Clavijo v East Harlem Council for Human Servs., Inc.
2019 NY Slip Op 33430(U)
November 13, 2019
Supreme Court, Kings County
Docket Number: 505717/2014
Judge: Larry D. Martin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Part 41

---x

RUBEN CLAVIJO,

Plaintiff,

Index no. 505717/2014

-against-

DECISION/ORDER

MSH 11, 12, 13, 14, 10

EAST HARLEM COUNCIL FOR HUMAN SERVICES, INC., WESTERMAN CONSTRUCTION COMPANY, INC., AND BORIKEN LOCAL DEVELOPMENT CORPORATION,

Defendants.

---x

WESTERMAN CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

ORLANDO DECORATING, INC.,

Third-Party Defendant.

---x

WESTERMAN CONSTRUCTION COMPANY, INC.,

Second Third-Party Plaintiff,

-against-

ELITE INTERIORS SYSTEMS, INC.,

Second Third-Party Defendant.

---x

WESTERMAN CONSTRUCTION COMPANY, INC.,

Third Third-Party Plaintiff,

-against-

ACADEMIC STONE SETTERS, INC.,

Third Third-Party Defendant.

---x

Recitation, as required by CPLR 2219(a), of the papers considered on the review of these motion for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1, 4, 9

Notice of Cross Motion and Affidavits Annexed	**15, 22**
Answering Affidavits	**2, 5-7, 10-11, 16-18. 23-24**
Replying Affidavits	**3, 8, 12-14, 19-21, 25**

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff commenced this action against Defendants East Harlem Council for Human Resources, Inc. and Boriken Local Development Corp. (hereinafter "East Harlem") and Westerman Construction Company, Inc. (hereinafter "Westerman") for injuries incurred as a result of an accident on October 22, 2013, while Plaintiff worked at a construction site. East Harlem is the owner of the construction site and Westerman was the general contractor for the site. Plaintiff's complaint alleges causes of action against the defendants under Labor Law §200/common-law negligence, § 240(1), and § 241(6).

Subsequently, Westerman commenced a third-party action against plaintiff's employer and subcontractor Orlando Decorating, Inc. (hereinafter "Orlando") for contractual and common-law indemnification, contribution and breach of contract. Westerman also commenced a second third-party action against subcontractor Elite Interior Systems, Inc. (hereinafter "Elite") for contractual and common-law indemnification, contribution and breach of contract. Westerman commenced a third third-party action against Academic Stone Setters, Inc. for contractual and common-law indemnification, contribution and breach of contract.

Orlando now moves under motion sequence #10 for summary judgment motion dismissing plaintiff's complaint as against defendants East Harlem and Westerman and dismissing Westerman's third-party action and any cross-claims against Orlando.

Plaintiff moves under motion sequence #11 for summary judgment as against defendants East Harlem and Westerman on liability only under Labor Law § 241(6) and common-law negligence.

Westerman moves under motion sequence #12 for summary judgment dismissing plaintiff's complaint as against it and granting summary judgment on third-party claims against Orlando and Elite for contractual and common-law indemnification and contribution. Orlando and Elite oppose the motion.

East Harlem cross moves under motion sequence #13 for summary judgment dismissing plaintiff's claims against it

Elite also cross moves under motion sequence #14 for summary judgment dismissing Westerman's claims against it for contractual and common-law indemnification and contribution.

ANALYSIS

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]).

Once a prima facie showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, supra, 49 N.Y.2d 557 [1980]).

Motion Sequence #10

Orlando contends that plaintiff's causes of action under Labor Law §200/common-law negligence, §240(1) and §241(6) against defendants East Harlem and Westerman should be dismissed. It is first important to note that the only claims against Orlando are for contractual and common-law indemnification, contribution and breach of contract in the third-party action commenced by Westerman. Plaintiff does not allege any claims against Orlando.

Orlando's affirmation in support of its motion and the memoranda of law only address plaintiff's causes of action against defendants Westerman and East Harlem. Orlando's papers failed to address the claims associated with the third-party action against it. Given Orlando's failure to address this branch of their motion, Orlando's motion for summary judgment dismissing the claims against it for contractual and common-law indemnification, contribution and breach of contract are denied. The third-party claims against Orlando will be further addressed in Westerman's motion sequence #12.

Motion Sequence #11

Plaintiff contends that they are is entitled to summary judgment against defendants pursuant to Labor Law §241(6) and common-law negligence.

In their affirmation in support, Plaintiff states that defendants violated Industrial Code §23-1.22(b)(2) and (3), arguing that the piece of plywood that plaintiff crossed over when his accident occurred was a ramp and it was not secured as required by the Industrial Code and safety standards.

Plaintiff testified that there was a three-quarter of an inch, five to six-feet-long (5'-6') by four-foot-wide (4') piece of plywood plank, with four bricks on the sides underneath the plywood, located by the entrance of the building. Plaintiff and two coworkers were pulling and pushing a cart with paint materials over the plywood to enter the building. Plaintiff was facing away from the entrance and was pulling the cart while his coworkers pushed the cart. Plaintiff states that when the cart was pushed and pulled over the plywood, the plywood bent and moved, causing the cart to roll to the left and the wheels to run over the toes of his left foot.

Defendants Westerman argues that the piece of plywood is not a ramp and it was placed only to cover and protect a freshly installed door saddle during the construction. East Harlem also argues that the testimony supports the fact that the accident happened because plaintiff's coworkers pushed the cart over the ramp and over the plaintiff's foot and not because the ramp was unsecured. It is unknown who placed the piece of plywood in the doorway.

Plaintiff failed to establish his entitlement to judgment as a matter of law because questions of fact exist as to whether the piece of plywood with four bricks underneath each side is considered a "ramp" for purposes of Industrial Code §23-1.22(b)(2) and (3) and if so, whether defendants Westerman and East Harlem, in fact, violated this section. Accordingly, this branch of plaintiff's motion is denied.

Plaintiff's affirmation in support of the motion also asks for an order entering summary judgment on behalf of plaintiff for liability pursuant to common law negligence. However, the papers failed to address this cause of action separately and only focus on arguments in favor of summary judgment pursuant to Labor Law §241(6).

This cause of action, however, will be addressed in defendants' motion sequence #12 and 13 below and this branch of plaintiff's motion is denied.

Motion Sequence #12

Westerman contends in their motion for summary judgment that plaintiff's Labor Law §240(1), §241(6) and §200/common-law negligence causes of action should be dismissed and summary judgment should be granted in favor of Westerman for its third-party claims against Orlando and Elite.

Labor Law §240(1)

Westerman argues that plaintiff's Labor Law §240(1) claim lacks merit as plaintiff's accident was not gravity-related. The purpose of Labor Law §240(1) is to protect construction workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Westerman has established, prima facie, that Labor Law §240(1) is inapplicable as plaintiff does not allege facts that support that his injuries were caused by an elevation-related occurrence (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 250 [2001]; *Ortega*, 57 AD3d at 58; *Gasques v State*, 15 NY3d 869 [2010]). This branch of Westerman's motion is granted and plaintiff's §240(1) cause of action against Westerman is hereby dismissed.

Labor Law §241(6)

Westerman argues that plaintiff's Labor Law §241(6) claim lacks merit because the Industrial Code Regulations relied upon by plaintiff are not applicable as a matter of law. As stated under plaintiff's motion sequence #11, issues of fact exist and this branch of Westerman's motion is denied.

Labor Law § 200/common-law negligence

Westerman argues that plaintiff's common-law negligence and Labor Law §200 claims are without merit as Defendant did not exercise any supervisory control over the work being performed by the plaintiff, and further, Westerman did not cause or create the alleged dangerous condition.

Labor Law §200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Rizzuto*, 91 NY2d at 352; *Comes v*

New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *see also Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]).

Labor Law §200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, questions of fact exist as to whether Westerman, as the general contractor, exercised control over the work performed on the premises that led to the placement of the plywood plank and whether the plywood plank existed for such time as to give Westerman notice of the alleged dangerous condition. Thus, this branch of Westerman's motion is denied.

Claims for Indemnification and Contribution

Westerman also contends that they are entitled to summary judgment as to its third-party claims against Orlando and Elite. Westerman seeks contractual and common-law indemnification and contribution from both third-party plaintiffs.

"In order to establish a claim for common-law indemnification, a party must 'prove not only that it was not negligent, but also that the proposed indemnitor…was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118-19 [2d Dept 2011], citing *Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2d Dept 2006]). "[T]he General Obligations Law prohibits the enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent" (see, General Obligations

Law § 5–322.1). Accordingly, since there exist questions of fact as to Westerman's negligence, this branch of their motion for common-law and contractual indemnification is denied.

"To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that ... a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries. The critical requirement...is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Eisman v Village of East Hills*, 149 AD3d 806, 808-09 [2d Dept 2017]). Questions of fact exist as to whether Orlando owed a duty to plaintiff and whether a breach of that duty contributed to causing or augmenting the alleged injuries. As to Elite, the record does not support a finding that Elite employees were working by or in the vicinity of the entrance where the accident occurred nor that it was responsible for the plywood being placed in the entrance. Thus, this branch of Westerman's motion for contribution as against Orlando and Elite is denied.

Motion Sequence #13

East Harlem cross moves seeking summary judgment in its favor and dismissing plaintiff's claims against it and granting it summary judgment against Westerman and Orlando for contractual and common-law indemnification.

Labor Law §200/common-law negligence

East Harlem contends that plaintiff's Labor Law §200/common-law negligence claims should be dismissed because there is no evidence that East Harlem was aware of any problems with the plywood plank involved in the accident. "Where a plaintiff's injuries do not stem from the manner of performing the work, and instead from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law §200 if it controlled the work site and either created the dangerous condition or had actual or constructive notice of the dangerous condition that caused the accident" (*Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007]). The record shows that East Harlem was not involved with plaintiff's work nor did it have any actual or constructive notice of the alleged dangerous condition causing plaintiff's accident. In opposition, plaintiff only contends that Westerman is liable under Labor Law §200/common-law negligence and makes no mention of East Harlem's liability under this section. Thus, this branch of East Harlem's motion is granted.

Labor Law § 241(6)

East Harlem contends that plaintiff's Labor Law §241(6) claim must also be dismissed because none of the Industrial Code Sections relied upon by plaintiff to support his claim are applicable. East Harlem adopts the arguments raised in Orlando's Memorandum of Law in motion sequence #10 on Labor Law §241(6). However, as stated in connection with plaintiff's motion sequence #11, issues of fact exist as to whether the plywood is considered a ramp under the Industrial Code, and therefore this branch of East Harlem's motion is denied.

Labor Law § 240(1)

East Harlem also contends that the Labor Law §240(1) claim is inapplicable to the facts of this case. As noted in connection with plaintiff's motion sequence #11, the court agrees that Labor Law §240(1) is inapplicable and this branch of East Harlem's motion is granted.

Claims for Indemnification

East Harlem claims that it is entitled indemnification from Westerman as per the terms and conditions of the general contract and that it is entitled to an award for contractual indemnification from Orlando because it was the subcontractor of Westerman and agreed to indemnify East Harlem.

"A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed. To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and may be held liable solely by virtue of . . . statutory or vicarious liability. However, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011]).

Thus, as Westerman and Orlando's negligence has not been determined, summary judgment on the issue of contractual indemnity against Westerman and Orlando is denied as premature.

East Harlem also states that since plaintiff sustained a grave injury as defined by Workers' Compensation Law, East Harlem is also entitled to an award of common law indemnification against Orlando. East Harlem has failed to establish that plaintiff suffered a grave injury as defined under the Worker's Compensation Law. While it is undisputed that plaintiff had several toes amputated, Orlando raises issues of fact as to whether the loss of the toes was caused by the accident or by plaintiff's diabetes.

Thus, summary judgment on the issue of common-law indemnification against Orlando is hereby denied.

Motion Sequence #14

Elite cross moves for summary judgment dismissing Westerman's second third-party complaint against Elite for contractual and common-law negligence, contribution, and breach of contract. Elite contends that there is no legal or factual basis under which Westerman could obtain contribution or common-law indemnification, is entitled to dismissal of the contractual indemnification as the alleged incident did not arise from Elite's work at the premises and that Elite did not breach their contract because it purchased a Commercial General Liability insurance policy that satisfies the terms of the contract between the parties to procure insurance.

Elite established, prima facie, an entitlement to judgment as a matter of law dismissing Westerman's causes of action for contractual and common-law negligence, contribution, and breach of contract. The record does not support a finding that Elite any connection to plaintiff's accident nor that it owed a duty to plaintiff and breach such duty. In opposition, Westerman failed to raise any issues of fact. Further, the Commercial General Liability insurance policy purchased by Elite is sufficient to satisfy the terms of the contract to procure liability insurance

Accordingly, Elite's motion is hereby granted, and the second third-party action is dismissed in its entirety.

SUMMARY

In summary, the court rules as follows: (1) Orlando's motion for summary judgment is denied; (2) plaintiff's motion is denied in its entirety; (3) Westerman's motion is granted as to Labor Law §240(1) cause of action only and otherwise denied as to plaintiff's Labor Law §§ 241(6) and 200 and denied as to Westerman's third-party and second third-party claims; (4) East Harlem's

motion is granted as to plaintiff's Labor Law §§ 240(1) and 200 only and it is denied as to plaintiff's Labor Law §241(6) and third-party claims for contractual and common-law negligence; and (5) Elite's motion is granted.

To be clear, plaintiff's claims under Labor Law §240(1) against Westerman and East Harlem are dismissed, there are material issues of fact as to plaintiff's claims under Labor Law §241(6) and §200 against Westerman, material issues of fact exist as to plaintiff's claims under Labor Law §241(6) against East Harlem; material issues of fact exist as to whether plaintiff suffered a grave injury as a result of the accident in connection with the claim for common-law indemnification against plaintiff's employer Orlando; material issues of fact exist as to Westerman's claims for contractual and common-law indemnification and contribution against Orlando; and Westerman's claims for contractual and common-law indemnification, contribution and breach of contract against Elite are dismissed.

Dated: NOV 13 2019

HON. LARRY D. MARTIN
J.S.C.

HON. LARRY D. MARTIN
Justice of the Supreme Court

KINGS COUNTY CLERK
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