DiGirolomo v 160 Madison Ave. LLC
2020 NY Slip Op 33543(U)
September 24, 2020
Supreme Court, Bronx County
Docket Number: 23865/14E
Judge: Elizabeth A. Taylor
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Δ Summary Judg
Denied

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2

CHRISTOPHER DIGIROLOMO and ARELIS DIGIROLOMO,

Plaintiffs,

Index No. 23865/14E

DECISION/ORDER

-against-

Present:
HON. ELIZABETH A. TAYLOR

160 MADISON AVE LLC, PARKVIEW PLUMBING & HEATING, INC., M.D. CARLISLE CONSTRUCTION, CORP. and NEW YORK CITY ACOUSTICS, INC.,

Defendants.

160 MADISON AVE, PARKVIEW PLUMBING & HEATING, INC. and M.D. CARLISLE CONSTRUCTION, CORP.,

Third-Party Plaintiffs,

Index No.

-against-

NEW YORK CITY ACOUSTICS, INC.,

Third-Party Defendant.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1-7, 8 - 10
Answering Affidavit and Exhibits	10-11, 12, 13-14,
Replying Affidavit and Exhibits	17-18, 19-20, 21-22, 23, 24, 25
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 and Labor Law §§ 200, 240(1) and 241(6), for an order dismissing plaintiff's complaint with any and all cross-claims against defendant Parkview Plumbing & Heating, Inc.; and motion pursuant to CPLR 3212 and Labor Law §§ 200 and 241(6), for an order dismissing plaintiff's complaint with any and all cross-claims against defendants/third-party plaintiffs 160 Madison Ave LLC and M.D. Carlisle

Construction Corp., are consolidated herein for decision and denied.

Plaintiffs commenced this personal injury action seeking damages for injuries allegedly sustained on July 29, 2014, as a result of a trip and fall while Christopher DiGirolomo was working as a journeyman ornamental ironworker at the subject construction site. Defendant 160 Madison Ave LLC (160 Madison) owned the construction site, and had retained defendant M.D. Carlisle Construction Corp. (MDCCC) as the general contractor for the project. Defendant Parkview Plumbing & Heating, Inc. (Parkview) served as the plumbing subcontractor, and 160 Madison contracted with New York City Acoustics (NYCA) to perform carpentry and safety protection at the site. Plaintiff performed iron work at the construction site under the employ of non-party R & R Architectural (R & R), which was the curtain wall subcontractor on the project. Parkview, 160 Madison and MDCCC move to dismiss plaintiff's Labor Law §§ 200 and 241(6) claims. Additionally, Parkiew moves to dismiss plaintiff's Labor Law § 240(1) claims, and Madison and MDCCC move for an order directing NYCA and Parkiew to indemnify them.

It is noted that on September 25, 2019, plaintiffs filed a Stipulation of Discontinuance for their Labor Law § 240(1) claims.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3213, subd [b])" *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065,

1067-1068 [1979]).

In support of the motions, movants submit, *inter alia*, the deposition transcripts of plaintiff Christopher DiGirolomo, Stephan Andonian (MDCC), Frank Mannino (non-party Site Safety, LLC), Michael Ceciliani (NYCA), Christopher Aiello (Parkview) and John Lyons (Parkview).

Mr. DiGirolomo alleges that he was injured when he tripped and fell over an open and uncovered "rough in" penetration, which are holes created in the floors of buildings for the placement of materials, such as for plumbing, piping, wiring, and related objects, like sinks and bathtubs. Mr. DiGirolomo testified that he and his R & R crew had been utilizing a "crab" hoist machine to hang the walls into place on the building's lower floors. Two to three days prior to his accident, he had seen the penetrations on the floor and observed that they were covered with plywood that was typically secured into the floor by nails or screws. When he arrived to the site on the morning of the accident, he did not notice any open and uncovered penetrations on the floor, nor did he observe other subcontractor employees there, except for some carpenters working on perimeter cables. Mr. DiGirolomo further testified that when he walked around one of the columns to adjust the tie-backs for the crab hoist, his right foot got caught in an open and uncovered penetration, causing him to trip and fall. He walked in that area a few days before the accident, and observed that the penetration was covered with plywood at that time.

MDCCC's "site safety program" indicates that its policy is to "never accept any unsafe working condition for any reason and to take immediate corrective action when any safety violation is observed." As per the policy, "[a]ll wall and floor openings shall

be properly protected," and floor covers "shall completely cover the opening or hole and will be secured against displacement and labeled 'Hole Cover: Do Not Remove.'" Stephan Andonian, one of MDCCC's superintendents at the project, testified that MDCCC did not have laborers at the construction site, but the superintendents met with the project's various subcontractors as well as with the safety manager on a weekly basis. Mr. Andonian also performed his own walk through inspections of the site three times per day. He explained that when R & R was working on a floor operating a crab hoist, that floor was considered a "controlled zone" and other contractors were not permitted on the floor due to safety reasons. Mr. Andonian testified that MDCCC's daily reports do not reflect that Parkview worked on the subject floor on July 24th, 25th, 28th and 29th, the day of the accident. According to Mr. Andonian, NYCA was the site's protection contractor, responsible for covering all floor openings and penetrations. The site safety manager was also responsible for doing daily safety inspection walks and reporting back to MDCCC. Mr. Andonian explained that the site safety program's direction to secure floor covers against displacement meant that the plywood covering should be nailed into the concrete.

Frank Mannino testified on behalf of Non-party Site Safety, LLC, which was retained by MDCCC as the construction site's safety manager. He avers that he was at the site daily from 7:00 a.m. to 6:00 p.m., and he performed walk-through inspections twice per day. As per the Site Safety logs, he testified that he did not observe any open penetrations during his walk-throughs on the date of the accident, or on the preceding day. The logs did not reflect when he performed the walk-throughs. According to Mr. Mannino, open penetrations would be reported to NYCA, which was responsible for

ensuring that they were covered and sealed. He noted that NYCA performed its own daily inspections, but did not report to him or submit documentation if its workers found open penetrations. He also testified that while there would have been a controlled access zone on the subject floor where the crab hoist was being operated, there could have been other contractors, including plumbing and electrical working there, behind the zoned area.

Michael Ceciliani, NYCA's president, testified that NYCA employees, including all crew members and carpenters, were responsible for inspecting each floor daily, and covering the floor penetrations. This was done by covering the penetrations with plywood and securing them to the concrete floor by shooting nails into the plywood. Mr. Ceciliani confirmed that the plywood depicted in the photographs of the penetration over which plaintiff tripped would have been created by NYCA.

Christopher Aiello, Parkview's foreman confirmed that Parkview was responsible for all plumbing on the project. Mr. Aiello testified that Parkview created approximately 100 penetrations on each floor for its plumbing access lines. According to Mr. Aiello, the carpenters were responsible for closing all openings and putting up safety nets. Parkview would return to install the pipes once the floors were secure. If Parkview needed to keep a penetration open, however, its employees would cover the hole with a piece of plywood but did not shoot nails or screws into it to secure the covering to the concrete floor; instead they would fashion a wooden anchor on the bottom of the plywood and "put it over the hole so that it . . . nobody could kick [it] off easily without picking it up." John Lyons, Parkview's owner, explained that Parkview's workers would remove coverings when access was needed to run the pipes, but if they could not finish

work on a penetration, they would cover the opening, but would not nail it into the floor.

The First Department has explained that

> [s]ection 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] [citations omitted]).

As Mr. DiGirolomo was injured when he tripped and fell at the work site, his claims arises from an alleged defect or dangerous condition existing on the premises. Although plaintiff bears the burden at trial to prove that defendant is negligent, a defendant moving for summary judgment "has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). "Actual notice may be found where a defendant either created the condition, or was aware of its existence prior to the accident" (*Atashi v Fred-Doug 117 LLC*, 87 AD3d 455, 456 [1st Dept 2011]). "To constitute constructive notice, a defect must be visible and apparent," and "must exist for a sufficient length of time prior to the accident to permit [a defendant] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). In these types of cases, "[a]

defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross*, 86 AD3d at 421; *see also Williams v New York City Hous. Auth.*, 99 AD3d 613, 613 [1st Dept 2012] [summary judgment denied because defendant did not present competent evidence that its janitorial schedule was followed on the accident date]).

It is undisputed that Parkview created the rough-in penetration, but Parkview contends that since these penetrations are an integral and necessary part of the construction of the building, they cannot be considered dangerous conditions, *per se*. Plaintiffs contends, however, that it was the failure to properly cover the penetration and secure said covering that constituted the dangerous condition. Parkview asserts that the evidence shows that it had not worked in the subject area on the date of the accident or during the several preceding days, and the inspection logs show that the penetration was covered during that time period, and hence, this shows the absence of any evidence indicating that it created the condition or could have had notice of it. However, based upon the record before this court, Parkview has failed to meet its initial burden to establish entitlement to summary judgment on the Labor Law §200 claim. There remain issues of fact, including but not limited to whether Parkview created the dangerous condition, whether it lacked constructive notice of the condition, and whether the subject penetration was sealed and if so, who secured it.

The 160 Madison and MDCCC defendants argue that they are entitled to summary judgment dismissing the complaint because plaintiffs cannot establish that they created or had notice of the allegedly dangerous condition. However, plaintiffs

have not alleged that the 160 Madison and MDCCC defendants created the dangerous condition, and notwithstanding their failure to present arguments in their moving papers in chief establishing when they had last inspected the subject floor before the accident, based on the evidence and arguments proffered by Parkview, the court finds that the record is insufficient to affirmatively establish that these defendants lacked constructive notice.

The 160 Madison and MDCCC defendants additionally argue that they cannot be held liable for plaintiff's injuries because they did not supervise or control his work, relying upon *Reilly v Newireen Assoc.*, 303 AD2d 214 (1st Dept 2003). This is unavailing, however, because *Reilly* involved a plaintiff's decedent whose injury was not caused by a dangerous condition on the premises, but instead by the type of work he was made to perform, to *wit*, an exertion-induced heart attack allegedly caused by being ordered to traverse 14 flights of stairs multiple times during a day. Contrary to these defendants' arguments, the First Department has instructed that with respect to common law negligence and Labor Law 200(1) claims, "[i]t is immaterial that [] defendants lacked supervisory control over [a] plaintiff's work [if] his injuries arose from the condition of the workplace, rather than the method used in performing the work" (*McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] [cleaned up] [quotation and citation omitted]). As noted *supra*, plaintiff alleges that he was injured due to the condition of the workplace, not because of the means and methods of his work. Hence, the 160 Madison and MDCCC defendants' focus on the supervisory control over plaintiff's work or over the work of the various other subcontractors on the

site is misplaced. In any event, MDCCC's superintendent Mr. Andonian testified that he performed thrice daily walk through inspections of the entire construction site, met with the various subcontractors on a weekly basis, received daily reports from them on MDCCC forms, and hired Site Safety and NYCA to perform multiple daily inspections on the site. Hence, even if 160 Madison and MDCCC defendants' liability turned on their ability to control the work of those whom they claim to be potentially liable for plaintiff's injuries, namely Parkview and/or NYCA, this evidence suffices to raise at least a question of fact as to whether 160 Madison and MDCCC retained a sufficient measure of control so as to render them liable. Accordingly, the branch of the motion to dismiss the Labor Law § 200 claim against 160 Madison and MDCCC must be denied, as they failed to meet their initial burden to establish entitlement to the requested relief.

Plaintiffs' claims under Labor Law 241(6) are predicated upon alleged violations of the following sections of the Industrial Code: 23-1.3, 23-1.5, 23-1.7, and 23-2.1 (*see* 12 NYCRR 23-1, *et seq.*), as well as a violation of Article 1926 of OSHA. The moving defendants seek summary judgment dismissing these claims, arguing that the cited sections of the Industrial Code are too general or are inapplicable to the facts of the case, and that OSHA regulations may not form the predicate of a Labor Law 241(6) violation. In response to these branches of the motions, plaintiffs proffered argument only as to section 23-1.5(c)(3) of the Industrial Code in opposing the motion by 160 Madison and MDCCC, thus indicating a concession that all of the other claims against these specific defendants should be dismissed, particularly since plaintiff did not even identify any specific provisions of any of the other cited sections of the code. Moreover, plaintiff's papers in opposition to Parkview's motion did not respond at all to this branch

of the motion. Based upon the record before this court, movants have established their initial burden to demonstrate that Industrial Code sections 23-1.3, 23-1.7, and 23-2.1, as well as a violation of Article 1926 of OSHA, are too general or are inapplicable to the facts of the case, and that OSHA regulations may not form the predicate of a Labor Law 241(6) violation.

"In contrast to section 200, section 241 (6) of the Labor Law imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]), and to "comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Liability under section 241(6) must be premised upon those provisions of the Industrial Code "mandating compliance with concrete specifications," rather than those which merely "establish general safety standards" (*see id* at 502-505).

Section 23-1.5(c)(3) of the Industrial Code provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored, or immediately removed from the job site if damaged." This is a specific safety standard, upon which a Labor Law 214(6) claim may be based (*see Contreras v 3335 Decatur Ave. Corp.*, 173 AD3d 496, 497 [1st Dept 2019]; *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018]). Movants have proffered only conclusory assertions that this section is general and is inapplicable because the instant case does not involve a safety device,

safeguard, or piece of equipment which was rendered unsound or inoperable. This is insufficient to satisfy their burden on summary judgment since the record shows that the plywood coverings at issue were meant to protect against the danger of workers tripping over open penetrations, and thus they may be found to have been a safety device or safeguard. There is a triable issues of fact, including but not limited to whether removing the coverings and either failing to properly re-affix them by nailing them into the concrete flooring as required by the MDCCC safety program, or neglecting to re-cover the openings at all, this regulation may have been violated.

Parkview also moves for summary judgment dismissing the cross-claims by 160 Madison and MDCCC for contractual indemnification on the ground that plaintiff's injuries cannot be shown to have arisen from Parkview's work at the construction site. Since the court has already determined that there is a triable issue of fact as to whether Parkview may have created the dangerous condition that caused plaintiff's injuries, this branch of Parkview's motion is denied.

The 160 Madison and MDCCC defendants also move for summary judgment granting contractual indemnification against NYCA and Parkview. It is well settled that a party seeking contractual indemnification must "establish that it was free from any negligence" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). Since the court has found that 160 Madison and MDCCC have failed to affirmatively establish their entitlement to summary judgment in this personal injury action, they have necessarily failed to establish that they are free from any negligence. This branch of their motion is thus denied.

It is noted that on November 13, 2018, the Justice Paul Alpert dismissed the

second third-party complaint against second third-party defendant Site Safety, LLC. It is further noted that on August 2, 2019, the parties filed a Stipulation of Discontinuance. Accordingly, the Clerk is directed to amend the caption to reflect such dismissals.

The foregoing shall constitute the decision and order of this court.

Dated: SEP 24 2020

J.S.C.

☒ Motion is denied
☒ Action is still active

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