Tibillin v Merrick Real Estate Group Inc.
2020 NY Slip Op 32477(U)
June 15, 2020
Supreme Court, Queens County
Docket Number: 704869/2017
Judge: Lourdes M. ventura

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA IAS Part 37
Justice

MILTON TIBILLIN,
Plaintiff,

Index Number: 704869/2017

-against-

Motion Date: September 9, 2019

MERRICK REAL ESTATE GROUP INC., 12 E. 72ND LLC, NORTH SHORE ARCHITECTURAL STONE, INC., and AMERICORE DRILLING & CUTTING, INC.,
Defendants.

Motion Seq. Nos. 1 & 2

The following papers numbered EF17 to EF88 read on this **(1)** motion by North Shore Architectural Stone, Inc. ("North Shore"), for summary judgment in its favor dismissing the complaint and all cross claims insofar as asserted against it; **(2)** motion by Merrick Real Estate Group, Inc. and 12 E. 72nd LLC (together referred to herein as "the owner defendants"), for summary judgment in their favor dismissing all claims and cross claims against them, and for summary judgment in their favor on their cross claim for indemnification from North Shore; **(3)** cross motion by plaintiff for summary judgment in his favor against North Shore on his Labor Law claims pursuant to CPLR 3212; and **(4)** cross motion by plaintiff for summary judgment in his favor on his Labor Law claims against the owner defendants, pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF17-EF56
Notices of Cross Motions - Affidavits - Exhibits.	EF59-EF75
Answering Affidavits - Exhibits	EF57-58, 77, 81-85
Reply Affidavits	EF76,78-80, 86-88

Upon the foregoing papers it is ordered that the motions and cross motions are combined herein for disposition, and determined as follows:

Plaintiff in this Labor Law action seeks damages for injuries sustained in a construction accident on September 2, 2015, when two stone slabs fell onto him as he was working near a parapet wall. The accident occurred during the course of a renovation project of a residential building located at 12 East 72nd Street, in New York City ("premises"). Co-defendant 12 E. 72nd LLC owned the subject premises and hired co-defendant Merrick Real Estate Group Inc. ("Merrick"), to act as general contractor for the project. Merrick, in turn, retained sub-contractor North Shore to install the flooring on the terrace; this included the installation of heavy stone slabs. Plaintiff, who was employed by non-party Big Apple Construction ("Big Apple"), claims that while he was placing capstones on top of the parapet wall on the building's rooftop, a nearby stone slab fell upon his knee, causing plaintiff to sustain physical injuries. As a result, plaintiff commenced the instant action, asserting causes of action against defendants for violations of Labor Law §200, §240(1), and §241(6) and for common law negligence.

Defendants, as provided above, move for summary judgment in their favor on the grounds that, inter alia, plaintiff was the sole proximate cause of the subject accident and that the accident could not have happened as plaintiff testified. Plaintiff opposes the motions and cross moves, in two separate cross motions, for summary judgment in his favor on his Labor Law claims. The cross motions are opposed by defendants.

Facts

Plaintiff testified as herein relevant, as follows: As of the date of the accident, September 2, 2015, plaintiff was employed by Big Apple and was performing work at 12 E. 72nd Street. Generally, the scope of the project involved the renovation of a residential building. On the date in question, plaintiff was installing coping/capstones on the parapet wall alongside the corridor. On the date of the accident, there were stone slabs that were leaning against the wall on which plaintiff was working. According to plaintiff, these slabs were in his way. Plaintiff denied touching or trying to move these slabs. Plaintiff testified he previously had asked "Willy" (William Peña), for the slabs to be moved out of his way, but that the slabs were not moved. Plaintiff was preparing to install coping on the parapet wall and to that end, he removed a blue plastic tarp which had been placed over the stone slabs.

As plaintiff was moving the coping, in a direction away from the slabs, one of the stone slabs fell upon plaintiff's right leg, seemingly for no reason, causing plaintiff to suffer physical injuries.

Barry Blenis testified on behalf of 12 E. 72nd LLC as follows: Steven Croman was the owner of the subject building, however, Blenis explained that he acted as Croman's "representative" on the subject construction. He was not paid for his work; rather, Blenis worked on this project as a "favor" to Croman. As the owner's representative on the subject project, Blenis was responsible for reviewing forms for overages, overseeing general contractor tickets for removal and delivery of materials as well as for general oversight. Blenis explained that the project at 12 E. 72nd Street was a gut renovation of the entire building to turn it into a single residence for Croman and his family. He further confirmed that Merrick was retained as the general contractor and construction manager on the job and, as such, was responsible for the overall work site safety on the date of loss. Merrick also directed, supervised, monitored, coordinated and administered the work on the site; was responsible for the delivery and storage of all materials on the site; and had authority to correct an issue if materials were being used or stored in an unsafe manner. Blenis also testified that Merrick provided a written site safety plan and was responsible for enforcing all of the procedures and policies in the site safety plan. Additionally, Blenis testified that he himself had the authority to stop any work performed in an unsafe manner. If he observed the unsafe storage of materials, Blenis had the authority to inform the owner, but not to correct it. Lastly, Blenis explained that North Shore was hired to do all the stone work on the job. North Shore was responsible for moving the stone slabs; however, Blenis unequivocally and affirmatively testified Merrick determined how and where stone slabs would be stored.

William Peña testified on behalf of Merrick, as follows: Peña has been employed by Merrick for over a decade. At the time of plaintiff's accident, Peña held the title of project manager. As a project manager, Peña generally coordinated the work and monitored the project schedule. He was also responsible for the enforcement of safety rules and regulations. Peña conceded that he had the right to stop unsafe work. Moreover, he had the authority to tell contractors when and where work was to be performed. Peña testified he would do daily routine walk-throughs to check on the progress of the work and to make sure that all work was being done safely. He also indicated that his daily walk-throughs included walking to the penthouse where this accident occurred. Peña similarly confirmed Merrick was the

general contractor on this project, which began sometime in 2012. Peña admitted plaintiff approached him the day before the accident and complained about the location of the stone slabs on the roof. Peña testified he instructed Mario Morales, a foreman for North Shore, to move the slabs so that plaintiff could work in the area thereat. Morales agreed to move the slabs the next morning (the date of the accident). Because the slabs weighed upwards of 400 lbs. and required five or six men to move, Peña did not think that Morales' response was unreasonable. Significantly, Peña testified he had no safety issues concerning the positioning of the stone slabs. Rather, he was merely concerned with the stone slabs possibly damaging the parapet wall. Finally, Peña testified that when he visited plaintiff at the hospital, plaintiff stated that he had attempted to move the stone slabs by himself on the date of the subject accident.

Mario Morales testified on behalf of North Shore, as follows: at the time of plaintiff's alleged accident, Morales held the title of field operations manager. He was essentially in charge of North Shore's day-to-day work at the subject site. Morales testified Merrick retained North Shore as a flooring subcontractor. North Shore's work included installing stone slabs on the terrace floor. The slabs themselves varied in size and were made of "Jet Mist" granite. They each weighed between 650-700 pounds, and required several men to relocate the slabs. Through Merrick, North Shore consulted with the structural engineer to determine where the slabs could be stored prior to installation; due to their extreme weight they had to rest in line with one of the building's structural support beams. Merrick had the authority to tell North Shore where to store the slabs. North Shore was the only contractor at the site that moved or otherwise manipulated the slabs. No other company was permitted to do so. It took about six workers to move an individual slab, using crowbars and dollies to assist. The last four slabs to be installed, including the subject slabs that fell on plaintiff, had been leaning against the parapet wall for approximately two weeks before the subject accident occurred. Morales testified that the slabs could not have been stacked flat like pancakes due to the "forward progress of the work" (i.e. they would have been in the way), as well as due to their weight, and stated that laying even one of them flat on the already installed slabs risked damaging the floor. Morales unequivocally and affirmatively testified that Merrick inspected "everything" every day, including the storage and placement of all materials. Merrick, as the general contractor, was responsible for overall site safety and had authority to correct any unsafe site conditions. According to Morales, Merrick was undoubtedly aware of the leaning slabs as they were in plain view, and never expressed any concern or made any

complaints. Morales testified that leaning the slabs against the parapet wall was absolutely not a safety hazard in that there was no way they could or would have tipped over or otherwise moved on their own. Morales also acknowledged that approximately one-and-a-half weeks prior to the accident, Peña requested that North Shore move the subject slabs because they were impeding plaintiff's work. North Shore, however, was unable to move the slabs at that time due to lack of manpower.

Finally, Morales identified the subcontract between Merrick and North Shore. §7 of the contract provides the following:

> To the fullest extent permitted by law, the Contractor shall and hereby does indemnify, defend, and hold harmless the Owner, Construction Manager, Indemnitees, and their respective parent companies…from and against all claims or causes of action, damages, losses and expenses, including but not limited to reasonable attorneys' fees and legal costs and expenses, resulting from the performance or non-performance of Contractor's Work, or the Contractor's operations, or the condition of the Site where Contractor's Work on the Project is being performed…

Discussion

To prevail on a cause of action pursuant to section 240 (1) in a " 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein' " (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). This requires a showing that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking (*Berman-Rey v Gomez*, 153 AD3d 653, 655 [2d Dept 2017]; *see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 662-663; *Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268). Labor Law § 240 (1) "does not automatically apply simply because an object fell and injured a worker" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 663).

In support of their motions, defendants made prima facie showings of their entitlement to summary judgment dismissing the Labor Law § 240 (1) cause of action by demonstrating that the stone slabs were not objects being hoisted or that required

securing for the purpose of the undertaking, and that did not fall because of the absence or inadequacy of an enumerated safety device (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 663; *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]; *Vatavuk v Genting N.Y., LLC*, 142 AD3d 989, 990 [2d Dept 2016]).

In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, the affidavit of his expert is speculative, conclusory, and unsupported by the facts (*see Rodriguez v D & S Builders, LLC*, 98 AD3d 957, 958-59 [2d Dept 2012]; *Delgado v County of Suffolk,* 40 AD3d 575, 576 [2d Dept 2007]; *DeLeon v State of New York,* 22 AD3d 786, 788 [2d Dept 2005]).

The branches of the motion which are to dismiss plaintiff's Labor Law 200 and common law negligence claims against defendants are denied. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *see Dos Anjos v Palagonia,* 165 AD3d 626, 627 [2d Dept 2018]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 822 [2d Dept 2017]). " 'Labor Law § 200 [is a codification of] the common law duty of an owner or [general] contractor to [maintain a safe construction site]' " (*Cooper v State of New York,* 72 AD3d 633, 635 [2d Dept 2010], quoting *Lane v Fratello Constr. Co.,* 52 AD3d 575, 576 [2d Dept 2008]; *see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]). Claims arising under Labor Law § 200 fall into two categories, "namely those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia,* 57 AD3d 54, 61 [2d Dept 2008]). To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to supervise or control the methods or materials of a plaintiff's work (*see Pacheco v Smith,* 128 AD3d 926 [2d Dept 2015]; *Rojas v Schwartz,* 74 AD3d 1046, 1046 [2d Dept 2010]). Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be held liable under Labor Law § 200 if it " 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition' " (*Vazquez v Humboldt Seigle Lofts, LLC*, 145 AD3d 709, 710 [2d Dept 2016], quoting *Rojas v. Schwartz,* 74 AD3d at 1047, quoting *Ortega v Puccia,* 57 A.D.3d at 61). Where, as here, a plaintiff's alleged injury arose from a dangerous condition on

the premises, a property owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 has the initial burden of showing that he or she neither created the dangerous condition nor had actual or constructive notice of it (*see Ventimiglia v Thatch, Ripley & Co., LLC,* 96 AD3d 1043, 1046 [2d Dept 2012]; *Rodriguez v BCRE 230 Riverdale, LLC,* 91 AD3d 933, 934 [2d Dept 2012]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected (*see Gordon v American Museum of Natural History,* 67 NY2d 836, 837 [1986]; *Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]; *Rendon v Broadway Plaza Assoc. Ltd. Partnership,* 109 AD3d 975, 977 [2d Dept 2013]). Here, the submissions of the defendants reveal that issues of fact exist, inter alia, as to whether the defendants either created or had actual or constructive notice of the alleged dangerous condition that caused the plaintiff's accident (*see Latino v Nolan & Taylor–Howe Funeral Home,* 300 AD2d 631 [2d Dept 2002]; *Garcia v Silver Oak USA,* 298 AD2d 555 [2d Dept 2002]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000]).

Defendants are entitled to summary judgment dismissing so much of the Labor Law § 241(6) cause of action as is predicated upon violations of 12 NYCRR 23–2.1(a)(1) and (2), and denies that branch of the plaintiff's cross motions which are for summary judgment on the issue of liability on those portions of the causes of action. A plaintiff asserting a cause of action under Labor Law § 241(6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 349 [1998]; *Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 503–505 [1993]; *Forschner v Jucca Co.,* 63 AD3d 996, 998 [2d Dept 2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866, 868 [2d Dept 2008]). Here, defendants demonstrated, prima facie, that 12 NYCRR 23–2.1(a)(1) does not apply to the facts of this case since plaintiff's accident did not occur on a "passageway, walkway, stairway or other thoroughfare" (*see Cody v State of New York,* 82 AD3d 925, 928 [2d Dep 2011]; *Barrios v Boston Props. LLC,* 55 AD3d 339, 340 [1st Dept 2008]; *Waitkus v Metropolitan Hous. Partners,* 50 AD3d 260, 260 [1st Dept 2008]; *Castillo v Starrett City*, 4 AD3d 320, 321 [2d Dept 2004]). Additionally, they demonstrated, prima facie, that 12 NYCRR 23–2.1(a)(2) does not apply to the facts of this case since plaintiff was not "beneath" the "edge" of a "floor, platform or

scaffold" at the time of the accident (see *Rodriguez v D & S Builders, LLC*, 98 AD3d 957, 959 [2d Dept 2012]).

The remaining Industrial Code provisions which plaintiff alleged to have been violated, to wit, 23-1.7(a)(1) and 23-1.7(a)(2) [overhead hazards]; 23-2.1(b) (disposal of debris); and 23-2.2[b] (stability or all shores and reshores), are not applicable to the facts of this case, as the subject slabs were stored on the floor, was not debris and was not a "shore" or "reshore", respectively. It is also noted that plaintiff does not assert the aforesaid provisions in his cross motions for summary judgment on his Labor Law § 241[6] claims.

The branch of the motion by the owner defendants which is for contractual indemnification from North Shore, is denied. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.,* 58 AD3d 660, 662 [2d Dept 2009]; *see* General Obligations Law § 5–322.1; *Hirsch v Blake Hous., LLC,* 65 AD3d 570, 571[2d Dept 2009]). Labor Law § 200 is a codification of the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). When an accident arises from a dangerous condition on the premises, an owner may be held liable if it created the condition or failed to remedy it despite having actual or constructive knowledge of it (*see Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d at 763; *Fuchs v Austin Mall Assoc., LLC*, 62 AD3d 746, 747 [2009]; *Chowdhury v Rodriguez*, 57 AD3d at 128).The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections" (*Kennedy v McKay,* 86 AD2d 597, 598 [2d Dept 1982]; *see Colon v. Bet Torah, Inc.,* 66 AD3d 731, 732 [2d Dept 2009]; *Wynne v State of New York,* 53 AD3d 656, 658 [2d Dept 2008]), and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact (*see Urban v. No. 5 Times Sq. Dev., LLC,* 62 AD3d 553, 555 [1st Dept 2009]). Moreover, if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition (*see Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2003]). Here, the undisputed record indicates that the alleged dangerous

condition was present on the premises for at least two weeks prior to plaintiff's accident. Accordingly, the owner defendant failed to establish that they were free from negligence as a matter of law (*see Hirsch v. Blake Hous., LLC,* 65 AD3d at 571; *Lane v Fratello Constr. Co.,* 52 AD3d 575, 576 [2d Dept 2008]; *Keating v Nanuet Bd. of Educ.,* 40 AD3d 706, 708–709 [2d Dept 2007]). Consequently, that branch of the owner defendants' motion which is for summary judgment on their cross claim for contractual indemnification from North Shore, is denied.

For the reasons provided in the discussion supra, the cross motions by plaintiff for summary judgment in his favor against North Shore and the owner defendants, respectively, are denied.

Conclusion

The branches of the motions by North Shore and the owner defendants to dismiss the plaintiff's Labor Law § 240 (1) claims, are granted.

The branches of the motions which are to dismiss plaintiff's Labor Law § 200 and common law negligence claims against defendants are denied.

The branches of defendants motions which are to dismiss plaintiff's Labor Law § 241(6) cause of action as is predicated upon violations of 12 NYCRR 23–2.1(a)(1) and (2), are granted.

The branch of the motion by the owner defendants which is for contractual indemnification from North Shore, is denied.

The cross motions by plaintiff are denied.

Dated: June 15, 2020

LOURDES M. VENTURA, J.S.C.