SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANTONIO HERNANDEZ, Index No. 152366/2016

Plaintiff

- against -

137 RIVERSIDE OWNERS, INC. a/k/a "THE CLARENDON," and ABC MANAGEMENT CORP.,

Defendants

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137 RIVERSIDE OWNERS, INC. a/k/a "THE CLARENDON," and ABC MANAGEMENT CORP.,

Third Party Plaintiffs

- against -

JRR CONTRACTING INC.,

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 sustained June 24, 2015, when a bag of cement that he was helping to unload from a flatbed trailer owned by third party defendant,

his employer, struck him on premises owned by defendant 137 Riverside Owners, Inc., managed by defendant ABC Management Corp., and undergoing demolition and waterproofing by third party defendant. Defendants move for summary judgment dismissing the complaint and awarding them contractual indemnification against third party defendant. C.P.L.R. § 3212(b). For the reasons explained below, the court grants defendants' motion in part.

II. DISMISSAL OF THE COMPLAINT

In a stipulation dated June 20, 2019, plaintiff discontinued his negligence claim, his claim under New York Labor Law § 200, and his claim under New York Labor Law § 241(6) to the extent this claim is based on 12 N.Y.C.R.R. § 23-1.5(a).

A. Labor Law § 240(1) Claim

Contrary to defendants' contention, unloading material for demolition or consruction work is covered under Labor Law § 240(1). Saquicaray v. Consolidated Edison of N.Y., Inc., 171 A.D.3d 416, 417 (1st Dep't 2019); Naughton v. City of New York, 94 A.D.3d 1, 7 (1st Dep't 2012); Phillip v. E. 80th St. Condominium, 93 A.D.3d 578, 579 (1st Dep't 2012). See Myiow v. City of New York, 143 A.D.3d 433, 436 (1st Dep't 2016). Although Berg v. Albany Ladder Co., Inc., 10 N.Y.3d 902, 904 (2008), held that Labor Law § 240(1) did not cover the plaintiff's fall while

unloading material for demolition work, his fall was outside the scope of § 240(1) because the fall did not result from lack of a safety device. Here, plaintiff testified at his deposition that he reported the need for a hoist to unload the cement bags to Juan Villegas, his supervisor. Naughton v. City of New York, 94 A.D.3d at 6; Phillip v. 525 E. 80th St. Condominium, 93 A.D.3d at 579. Jose Rodriguez, the president of third party defendant, at his deposition denied that any employee requested equipment for unloading the flatbed, but admitted that a hoist was used on the demolition site to lift materials to higher floors and lower debris from them.

Although Toefer v. Long Is. R.R., 4 N.Y.3d 399, 408 (2005), held that the plaintiff who was knocked backwards and off a truck while unloading it was not exposed to an elevation-related risk contemplated by Labor Law § 240(1), here plaintiff was exposed to the elevation-related risk of being struck by material lowered to him. In sum, unloading material off a truck may involve an elevation-related risk, as here, or may not, depending on how the work is being performed and how the injury occurs. See id.; Landa v. City of New York, 17 A.D.3d 180, 181 (1st Dep't 2005). Defendants' contention that repeated lifting and carrying of heavy loads over several weeks caused plaintiff's injury, not a

bag of cement being unloaded and lowered to him finds no support in the evidentiary record. See Chiechorski v. City of New York, 154 A.D.3d 413, 413-14 (1st Dep't 2017).

Defendants also maintain that there was only a minimal height difference between the worker lowering the bag of cement and plaintiff, but Labor Law § 240(1) applies to heavy material falling even a short distance. Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 10 (2011); Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 605 (2009); Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d 404, 405 (1st Dep't 2018); Harris v. City of New York, 83 A.D.3d 104, 110 (1st Dep't 2011). The deposition testimony by all the witnesses who addressed this issue established that the bags weighed at least 50 pounds and as much as 94 pounds each. Labor Law § 240(1) also applies to the unanticipated rapid descent of materials being lowered. Bonaerge v. Leighton House Condominium, 134 A.D.3d 648, 649 (1st Dep't 2015); Arnaud v. 140 Edgecomb LLC, 83 A.D.3d 507, 508 (1st Dep't 2011); Harris v. City of New York, 83 A.D.3d at 109. For all these reasons, the statute applies to plaintiff's injury.

B. Labor Law § 241(6) Claim

To support a Labor Law § 241(6) claim, plaintiff maintains that defendants violated 12 N.Y.C.R.R. §§ 23-1.7(d), (e)(2), and

(f) and 23-3.3(e). According to Rodriguez, after unloading bags of cement from the flatbed, the workers loaded it with debris to be removed later in the day. Plaintiff testified that his co-worker slipped on construction debris on the flatbed, which caused him to drop the bag of cement toward plaintiff unexpectedly. The flatbed is an "elevated working surface" required to be free of "a slippery condition" under 12 N.Y.C.R.R. § 1.7(d) and an area "where persons work" required to be "free from accumulations of dirt and debris" under 12 N.Y.C.R.R. § 1.7(e)(2).

While Rodriguez testified that, after he dumped debris from he flatbed at the dump yard, the flatbed was cleaned there, he testified merely about his usual practice, not his actions leading up to the time of plaintiff's injury. Carlos Mendez, a helper employed by third party defendant, testified at his deposition that he cleaned the flatbed only after the bags of cement were unloaded. Defendants thus fail to demonstrate compliance with 12 N.Y.C.R.R. § 23-1.7(d), Luciano v. New York City Hous. Auth., 157 A.D.3d 617, 617 (1st Dep't 2018); Velasquez v. 795 Columbus LLC, 103 A.D.3d 541, 542 (1st Dep't 2013), or § 23-1.7(e)(2). Licata v. AB Green Gansevoort, LLC, 158 A.D.3d 487, 489 (1st Dep't 2018); Rodriguez v. DRLD Dev., Corp., 109

A.D.3d 409, 410 (1st Dep't 2013). The fact that plaintiff's co-worker lowering the bag slipped rather than tripped on the debris does not remove the circumstances of plaintiff's injury from the scope of 12 N.Y.C.R.R. § 23-1.7(e)(2). Serrano v. Consolidated Edison Co. of N.Y. Inc., 146 A.D.3d 405, 406 (1st Dep't 2017); DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 625 (1st Dep't 2015). Nor do defendants show that, because plaintiff's co-worker, rather than plaintiff, slipped on the debris, defendants' violation of 12 N.Y.C.R.R. § 23-1.7(d) and (e)(2) did not cause plaintiff's injury and is not actionable under Labor Law § 241(6). Sweet v. Packaging Corp. of Am., Tenneco Packaging, 297 A.D.2d 421, 421-22 (3d Dep't 2002). See Parker v. Ariel Assoc. Corp., 19 A.D.3d 670, 671 (2d Dep't 2005).

Plaintiff also claims that defendants' failure to provide a ramp between the flatbed and the ground violated 12 N.Y.C.R.R. § 1.7(f). That provision is inapplicable, however, because plaintiff was working at ground level as co-workers standing on the flatbed above handed bags of cement to him, and plaintiff did not need a ramp as a means of access to a level above or below ground. Sawczyszyn v. New York Univ., 158 A.D.3d 510, 511 (1st Dep't 2018); Molloy v. Long Is. R.R., 150 A.D.3d 421, 422 (1st Dep't 2017); Miranda v. NYC Partnership Hous. Dev. Fund Co.,

Inc., 122 A.D.3d 445, 446 (1st Dep't 2014). Nor does 12 N.Y.C.R.R. § 23-3.3(e) apply to plaintiff who was unloading construction material, not removing demolition debris or other demolition material. Tavarez v. Sea-Cargoes, 278 A.D.2d 94, 95 (1st Dep't 2000); Freitas v. New York City Tr. Auth., 249 A.D.2d 184, 185 (1st Dep't 1998). Therefore plaintiff sustains a claim under Labor Law § 241(6) based on 12 N.Y.C.R.R. § 23-1.7(d) and (e)(2), but not based on §§ 23-1.7(f) and 23-3.3(e).

III. DEFENDANTS' CONTRACTUAL INDEMNIFICATION CLAIM

Defendants seek summary judgment on their contractual indemnification claim against third party defendant, which maintains that factual issues raised by the conflicting testimony precludes this relief. The parties stipulated on the record June 20, 2019, that the indemnification provisions in the contract between 137 Riverside Owners and third party defendant dated September 8, 2014, were authenticated and admissible for purposes of determining defendants' motion for summary judgment.

In relevant part, § 9.15.1 of the contract provides that:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work . . . , but only to the extent caused by the negligent acts or omissions of

> the Contractor, a Subcontractor, anyone directly or indirectly employed by them . . . .

Aff. of David Heller Ex. L, at 11. This indemnification provision allows enforcement only to the fullest extent permitted by law. Based on that qualification, defendants may enforce the contract's indemnification provision only to the extent 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). This indemnification provision also requires a finding that third party defendant's negligence contributed to plaintiff's injury.

Section 6 of the rider to the contract between 137 Riverside Owners and third party defendant further provides that:

> Contractor hereby indemnifies the Owner, its employees and agents and the tenants of the building from and against any damages or losses, including, without limitation, reasonable attorney's fees and disbursements, which may result from or be attributable to the contractor's performance, acts, errors or omissions or willful misconduct in the performance of the Work.

Heller Aff. Ex. L, at 21. Since this provision limits indemnification to third party defendant's conduct, it is enforceable even though the other indemnification provision's conditional terms are absent. See Brooks v. Judlau Contr., Inc., 11 N.Y.3d at 209. Unlike the other provision, this provision does not require a finding of third party defendant's negligence. Brown v. Two Exch. Plaza Partners, 76 N.Y.2d at 178.

Despite the divergent accounts by plaintiff and Mendez regarding the circumstances of plaintiff's injury, the claim undisputedly arose from third party defendant's work. No admissible evidence supports third party defendant's suggestion that plaintiff incurred no injury from being handed bags of cement June 24, 2015, and simply suffered from chronic back pain.

While third party defendant further contends that the indemnification provisions may not be enforced to indemnify defendants for their own negligence, plaintiff discontinued his negligence and Labor Law § 200 claims against defendants. See Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013); Macedo v. J.D. Posillico, Inc., 68 A.D.3d 508, 510 (1st Dep't 2009). The absence of defendants' negligence renders the indemnification provision in section 6 of the contract rider enforceable despite omission of the qualifying phrase "to the

fullest extent permitted by law." See Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d at 795 n.5; Mathews v. Bank of Am., 107 A.D.3d at 496; Rhodes-Evans v. 111 Chelsea LLC, 44 A.D.3d 430, 434 (1st Dep't 2007); Crouse v. Hellman Constr. Co., Inc., 38 A.D.3d 477, 478 (1st Dep't 2007). Any remaining liability would be vicarious, which does not bar summary judgment in defendants' favor on their contractual indemnification claim. Brown v. Two Exchange Plaza Partners, 76 N.Y.2d at 179; Martinez-Gonzalez v. 56 W. 75th St., LLC, 172 A.D.3d 616, 617 (1st Dep't 2019); O'Leary v. S&A Elec. Contr. Corp., 149 A.D.3d 500, 503 (1st Dep't 2017); Paulino v. Bradhurst, LLC, 144 A.D.3d 430, 431 (1st Dep't 2016).

IV. CONCLUSION

For the reasons explained above, the court grants defendants' motion to the extent of dismissing plaintiff's Labor Law § 241(6) claim based on violation of 12 N.Y.C.R.R. §§ 23-1.7(f) and 23-3.3(e) and awarding summary judgment in defendants' favor on their contractual indemnification claim against third party defendant, but otherwise denies their motion. C.P.L.R. §

3212(b) and (e). This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: January 24, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.