

Stack v Metropolitan Transp. Auth.
2020 NY Slip Op 31598(U)
May 29, 2020
Supreme Court, New York County
Docket Number: 157479/2014
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

JAMES STACK,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, CS
BRIDGE CORP., MILLER DRUCK SPECIALTY
CONTRACTING, INC., RIZZO ASSOCIATES, INC.

Defendants.

-----X

INDEX NO. 157479/2014

MOTION DATE 01/10/2020

MOTION SEQ. NO. 002 003

**DECISION
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 85, 89, 90, 94, 95, 96, 97, 98, 100, 101, 102, 133, 135, 137, 139, 142, 155, 156, 161

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 86, 87, 91, 92, 93, 99, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 136, 138, 140, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 157, 158, 159, 160, 163, 164, 165

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

Motion Sequences Nos. 002 and 003 are hereby consolidated for disposition and resolved as follows:

Background

This is an action for personal injuries brought by plaintiff, James Stack, as the result of an accident that occurred in a construction site located at the Metropolitan Transit Authority (“MTA”) Fulton Street Transit Center in Manhattan. Plaintiff was a laborer employed by the general contractor of the construction project, Plaza Construction (“Plaza”), a non-party to this action. Plaintiff claims that, immediately subsequent to the delivery of a dumpster container to

the construction site, plaintiff was injured while attempting to close one of two gates that opened outward from a perimeter fence onto the adjacent street. While plaintiff was in the process of closing that gate, a gust of wind caused the other gate to strike his body, causing him to fall and/or make contact with a nearby container. Plaintiff alleges that the gates were not properly secured, restrained, anchored, or fastened, and that this, along with the improper placement and storage of construction materials within the enclosed area, was a proximate cause of his injuries.

Stack was an employee of Plaza Construction Corp (“Plaza”), the general contractor of the construction site, and took instruction exclusively from Plaza. NYSCEF Doc. No. 58. Plaza retained various subcontractors, including CS Bridge Corp (“CS Bridge”), which constructed and installed the gates at issue in accordance with Plaza Construction’s specifications; Miller Druck Specialty Contracting, Inc. (“Miller Druck”), the stone flooring and granite tile contractor; and Rizzo Associates (“Rizzo”), who delivered and picked up the containers and dumpsters.

The alleged accident occurred after Rizzo delivered a dumpster through gates at the delivery entrance of the site. As plaintiff was in the process of placing a chain for the lock on right-side gate a, gust of wind caused the left-side gate to swing toward and strike him. Plaintiff subsequently fell and hit the dumpster delivered by Rizzo. Plaintiff stated that he did not secure the left-side gate and that there were no holes to anchor the gate when opened. Further, plaintiff alleges that the gate was opened outward instead of inward because there was a stone pallet protruding into the driveway.

As a result of the alleged injuries, plaintiff brought claims against defendants for violations of Labor Law sections 200, 240(1), 241(6) and common law negligence. In their answer, Metropolitan Transportation Authority (“MTA”) subsequently filed cross-claims as against Miller Druck for contribution, common-law indemnification, contractual indemnification

and breach of contract for failure to procure insurance. Miller Druck also filed cross-claims against MTA for contribution, common-law indemnification, contractual indemnification and breach of contract for failure to procure insurance.

Motion Sequence No. 002

In Motion Sequence No. 002, defendant, Miller Druck, moves the Court pursuant to CPLR 3212 for summary judgment and dismissal of the complaint and all cross-claims.

Plaintiff's claims under Labor Law sections 240(1) & 241(6) against Miller Druck

The Court notes that nowhere in the various opposition papers submitted by plaintiff in opposition to the motions does plaintiff discuss or address the viability of its claims under sections 240(1) or 241(6) of the Labor Law. Accordingly, those claims are dismissed as against Miller Druck.

Plaintiff's Labor Law section 200 and common law negligence claims against Miller Druck

Labor Law section 200 codifies the common law duty of an owner or general contractor to provide workers with a safe place to work. *See Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343 (1998). Subcontractors, such as Miller Druck, can only be held liable for injuries on a worksite if they have the authority to supervise or control the area or work that caused plaintiff's harm. *See Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 311 (1981) (an implicit precondition to the common-law duty "is that the party to be charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition"); *Singh v. Black Diamonds L.L.C.*, 24 A.D.3d 138, 139-40 (1st Dep't 2008). Here, Miller Druck, through a showing of deposition testimony, has met its burden that they did not have the authority to supervise or control the area or work that caused plaintiff's harm. Charles Krammer, a Plaza employee and superintendent at the accident site, testified that Plaza

was the General Contractor for the project. *See* NYSCEF Doc. No. 60. Krammer also admitted that Plaza hired the subcontractor who built the perimeter fence around the site, CS Bridge. *Id.* at p.40. Further, Krammer testified that it was Plaza's responsibility to ensure that the gate opened correctly. *Id.* Finally, plaintiff himself stated that he only took instructions from Vinny Amato, the site foreman and employee of Plaza. NYSCEF Doc. 58 at 43. Thus, plaintiff was injured while under the supervision and control of Plaza, not Miller Druck.

Moreover, this case involves an injury allegedly caused by a dangerous condition at the worksite, specifically an allegedly improperly installed or constructed gate. Where a plaintiff's injuries stem not from the manner in which the work was being performed, but rather from a dangerous condition on the premises, a contractor cannot be held liable under common-law negligence or Labor Law section 200, absent evidence that the party actually created the dangerous condition or had actual or constructive notice of it (*see DeMaria v RBNB 20 Owner, LLC*, 129 A.D.3d 623, 625 [1st Dep't 2015]; *Sotomayer v Metropolitan Transit Authority*, 92 A.D.3d 862, 863 [2d Dep't 2012]). Here, there is no evidence that Miller Druck created the alleged dangerous condition involving the unsecured gate door, nor is there any proof that it had notice of said condition.

The parties opposing the motion have not provided sufficient evidence to rebut the movant's evidence that they did not supervise or control the work or work area and lacked any actual or constructive notice of the defective gate. Rather, the parties opposing the motion argue that there are material questions of fact regarding whether the placement at the job site of the pallets delivered by Miller Druck forced the workers to open the gate outward instead of inward. These arguments miss the mark. First, none of these arguments rebuts the fact that Miller Druck did not supervise or control either the work or work area. Second, it is undisputed that the

proximate cause of the accident was the gate. Third, the parties opposing the motion have offered no evidence that Miller Druck had any connection to the instrument of harm – the gate. Plaintiff's theory regarding the placement of the stone pallets is, at best, strained and does not explain why the pallets prevented plaintiff or any of his co-workers from properly securing the gate prior to attempting to close it. Additionally, Miller Druck has put forth uncontroverted deposition testimony establishing that Miller Druck had no control or authority over the either the gate or the placement of the stone pallets within the enclosed area of the construction site. Krammer testified that Plaza's labor foreman, Vinnie Amato, coordinated the delivery of Miller Druck's stone with the site's dockmaster. Amato also was responsible for determining where the materials and the dumpsters were placed on the site, and that Plaza employees were responsible for maintaining the area inside the gate and directing Miller Druck's employees as to where they should perform their work and/or store their materials. *See* NYSCEF Doc. No. 60, pp. 86, 90-91, 99-100. Thus, even assuming that the placement of the stone pallets somehow could be part of the dangerous condition at the job site, the unrebutted deposition testimony establishes that Miller Druck had no role in creating the allegedly dangerous condition at the job site that caused plaintiff's accident, nor that it had actual or constructive notice of any condition that could have proximately caused plaintiff's inability to secure the gate. Accordingly, the Labor Law section 200 and common law negligence claims against Miller Druck are dismissed.

MTA's cross-claims against Miller Druck for contractual indemnification

In light of the dismissal of the main action insofar as asserted against the MTA¹, the MTA's cross-claims against Miller Druck, are dismissed as academic. *See Hoover v. Int'l Bus Machs. Corp.*, 35 A.D.3d 371, 372 (2nd Dep't 2006)

¹ See Motion Sequence 003 *infra*.

CS Bridge's cross-claim against Miller Druck

In the absence of evidence of Miller Druck's negligence, Miller Druck is entitled to summary judgment dismissing CS Bridge's cross-claim for contribution. *See Wilk v Columbia Univ.*, 150 A.D.3d 502, 504 (1st Dep't 2017).

Motion Sequence No. 003

In Motion Sequence No. 003, defendant MTA moves the Court pursuant to CPLR 3212(b) for: (i) summary judgment dismissing plaintiff's claims against the MTA under Labor Law sections 240(1), 241(6) and 200, and common-law negligence; (ii) summary judgment separately dismissing with prejudice plaintiff's Labor Law section 241(6) claim to the extent predicated on an alleged violation of 12 NYCRR section 23-2.1 and to the extent there is a claim for damages based on alleged hearing loss, as untimely as against the MTA for plaintiff's failure to include this regulation or allegation of damages in the Notice of Claim; (iii) summary judgment as against defendants CS Bridge Corp., Miller Druck Specialty Contracting, Inc. and Rizzo Associates, Inc. on the MTA's cross-claims for contractual indemnification; and (iv) summary judgment dismissing all cross-claims asserted against MTA, including CS Bridge's cross-claim for contribution, and Miller Druck's cross-claims for common-law indemnification, contribution, contractual indemnification and breach of contractual obligation to procure liability insurance.

Defendant Rizzo cross-moves for summary judgment seeking dismissal of plaintiff's complaint and of all cross-claims asserted by any other party to this action. Defendant CS Bridge cross-moves for summary judgment seeking dismissal of plaintiff's claims under Labor Law sections 200, 240(1) and 241(6), and plaintiff's common law negligence claim.

Plaintiff's claims against MTA under Labor Law sections 240(1), 241(6), 200 and negligence

As plaintiff did not oppose the branch of MTA's motion seeking dismissal of plaintiff's claims under Labor Law sections 240(1) or 241(6), summary judgment is granted in favor of MTA dismissing these claims. Plaintiff also does not contest MTA's assertion that plaintiff's claim of damages for hearing loss should be disallowed as it was not part of the Notice of Claim that was filed prior to the commencement of this action. Accordingly, plaintiff's claim of damages for hearing loss is dismissed.

That leaves plaintiff's claims against MTA for violation of Labor Law section 200 and common-law negligence. MTA argues that those claims should be dismissed on the grounds that it did not have supervisory control over plaintiff's work activities at the time of the accident and lacked any notice, actual or constructive, of the allegedly defective gate. Actual supervisory control or input into how the work that resulted in plaintiff's injury is performed is required to impute liability under Labor Law section 200. *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 311 (1st Dep't 2007); *Bednarczyk v. Vornado Realty Trust*, 63 A.D.3d 427, 428 (1st Dep't 2009). The MTA did not exercise any supervisory control over plaintiff's work at any time. The MTA did not engage in any conduct that caused the alleged accident. Moreover, the MTA Capital Construction Project Manager Bharat Kothari testified that Plaza made the determination that the subject gate should be built in that location and the MTA "had no say in how [or where] the gate was built." NYSCEF Doc. No. 75, 71:7-9; 74:17- 75:15; 76:2-20. In addition, the movant offers ample evidence through multiple affidavits, including those of plaintiff and other Plaza employees, that there was no notice of a dangerous or defective condition regarding the gate.

In its opposition to the motion, plaintiff failed to raise a triable issue of fact. There is no evidence that plaintiff, plaintiff's employers, or any of the workers at the construction site, ever complained to MTA about the condition of the gate or brought it to their attention. Indeed, the MTA representative at the jobsite testified at his deposition that during his entire time inspecting the jobsite, he never once saw any worker open the gate outward towards the street. Given this lack of notice, MTA's lack of involvement with or control over the worksite, and the nature of the condition that caused plaintiff's accident, it cannot be reasonably concluded that MTA should have anticipated or foreseen the danger to plaintiff. *See Bayo v. 626 Sutter Ave. Assoc., LLC*, 106 A.D.3d 648, 649 (1st Dep't 2013); *Monroe v City of New York*, 67 A.D.2d 89, 96-97 (2d Dep't 1979) ("If the place provided by the owner for work is unsafe because of some hidden defect which reasonable inspection would not have disclosed, the owner will not be held liable if injury results therefrom. He is required to exercise reasonable foresight, but not prophetic vision."). Accordingly, MTA bears no responsibility for causing or creating the allegedly dangerous condition. Nor is there any indication that MTA could have notice of what is essentially a transitory condition, a gate that was not adequately secured against sudden gusts of wind. Accordingly, the branch of MTA's motion for summary judgment seeking dismissal of plaintiff's claims under Labor Law section 200 and common-law negligence is granted.

In view of the foregoing, MTA's motion for summary judgment seeking contractual indemnification against CS Bridge, Miller Druck and Rizzo is denied as moot. As plaintiff's claims have been dismissed against MTA in their entirety, MTA's cross-claims for indemnification are academic. *See Hoover v. Int'l Bus Machs. Corp.*, 35 AD3d 371, 372 (2nd Dep't 2006).

In the absence of evidence of MTA's negligence, MTA is entitled to summary judgment dismissing CS Bridge's cross-claim for contribution. *See Wilk v Columbia Univ.*, 150 A.D.3d 502, 504 (1st Dep't 2017). Further, as plaintiff's claims have been dismissed against Miller Druck in their entirety, Miller Druck's cross-claims against MTA for common-law indemnification, contribution, contractual indemnification and breach of contractual obligation to procure liability insurance are academic and the portion of MTA's motion for summary judgment seeking dismissal these claims are denied as moot.

Defendant Rizzo's cross-motion for dismissal of the complaint and all cross-claims

As plaintiff did not oppose the branch of Rizzo's motion for summary judgment seeking dismissal of plaintiff's claims under Labor Law sections 240(1) or 241(6), this branch of Rizzo's motion is granted and these claims are dismissed as against Rizzo.

The branch of Rizzo's motion for summary judgment seeking dismissal of plaintiff's claims under Labor Law section 200 is also granted. Rizzo's truckdriver, Domenico Recine, who delivered (and/or picked up) the containers or dumpsters always and solely took directions at the Project site from Plaza employees (i.e., the "flagmen"), including plaintiff, who would direct Recine to the specific place the flagmen wanted Recine to drop off or pick up the container. NYSCEF Doc. No. 73. Rizzo's driver had no discretion as to where they were placed and testified that the person "backing him up" into the site would direct where he would drop off the container. *Id.*

The branch of Rizzo's motion for summary judgment seeking dismissal of the cross-claims asserted by the other parties in the action is granted. In the absence of evidence of Rizzo's negligence, summary judgment dismissing the claims for contribution and for common-law indemnification is warranted. *See Wilk, supra.* Additionally, there is no basis for any claim

of contractual indemnification against Rizzo in this matter. Accordingly, all claims and cross-claims against Rizzo are dismissed.

Defendant CS Bridge's cross-motion for dismissal of the complaint and all cross-claims

The branch of CS Bridge's cross-motion for summary judgment seeking dismissal of plaintiff's claims under Labor Law sections 240(1) and 241(6) is granted, as plaintiff did not oppose dismissal of these claims. However, the branch of CS Bridge's cross-motion for summary judgment seeking dismissal of plaintiff's Labor Law section 200 and common law negligence claims is denied. Despite the affidavit from engineer, Thomas Parisi (NYSCEF Doc. No. 146) questions of material fact remain as to the nature of CS Bridge's work on the gate and its relation to the injuries sustained by plaintiff. Accordingly, all claims and cross-claims are dismissed except for plaintiff's claims under Labor Law section 200 and common law negligence.

This constitutes the decision of this Court. Settle order on notice.

5/29/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE



JAMES EDWARD D'AUGUSTE, J.S.C.