Coto v City of New York
2019 NY Slip Op 30520(U)
February 22, 2019
Supreme Court, New York County
Docket Number: 153117/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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MIGUEL ANGEL COTO, Index No. 153117/2015

Plaintiff

- against -

CITY OF NEW YORK and WDF, INC.,

Defendants

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CITY OF NEW YORK and WDF, INC., Index No. 595080/2017

Third Party Plaintiffs

- against -

BASE CONSTRUCTION CORP.,

Third Party Defendant

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries while working on a construction project at the Wards Island Wastewater Treatment Plant owned by defendant-third party plaintiff City of New York, where defendant-third party plaintiff WDF, Inc., was the general contractor and third party defendant Base Construction Corp. was a subcontractor and plaintiff's employer. On December 22, 2014, plaintiff was assigned to walk alongside a bobcat operated by his foreman and to use his hands to steady the bundle of rebar that the bobcat was transporting

for the project's concrete work, when a piece of rebar tilted and knocked plaintiff to the ground, and the bobcat ran over his foot and leg.

Defendants move for summary judgment, C.P.L.R. § 3212(b), on their third party claims for contractual and non-contractual indemnification and a declaratory judgment that third party defendant was defendants' statutory agent under the New York Labor Law. C.P.L.R. § 3001. Third party defendant separately moves for summary judgment dismissing plaintiff's claim under Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). Plaintiff cross-moves for summary judgment on defendants' liability for violation of Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court grants defendants' motion in part, denies third party defendant's motion, and grants plaintiff's cross-motion.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. A Declaratory Judgment That Third Party Defendant Is a Statutory Agent

A party that is neither an owner nor a general contractor may be liable as an owner's or a general contractor's statutory agent under Labor Law §§ 200, 240(1), and 241(6) if the party maintained the authority to control the activity that caused plaintiff's injury. Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d 426, 434 (2015); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005); Santos v. Condo 124 LLC, 161 A.D.3d 650, 653 (1st Dep't 2018); Coretto v. Extell W. 57th St., LLC, 137 A.D.3d 677, 678 (1st Dep't 2016). Daniel Zane, WDF's project manager,

at his deposition authenticated WDF's subcontract with third party defendant executed July 30, 2014, for it to perform the concrete work and site work under the buildings being constructed or reconstructed. White v. 31-01 Steinway, LLC, 165 A.D.3d 449, 452 (1st Dep't 2018). Article 21 of the subcontract between WDF and third party defendant provides that:

> The Work shall be performed and furnished under the direction and to the satisfaction of Owner, Architect, and Contractor, but Subcontractor shall not thereby be relieved of its obligation to supervise the work . . . .

Aff. of Kenneth Gerard Ex. E, at 17. Article 2 of the subcontract defines "Work" as:

> furnishing and performance of all labor and materials by Subcontractor at or for the benefit of the Project that (A) is within the general scope of this Subcontract and the Contract Documents, or (B) can be reasonably inferred from the general scope of this Subcontract, the Contract Documents and as set forth in Exhibits A and B . . . .

Id. at 2. Exhibit B of the subcontract describes the scope of work as including "concrete work for new and existing buildings." Id. at 30. The subcontract also obligates third party defendant to "furnish and maintain a competent and adequate staff and use its best skill and attention for the proper administration, coordination, supervision and superintendence of the Work." Id. at 2.

The subcontract's provisions that third party defendant is responsible for supervising the work encompassed by the subcontract demonstrate the authority to supervise the transportation of materials for the concrete work that caused plaintiff's injury. Nascimento v. Bridgehampton Constr. Corp.,

86 A.D.3d 189, 193-94 (1st Dep't 2011); Weber v. Baccarat, Inc., 70 A.D.3d 487, 488 (1st Dep't 2010). The deposition testimony by plaintiff and by Matteo Doati, plaintiff's foreman, that only Doati directed plaintiff's work further supports third party defendant's authority to control the activity that caused plaintiff's injury. Merino v. Continental Towers Condominium, 159 A.D.3d 471, 472 (1st Dep't 2018); Muriqi v. Charmer Indus. Inc., 96 A.D.3d 535, 536 (1st Dep't 2012). While third party defendant points to the City's responsibility for the premises' exterior and WDF's authority over the project, redundant authority does not negate third party defendant's authority. Tuccillo v. Bovis Lend Lease, Inc., 101 A.D.3d 625, 628 (1st Dep't 2012); Weber v. Baccarat, Inc., 70 A.D.3d at 488. Therefore the evidence presented establishes that third party defendant was the general contractor WDF's statutory agent.

B. Contractual Indemnification

Defendants base their claims for contractual indemnification against third party defendant on Article 13 of the subcontract, which provides that:

> To the fullest extent permitted by law, Subcontractor shall defend, with counsel acceptable to Contractor, indemnify, and hold harmless the Contractor and all entities and individuals to whom Contractor must provide defense and indemnity pursuant to the Prime Contract, against any and all losses, liabilities, costs, claims, causes of actions, suits, damages and expenses (including reasonable attorneys fees and disbursements) . . . .

Gerard Aff. Ex. E, at 10. Article 13 defines "Contractor" to include "the Owner." Id. While the court must construe a contract for indemnification strictly, Hooper Assoc. v. AGS

Computers, 74 N.Y.2d 487, 491 (1989); Millennium Holdings LLC v. Glidden Co., 146 A.D.3d 539, 545 (1st Dep't 2017); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 628 (1st Dep't 2015); Campos v. 68 W. 86th St. Owners Corp., 117 A.D.3d 593, 595 (1st Dep't 2014), an indemnification contract is enforceable if it unambiguously expresses the intent to indemnify. Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265, 274 (2007); Hooper Assoc. v. AGS Computers, 74 N.Y.2d at 491-92.

The subcontract allows indemnification of defendants even if they were negligent, but only to "the fullest extent permitted by law." Gerard Aff. Ex. E, at 10, 11. Based on that qualification, defendants may enforce the subcontract's indemnification provision only insofar as the evidence establishes that the indemnification is not for damages attributable to defendants' negligence or other culpable conduct. N.Y. Gen. Oblig. Law § 5-322.1(1); Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 207, 210 (2008); Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 795 n.5 (1997); Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 175, 180-81 (1990); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018). Although defendants may not be indemnified for their culpable conduct, based on the contract's terms third party defendant's conduct triggering its duty to indemnify need not be negligent or otherwise culpable, but need only "arise out of or relate to the Subcontract Work." Gerard Aff. Ex. E, at 11.

Defendants contend that they were not negligent in any

event, because they did not supervise or control plaintiff's work and lacked notice of any hazard that caused his injury. Labor Law § 200 codifies an owner's duty to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.3d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). If a dangerous condition arising from a contractor's work caused plaintiff's injury, defendants may be liable for negligently allowing that condition and violating Labor Law § 200, if they supervised or exercised control over the activity that caused his injury. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). See Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014). If a dangerous condition on the work site caused the injury, liability depends on defendants' creation or actual or constructive notice of the condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144.

As set forth above, plaintiff's and Doati's testimony demonstrates that only third party defendant supervised and controlled plaintiff's work, establishing that defendants did not supervise or control his work. Galvez v. Columbus 95th St. LLC, 161 A.D.3d 530, 531 (1st Dep't 2018); Ciechorski v. City of New York, 154 A.D.3d 413, 414 (1st Dep't 2017); Grant v. Solomon R.

Guggenheim Museum, 139 A.D.3d 583, 584 (1st Dep't 2016); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626. Both witnesses also testified, however, that the unevenness of the road over which the bobcat traveled caused the rebar to move. Defendants present no evidence that they lacked notice of the unevenness of the road. Zane testified only that WDF's safety representative inspected the site regularly to ensure that work was performed safely, which raises factual issues regarding at least WDF's constructive notice of the road's condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 627; McCullough v. One Bryant Park, 132 A.D.3d 491, 492 (1st Dep't 2015); Kosovrasti v. Epic (217) LLC, 96 A.D.3d 695, 696 (1st Dep't 2012); Urban v. No. 5 Times Sq. Dev., LLC, 62 A.D.3d 553, 555-56 (1st Dep't 2009). Defendants further fail even to claim that neither the City, as the premises' owner, nor the general contractor WDF created the uneven condition of the road. Jaycoxe v. VNO Bruckner Plaza, LLC, 146 A.D.3d 411, 412 (1st Dep't 2017). See Santos v. Condo 124 LLC, 161 A.D.3d at 656; Prevost v. One City Block LLC, 155 A.D.3d 531, 534 (1st Dep't 2017).

These factual issues bearing on defendants' negligence preclude summary judgment awarding defendants full contractual indemnification. DePaul v. NY Brush LLC, 120 A.D.3d 1046, 1048 (1st Dep't 2014); Urban v. No. 5 Times Sq. Dev., LLC, 62 A.D.3d at 557; Callan v. Structure Tone, Inc., 52 A.D.3d 334, 335-36 (1st Dep't 2008). Nevertheless, as more fully discussed below in connection with plaintiff's claim under Labor Law § 240(1), the

evidence of third party defendant's failure to secure the rebar demonstrates that the potential damages and expenses in this action are at least partly attributable to third party defendant's conduct and not solely to defendants' conduct. Therefore defendants will be entitled to at least partial contractual indemnification, depending on the extent to which the road's condition and defendants' responsibility for it did or did not contribute to the damages and expenses incurred.

C. Non-Contractual Indemnification

For similar reasons, defendants are not entitled to summary judgment on their third party non-contractual, implied indemnification claims. More definitively, however, Workers' Compensation, plaintiff's exclusive remedy against his employer, third party defendant, for an injury sustained in the course of his employment, also bars all other claims against third party defendant for that injury. N.Y. Workers' Comp. Law §§ 11, 29(6); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Macchirole v. Giamboi, 97 N.Y.2d 147, 149-50 (2001); Heritage v. Van Patten, 59 N.Y.2d 1017, 1019 (1983); Alba v. Dani Michaels, Inc., 303 A.D.2d 257, 257 (1st Dep't 2003). Where the employee's injuries qualify as "grave," the employer may be liable for non-contractual, implied indemnification or for contribution to other parties that the employee sues, N.Y. Workers' Comp. Law § 11; New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d 501, 505 (2014); Fleming v. Graham, 10 N.Y.3d at 299; Netzahuall v. At Will LLC, 145 A.D.3d 492, 492 (1st Dep't 2016), but plaintiff's

fractured leg does not constitute a grave injury. N.Y. Workers' Comp. Law § 11; Fleischman v. Peacock Water Co., Inc., 51 A.D.3d 1203, 1205 (3d Dep't 2008). Therefore defendants may not seek implied indemnification against third party defendant. Brooks v. Judlau Contr., Inc., 11 N.Y.3d at 208; Clavin v. CAP Equip. Leasing Corp., 156 A.D.3d 404, 404 (1st Dep't 2017); Ironshore Indem., Inc. v. W&W Glass, LLC, 151 A.D.3d 511, 512 (1st Dep't 2017); Maggio v. 24 W. APF, LLC, 134 A.D.3d at 627.

III. PLAINTIFF'S LABOR LAW § 240(1) CLAIM

Third party defendant seeks summary judgment dismissing plaintiff's claim under Labor Law § 240(1). Plaintiff seeks summary judgment on defendants' liability under Labor Law § 240(1).

Since a "third-party defendant may assert against the plaintiff in his or her answer any defenses which the third-party plaintiff has to the plaintiff's claim," and may enforce "the rights of a party adverse to the other parties in the action," C.P.L.R. § 1008, third party defendant may seek dismissal of plaintiff's Labor Law § 240(1) claim. Giandana v. Providence Rest Nursing Home, 8 N.Y.3d 859, 860 (2007); Houston Cas. Co. v. Cavan Corp. of NY, Inc., 158 A.D.3d 536, 539 (1st Dep't 2018); Muniz v. Church of Our Lady of Mt. Carmel, 238 A.D.2d 101, 102 (1st Dep't 1997). Third party defendant's motion and its opposition to plaintiff's cross-motion, as well as defendant's opposition to plaintiff's cross-motion, each contend that Labor Law § 240(1) does not apply to plaintiff's circumstances because

plaintiff did not fall, nor did anything fall on him.

Liability under Labor Law § 240(1) depends on an injury flowing from the force of gravity on an object. Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 604 (2009); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993); Brown v. VJB Constr. Corp., 50 A.D.3d 373, 376 (1st Dep't 2008). Plaintiff's task of holding the load being transported, to keep it from falling off the bobcat, involved elevation related hazards covered by Labor Law § 240(1). Penaranda v. 4933 Realty, LLC, 118 A.D.3d 596, 597 (1st Dep't 2014). See Galvez v. Columbus 95th St. LLC, 161 A.D.3d at 531. The fact that plaintiff was injured not from the unsecured or falling rebar, but instead from being run over by the bobcat, does not eliminate liability under Labor Law 240(1), because the failure to provide adequate protective devices to secure the load was a proximate cause of his injury. Landi v. SDS William St., LLC, 146 A.D.3d 33, 38 (1st Dep't 2016); McLean v. Tishman Constr. Corp., 144 A.D.3d 534, 534-35 (1st Dep't 2016); Aramburu v. Midtown W.B, LLC, 126 A.D.3d 498, 499 (1st Dep't 2015). After one of the two straps securing the load broke, only one strap was used, which was inadequate to prevent a piece of rebar from becoming unsecured, swaying and tilting up and down due to the force of gravity, and knocking plaintiff to the ground. Aramburu v. Midtown W. B, LLC, 126 A.D.3d at 499; Gove v. Pavarini McGovern, LLC, 110 A.D.3d 601, 602 (1st Dep't 2013); Brown v. VJB Constr. Corp., 50 A.D.3d at 376-77.

The difference in elevation between the rebar on the bobcat and plaintiff is not de minimis as defendants and third party defendant suggest, because the bundle of rebar, even though its weight is unspecified, was heavy enough to require transportation by a bobcat. Runner v. New York Stock Exch., Inc., 13 N.Y.3d at 605; Landi v. SDS William St., LLC, 146 A.D.3d at 38; Marrero v. 2075 Holding Co. LLC, 106 A.D.3d 408, 409 (1st Dep't 2013); Brown v. VJB Constr. Corp., 50 A.D.3d at 377. The fact that plaintiff was close to the level of the rebar when it struck him or that it was not being hoisted or lowered does not negate defendants' liability. Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 9 (2011); Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757, 758-59 (2008). Because the undisputed evidence establishes that plaintiff was injured as the direct result of the failure to provide adequate securing straps or other securing devices on the load being transported, plaintiff is entitled to summary judgment on his Labor Law § 240(1) claim. Aramburu v. Midtown W. B, LLC, 126 A.D.3d at 499; Gove v. Pavarini McGovern, LLC, 110 A.D.3d at 602; Brown v. VJB Constr. Corp., 50 A.D.3d at 376-77. See Wilinski v.334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d at 11.

IV. CONCLUSION

Consequently, the court grants defendants-third party plaintiffs' motion for summary judgment to the extent of declaring that third party defendant is a statutory agent under the Labor Law and awarding defendants-third party plaintiffs

contractual indemnification against third party defendant in proportion to their nonculpability for their damages and expenses incurred in this action. C.P.L.R. §§ 3001, 3212(b) and (e). The court denies the remainder of defendants-third party plaintiffs' motion and denies third party defendant's motion for summary judgment dismissing plaintiff's claim under Labor Law § 240(1). C.P.L.R. § 3212(b). The court grants plaintiff's cross-motion for summary judgment on defendants' liability for violation of Labor Law § 240(1). C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment that defendants, jointly and individually, are liable to plaintiff under Labor Law § 240(1) and that third party defendant is a statutory agent under the Labor Law and is liable to defendants-third party plaintiffs for at least partial contractual indemnification.

DATED: February 22, 2019

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.