Simo v City of New York
2020 NY Slip Op 34376(U)
December 28, 2020
Supreme Court, Kings County
Docket Number: 524075/2017
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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GREGORY SIMO and ANDREA GUZMAN,

Plaintiffs,

-against –

THE CITY OF NEW YORK, and EL SOL CONTRACTING AND CONSTRUCTION CORPORATION/ES II ENTERPRISES, J.V.,

Defendants.
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Index No.: 524075/2017
Motion Date: 10-5-2020
Mot. Seq. No.: 2-4

DECISION/ORDER

THE CITY OF NEW YORK and EL SOL CONTRACTING AND CONSTRUCTION COPRORATION/ES II ENTERPRISES, LLC, J.V.,

Third-Party Plaintiffs,

-against-

TOWER MAINTENANCE CORP.,

Third-party Defendant.
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Upon NYSEF Items Nos: 47-114 the motion and cross-motions are decided as follows:

In this action to recover damages for personal injuries, defendants/third-party plaintiffs The City of New York ("the City") and El Sol Contracting and Construction Corporation/ES II Enterprises, LLC, J.V. ("El Sol") move pursuant to CPLR 3212 for and order (1) granting summary judgment dismissing the plaintiff's complaint against the City; (2) alternatively, granting summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against the City; (3) alternatively, granting the City summary judgment against the third-party defendant Tower Maintenance Corp. ("Tower") for contractual indemnification including; (4) granting El Sol summary judgment dismissing the plaintiff's

Labor Law § 200 and common-law negligence claims; (5) granting El Sol summary judgment against Tower for contractual indemnification; (6) granting El Sol summary judgment against Tower for breach of its contract to procure insurance; and (7) summary judgment on behalf of El Sol and the City dismissing Tower's cross-claims (**Mot. Seq. No. 2**).

Tower cross-moves pursuant to CPLR 3212 for, *inter alia*, an order granting Tower summary judgment and dismissing the third-party complaint on the ground that the third-party claims are barred by the anti-subrogation rule (**Mot. Seq. No. 3**).

The plaintiffs, Gregory Simo and Andrea Guzman, cross-move pursuant to CPLR 3212 for, *inter alia*, an order granting them summary judgment against the City and El Sol on their claims pursuant to Labor Law §§ 240(1) and 241(6) claims (**Mot. Seq. No. 4**).

The motion and cross-motions are consolidated for disposition.

Background:

This action arises out of an accident that occurred on July 11, 2017, during the painting of the Gowanus Expressway, an elevated highway owned by the State of New York. The plaintiff, a laborer employed by Tower, was working as part of a crew assigned to disassemble the painting platforms that were suspended from the underside of the Gowanus Expressway on which the painters would stand in order to perform their work. At the time of the accident, the plaintiff was standing on top of a platform truck that was parked at the intersection of 57th Street and 3rd Avenue, Brooklyn, New York, on the public roadway below the Gowanus. It is unrefuted that the City owned the public roadway.

On the top of the truck there was a roof deck, a flat level surface running the length of the truck. At the time of the accident, the roof deck was approximately fourteen (14) feet above the street. While standing on the roof deck just prior to the accident, the plaintiff was receiving

platform pieces from his co-workers who were working above him. The roof deck had an opening that measured approximately two square feet which allowed workers to access the roof and to pass materials down to the bed of the truck.

In support of his cross-motion, plaintiff submitted, among other things, his own affidavit in which he stated:

> 6. In order to receive the suspended platform pieces from the workers above, I was standing on this roof deck. There was an opening in the roof deck, approximately two-foot square, through which the workers access the roof deck work area as well as passed down parts of the platform into the cabin of the truck. There was a removable cover to close the opening, however, the door needed to be open to lower the platform parts down into the box of the truck.
>
> 7. While working on the roof of the truck receiving pieces of the platforms from the workers, I fell through the roof opening all the way down to the bed of the truck, a distance of 8- 10 feet below.
>
> 8. At the time of this incident I was wearing a safety harness and a yoyo device which were provided to me at the job site. The yo-yo device did not engage as it should have while I was in free fall.
>
> 9. After falling I disconnected my yoyo from the harness, sat in the truck, and was assisted by my supervisor/foremen Marcello Conke.
>
> 10. The opening on the roof of the truck I fell through was a 2 foot by 2-foot square hole. There was no safety railing or protection of any kind around this opening on the roof deck of the truck.

Plaintiff's deposition and 50-h hearing testimony were also submitted in support of the motions. Plaintiff's testimony supports the view that at the time of the accident, he was stacking the platform pieces on the roof deck and was not engaged in lowering any materials through the opening.

Discussion:

That branch of Mot. Seq. No. 2 which seeks an order awarding the City summary judgment dismissing the complaint is **GRANTED**. The duties imposed by Labor Law §§ 240(1) and 241(6) are imposed upon contractors and owners. Here, the City established its prima facie entitled to summary judgment dismissing the claims pursuant to § 240(1) and §241(6) by demonstrating that it was neither an "owner" or "contractor" within the meaning of these statutes. The admissible proof demonstrated that the State of New York was the owner of the Gowanus Expressway, that NYS DOT was in charge of the Gowanus Expressway project, that the City did not perform any of the construction, that that the City did not hire the plaintiff's employer and that it did not supervise, direct or control any aspect of work. The case law is clear that under these circumstances, City is not considered an owner or contractor under Labor Law §§ 240(1) and 241(6) *(see Albanese v. City of New York*, 5 N.Y.3d 217; *Coelho v. City of New York*, 176 A.D.3d 1162).

With respect to the plaintiffs' common-law negligence claims and claims pursuant Labor Law § 200(1), it is well settled that Labor Law 200(1) is a codification of a party's common law duty to provide workers with a safe place to work (*Gonzalez v. Perkan Concrete Corp.*, 110 A.D.3d 955, 958 [internal quotation marks omitted]; *see Chowdhury v. Rodriguez*, 57 A.D.3d at 127). Where, as here, a claim arises of the means and methods the work, a party is not liable under Labor Law § 200 or the common law unless it had the authority to supervise or control the work (*see Ortega v. Puccia*, 57 A.D.3d 54, 61; *Abdou v. Rampaul*, 147 A.D.3d at 887, *Rodriguez v. Gany*, 82 A.D.3d 863, 865). A party has the authority to supervise or control the work when that party bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 A.D.3d at 61). A party's general supervisory authority over the work is insufficient to impose

liability in the absence of evidence that the party had the authority to supervise or control the manner in which the plaintiff performed his work (*see, e.g., Fucci v. Douglas S. Plotke, Jr., Inc.*, 124 A.D.3d 835, 836-37). Here, the City demonstrated, prima facie, that it did not have the authority to supervise or control the performance of plaintiff's work and the evidentiary materials before the Court on this issue fail to raise a triable issue of fact. Accordingly, that branch of motion seq. No. 2, in which the City seeks an order granting it summary judgment dismissing plaintiffs' complaint insofar as asserted against it, in its entirety, is **GRANTED**.

Turning to that branch of motion seq. No. 2 in which El Sol seeks an order granting it summary judgment dismissing plaintiff's claims pursuant to Labor Law § 200(1) and the common law, the admissible proof demonstrated that El Sol did not have the authority to supervise and control the manner in which the plaintiff performed his work. The contract between El Sol and Tower expressly provided that Tower will "furnish all supervision" with respect to its contracted for work. Both the plaintiff and Marcello Conke, the plaintiff's foreman, testified that the plaintiff received his work instructions from Mr. Conke. The plaintiff further testified that no one from El Sol told him how to do his work. Mr. Conke also testified that El Sol did not instruct the plaintiff where or how to perform his work. El Sol therefore established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action against it and the submissions before the Court fail to raise a triable issue of fact in opposition. Accordingly, that branch of Mot. Seq. No. 2 which seeks an order granting El So summary judgment dismissing plaintiff's claims pursuant to Labor Law § 200(1) and the common law is **GRANTED**.

With respect to that branch of mot. seq. 2 in which El Sol seeks an order granting it summary judgment against Tower on its claim for contractual indemnification and for its failure to procure insurance for El Sol, Article 16 of the contract provides in pertinent part as follows:

> **Article 16. INSURANCE**
>
> . . . Subcontractor [Tower] must provide evidence of the following coverage with Certificates of Insurance and Endorsements of Insurance from insurance carrier[s] satisfactory to the Contractor and Owner, in the form annexed hereto as Exhibit F. . . .
>
> Certificates and Endorsements shall list the following as Additional Insured:
>
> El Sol Contracting & Construction Corp./ES II Enterprises, LLC, J.V. State of New York New York State Department of Transportation.

The contract documents obligated Tower to procure for El Sol primary coverage in the amount of $1 million per occurrence and excess coverage in the amount of $7 million per occurrence. Tower procured primary insurance with Nationwide/Scottsdale Insurance Co. which provided coverage in the amount specified in the contract and which named El Sol as an additional insured. Nationwide/Scottsdale Insurance Co. accepted El Sol's tender for additional insured coverage and has been affording El Sol a defense in this action. Since the same insurance company covers both Tower and El Sol for the same risk, the anti-subrogation rule applies and indemnification is barred to the extent that any verdict in favor of the plaintiffs is within the limits of the primary policy purchased by Tower (*see North Star Reins. Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281; *Yong Ju Kim v. Herbert Construction Co.*, 275 A.D.2d 709; *Storms v. Dominican Coll. of Blauvelt*, 308 A.D.2d 575, 577). Since El Sol is not entitled to contractual indemnification against Tower for the first $1 million of any judgment rendered against El Sol, that branch of Mot. Seq. No. 2 in which El Sol seeks summary judgment against

Tower on its claim for contractual indemnity is **DENIED** to the extent that El Sol seeks contractual indemnification for a judgment less than $1 million (*see Aguilar v. Graham Terrace, LLC*, 186 A.D.3d 1298) and that branch of Mot. Seq. No. 3 in which Tower seeks for summary judgment dismissing El Sol's claim for contractual indemnification is **GRANTED** to the extent that El Sol seeks contractual indemnification for a judgment less than $1 million.

With respect to those aspects of mot. seq. No. 2 and mot. Seq. No. 3 concerning El Sol's claim for contractual indemnification any judgment that exceeds $1 million, for the reasons stated in *Aguilar v. Graham Terrace, LLC, supra.*, the motions are **DENIED** as premature.

That branch of Mot. Seq. No. 2 which seeks an order awarding the City summary judgment against Tower on its claim for contractual indemnification is **DENIED** (see *Bussanich v. 310 E. 55th St. Tenants*, 282 A.D.2d 243, 244; *Navillus Tile, Inc. v. Bovis Lend Lease LMB, Inc.*, 74 A.D.3d 1299).

Since El Sol and the City established their entitlement to summary judgment dismissing the plaintiff's common-law negligence and Labor Law § 200 claims, that branch of Mot. Seq. No. 2 which seeks an order awarding summary judgment dismissing Tower's cross-claims is **GRANTED** (*Donoghue v. New York City School Constr. Auth.*, 1 A.D.3d 333).

That branch of Mot. Seq. No. 4 in which the plaintiff seeks an order granting him summary judgment on his claims against the defendants pursuant to pursuant to Labor Law § 240(1) is **DENIED**. Labor Law § 240(1) "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 124). The purpose of Labor Law § 240(1) "is to

protect workers by placing ultimate responsibility on owners and contractors instead of on workers themselves" (*Saint v. Syracuse Supply Co.,* 25 N.Y.3d 117, 124 [internal quotation marks and citation omitted]). It "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*id.* at 124).

As stated above, since the City is not an owner within the meaning of Labor Law § 240(1), plaintiff's claim under § 240(1) against the City must be dismissed. With respect to plaintiff's § 240(1) claim against El Sol, El Sol is clearly a contractor within the meaning of the statute and contrary to defendants' contention, the plaintiff was exposed to an elevation-related risk. While El Sol had a non-delegable duty to comply with § 240(1), there are triable issue of fact as to whether plaintiff's actions were the sole proximate cause of his own injuries. A jury could infer from the evidence that at the time of the accident, the plaintiff was not involved in lowering materials down to the bed of the truck and that there was no reason for him to be working on the deck platform while the opening was uncovered.

As the Court of Appeals recent stated:

> Liability under Labor Law § 240(1) "does not attach" where adequate safety devices are available and the plaintiff "knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v. New York Post,* 14 N.Y.3d 83, 88, 896 N.Y.S.2d 732, 923 N.E.2d 1120 [2010]). Where a worker declines to use an available safety device, the worker's "own negligence is the sole proximate cause of his injury," precluding him from recovering (*id.*, citing *Cahill v. Triborough Bridge & Tunnel Auth.,* 4 N.Y.3d 35, 39–40, 790 N.Y.S.2d 74, 823 N.E.2d 439 [2004]). Put differently, "an owner [or contractor] who has provided safety devices is not liable for failing to insist that a recalcitrant worker use the devices" (*Cahill,* 4 N.Y.3d at 39, 790 N.Y.S.2d 74, 823 N.E.2d 439 [internal quotation marks and citation omitted]). The owner's obligation is to provide appropriate

safety devices – not to protect employees who ignore them.

(Biaca-Neto v. Bos. Rd. II Hous. Dev. Fund Corp., 34 N.Y.3d 1166, 1169). The cover to the opening was an adequate safety device that plaintiff knew was available and had the opening been covered at the time of the accident, the accident would not have occurred. With respect to whether plaintiff was expected to keep the opening closed at times when he was not lowering materials to the bed of the truck, Mr. Conke testified as follows:

> Q. Did Tower Maintenance have safety meetings?
>
> A. Every day in the morning.
>
> MS. SZEMER: Twice a month?
>
> MS. MATSCHKE: In the morning. Right? Every day in the morning. A. Correct.
>
> Q. And what did those meetings consists of?
>
> A. They always talked about El Sol's safety equipment, personal equipment, and we were always commented on taking great care with the traffic because there was a lot of movement. And every day it was mentioned that if you're working with a lift truck, you have to keep the opening closed at the top. (indicating) And always, and if you're on top you can always get clipped.

Mr. Conke's testimony raised triable issues of fact as to whether the plaintiff was expected to keep the opening covered unless he was engaged in lowering materials to the bed of the truck and whether the plaintiff had no good reason not to have the opening covered.

That branch of Mot. Seq. No. 4 in which the plaintiff seeks an order granting him summary judgment on his claims against the defendants pursuant to pursuant to Labor Law § 241(6) is also **DENIED**. Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being

performed" (*Lopez v. New York City Dept. of Envtl. Protection,* 123 A.D.3d 982, 983; *see also Perez v. 286 Scholes St. Corp.,* 134 A.D.3d 1085, 1086). While a plaintiff must allege and prove a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code to prevail on a cause of action pursuant to section 241(6) (*see Misicki v. Caradonna,* 12 N.Y.3d 511, 515; *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 505), as the Appellate Division, Second Department explained in *Seaman v. Bellmore Fire District:*

> [W]here such a violation is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and "thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *see Long v. Forest–Fehlhaber,* 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Daniels v. Potsdam Cent. School Dist.,* 256 A.D.2d 897, 898, 681 N.Y.S.2d 852).

Seaman v. Bellmore Fire Dist., 59 A.D.3d at 516). Accordingly, even if plaintiffs' submissions established as a matter of law that a violation of one of the provisions of the Industrial Code that plaintiff alleged was a substantial factor in causing the accident, such would only constitute some evidence of El Sol's liability under § 241(6) and would not demonstrated liability as a matter of law. Further, for the reasons stated above, there are triable issue of fact as to whether plaintiff's own negligence was the sole proximate cause of his injuries. Further, since there are triable issues of fact as to whether plaintiff's actions were the sole proximate cause of his injuries is another reason to deny plaintiff's motion for summary judgment under § 241(6).

Accordingly, it is hereby

ORDRED that the motions are decided as indicated above. Any relief not expressly granted is **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 28, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020