Mayorga v 75 Plaza LLC
2019 NY Slip Op 31212(U)
April 30, 2019
Supreme Court, New York County
Docket Number: 159760/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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JOSE MAYORGA,

Plaintiff,

-against-

75 PLAZA LLC, RXR REALTY LLC, RXR CONSTRUCTION & DEVELOPMENT LLC and RXR ATLAS LLC,

Defendants.

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75 PLAZA LLC, RXR CONSTRUCTION & DEVELOPMENT LLC and RXR ATLAS LLC,

Third Party Plaintiffs,

-against-

ALL STATE INTERIOR DEMOLITION, INC.,

Third-Party Defendant.

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DECISION & ORDER

Index No.: 159760/2016

Mot. Seqs. 001, 002, 003

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 55, 83, 100, 103
were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 84, 98, 99, 101, 102, 104
were read on this motion to/for SEVER ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 105, 106
were read on this motion to/for SUMMARY JUDGMENT

Motion sequence numbers 001, 002, and 003, have been consolidated for disposition.

In motion sequence 001, plaintiff Jose Mayorga moves, pursuant to CPLR 3212, for an order granting summary judgment as against RXR Construction & Development (RXR Construction)

for violations of Labor Law §§ 240 (1) and 241 (6), and ordering an immediate trial on damages pursuant to CPLR 3212 (c).

In motion sequence 002, third-party defendant All State Interior Demolition, Inc. (All State), moves, pursuant to CPLR 603 and 1010, for an order severing the third-party action from the main action.

In motion sequence 003, defendants 75 Plaza, LLC, RXR Realty, LLC, and RXR Construction (collectively known hereafter as defendants), cross-move, pursuant to CPLR 3211 and 3212, for an order granting summary judgment and dismissing plaintiff's claims for common law negligence and violations of Labor Law §§ 200, 240, and 241 (6). Defendants also move for an order granting RXR Construction summary judgment on its claim for contractual indemnification as against All State.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff testified that he was injured on September 12, 2016, at 77 Rockefeller Plaza, New York, New York. On the date of his accident, plaintiff worked for All State, a demolition company. Plaintiff performed interior demolition of drop ceilings and drywall. He maintained that All State brought him tools to utilize, including a hard hat, safety glasses, earplugs, gloves, a harness, and a welder's jacket. Plaintiff testified that ladders, scaffolds, baker scaffolds, carts, pipe scaffolds, and man lifts were located at the site.

All State performed demolition at 77 Rockefeller Plaza for RXR Construction, the general contractor. Plaintiff reported to "Dario," a foreman for All State. Dario would have meetings in the morning to tell the All State workers where they were to work. Plaintiff testified

that Dario would not discuss safety topics, but that he made the workers sign a document known as a "toolbox safety sheet." All State had its own worker at the site who would walk around on a daily basis looking for safety issues. If plaintiff observed anything unsafe, he would report it to Dario.

On the morning of his accident, plaintiff met with Dario, who told him to remove tree grilles which were outside on the sidewalk and to remove a fire damper (the damper). The damper was located on the exterior loading dock on top of a door frame. After removing the tree grilles, plaintiff proceeded to the loading dock. Plaintiff was working with Salvatore Pepitone (Pepitone). He did not remember anyone else working at the loading dock but recalled that he saw a manlift which belonged to All State. The damper was about eight feet above the surface of the loading dock. While standing on a manlift, plaintiff used an acetylene torch to remove four bolts from the damper. After burning the bolts, plaintiff leaned the damper towards a frame for support so that he could tie it up in preparation for it to be lowered.

Plaintiff tied up the damper while he was on the manlift and made a square knot with the rope as Pepitone watched him from ground level. When plaintiff tried to lower the damper, it did not move because brass welds were still attached, keeping it secure on the frame. Plaintiff got off the manlift and grabbed a crowbar to pop the welds. Pepitone held the rope, which was looped over the temporary frame.

After plaintiff removed the last weld, he told Pepitone to tighten the rope and, within a split second, the damper fell. Plaintiff heard Pepitone yell and, although he (plaintiff) tried to run out of the way, the damper struck his shoulder and back, propelling him towards the manlift.

Plaintiff hit his knees on the concrete, his shoulder and head came into contact with the manlift, and he lost consciousness.

Plaintiff did not ask Dario for equipment to assist with the removal of the damper. However, he asked Dario for additional manpower at the beginning of the day. Plaintiff told Dario about the accident but did not talk to anyone who represented the owner or the general contractor. Plaintiff later learned that the damper weighed 200 pounds.

After the accident, plaintiff completed an employee claim form which bore the name of an entity called United Interior Renovations LLC (United) which, he believed, was a part of All State. Plaintiff testified that he sometimes received checks issued from United, whereas at other times he received checks issued by All State. Plaintiff maintained that he was told that United and All State were the same company.

LEGAL CONCLUSIONS:

"The proponent of a summary judgment motion 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 . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Plaintiff contends that he is entitled to summary judgment against RXR Construction on his claim of a violation of Labor Law § 240 (1). Defendants argue that they are entitled to summary judgment dismissing this claim.

Labor Law § 240 (1) provides in part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Appellate Division, First Department has held that "[t]he failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner*, Inc., 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted). "Labor Law § 240 does not impose a duty on an owner, as a matter of law, to compel a worker who refused to use available satisfactory equipment to do so." *Cannata v One Estate, Inc.*, 127 AD2d 811, 813 (2d Dept 1987) (citations and quotations omitted).

Plaintiff argues that RXR Construction was a statutory agent of the owner for the purpose of liability under Labor Law § 240 (1). He further contends that Labor Law § 240 (1) was violated because he was injured by the falling damper, a heavy object which should have been secured. Plaintiff contends that the damper's fall was not an ordinary peril associated with demolition work.

Defendants contend that plaintiff's claim pursuant to Labor Law § 240 must be dismissed because the danger of the falling damper was a usual and ordinary peril associated with demolition work. Defendants argue that the damper was part of the permanent structure of the

building which did not require securing for the purposes of the undertaking because it was slated for demolition.

Alternatively, defendants argue that, if this Court finds that Labor Law § 240 (1) was violated and that this violation was the proximate cause of plaintiff's accident, the burden shifts to them to demonstrate that plaintiff's own acts or omissions were the sole proximate cause of the occurrence. Defendants maintain that plaintiff knowingly and willingly declined to use an available safety device. They argue that plaintiff testified that numerous safety devices were made available to him at the jobsite, including manlifts, ladders, pipe scaffolds, and a baker's scaffold, but that he did not use the same.

Defendants also argue that discovery remains outstanding and that only plaintiff's deposition has been held. They maintain that All State, plaintiff's employer, who directed him and was responsible for providing safety equipment, was not deposed. Defendants contend that plaintiff has recently added RXR Atlas, LLC as a direct defendant, and that the said entity has not yet appeared in this matter.

Defendants also contend that plaintiff's affidavit conflicts with his deposition testimony. Specifically, they maintain that, although plaintiff testified that All State provided him with ladders, pipe scaffolds, baker scaffolds and manlifts, he stated that nobody at the site offered him any devices to remove the damper. Defendants also maintain that, although plaintiff testified that he never asked for additional manpower after he observed the size of the damper, he states in his affidavit that, when he asked whether someone could work with him, he was told that there was nobody available to do so.

While defendants argue that plaintiff declined to use an available safety device which would have prevented his accident, it is unclear to this Court, due to the outstanding discovery, whether plaintiff received instructions regarding the need to use safety devices available at the site. Thus, the branch of plaintiff's motion, and the branch of defendants' cross motion, seeking summary judgment relating to a violation of Labor Law § 240 (1) are denied.

Defendants further argue that this Court should dismiss plaintiff's Labor Law § 200 claim. Labor Law § 200 (1) states, in pertinent part, as follows:

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . ."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise from allegedly dangerous conditions at a particular work site, a plaintiff must demonstrate that an owner or general contractor had control over the site and either created the dangerous condition, causing an injury, or did not remedy the dangerous or defective condition, despite having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

Defendants contend that plaintiff's claims for common law negligence and a violation of Labor Law § 200 must be dismissed because plaintiff testified that the only entity that supervised and directed the manner in which he conducted his work was All State, his own employer. Defendants argue that there is no evidence that they directed or controlled plaintiff's work.

All State contends that defendants' motion for summary judgment must be denied as premature since there have been no depositions and it is entitled to the opportunity to obtain evidence demonstrating that defendants did not supervise or control plaintiff's work. All State further maintains that it has not yet been provided complete copies of prior pleadings, including discovery demands and responses.

This Court finds that defendants have not sustained their burden of demonstrating, as a matter of law, that they did not have authority or control over the work site. Since defendants' depositions have not yet been conducted, it is unclear to this Court what role, if any, defendants played in the work which plaintiff conducted. Therefore, that branch of defendants' cross motion seeking summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims must be denied.

Plaintiff contends that he is entitled to summary judgment on his Labor Law § 241 (6) claim against RXR Construction. Defendants argue that summary judgment should be granted in their favor dismissing plaintiff's claim pursuant to this section of the Labor Law.

Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places . . . ."

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, a plaintiff must establish that a defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007).

In his bill of particulars, plaintiff alleges that defendants violated Industrial Code sections 23-1.7, 23-2.1, 23-3.3, 23-6, 23-8, 23-9.4, 23-8.1 (a-k, f and l), 23-8.2 (a-l), 23-8.5, and 23-9.8 (a-l). Defendants contend that, although plaintiff alleges that section 23-3.3 (b) (3) and (c) are applicable, he fails to address any of the other sections of the Industrial Code allegedly violated. Thus, as defendants correctly argue, the Industrial Code sections which plaintiff fails to address are hereby dismissed as abandoned. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (holding that because plaintiff did not oppose the claim for wrongful termination, he has abandoned such claim).

Plaintiff alleges that RXR Construction violated section 23-3.3 (b) (3) and (c). Section 3-3 (b) (3) and (c) state as follows:

"(b) Demolition of walls and partitions

(3) Walls, chimneys and other parts of any buildings or structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

Section 23-3.3 (b) (3) and (c) have been held to be sufficiently specific enough to support a claim for liability pursuant to Labor Law § 241 (6). *See Ortega v Everest Realty LLC*, 84 AD3d 542, 544 (1st Dept 2011); *Gawel v Consolidated Edison Co. of New York, Inc.*, 237 AD2d 138, 138 (1st Dept 1997).

Due to the outstanding discovery discussed above, lack of discovery, it is unclear to this Court whether sections 23-3.3 (b) (3) and (c) of the Industrial Code are applicable or were violated. Although section (b) (3) addresses how structures should not be left unguarded and section (c) addresses inspections, defendants have not had the opportunity to produce witnesses for a deposition. Therefore, that branch of plaintiff's motion and defendants cross motion seeking summary judgment pursuant to Labor Law § 241 (6) predicated on an alleged violation of section 23-3.3 (b) (3) and (c) of the Industrial Code must be denied.

Defendants maintain that RXR Construction is entitled to contractual indemnification from All State. RXR Construction argues that All State agreed to indemnify it for claims made as a result of accidents which arise out of its work and the work of its subcontractors. RXR Construction maintains that the accident arose out of All State's demolition work as dictated by

the contract, that All State supervised and controlled the work, and that the contract requires All State to implement the means and methods of the work, to ensure the safety of its workers, and to comply with the Labor Law. Alternatively, RXR Construction maintains that, if this court determines that a finding of negligence is necessary for indemnification purposes, then it is entitled to a conditional order of summary judgment on its third party claim for contractual indemnification against All State.

All State contends that RXR Construction is not entitled to summary judgment on its claim for contractual indemnification because it (All State) was not negligent and because there are issues of fact regarding the active negligence of RXR Construction. All State maintains that discovery is outstanding and that RXR Construction incorrectly asserts that plaintiff was employed by All State. All State contends that, on the date of plaintiff's accident, it did not have any employees at the site, but that there were employees of United, a company with which All State subcontracted to perform demolition work.

Since questions of fact exist as to which party, if any, was negligent, that branch of defendants' cross motion seeking summary judgment for contractual indemnification against All State must be denied. *See Scekic v SL Green Realty Corp*, 132 AD3d 563, 566 (1st Dept 2015) (questions of fact regarding contractual indemnification, including the precise roles of defendants, needed to be resolved by the trier of fact).

All State argues that, pursuant to CPLR 603 and 1010, an order must be granted severing the third-party action from the main action.

CPLR 1010, which is entitled "Dismissal or separate trial of third-party complaint" provides:

> "[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

CPLR 603, which is entitled "Severance and separate trials" provides:

> "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others."

All State contends that defendants/third-party plaintiffs commenced a third-party action against All State on October 16, 2017. After an agreement was made between the parties to extend the time period in which All State was to answer, All State filed an answer on February 28, 2018. All State also served a demand for a third-party bill of particulars, a demand for a verified bill of particulars, and a notice to take a deposition. All State maintains that it was unaware that, on February 23, 2018, plaintiff filed a motion for summary judgment as against RXR Construction. All State also maintains that three discovery conferences have been held in which it did not participate.

All State contends that severance is warranted because it has been substantially prejudiced. All State argues that it has not had an opportunity to conduct discovery and that defendants/third party plaintiffs waited seven months after interposing an answer to file an action against it, despite being aware of a contractual relationship between the parties. All State contends that several court appearances have taken place, that discovery was exchanged between the other parties, that plaintiff appeared for a deposition, and that plaintiff filed a motion for summary judgment.

Plaintiff argues that it should not be prejudiced by defendants and third-party defendants' delays in prosecuting this action. He contends that it would be prejudicial for plaintiff to appear for another deposition when there are no disputes as to how his injury occurred.

In opposition, defendants contend that the motion to sever is unwarranted since All State, plaintiff's employer, is a necessary party. Defendants maintain that they did everything possible to expeditiously commence the third-party action once the identity of plaintiff's employer was discovered. They argue that severing the third-party action would be an inefficient use of judicial resources since it would require two trials on identical issues.

Here, discovery has only recently commenced, the defendants have not been deposed, and the main action and the third-party action have common factual and legal issues. *See Neckles v VW Credit, Inc.*, 23 AD3d 191, 192 (1st Dept 2005) (holding "[t]he motion court erred in granting plaintiff's motion to sever the main action from the third-party action. The main and third-party actions involve common factual and legal issues which should be tried together"). Additionally, neither plaintiff nor All State will be prejudiced if the action is not severed. Thus, All State's motion to sever is denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion (mot. seq. 001) by plaintiff Jose Mayorga for summary judgment (sequence 001) as against RXR Construction & Development is denied; and it is further

ORDERED that the motion (mot. seq. 002) by third-party defendant All State Interior Demolition, Inc. for an order severing the third-party action from the main action and directing that a separate trial be held is denied; and it is further

ORDERED that the cross motion (mot. seq. 003) by defendants 75 Plaza, LLC, RXR Realty, LLC, and RXR Construction for summary judgment dismissing plaintiff's common-law negligence claim and claims pursuant to Labor Law sections 200, 240(1) and 241(6) is granted to the extent of dismissing plaintiffs's claim pursuant to Labor Law § 241(6) insofar as it is predicated on violations of Industrial Code sections 23-1.7, 23-2.1, 23-6, 23-8, 23-9.4, 23-8.1 (a-k, f and l), 23-8.2 (a-l), 23-8.5, and 23-9.8 (a-l), and the motion is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, counsel for defendants 75 Plaza LLC, RXR Realty LLC and RXR Construction shall serve a copy of this order, with notice of entry, on counsel for all parties, as well as on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that the parties are to appear for a status conference at 80 Centre Street, Room 280, on June 4, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: April 30, 2019

ENTER:

HON. KATHRYN E. FREED, J.S.C.