Diaz v New York City Hous. Auth.
2020 NY Slip Op 33210(U)
September 29, 2020
Supreme Court, Kings County
Docket Number: 522841/16
Judge: Debra Silber

At an IAS Term, Part 9, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of September, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice,

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ROBERT F. DIAZ, JR. AND MARIE DIAZ,

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY AND JACOBS PROJECT MANAGEMENT CO.,

Defendants.

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JACOBS PROJECT MANAGEMENT CO.,

Third-Party Plaintiff,

-against-

KORDUN CONSTRUCTION CORP.,

Third-Party Defendant.

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DECISION/ORDER

Index No. 522841/16

Mot. Seq. # 10

The following e-filed papers read herein:	NYSCEF Doc. Nos.[1]
Notice of Motion and Affidavits (Affirmations) and Exhibits Annexed	213, 215
Opposing Affidavits (Affirmations)	224, 240

[1] New York State Courts Electronic Filing Document Number

Upon the foregoing papers, defendant/third-party plaintiff Jacobs Project Management Co. (Jacobs) moves, in motion (mot.) sequence (seq.) 10, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the plaintiffs' complaint and any cross claims asserted against it.

Jacobs' motion is granted only to the extent that plaintiffs' common-law negligence and Labor Law § 200 causes of action are dismissed as against it and is otherwise denied.

BACKGROUND

The instant action arises from a June 30, 2016 construction site accident in which plaintiff Robert Diaz sustained injuries when he fell from a scaffold while working in the basement of Building 13 of the Gravesend Houses in Coney Island.[2] The Gravesend Houses are owned by defendant New York City Housing Authority (NYCHA) and the underlying project involved the replacement of boilers in numerous NYCHA buildings that had been damaged during Superstorm Sandy. As is relevant here, NYCHA hired Jacobs to serve as the construction manager for the project and hired plaintiff's employer, third-party defendant Kordun Construction Corp. (Kordun), to, among other functions, install temporary boiler units outside the buildings and connect them into the existing heating system until the new permanent boilers were installed.

It is undisputed that, on the date of the accident, plaintiff was instructed by his supervisor to build a scaffold in the boiler room in order to allow workers to access pipes near the basement's ceiling, which was 18 to 35 feet above the ground. According to plaintiff's deposition testimony, the accident occurred while he was standing on the first

[2] Plaintiff Maria Diaz's claims are derivative only. All singular references to plaintiff relate to plaintiff Robert Diaz.

level of the scaffold, 10 to 12 feet above the ground, as he was attempting to install a section of the scaffold on the level above him, when the planks under him "kicked out," causing him to fall off of the scaffold and onto the basement floor, sustaining injuries.

Plaintiff commenced this action on December 22, 2016 and asserted causes of action against the defendants premised on common-law negligence as well as violations of Labor Law §§ 200, 240 (1), and 241 (6).[3] Upon answering, NYCHA cross-claimed against Jacobs, and Jacobs commenced a third-party action against Kordun. After issue was joined, the court, in an order dated August 9, 2018, denied plaintiffs' first motion, mot. seq. one, for partial summary judgment, as premature. In February 2019, plaintiffs again moved, in mot. seq. four, for summary judgment, and Jacobs, NYCHA and Kordun also moved, in mot. seq. six, for summary judgment in their favor. In the June 13, 2019 order which resolved mot. seq. five (*see* n 3, below) the court granted NYCHA's and Kordun's motion, mot. seq. six, to the extent that it dismissed plaintiff's Labor Law § 200 and common-law negligence causes of action as against NYCHA and Kordun, and denied the remainder of the parties' motions, mot. seqs. four and six, without prejudice to their being renewed after the completion of discovery.[4] Once discovery was complete, plaintiffs again moved, in mot. seq. nine, for partial summary judgment in their favor on the Labor Law §§ 240 (1) and 241

[3] Plaintiff also asserted those causes of action against Jacobs Engineering Group, Inc., but that defendant was dismissed from the action as an improper party by an order, in mot. seq. five, dated June 13, 2019 and entered June 18, 2019.

[4] The court notes that plaintiffs presently oppose Jacobs' current motion, mot. seq. 10, on the ground that Jacobs had previously moved, in mot. seq. 5, for summary judgment. As the prior denial of Jacobs' motion, mot. seq. 5, was specifically made without prejudice to Jacobs' renewing the motion, and as the prior denial imposed no conditions on such renewal, the court rejects plaintiffs' argument that Jacobs' motion, mot. seq. 10, must be denied because of the prior decision for mot. seq. 5.

(6) causes of action as against NYCHA, and the court, in an order dated and entered May18, 2020, denied the motion, mot. seq. nine, because it found that there were factual issues as to whether plaintiff's actions in the construction of the scaffold constituted the sole proximate cause of the accident.

STATUTORY AGENCY

In moving for summary judgment, Jacobs initially contends that it may not be held liable under the Labor Law because it was not an owner, general contractor or statutory agent. An entity hired as a construction manager that is not in contractual privity with the plaintiff's employer is generally not responsible for the plaintiff's injuries under Labor Law §§ 200, 240 (1) and 241 (6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Maurisaca v Bower at Spring Partners, L.P.*, 168 AD3d 711, 712 [2d Dept 2019]; *Barrios v City of New York*, 75 AD3d 517, 518-519 [2d Dept 2010]). The label of "construction manager", however, is not, in and of itself, determinative, and an entity identified as a construction manager may be held vicariously liable as an agent of the owner under the Labor Law where the construction manager had the ability to control the activity that brought about the injuries (*see Walls*, 4 NY3d at 863-864; *Maurisaca*, 169 AD3d at 712; *Barrios*, 75 AD3d at 518-519). As noted by the Court of Appeals, "when the work giving rise to these duties [imposed by sections 200, 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *see Walls*, 4 NY3d at 864).

In considering Jacobs' authority to supervise and control the work, the court notes that there is no dispute that Kordun was hired directly by NYCHA, and Jacobs and Kordun are thus each prime contractors (*see Russin*, 54 NY2d at 316-318). Accordingly, the extent of Jacob's authority over plaintiff's work turns primarily on the terms of its contract with NYCHA (Contract), and here, in addition, the terms of NYCHA's Requests for Proposals (RFP) (*see* NYSCEF Doc. No. 217, annexed as exhibit E to Jacobs' moving papers) which were specifically incorporated into the Contract (Contract § 1.3). While the Contract provided that Jacobs was "not generally" designated as NYCHA's agent, it further provided that Jacobs was NYCHA's agent to the extent stated as having been delegated to Jacobs pursuant to the agreement (Contract §§ 4.2, 4.3). The RFP required Jacobs to administer the construction phase of the work by, among other acts, scheduling and coordinating the work (RFP § 2.2.2) and monitoring its progress and quality (RFP §§2.2.4, 2.2.7). The RFP provided that Jacobs maintain competent full-time staff at the project site at all times that workers were performing work, and to conduct meetings with the workers relating to the work (RFP §§ 2.2.2, 2.2.10). With respect to safety, RFP § 2.2.12 provided that:

> "[Jacobs] shall require the CCs [construction contractors] to submit their site specific safety plan to [Jacobs] for review and written approval. [Jacobs] shall serve a central role in dissemination of safety-related information between the CCs and NYCHA. [Jacobs] shall not have control over or charge of the work and [Jacobs] shall not be responsible for the CCs means, methods, techniques, sequences or procedures, and/or for safety precautions and plans in connection with the work of the CCs, since these are solely the CCs' responsibility. [Jacobs] shall, however, have the requirement and right to implement an immediate stop work order or corrective action to the CCs on behalf of NYCHA in the event of an unsafe work condition. [Jacobs] shall notify NYCHA immediately upon

> issuing such an order and also notify NYCHA after the event has been mitigated. [Jacobs] shall not be responsible for CCs' failure to carry out the work in accordance with the CCs safety plans, and/or applicable safety rules and regulations. Nevertheless, [Jacobs] shall promote safety and endeavor to guard against the creation of unsafe conditions by any CC. The CC shall provide the services of a New York City licensed Site Safety Manager to prepare a Site safety plan for [Jacobs'] review and written approval. Where the Project involves façade restoration, rehabilitation and/or repair, or if the Project is of such magnitude that New York City Code requires the services of a Certified Site Safety Manager[,] [Jacobs] is required to provide one on site on an 'as needed' basis during construction" [emphasis added].

In addition to these contractual requirements, the deposition testimony of the parties shows that, while none of Jacobs' personnel were in the basement at the time of the accident, there were Jacobs' personnel on the site that day and every day of the project. Jacobs' deposition witness Richard Fennema admitted that Jacobs had authority to stop a contractor's work if there was an imminent threat to life, although he was not aware if Jacobs had exercised such authority during this project. Another Jacobs' deposition witness, Luigi Chiechi, testified that, while he does not recall Jacobs having stopped the work, he does recall Jacobs stopping particular unsafe activities. Chiechi testified, for example, that if Jacobs' people saw a contractor using a ladder with a broken step, Jacobs' people would speak directly to the worker and his or her foreperson and tell them to replace the ladder with a proper piece of equipment (NYSCEF Doc. No. 228, Chiechi deposition tr at 23, line 11, through 24, line 3). Fennema further conceded that working on an unsafe scaffold was the kind of condition that would have warranted stopping work, or requiring correction (NYSCEF Doc. No. 227, Fennema deposition tr at 21, line 13, through 22, line 6). Plaintiff,

in his deposition testimony, stated that, at one point during the project, Jacobs had stopped him from using a cage he had constructed because it was not OSHA-compliant (NYSCEF Doc. No. 220, Diaz deposition tr at 126, line 19, through 127, line 5).

Based on these Contract terms and the deposition testimony, the court finds, as a matter of law, that Jacobs was acting as a statutory agent for NYCHA during the course of the project. While the RFP language states that Jacobs was not responsible for the contractors' means, methods and safety precautions, which seems to be intended to impose some limits on Jacobs' responsibility with regard to the contractors, its broad contractual responsibility for the overall direction of the project, its responsibility to monitor the safety of the contractors' work and its ultimate responsibility to step in and stop or correct unsafe work practices, which authority it regularly exercised to the extent of correcting unsafe work practices, according to the deposition testimony of plaintiff and Luigi Chiechi, support the court's conclusion that Jacobs was NYCHA's agent. Contractually, Jacobs served as the eyes, ears and voice of NYCHA, and bore ultimate responsibility for site safety, despite the above noted language that provides for some limitation on this obligation (*see Walls*, 4 NY3d at 864; *Valdez v Turner Constr. Co.*, 171 AD3d 836, 839 [2d Dept 2019]; *cf. Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853, 856-857 [2d Dept 2018]; *Lamar v Hill Intl., Inc..*, 153 AD3d 685, 686 [2d Dept 2017]; *Rios-Rodriguez v City of New York*, 58 Misc 3d 1226 [A], 2018 NY Slip Op 50279, *5 [U] [Sup Ct, Queens County 2018]).

The court notes that Jacobs' responsibilities were quite similar to those found by the appellate courts to demonstrate agency as a matter of law, or at least to create an issue of fact in that regard (see *Walls*, 4 NY3d at 864; *Lind v Tishman Constr. Corp. of N.Y.*, 180

AD3d 505, 505 [1st Dept 2020]); *Barrios,* 75 AD3d at 518-519; *Lodato v Greyhawk N. Am., LLC,* 39 AD3d 491, 493 [2d Dept 2007], all finding agency as a matter of law) and (See *Maurisaca,* 168 AD3d at 712-713; *Santos v Condo 124 LLC;* 161 AD3d 650, 653 [1st Dept 2018]; *Hall v Queensbury Union Free Sch. Dist.,* 147 AD3d 1249, 1253 [3d Dept 2017]; *Kittelstad v Losco Group, Inc,* 92 AD3d 612, 612-613 [1st Dept 2012]; *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 1131 [2d Dept 2007], all finding the plaintiff raised an issue of fact). Although the language of the contracts at issue in *Giannas* and *Lamar* appears to bear some similarity to the one here, those decisions are distinguishable in that the above noted testimony of plaintiff and Chiechi shows that Jacobs actually exercised some supervisory authority over safety during the project (*cf. Giannas,* 166 AD3d at 856-857; *Lamar,* 153 AD3d at 686-687).

SOLE PROXIMATE CAUSE

As noted in this court's May 18, 2020 decision which denied plaintiffs' motion for summary judgment, mot. seq. nine, the parties generally agreed that the scaffold platform on which plaintiff was standing at the time of his accident was inadequate because: (1) more than two planks are generally required to make a safe platform; (2) the planks that plaintiff used were damaged or otherwise inadequate; and (3) the planks should have been wired, nailed or otherwise secured into position. In opposing the prior motion, NYCHA relied on the deposition testimony of plaintiff's supervisors at Kordun, who asserted, among other things, that plaintiff was fully trained in scaffold construction, and that he knew that ample frame elements and OSHA-compliant planks were available at the work site to build a

proper scaffold.[5] The court considered, in determining mot. seq. nine, whether this testimony was sufficient to demonstrate that plaintiff's own actions were the sole proximate cause of his injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427 [4th Dept 2007]; *Berenson v Jericho Water Dist.*, 33 AD3d 574, 576 [2d Dept 2006]; *Plass v Solotoff*, 5 AD3d 365, 367 [2d Dept 2004], *lv denied* 2 NY3d 705 [2004]; *Heffernan v Bais Corp.*, 294 AD2d 401, 402-403 [2d Dept 2002]). However, the court did not conclude that plaintiff was the sole proximate cause of his accident, and noted that plaintiff's testimony was that the scaffold frames and parts had been sent to another job site, and that the insufficient planks and parts he had used were all that he had available at the job site. This testimony demonstrated the existence of a factual issue with respect to defendants' claim of sole proximate cause (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010] [a plaintiff's actions can only be the sole proximate cause where, among other things, adequate safety devices are readily available]; *Pacheco v Halsted Communications, Ltd.*, 144 AD3d 768, 769 [2d Dept 2016]; *Rice v West 37th Group, LLC*, 78 AD3d 492, 495-496 [1st Dept 2010]). As Jacobs has not identified a factual or legal basis for reaching a different conclusion here, this court finds that plaintiff's testimony demonstrates the existence of factual issues that preclude finding that plaintiff's actions were the sole proximate cause of his accident as a matter of law.

LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE

Turning to the portions of defendant's motion addressed to plaintiff's common-law negligence and Labor Law § 200 causes of action, plaintiff's claims here arise out of the

[5] The facts relevant to the sole proximate cause issue are more fully detailed in the May 18, 2020 decision.

means, methods and manner of performing his work (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671 [2d Dept 2018]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607-608 [2d Dept 2013]). When common-law negligence and section 200 claims arise out of dangers related to the means, methods or manner of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the means and methods ("performance") of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 635-636 [2d Dept 2010]). Without this, an owner's or contractor's authority to stop the work, or their general supervisory authority over the injury-producing work, is insufficient to demonstrate supervision and control for purposes of section 200 of the Labor Law and common-law negligence (*see Poulin*, 166 AD3d at 670-673; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2015]; *Sanchez v Metro Bldrs Corp.*, 136 AD3d 783, 787 [2d Dept 2016]).

In view of the record evidence demonstrating that Kordon's supervisors determined the means and methods of performing the work, and that they were the ones who provided the instructions to plaintiff relating to the injury-producing work, Jacobs has demonstrated its prima facie entitlement to dismissal of the Labor Law § 200 and common-law negligence causes of action. As plaintiff has failed to overcome the motion and present evidentiary proof demonstrating an issue of fact regarding Jacobs' supervision and control of his work,

Jacobs is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action.

NYCHA'S CROSS CLAIMS

Finally, as Jacobs has failed to address NYCHA's cross claims against it in moving for summary judgment, it has not met its burden for summary judgment, and the portion of its motion which seeks (in the notice of motion) to dismiss NYCHA's cross claims must be denied, regardless of the sufficiency of the opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Garcia v Market Assoc.*, 123 AD3d 661, 664-665 [2d Dept 2014]).

Accordingly, it is

ORDERED that Jacobs' summary judgment motion, mot. seq. 10, is granted only to the extent that plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed as against Jacobs, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

E N T E R:

Hon. Debra Silber, J.S.C.