motions are addressed here. Motion sequence (MS) 4 is second third-party defendant Production Glue, Inc.'s motion for summary judgment dismissing Karl's and Frieze's separate indemnification claims against it. MS 5 is Karl's motion for summary judgment dismissing all claims and cross-claims against it. And MS 6 is Frieze's motion for summary judgment dismissing all claims and cross-claims against it. Plaintiff opposes all the motions to the extent that relate to the dismissal of his claims and complaint but otherwise takes no position on the indemnification relief sought by the movants. Conversely, all the movants partially oppose the other's motions only on the indemnification and contribution relief sought in the third-party claims but do not oppose the parts of the motions that seek dismissal of plaintiff's claims against defendants Frieze and Karl's.

FACTS

Platform, plaintiff's employer, was hired to set up temporary walls to separate exhibit spaces or cubicles in the art tent (NYSCEF doc no 173 – Lebron tr., pp 28-29). His tools, equipment, instructions, and directives all came from Platform (*id.*, pp 43-44, 107). At the start of the day, plaintiff reached the tent, which was set on a platform, by using a ramp that was by the side of the office (*id.*, p 34). His task on the day of the accident was to put floor moldings on the walls. By then, Karl's was about "three quarters" finished in laying down the flooring in the tent. Once the floors were down and painted grey, indicating a finished floor, Platform would install the walls and moldings. If there was an area that could not be worked on yet, plaintiff's supervisor would inform plaintiff (*id.*, p 36).

At the time of his accident, plaintiff was breaking for lunch. He walked to a clear opening that was about 50 to 75 feet away to leave the tent. The food vendor tent was about 40 feet away from this opening that he and others used as an exit. According to plaintiff, there were no caution tapes, barriers, or cones to block off the exit. At no time did plaintiff see any caution tapes, barriers, or cones to bar him from going to certain unfinished areas, and he had not noticed any cracks or sloping of the wood floor (*id.*, pp 61-62, 78, 48-49). The floor was made up of two layers of plywood. Plaintiff claims that the defective piece of plywood that cracked was black unlike the rest of the grey-painted floor in that area (Lebron tr, pp 47-48).

The absence of any barrier or caution tape was disputed by Louise Dixon, a production director for Frieze, who testified that she saw barriers and caution tape at the accident site when she responded immediately to the accident. However, Dixon did not notice any broken flooring; the flooring was temporary in the area of the accident (NYSCEF doc no 175 – Dixon tr, pp 27-28). Alexander Melillo, Platform's president and founder, also saw caution tape that roped off the "ledge" of the platform when he responded to the accident about fifteen to twenty minutes later. He also did not notice any broken flooring or plywood (NYSCEF doc no 176 – Melillo tr, pp 16, 19). Plaintiff's co-worker, Nathaniel Stringer, testified that he and plaintiff went under the yellow caution tape that was "[a]bout 3 to 4 feet with a barricade going around the section." Stringer also testified that the area was cordoned off with metal barricades and caution tapes (NYSCEF doc no 178 – Stringer tr, pp 23-24). Stringer described the opening as an undesignated exit as there were no walls to sides of the tent (*id.*, pp 13-14).

While there were other openings, this opening was closest to the food tent, and plaintiff had taken this route for a couple of days (NYSCEF doc no 173 – Lebron tr., pp 58, 62). There were no stairs at this opening or other openings, so plaintiff was going to jump down about three feet to the ground (*id.*, pp 63-64, 82-83). As plaintiff was about eighteen inches from the platform edge, his right foot stepped on a floor plywood that was two-feet wide by three- to four-feet long. When his left foot landed on the same piece of plywood, the plywood cracked and caved in. He foot fell through the floor with the rest of his body going forward. He landed three feet below on the grass. Plaintiff weighed about 220 pounds (*id.* pp 67-68, 71, 75, 85-86, 91-93, 112). Nathaniel Stringer heard plaintiff hollering behind him, turned around and saw plaintiff on the ground. Stringer observed that the flooring by the edge "gave way" (Stringer tr., p17).

DISCUSSION

Movants for summary judgment must make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad *v New York Univ. Med. Center,* 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*Friends of Animals v Assoc. Fur Manufacturers,* 46 NY2d 1065, 1067 [1979]). Once met, this burden shifts to the opposing party to demonstrate the existence of a triable issue of fact *(Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]).

Labor Law § 240(1)

Plaintiff argues that defendants Frieze and Karl's breached their non-delegable duty under Labor Law § 240(1) and are liable for his injuries because they failed to provide him with a safe means of access to an elevated platform to perform

his work. "Liability may ... be imposed under [Labor Law § 240 (1)] only where the 'plaintiffs injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" *(O'Brien v Port Authority of New York and New Jersey,* 29 NY3d 27, 33 [2017] quoting *Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90, 97 [2015] [internal citations omitted]). Liability attaches where there is a significant elevation hazard and protective devices were not afforded to protect against these risks *(O'Brien,* 29 NY3d at 33). The fact that a construction worker fell at a construction site does not trigger the protections under Labor Law § 240(l).

Plaintiff's work of installing floor moldings is not a height-related risk. As plaintiff describes it, he was on his way to lunch at the time of the accident, and his injury was a result of a floor plywood cracking under his weight that caused him to fall off the platform. In short, plaintiff's work is not height-related, plaintiff was not performing his work when he was injured; and there was a ramp to access up and down the platform. Labor Law § 240(1) is not applicable in this case. Hence, plaintiff's Labor Law § 240(1) claim is dismissed.

Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors are under a nondelegable duty to provide reasonable and adequate protection and safety for workers and comply with specific safety rules and regulations promulgated by Commissioner of Department of Labor. To warrant protection under Labor Law 241(6), plaintiff must establish that his injury occurred in an area "in which construction, excavation or demolition work is being performed" (*Rhodes-Evans v 111 Chelsea LLC,* 44 AD3d 430, 434 [1st Dept 2007]). To support a claim under § 241(6), plaintiff must point to a specific violation of particular code specifications and not simply claim non-compliance with general safety standards (*see Comes v New York State Elec. and Gas Corp.,* 82 NY2d 876, 878 [1993] [finding that a plaintiff cannot prevail on a 241(6) cause of action if it alleges only violations of general safety standards and requiring plaintiff to show violations of "concrete specifications imposing a duty on defendant"]).

Plaintiff alleges a myriad of Industrial Code violations but does not support or argue these claimed violations in his oppositions to Frieze and Karl's respective motions except for NYCRR 23-1.8(f) governing vertical passage. Plaintiff claims that while there was a ramp on the other side of the tent, there were no other safe means of egress. The stairs had not been built yet. Karl's argue that plaintiff is not the type of worker that comes under the protection of Labor Law § 241[6] (*see Dalton v New Water St. Corp.*, 284 AD2d 213 [1st Dept 2001]).

Plaintiff's accident was not caused by the lack of a ramp or stairs at the opening he chose to exit the platform. Indeed, a ramp or stairs by the opening

plaintiff used to exit the platform would indicate that the opening was a designated exit. Although plaintiff had intended to jump off the three-foot high platform, he had not done so. His accident occurred because, as plaintiff described it, the plywood cracked causing him to fall through and forward. The presence of a ramp or stairs at the location that plaintiff used as an undesignated exit would have had no impact on plaintiff's accident. If plaintiff's argument is that a ramp or staircase would have prevented the fall, he could have walked to the existing ramp to exit – the same ramp he used to enter the platform. Plaintiff's claim under Labor Law § 241(6) is dismissed.

Labor Law § 200

Labor Law § 200 codifies the "common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). To prevail on a Labor Law § 200 claim, plaintiff must demonstrate that defendants "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" (*Torkel v NYU Hosps. Ctr* 63 AD3d 587, 591 [1st Dept 2009] citing *Perrino v Entergy Nuclear Indian Point 3, LLC,* 48 AD3d 229, 230 [2008]).

Plaintiff's oppositions to both Karl's and Frieze's respective motions do not address the Labor Law § 200 claim that Karl's and Frieze each seek to dismiss. It is noted that there is no dispute that neither Frieze nor Karl's supervised or controlled plaintiff's work, and there is no evidence of either defendant having actual or constructive knowledge of the alleged defect on the floor. Hence, the Labor Law § 200 claim is dismissed.

Indemnification and Contribution Claims

Given that all of plaintiff's claims in this matter have been dismissed, the third-party complaints for indemnification and contribution as it relates to third-party defendant Platform International, Inc. (MS 4), and second and third third-party defendant Production Glue (MS 5 and MS 6) are dismissed as academic.

Accordingly, it is hereby ORDERED that the branch of defendants Karl's Event Services' and Karl's Event Rental Incorporated's motion for summary judgment (MS 5) dismissing plaintiff's complaint against them is granted; it is further

ORDERED that defendants Frieze Events, Inc. and Frieze Arts, Inc.'s motion for summary judgment (MS6) dismissing the complaint against them is granted; it is further

ORDERED that third-party defendant Production Glue, LLC's motion for summary judgment (MS4) is dismissed as academic; it is further

ORDERED that the cross-claims for indemnification and contribution in Motion Sequences 4, 5, and 6 are dismissed as academic; it is further

ORDERED that the third-party complaint against Platform International, Inc., and the second and third third-party complaints against Production Glue, LLC are dismissed as academic; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment as written.

This constitutes the decision and order of the court.

HON. MARGARET A. CHAN

11/29/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE