Ali v New York City Hous. Auth.
2020 NY Slip Op 34420(U)
December 4, 2020
Supreme Court, Kings County
Docket Number: 519920/2016
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 4th day of December, 2020.

P R E S E N T:
Hon. Wayne P. Saitta, Justice.

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ANSAR ALI

Plaintiff, Index No. 519920/2016

-against-

DECISION AND ORDER

NEW YORK CITY HOUSING AUTHORITY,
AND TDX CONSTRUCTION CORP.,

Defendants,

---X

TDX CONSTRUCTION CORPORATION,

Third-Party Plainitff,

-against-

ABAX INC.,

Third-Party Defendants,

---X

The following papers numbered 109-273 read herein:	NYSCEF DOC. NO.
Notice of Motions (Cross-Motions)	109, 136, 150, 174
Affirmations in Support	110, 137, 151, 175
Affirmations in Opposition	189, 156, 207, 225, 254, 256, 267, 268, 273
Affirmations (Affidavits) in Reply	252, 258-259, 271 -272
Sur-Reply	270
Exhibits	111-134, 138-148, 160-167, 152, 176-186, 190-205, 208-223, 226-242, 257, 260, 269

Facts

This action arises from a construction accident that occurred on the roof of a building that is part of Bushwick Houses. The building is owned by Defendant New York City Housing Authority ("NYCHA").

NYCHA hired Defendant/third-party Plaintiff TDX Construction Corporation ("TDX") as a construction manager to oversee exterior brick restoration work of the buildings that comprise this complex. TDX was to monitor the progress of the work in terms of quality and quantity and to report such information back to NYCHA. Pursuant to the contract between NYCHA and TDX the responsibility for the means and methods of construction remained with the contractors.

NYCHA also directly hired third-party Defendant ABAX, Plaintiff's employer, to perform the pointing work.

Plaintiff was hired by ABAX to perform masonry and pointing work at the subject premises. ABAX's work required the use of suspended scaffolding that hung over and down the sides of the building.

On the day of his accident, Plaintiff was moving counterweights across the subject roof. The roof of the subject premises was covered in gravel. The gravel is a permanent part of the roof put down to protect the roof membrane.

On one of his trips across the roof, Plaintiff slid on the roof's loose gravel and slid into and tripped on a pile of safety ropes. These ropes were used by workers on the hanging scaffolds as a safety line but were not in use on the day of Plaintiff's accident. On the day of the accident the ropes were not attached to any scaffold. They were not coiled or stowed away but were left in a pile on the roof.

Labor Law § 241(6) and Plaintiff's Cross-Motion for Leave to Amend

Defendants seek dismissal of Plaintiff's claims under Labor Law § 241(6). Plaintiff, in turn, seeks to amend the Bill of Particulars to add violations of two specific sections of the Industrial Code: section 23-1.7(d), "protections from slipping hazards", and section 23-1.7(e)(1) and (2), "protection from tripping hazards". A violation of a specific section of the Industrial Code is a requisite for a claim pursuant to Labor Law § 241(6).

Plaintiff's motion to amend

Plaintiff had not cited subsections 23-1.7(d) and 23-1.7(e)(1) and (2) in his pleadings, but only specified subsection 23-1.7(a)(1)(2) in his Bill of Particulars.

The Second Department has held that where an Industrial Code violation not pled in the Bill of Particulars does not rely on new factual allegations and there are no new theories of liability, there is no prejudice to the defendant in asserting it later. In such cases, the Second Department has permitted plaintiffs to assert new violations for the first time in motion practice. *Sheng Hai Tong v. K and K 7619, Inc.*, 144 AD3d 887 [2d Dept 2016]; *Doto v. Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015]; *Przyborowski v. A & M Cook, LLC*, 120 AD3d 651 [2d Dept 2014].

In this case, Plaintiff's claims pursuant to 23-1.7(d) and (e)(1) and (2) are not based on new factual allegations. They are based on Plaintiff's allegations that he slipped on the gravel on the roof and tripped on a rope left on the roof. These allegations were made as early as his 50-H hearing and are contained in the workers compensation questionnaire form.

Nor have Defendants, demonstrated that they would be prejudiced by the amendment, as they have addressed subsections 1.7(d) and 1.7(e)(1) and (2) in their motions for summary judgment,

Because the amendments are not based on new factual allegations and the amendment would not prejudice Defendants, Plaintiff should be allowed to amend his complaint.

However, while Plaintiff should be allowed to amend his complaint to include 23-1.7[e](2), leave to add claims pursuant to subsections 23-1.7(d) or [e](1) should be denied because those subsections are not applicable to the facts of this case.

Industrial code section 23-1.7(d) provides for slipping hazards:

> Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

The gravel Plaintiff alleges he slipped on is not inherently slippery nor is it a foreign substance. The gravel covering the roof is a permanent part of the roof to protect the roof membrane. Therefore, this subsection is not applicable

Industrial Code section 23-1.7[e](1) is inapplicable because the area where plaintiff was injured was not a passageway but a work area.

However, Industrial code section 23-1.7[e](2) which is similar to section 23-1.7[e](1), does apply to work areas. It provides that:

> The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

As discussed below, in connection with Defendants' motion to dismiss, there remain questions of fact as to whether section 23-1.7[e](2) is applicable to the rope Plaintiff alleges he tripped on.

Defendants' motion for summary judgment

In addition to opposing the motion to amend, Defendants NYCHA, TDX and ABAX also move for summary judgment dismissing Plaintiff's claim pursuant to § 241(6) arguing that section 23-1.7[e](2) is not applicable because the rope was an integral part of the work being performed and that section 23-1.7(a)(1)(2) is not applicable because it applies to overhead hazards.

Plaintiff does not oppose Defendants' motions as to a violation of 23-1.7(a)(1)(2), nor does he allege any facts which would support a finding that his accident was due to an overhead hazard. Therefore, Defendants' motions are granted to the extent of dismissing Plaintiff's claim of a violation of Industrial Code subsection 23-1.7(a)(1)(2).

Section 23-1.7[e](2)

As to section 23-1.7[e](2), Plaintiff argues that the rope was not integral to his work as it was not in use on the day of the accident and that it should have been coiled or stored away.

Whether a piece of equipment is integral to the work is generally a question of fact. *Torres v. Forest City Ratner Companies, LLC,* 89 AD3d 928 [2d Dept 2011]; *McDonagh v. Victoria's Secret*, 9 AD3d 395 [2d Dept 2004]; *Gonzalez v. Magestic Fine Custom Home*, 115 AD3d 796 [2d Dept 2014].

In determining whether a cable is an integral part of the work, the Second Department has made a distinction between cables that are attached to part of the building and cables that are lying on a floor unattached (*Gonzalez v. Magestic Fine Custom,* 115 AD3d 798 [2nd Dept 2014].)

Gonzalez v. Magestic Fine Custom presented a very similar fact pattern to the present case. There, the plaintiff tripped over electric cables and the Court held that

because Plaintiff testified that the cables were lying loose on the floor as opposed to being attached to a part of the house, he had raised a question of fact as to whether the cables were an integral part of the work. In contrast, the Court has held that electric cables hanging from the ceiling, whose ends were lying on the floor were integral to the work being performed (*Martinez v. 281 Broadway Holding*, 183 AD3d 712 [2nd Dept 2020].)

In determining whether equipment is an integral part of the work, one should consider the language of the regulation which requires the area to be kept clear "in so far as may be consistent with the work being performed".

The language of the section focuses the analysis on whether removing the tool, equipment, or material would interfere with the work being done or prevent it from being done.

In this case, the day before Plaintiff's accident, the hanging scaffold to which the ropes would have been attached had been moved across the roof in question. On the day of his accident, Plaintiff was moving counterweights across the roof. On one of his trips across the roof, Plaintiff slid on the roof's loose gravel and slid into and tripped on a pile of safety ropes. The ropes were used by workers on the hanging scaffolds as a safety line but were not in use on the day of Plaintiff's accident.

Plaintiff submits TDX's December 17, 2019 deposition by Vinay Lagad in opposition which indicates the rope should have been stored away:

> Q You mentioned also about coils of rope, is that correct?
> A Right.
> Q That was for the safety lines?
> A They use it for the safety line.
> Q When you say safety line you mean a rope that attaches to something on the roof then goes down to a harness for individual person?
> A Right.
> Q Are they stored in the coils on the roof?

A Just, just laying there, stored maybe wasn't properly installed for the safety line, it was just laying there as for the picture just a coil laying there, is not used for.
A Actually, not properly stored. Just laying there for storage purposes tied properly and put in the yard.
Q Were there any rules and procedures as to how those ropes should be stored during the day, when they are not being used and on the rope.
A Stored it in a staging area.
Q Where?
A Staging area.
Q Where would the staging area be, with respect to the roof?
A By the ABAX cabinet container.
Q The cabin?
A The office.
Q Wouldn't be stored on the roof, it would be on the trailer?
A Should be the trailer.
Q Anyplace to store them on the roof?
A For that particular.
MR. DeVENEY: Your talking about ABAX now?
MR. CATALANO: Yes.
A With that picture, with this coil, I cannot confirm anything. I don't know, if it in the process of something, somebody lift there to build something else, like to use it as a safety line, it was there. I don't see any person using it. Assume it is a storage.
(Vinay Lagad Deposition, p. 94)

As the ropes were attached neither to the building nor the scaffold, there is a question of fact whether it was an integral part of the work and whether storing or coiling the ropes would have been consistent with the work Plaintiff was performing.

Due to this question of fact, Defendants' motion to dismiss should be denied as to NYCHA.

However, the motion should be granted as to Defendant TDX because TDX, a construction manager, did not supervise or control Plaintiff's work and thus they were not an agent of NYCHA within the meaning of § 241(6).

While § 241(6) covers contractors, owners, and their agents, liability under § 241(6) is not determined by a party's title but whether the party supervised the work at issue. Under § 241(6), an owner's "agent" may be held vicariously liable for a contractor's

violation of the Industrial Code where it had authority to control the work. *White v. Village of Port Chester*, 92 AD3d 872 [2d Dept 2012]; *Soltes v. Brentwood Union Free School Dist.*, 47 AD3d 804 [2d Dept 2008].

> A construction manager without authority to control the activity which brought about the plaintiff's injury is not considered an agent of the owner under Labor Law §§ 240(1) and 241(6). The label given a defendant, whether “construction manager” or “general contractor,” is not determinative. Instead, the core inquiry is whether the defendant had the “authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition” (*Myles v. Claxton*, 115 A.D.3d 654 [2d Dept 2014].)

TDX was hired by NYCHA to provide limited construction management services at the subject premises relative to the exterior brick restoration work performed by ABAX. TDX was to monitor the progress of the work in terms of quality and quantity and to report such information back to NYCHA. The contract between TDX and NYCHA supports TDX’s contention that it was not given the authority to supervise, direct or control ABAX’s work. TDX was not granted authority or control over either the means or methods of ABAX’s work.

Article 4 of the NYCHA/TDX contract provides:

> Except as expressly set forth herein, neither this agreement nor the CMa's rendition of Services hereunder, shall be deemed the CMa's assumption of responsibility for:
>
> 4.1.2 construction, means, methods, techniques or sequences at the Site, all of which are and remain the responsibility of the Construction Contractor(s) (NYCHA/TDX Contract, Article 4.)

As TDX did not control or supervise Plaintiff’s work, it was not a statutory agent under § 241(6).

For foregoing reasons, Defendants NYCHA and ABAX's motions to dismiss Plaintiffs § 241(6) claims as to section 23-1.7(e)(2) must be denied and Defendant TDX's motion to dismiss Plaintiff's § 241(6) claim as to section 23-1.7(e)(2) must be granted.

Labor Law § 200 and Common Law Negligence

Defendants NYCHA and TDX move for summary judgment dismissing Plaintiff's claims pursuant to Labor Law § 200 and common law negligence.

"Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (*Zukowski v. Powell Cove Estates Home Owners Association,* 2020 N.Y. Slip Op. 05974 [2d Dept 2020], quoting *Lombardi v. Stout,* 80 NY2d 290, 294 [1992].) Unlike sections 240(1) and 241(6), section 200 does not impose vicarious liability on owners and owner's agents.

Labor Law § 200 cases fall into two categories: (1) those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and (2) those involving the manner in which the work is performed.

Plaintiff's accident arose not from a dangerous condition at the premises but by the means and methods employed, and neither NYCHA nor TDX controlled or supervised Plaintiff's work.

The gravel roof was not a dangerous condition inherent to the premises as there is nothing inherently hazardous or dangerous about gravel on a roof used for the purpose for which it was intended: to protect the roof membrane. To the extent Plaintiff argues that the gravel should have been moved to create a path or wood laid over the gravel, those considerations relate to the means and methods of the work.

Where the manner of work is at issue, "no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v. City of New York*, 304 AD2d 611, 612 [2d Dept 2003].) Rather, when a claim is made due to alleged defects or dangers in the methods or materials of the work, it must be shown that the party to be charged has the authority to supervise or control the performance of the work. *Zukowski v. Powell Cove Estates Home Owners Association,* 2020 N.Y. Slip Op. 05974 [2d Dept 2020]; Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343 [1998].

Here, NYCHA, as the owner of the subject premises, did not exercise the requisite level of supervision or control over ABAX's work and therefore has no liability under Labor Law § 200 or common law negligence. Plaintiff was injured while working at the express direction of his employer, ABAX and his accident was a result of the means and methods of ABAX's work rather than a dangerous condition at the job site.

Similarly, as discussed above, TDX did not control or supervise Plaintiff's work.

As the accident was caused by ABAX's means and methods and Defendants NYCHA and TDX did not control Plaintiff's work, his § 200 and common law negligence claims must be dismissed.

Labor Law § 240(1)

Defendants move to dismiss Plaintiff's claims under Labor Law § 240(1) as Plaintiff's injury was not the result of an elevation related hazard.

"Labor Law § 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured" (*Gasques v. State,* 59 AD3d

666 [2nd Dept 2009], quoting *Natale v. City of New York,* 33 AD3d 772, 773-774 [2d Dept 2006].)

Plaintiff does not oppose Defendants' motions as to this cause of action nor does he allege any facts which would support a finding that his accident was elevation related. Therefore, Defendant's motions to dismiss Plaintiff's § 240(1) claims are granted.

Claims for Common Law Indemnification and Contribution

Defendants NYCHA and TDX made claims against other defendants for common law indemnification and contribution. Each Defendant moved for summary judgment dismissing claims against them for common law indemnification.

NYCHA's motion

NYCHA moves to dismiss claims against it by TDX for common law indemnification and contribution. NYCHA's motion should be granted because, as discussed above, NYCHA was not negligent as it did not control or supervise Plaintiff's work. If NYCHA is found liable pursuant to § 241(6) it will be because it was vicariously liable for ABAX's acts.

TDX's motion

TDX's motion to dismiss NYCHA's cross-claims for common law indemnification and contribution against it should be granted because as discussed above, TDX did not control or supervise Plaintiff's work.

ABAX's motion

ABAX's motion to dismiss TDX's third-party claims for common law indemnification and contribution against it should be granted as it was Plaintiff's employer and Plaintiff did not suffer a grave injury as defined in Workers Compensation

Law section 11. TDX acknowledges that its claims for common law indemnity and contribution asserted against ABAX would be barred under Workers Compensation Law section 11.

TDX's Claim for Contractual Indemnification

Defendant TDX plead a claim for contractual indemnification against ABAX. TDX moves for conditional summary judgment on its claim against ABAX for contractual indemnification and ABAX in turn moves to dismiss TDX's claim for contractual indemnification.

"A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Golec v. Dock Street Construction, LLC* 186 AD3d 463 [2d Dept 2020], quoting *Sobel v. City of New York,* 120 AD3d 485 [2d Dept 2014].)

While TDX did not have a contract directly with ABAX, ABAX's contract with NYCHA requires ABAX to indemnify NYCHA and its agents from all liability resulting from ABAX's work on the project. The indemnification clause states:

> 5. Risks: Indemnification:
>
> (c) Indemnification. If any person sustains injury or death, or loss or damage to property occurs, resulting directly from the Work of the Contractor, or its subcontractors, in the performance of this Contract, or from the Contractor's failure to comply with any of the provisions of this Contract or of law, or for any other reason whatsoever, the Contractor, to the fullest extent permitted by applicable law, shall indemnify and hold the Authority and its members, officers, agents and employees harmless from any and all claims and judgments for damages and from costs and expenses to which the Authority or its members, officers, agents and employees may be subjected or which it may suffer or incur by reason thereof.
> (NYCHA/ABAX Contract, Article III, 5(c).)

This contract also required ABAX to indemnify and hold TDX ("CMa Firm") harmless from liability and damages that result directly or indirectly from ABAX's performance of its work:

> 61. Contracts Involving a Construction Management as Agent Firm:
>
> In the event the Authority elects, in its sole discretion, to use a construction management firm (the "CMa Firm,"), as the Authority's agent to oversee and direct the Contractor's performance of the Work under this Contract, then the Authority, after making such election, will notify the Contractor in writing as to such election, and will provide the Contractor with the name, address and telephone number of the CMa Firm. Additionally, in the event of such election by the Authority:
>
> (a) the Contractor shall, in furtherance of ARTICLE III, Sections 5(c) and 5(g) of these Special Conditions, defend, indemnify and hold harmless the CMa Firm (TDX) to the same extent that the Contractor is obligated to defend, indemnify and hold harmless the Authority under these two Sections; and

ABAX moves to dismiss TDX's third-party claims for contractual indemnification on two grounds. First, that TDX has denied being an agent of NYCHA and second, that the indemnification would be barred by New York's anti-subrogation rule.

ABAX argues that because TDX has asserted that it is not an agent of NYCHA in seeking to dismiss Plaintiff's § 241(6) claim, it cannot assert that it is an agent of NYCHA for purposes of the indemnification clause in the contract. However, Section 61(a) of the NYCHA/ABAX contract clearly requires ABAX to defend and indemnify TDX as construction manager.

ABAX's second argument is that TDX's claim for contractual indemnification is barred by New York's anti-subrogation rule because its insurer has agreed to defend and indemnify TDX.

"Under the antisubrogation rule, 'an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered"'

(*Wausau Underwriters Insurance Company v. Gamma USA*, 166 AD3d 928, 931 [2d Dept 2018, quoting *ELRAC, Inc. v. Ward,* 96 NY2d 58, 76 [2001].) "This rule prevents an insurer from passing its losses to its own insured" (*id.*)

TDX argues that it may still maintain its claim for indemnification against ABAX because Plaintiff's judgment may exceed the limits of the insurance policy. However, as the Court has held, TDX is not liable pursuant to Labor Law § 240(1), § 241(6), § 200 or common law negligence so there will be no judgment against TDX to indemnify. The only possible expense TDX will incur is for its attorney's fees, which, pursuant to the contract, ABAX is required to indemnify TDX for. The contract requires ABAX to defend TDX which means that TDX is entitled to be reimbursed for its attorney's fees (*Sand v. City of New York*, 83 AD3d 923 [2d Dept 2011].) However, it is not clear from the papers submitted whether ABAX's insurer had in fact agreed to pick up TDX's defense.

For this reason, the Court denies both TDX's motion for summary judgment and ABAX's motion to dismiss TDX's claim for contractual indemnification.

Failure to Insure

ABAX moves to dismiss TDX's claim against it for failure to procure insurance. Section 61(b) of the contract between ABAX and NYCHA provides that ABAX shall procure insurance for any construction manager, stating:

> (b) the Contractor, and each Subcontractor of the Contractor, in furtherance of ARTICLE III, Section 20 of these Special Conditions, shall (i) also name the CMa Firm as an additional insured to the Contractor's Commercial General Liability insurance policy, and (ii) provide to the CMa Firm, or its designated representative, on demand, satisfactory certificates of insurance evidencing that such Commercial General Liability insurance is in effect.
> (NYCHA/ABAX Contract, Article III, 61 (a) and (b).)

ABAX did not provide an insurance policy showing that TDX was named as an additional insured. Instead, it submitted a letter from its insurer Ironshore. However, it cannot be determined from the letter whether Ironshore has agreed to defend and indemnify TDX or if its acceptance was conditional whether those conditions comport with the terms of the contract. These outstanding questions of fact preclude granting summary judgment dismissing this claim.

WHEREFORE, it is ORDERED that Plaintiff's cross-motion for leave to amend his Bill of Particulars is granted to the extent of allowing the addition of Industrial Code subsection 23-1.7[e](2); and it is further

ORDERED that Plaintiff's cross-motion for leave to amend his Bill of Particulars is denied as to Industrial Code subsections 23-1.7(d) and 23-1.7[e](1); and it is further

ORDERED that Defendant TDX is granted summary judgment dismissing Plaintiff's complaint as against it; and it is further

ORDERED that Defendant TDX is granted summary judgment dismissing Defendant NYCHA's common law indemnification and contribution cross-claims as against it; and it is further

ORDERED that Defendant TDX is denied summary judgment on its claim for contractual indemnification and contribution against Defendant ABAX; and it is further

ORDERED that Defendant NYCHA is granted summary judgment dismissing Plaintiff's Labor Law § 240(1), § 200, and common law and contribution claims as against it; and it is further

ORDERED that Defendant NYCHA is denied summary judgement of Plaintiff's Labor Law § 241(6) claim as to Industrial Code subsection 23-1.7[e](2); and it is further

ORDERED that Defendant NYCHA is granted summary judgment dismissing Defendant TDX's common law indemnification and contribution claims as against it; and it is further

ORDERED that Defendant ABAX's motion to dismiss Plaintiff's Labor Law §240(1), § 200, and common law claims is granted; and it is further

ORDERED that Defendant ABAX's motion to dismiss Plaintiff's Labor Law §241(6) claim as to Industrial Code subsection 23-1.7[e](2) is denied; and it is further

ORDERED that Defendant ABAX is granted summary judgment dismissing TDX's third-party common law indemnification claims as against it; and it is further

ORDERED that Defendant ABAX is denied summary judgment as to TDX's third-party contractual indemnification claims as against it; and it is further

ORDERED that Defendant ABAX is denied summary judgment as to TDX's third-party claims for failure to procure insurance as against it.

This constitutes the decision and order of the Court.

ENTER,

J.S.C.