Vazquez v JRM Constr. Mgt., LLC
2021 NY Slip Op 30977(U)
March 29, 2021
Supreme Court, Kings County
Docket Number: 522012/2017
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
ROBERT VAZQUEZ,

Plaintiff,

Index No: 522012/2017

-against-

DECISION AND ORDER

JRM CONSTRUCTION MANAGEMENT, LLC, 422 FULTON OWNER, LLC, and TISHMAN SPEYER PROPERTIES, L.P.,

Defendants,

x

JRM CONSTRUCTION MANAGEMENT, LLC, 422 FULTON OWNER, LLC, and TISHMAN SPEYER PROPERTIES, L.P.,

Third-Party Plaintiffs,

-against-

SAFWAY ATLANTIC, LLC and CUSTOM PROTECTIVE SERVICES OF NY, LLC,

Third-Party Defendants.

x

Recitation as required by CPLR 2219(a), of the papers considered in these motions for summary judgment.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	79-90; 93-103; 107-118 134-138
Cross-motion and affidavits annexed.....	
Answering Affidavits.....	155; 159-162
Reply Papers.....	176-177; 186-187
Memorandum of law.....	

Upon the foregoing cited papers, the Decision/Order on these motions:

In this action to recover damages for personal injuries, plaintiff Robert Vazquez [Vazquez] moves (motion sequence no. 2) for an order severing the third-party action pursuant to CPLR §603 and CPLR 1010. Vazquez separately moves (motion sequence

no. 3) for an order granting him summary judgment on his Labor Law §§240(1) and 241(6) causes of action pursuant to CPLR 3212. Third-party plaintiffs JRM Construction Management, LLC [JRM], 442 Fulton Owner, LLC [442 Fulton] and Tishman Speyer Properties, LP [Tishman] move (motion sequence no. 4) for the entry of a default judgment against third-party defendant Custom Protective Services of NY, LLC [Custom Services] pursuant to CPLR 3215. Safway Atlantic LLC [Safway] moves (motion sequence no. 5) for an order (1) dismissing the third-party complaint pursuant to CPLR 1010 as untimely; (2) dismissing the third-party complaint pursuant to CPLR 3211(a)(3) (no legal capacity to sue) and pursuant to CPLR 3211(a)(7) (failure to state a cause of action); (2) treating this motion as one for summary judgment pursuant to CPLR 3211(c) and granting Safway summary judgment; or, in the alternative (4) severing the third-party action pursuant to CPLR §603.

It is alleged that on October 24, 2017, Vazquez, in the course of his employment as a demolition laborer for non-party Rite-Way Internal Removal [Rite-Way], at a construction project in the Macy's building located at 422 Fulton Street, Brooklyn, sustained injuries, when a 5 ½ foot high stack of unsecured metal mesh slid off an A-frame dolly as he was transporting it onto a hoist (construction elevator), causing a deep laceration in his forearm and resultant nerve and other damage. On the date of this accident, Tishman and 422 Fulton were the building owners, JRM was the general contractor for the project, Rite-Way was the demolition subcontractor retained by JRM, and Safway and Custom Services, respectively, were the subcontractors hired by JRM to install and operate the hoist. Vazquez commenced this action against Tishman, 422 Fulton, and JRM alleging violations of Labor Law §§ 240(1), 241(6), 200 and common-law negligence. Tishman, 422 Fulton, and JRM later commenced the third-party action against Safway and Custom Services for contribution, indemnity and breach of contract.

Plaintiff's motion for partial summary judgment

Deposition testimony of Robert Vazquez

Vazquez testified that in May 2017 he started working for Rite-Way as a demolition laborer at the Macy's project and continued working at the site through the date of this accident. His job included knocking down walls and transporting debris. When he arrived at work on the date of the accident, his foreman George instructed him to move an A-frame dolly full of metal from the first-floor to the basement by use of a hoist. Vazquez described the dolly as being about 2-feet wide by 4-feet long, with 4 wheels that were approximately 10 inches in height, and a platform on which to put materials. The dolly also had two sets of poles - ones that were straight and ones that were on an angle for materials to lean on. The dolly was pre-loaded with about 15 sheets of 4x8-foot metal mesh, with each sheet weighing about 10 pounds. The sheets, which were larger than the bed of the dolly, hung off each side by about 2 feet, and were not secured to the dolly in any way. Vazquez further testified that he pushed the dolly

approximately 10-feet to the hoist's entry without any issue, but when he attempted to push the dolly onto the hoist, its wheels hit the floor of the hoist which was misleveled, causing the metal sheets to slide off the dolly and cut his arm. During his deposition, Vazquez was read a statement made by Alex Kazinets, a Rite-Way worker who claimed that he was pushing the dolly with Vazquez at the time of the accident, which states "(3) sheets slid off. After sheets slid off of A-frame, Rob and Alex moved to side of Hoist. Then it was noticed that more sheets were close to coming off A-frame. We tried to pick them up together to move them back. As we picked them up all of the sheets slid off causing laceration to Rob's forearm…" When asked whether he knew Mr. Kazinets, Vazquez denied knowing Mr. Kazinets or working with him at the time of the accident and disputed his account of the accident.

Deposition testimony of Tishman and 422 Fulton by Victor Joseph Carrero

Victor Joseph Carrero [Carrero] was the director/project manager for this construction project and his responsibilities included monitoring the construction at the Macy's site. Carrero testified that Tishman hired JRM as general contractor for the project and that JRM retained Rite-Way to perform the interior demolition work at the site. Carrero was first made aware of the incident by the medic who reported to the scene. The medic notified him that someone sliced their forearm and had a severe injury. The medic told him that Vazquez was handling material on the A-frame, it slipped, and he went to grab it, and it sliced his arm. The medic also told him that the A-frame was possibly overloaded, but that was just her observation. Carrero also spoke to Rite-Way's foreman, Joe, on the day of the accident. Joe mentioned to Carrero that he had a safety briefing with his entire team first thing that morning to remind them how sharp the material was and to make sure that they were careful in handling it. Joe provided Carrero with the same description of the accident that had been previously provided to him.

Deposition testimony of JRM by Thomas Clarke, Jr.

Thomas Clarke Jr. [Clarke] was the superintendent for JRM, the general contractor for this project who was retained by the owner, Tishman. JRM retained Safway and Security to install and operate the construction hoists at the site. It was the hoist operators' responsibility to make sure that the hoist was level with the floor. With respect to A-frame dollies, Clarke testified that the loads on a dolly were to be properly secured with a rope, strap or cord to make sure the materials would not fall. Clarke was working on the date of the accident and went to the scene after it happened. He saw the dolly in the hoist and the metal panels neatly stacked against a wall. It was his understanding, however, that the incident did not actually occur at or in the hoist. Clarke testified that he issued a report for this incident based on his conversation with Vazquez. The report states: "Robert was loading wire mesh into the freight hoist on the first floor along with a coworker. The wire mesh was on an A-frame dolly and the men were pushing the A-frame toward the hoist. Just outside the hoist the wire mesh slid off the

dolly. The men tried to stop the mesh from falling and got cut." The report also indicated that Alex Kazinets was a witness to the accident. Clarke testified that there are certain types of straps with padding that can be used to secure sharp materials, and that was something that could have been used to keep the metal pieces from falling. Clarke also testified that nothing in the reports indicate that Vazquez failed to follow any instructions on the date of his injury. Clarke further testified that he also spoke to George, Vazquez' supervisor, who indicated to him that maybe they should not have put as many sheets on one dolly or that they should have used a different method to transport the material.

Testimony of Rite-Way by Joseph Tramutolo

Joseph Tramutolo, Rite-Way's project manager, testified that his company was hired to do a complete demolition of the interior of the Macy's building. As the project manager his responsibilities were to oversee the daily operations at the jobsite. Tramutolo testified that Rite-Way brought metal mesh to the jobsite to be installed on a ramp to create slip-resistance for its mobile equipment during the work. The metal mesh was delivered by truck and then loaded onto an A-frame dolly by Rite-Way workers. Tramutolo described the metal mesh as being about 8 x 4-feet, heavy, and sharp enough to injure someone. He estimated that the dolly and the materials weighed a couple of hundred pounds and stood about 5 ½ feet high off the ground. Tramutolo testified that the metal sheets did not require securing by a rope or strap as the material is able to support itself on the dolly if the weight is distributed the right way. Tramutolo also indicated that the A-frame does not come with its own securing device, but rope can be used for extra security. Although he believed that if rope was used, the rope would have been cut due to the sharp edges. He did testify, however, that certain materials would need something more than just the A-frame to keep them from falling, and would require the use of ropes, straps or cords, items they had in their shanty.

Tramutolo testified that on the morning of the accident, Vazquez was instructed by George, his supervisor, to move the loaded A-frame dolly from the first-floor level to the basement level via the hoist. Tramutolo remembered seeing Vazquez and another worker pushing the dolly and he remembered telling the men to be careful when handling the equipment because the material was very sharp. Although he did not witness the accident, he heard a loud noise and then observed the mesh material on the floor and that Vazquez was injured. He testified that Vazquez did not break any rules, instructions or any directives that he was provided. During the deposition, Tramutolo was shown a document entitled "Supervisor Accident Investigation Form" that he completed, which indicated human error as a cause of the accident. Tramutolo testified that although his report indicated human error as a possible cause of the accident, he really did not know what caused the accident and just wrote down all possibilities including that the hoist might have been misleveled.

Labor Law §240(1)

Labor Law §240(1) imposes absolute liability upon owners and contractors who violate the statute by failing to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (*see Balzer v City of New York*, 61 AD3d 796 [2d Dept 2009]). "[T]he single decisive question in determining whether Labor Law §240(1) is applicable is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch. Inc*., 13 NY3d 599, 603 [2009]). "[F]alling object" liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured (*Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1091 [2d Dept 2015] quoting *Quattrocchi v F.J. Sciame Constr. Corp*., 11 NY3d 757, 758-759 [2008]). Liability also attaches "where the plaintiff demonstrates that, at the time the object fell, it "required securing for the purposes of the undertaking" (*Garbett v Wappingers Central School District*, 160 AD3d 812, 814 [2d Dept 2018] quoting *Escobar v Safi*, 150 Add 1081, 1083 [2d Dept 2017]). It is not necessary that the object fall from a level higher than the level at which the work is being performed (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp*., 18 NY3d 1 [2011]).

Here, Vazquez establishes his prima facie entitlement to judgment as a matter of law with respect to Labor Law §240(1). First, given the cumulative weight of the dangerously sharp metal sheets and the height to which they were stacked, it is demonstrated that the elevation differential is within the purview of the statute (*see Touray v HFZ 11 Beach St. LLC*, 180 AD3d 507 [1st Dept 2020]. Moreover, the evidentiary submissions demonstrate that the defendants failed to provide Vazquez with an adequate safety device and that this failure was a proximate cause of his injuries (*see Rudnik v Brogor Realty Corp*., 45 AD3d 828 [2d Dept 2007]). This is so whether the 5 ½-foot stack of unsecured mesh sheets fell immediately after the dolly hit the misleveled hoist as Vazquez testified or they fell while Vazquez and his co-worker were attempting to pick up the fallen/falling sheets to place back on the dolly as indicated in Mr. Kazinets' witness statement, as either scenario implicates the protections of Labor Law §240(1) (*see Escobar, supra).* In light of the nature of the work performed at the time of the accident, it was foreseeable that the metal mesh posed a significant risk of falling on the workers and the material should have been secured within the meaning of the statute (*cf. McLean v 405 Webster Ave Assocs*., 98 AD3d 1090 [2d Dept 2012]).

In opposition, the defendants fail to raise a triable issue of fact as to the absence of a statutory violation or that Vazquez was the sole proximate cause of his injuries. Defendants present no evidence that the A-frame dolly was an adequate safety device for the task (*see Touray v HFZ 11 Beach St. LLC*, 180 AD3d 507 [1st Dept 2020]). Although Rite-Way's project manager, Mr. Tramutolo, testified that the metal mesh on the A-frame dolly would not require any securing if properly loaded, there is testimony

and an affidavit submitted by Mr. Kazinets, indicating that the cart may have been overloaded. Moreover, the A-frame dolly did not have its own securing mechanism and no ropes or straps were provided to secure the load (*see Touray, supra*). Further, contrary to defendants' contentions, Mr. Kazinets' witness statement and affidavit do not raise a bona fide issue as to whether Vazquez' conduct was the sole proximate cause of the accident. Even accepting Mr. Kazinets' account of the accident as true, Vazquez' actions in attempting to pick up the fallen and/or falling metal sheets raises, at most, an issue as to his comparative negligence, which is not a defense to a cause of action under Labor Law § 240(1) and does not effect a reduction in liability (*see Rapalo v. MJRB Kings Highway Realty, LLC*, 163 A.D.3d 1023, 1024 [2d Dept 2018]).

Accordingly, Vazquez' motion for summary judgment on liability under Labor Law 240(1) is granted.

Labor Law §241(6)

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 AD2d 982, 983 [2d Dept 2015]). In order to establish liability under Labor Law §241(6), "a plaintiff or claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]). The predicate Industrial Code provision must "set[ ] forth specific safety standards" (*Hricus v. Aurora Contrs., Inc*., 63 A.D.3d 1004, 1005 [2d Dept 2009] [internal quotation marks omitted]. Here, Vazquez seeks partial summary judgment on his Labor Law §241(6) cause of action based on the defendants' alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7(e)(1) and 23-2.1(a)(1) and (2).

Vazquez fails to establish prima facie entitlement to partial summary judgment on his Labor Law §241(6) claim. With respect to Industrial Code § 23-1.7(e)(1), which requires "passageways" to be kept clear of tripping and other hazards, Vazquez fails to demonstrate that this regulation is applicable to these facts as no showing is made that the site where the accident happened was a "passageway" as opposed to an open work area (*see Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730 [2d Dept 2007]). Similarly, Vazquez fails to demonstrate the applicability of Industrial Code §23–2.1(a)(1), which requires that "building materials" be "stored in a safe and orderly manner" and be "so located that they do not obstruct any passageway, walkway, stairway, or other thoroughfare", as the mesh sheets were not being "stored" but were being transported (*see Castillo v Starrett City, Inc*, 4 AD3d 320 [2d Dept 2004] and they were not obstructing "any passageway, walkway, stairway or other thoroughfare" (*see Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002 [2d Dept 2012]). Finally, Vazquez

fails to demonstrate the applicability of Industrial Code §23-2.1(a)(2), which requires that "material" not be "placed or stored" close to the "edge" of a "floor, platform or scaffold" as Vazquez 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 967 [2d Dept 2012]).

Accordingly, Vazquez' motion for summary judgment on liability under Labor Law §241(6) is denied.

Safway's motion to dismiss pursuant to CPLR 3211(a)

As part of its motion, Safway seeks to dismiss the third-party complaint on the ground that the claims for common-law and contractual indemnification violate the anti-subrogation doctrine.

"Subrogation an equitable doctrine, entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*North Star Reinsurance Corp. v Continental Ins. Co.*, 82 NY2d 281 [1993]). However, "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." The rule is intended to prevent an insurer from passing its losses to its own insured (*see Wasau Underwriters Ins. Co. v Gamma USA, Inc.*, 166 AD3d 928 [2d Dept 2018]). The rule also seeks to prevent instances "in which an insurer and its insured have adverse interests, which might undercut an insurer's incentive to provide a vigorous defense to its insured" (*ELRAC, Inc., v Ward*, 96 NY2d 58, 76 [2001]).

Pursuant to the terms of its contract with JRM, Safway was required to maintain general liability coverage in specified amounts and was to name 422 Owner, Tishman and JRM as additional insureds under the policy. Safway procured its insurance coverage on a primary and non-contributory basis through the owner-controlled insurance program (OCIP) issued to 422 Fulton by Zurich American Insurance Company for all eligible contractors at the Macy's construction project. Rite-Way, as a demolition contractor, was ineligible to enroll in OCIP, and was required to obtain its own coverage. Consequently, Rite-Way, purchased its own policy of insurance from AXIS Insurance [AXIS] and 422 Fulton, Tishman, and JRM were named as additional insureds under the AXIS policy. After commencement of this action, 422 Fulton, Tishman, and JRM tendered their defense to AXIS, which accepted the tender under the policy of insurance issued to Rite-Way and agreed to defend and indemnify without reservation and on a primary and noncontributory basis.

Here, since Safway was a member of the OCIP, and the OCIP had a $3,000,000 deductible per occurrence for which 422 Fulton is responsible, the anti-subrogation rule bars 422 Fulton, Tishman, and JRM from asserting claims against Safway (*see Wasau, supra*). In opposition, 422 Fulton, Tishman, and JRM fail to raise a triable issue of fact.

Accordingly, Safway's motion to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) is granted. The remainder of Safway's motion is denied as moot.

Vazquez' motion to sever the third-party complaint

In light of the dismissal of the third-party action against Safway, Vazquez' motion for an order severing the third-party action pursuant to CPLR §603 and CPLR 1010 is denied as moot.

Defendant/Third-party plaintiffs' motion pursuant to CPLR 3215 for a default judgment

Defendant/third-party plaintiffs 422 Fulton, Tishman, and JRM move for an order pursuant to CPLR 3215 granting them leave to enter a default judgment against third-party defendant Custom Services due to its failure to appear or answer the third-party complaint.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215 [f]; *Allstate Ins. Co. v. Austin*, 48 AD3d 720 [2d Dept 2008]). Here, movants fail to submit either an affidavit of the facts constituting the claim or a verified complaint as the affidavit of the facts constituting the claim (*see* CPLR 3215(f); *DLJ Mortg. Capital, Inc. v United General Title Ins. Co*., 128 AD3d 760 [2d Dept 2015]).

Accordingly, defendant/third-party plaintiffs 422 Fulton, Tishman, and JRM's unopposed motion for leave to enter a default judgment against Custom Services pursuant to CPLR 3215 is denied.

In view of the foregoing it is hereby

Ordered, that Vazquez' motion for summary judgment on liability under Labor Law §240(1) is granted, and it is further

Ordered, that Vazquez' motion for summary judgment on liability under Labor Law §241(6) is denied, and it is further

Ordered, that Safway's motion to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) is granted and the remainder of the motion is denied as moot.

Ordered, that 422 Fulton, Tishman and JRM's motion for leave to enter a default judgment against third-party defendant Custom Services pursuant to CPLR 3215 is denied, and it is further

Ordered, that Vazquez' motion to sever the third-party action is denied as moot.

This constitutes the decision/order of the court.

Dated: March 29, 2021

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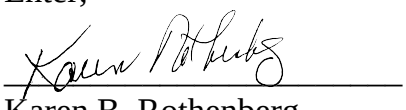

Karen B. Rothenberg
J.S.C.