Hernandez v Pacific 670-674, LLC, Inc.
2021 NY Slip Op 32545(U)
November 29, 2021
Supreme Court, Kings County
Docket Number: Index No. 518242/18
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 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 November, 2021.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

ESTEBAN RODRIGUEZ HERNANDEZ,

Plaintiff,

-against-

PACIFIC 670-674, LLC, INC., NY DEVELOPERS & MANAGEMENT, LLC, and NY DEVELOPERS & MANAGERS, INC.,

Defendants.

PACIFIC 670-674, LLC, INC., NY DEVELOPERS & MANAGEMENT, LLC, and NY DEVELOPERS & MANAGERS, INC.,

Third-Party Plaintiffs,

-against-

BIG APPLE DESIGNERS, INC.,

Third-Party Defendant.

PACIFIC 670-674, LLC, INC., NY DEVELOPERS & MANAGEMENT, LLC, and NY DEVELOPERS & MANAGERS, INC.,

Second Third-Party Plaintiffs,

-against-

VELOCITY FRAMERS USA, INC.,

Second Third-Party Defendant.

BIG APPLE DESIGNERS, INC.,

Third Third-Party Plaintiff,

-against-

KEYSTONE INTERIORS, INC.,

Third Third-Party Defendant.

DECISION AND ORDER

Index No. 518242/18

Mot. Seq. No. 3 and 5

The following e-filed papers read herein:	NYSCEF Doc No.:
Notice of Motion/Cross Motion, Affirmations, Memoranda of Law, and Exhibits Annexed	29-36; 47-55
Opposing Affirmations and Exhibits Annexed	71-81, 82-92; 93-95; 122-135, 136-149; 150-151, 152-153; 158-159, 160-161, 162-169
Affirmations in Reply and Exhibits Annexed	98; 113; 154; 156; 170

In this action to recover damages for personal injuries, the plaintiff Esteban Rodriguez Hernandez (the "plaintiff") moves for partial summary judgment on liability on his Labor Law § 240 (1) claim as against the defendants/third-party plaintiffs/second third-party plaintiffs Pacific 670-674, LLC, Inc. (Pacific), and NY Developers & Management Inc., incorrectly sued herein as NY Developers & Management, LLC and NY Developers & Managers, Inc. (NYDM and, collectively with Pacific, the principal defendants).[1]

The principal defendants cross-move for an order, pursuant to CPLR 3212:(1) granting them summary judgment dismissing the plaintiff's complaint in its entirety; (2) granting them summary judgment on their claims for indemnification, contribution, and breach of contract as against the third-party defendant/third third-party plaintiff Big Apple Designers, Inc. ("Big Apple") and the second third-party defendant Velocity Framers USA, Inc. ("Velocity"); (3) dismissing Big Apple's cross claims as against them; and (4) extending their time to serve (and, upon extension, accepting as timely served) their cross motion.

[1] Although plaintiff's notice of motion requests summary judgment pursuant to Labor Law §§ 200, 240 (1), and 241 (6), his accompanying papers make it clear that the only grounds for the requested relief is Labor Law § 240 (1).

Background

This action arises out of injuries sustained by the plaintiff on April 15, 2016 during construction of an eight-story residential building located at 670 Pacific Street in Brooklyn, New York (the "building"). Prior to the accident, Pacific, which owned the building, had hired NYDM to serve as the construction manager for the project. Thereafter, Pacific and NYDM hired various subcontractors to perform work on the project. Among those subcontractors was Velocity, pursuant to the Subcontract, dated August 20, 2014, as amended by a rider , to perform, among other things, drywall, framing, and carpentry work. Prior to the plaintiff's accident, Velocity assigned the subcontract to Big Apple (the "assignment").[2] Approximately one week prior to the plaintiff's accident, Big Apple further subcontracted a portion of the work to Keystone pursuant to agreement, made April 8, 2016. Plaintiff appears to have been an employee of Keystone at the time of his accident.[3] On the day of the accident, plaintiff was working in the eighth-floor lobby applying compound to the ceiling. In order to reach the ceiling, he was working on a Baker

[2] Although Velocity did not execute the assignment, the record reflects that Big Apple, a sister company of Velocity owned by the same individual, consented to (and ratified) the assignment by performing work under the subcontract, as well as by further subcontracting a portion of the subject work to Keystone. Big Apple's reliance on General Obligations Law § 5-1107 is misplaced because the statute addresses the narrow requirement of consideration for establishing a valid contractual assignment ("An assignment shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor, or by his agent."). The statute, however, has nothing to do with the assignment of a contract which, by the time of the plaintiff's accident, was already partially performed by its assignee (*i.e.*, Big Apple).

[3] Whereas the plaintiff testified at his pretrial deposition that he was a Velocity employee, Keystone is listed as his employer in the "First Report of Injury Report Type (MTC) 02-Change" which was received (and accepted) by the Workers' Compensation Board on August 29, 2016.

scaffold whose platform was approximately six-to-seven feet above the floor. The scaffold had four wheels, each with its own lock. The scaffold, as positioned by the plaintiff in order to perform his work, was partially obstructing the entrance to one of the two elevators which serviced the lobby. About one hour before the accident, several people used the partially obstructed elevator and they repositioned the scaffold (with plaintiff on it) several times to allow them to pass by. Each time the scaffold was repositioned they unlocked its wheel locks and, after repositioning it, reset the wheel locks. Approximately 30 to 40 minutes after the scaffold was last repositioned, the plaintiff walked from one side of the scaffold (which was flush to, and supported by a lobby wall) to the scaffold's other side which was unsupported. None of the scaffold's sides were equipped with a safety railing. The plaintiff was standing on the scaffold when he placed a bucket of compound on the platform which he intended to use as a stool to reach the lobby ceiling. As the plaintiff was stepping up onto the bucket, the scaffold tilted away from the adjacent wall, causing him to lose his balance and fall to the lobby floor.

Discussion

Plaintiff's Labor Law § 240 (1) Claim

"Under Labor Law § 240 (1), contractors and owners engaged 'in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building . . .' must provide 'scaffolding . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed'" (*O'Brien v Port Auth. of NY & NJ*, 29 NY3d 27, 33 [2017]). As the Court of Appeals observed in *Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280 (2003):

> "In cases involving . . . scaffolds that . . . malfunction for no apparent reason, we have . . . continued to aid plaintiffs with a presumption that the . . . scaffolding device was not good enough to afford proper protection [as required by Labor Law § 240 (1)]. Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the *sole* cause of the accident. If defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment. On the other hand, defendant may be granted summary judgment if the record establishes conclusively that no Labor Law § 240 (1) violation was shown to have been *a* proximate cause of the accident and that the accident was therefore caused *solely* by plaintiff's conduct."

(*Blake*, 1 NY3d at 289 n 8 [internal citations omitted; emphasis added]).

Furthermore, "A worker's comparative negligence is not a defense to a cause of action under Labor Law § 240 (1)" (*Cruz v R.C. Church of St. Gerard Magella*, 174 AD3d 782, 783 [2d Dept 2019]).

Here, the plaintiff has established prima facie his entitlement to judgment as a matter of law by demonstrating that he was engaged in work within the ambit of Labor Law § 240 (1) and that his injuries were proximately caused by "the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

In opposition to the plaintiff's prima facie showing, the principal defendants, Big Apple, and Keystone have failed to present a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation *and* that the plaintiff's own acts or omissions were the *sole* cause of his accident (*see Masmalaj v New York City Econ. Dev. Corp.*, 197 AD3d 1292, 1293-1294 [2d Dept 2021]; *Leon-Rodriguez v R.C. Church of Sts.*

Cyril & Methodius, 192 AD3d 883, 885 [2d Dept 2021]; *Carrion v City of New York*, 111 AD3d 872, 873 [2d Dept 2013]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2d Dept 2009]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]).[4] Conflicting factual interpretations as to why the scaffold tilted or why the plaintiff fell are irrelevant. Where, as here, a violation of Labor Law § 240 (1) is *a* proximate cause of the accident, the plaintiff's conduct cannot be deemed *solely* to blame for it (*see Zong Mou Zou v Hai Ming Const. Corp.*, 74 AD3d 800, 801 [2d Dept 2010]).

Likewise, the objecting defendants have failed to raise a triable issue of fact as to whether the plaintiff was a recalcitrant worker. In that regard, they have failed to present any evidence that the plaintiff was provided with specified safety devices, that such devices were readily available for his use, and that although the plaintiff was specifically instructed to use such devices, he chose for no good reason to disregard those instructions (*see Zong Mou Zou*, 74 AD3d at 801).[5]

Plaintiff's Labor Law § 241 (6) Claim

[4] Keystone's reliance on the First Judicial Department's decision in *Nohejl v 40 W. 53rd Partnership*, 205 AD2d 462 (1994), is unavailing. More recent and controlling authority from the Second Judicial Department, as cited in the text, is contrary to *Nohejl* (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

[5] The Second Judicial Department's decisions to the contrary, as cited by the objecting defendants in their respective papers, are distinguishable. Unlike *Plass v Solotoff*, 5 AD3d 365 (2d Dept 2004), *lv denied* 2 NY3d 705 (2004), the plaintiff here did not assemble the scaffold. Nor is *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802 (2d Dept 2013), on point because the scaffold here tilted *before* the plaintiff fell. In contrast to *Reborchick v Broadway Mall Props., Inc.*, 10 AD3d 713 (2d Dept 2004), the plaintiff's credibility as to how his accident occurred is not at issue here. Lastly, *Daley v 250 Park Ave., LLC*, 126 AD3d 747 (2d Dept 2015), is inapplicable because the scaffold here was not mispositioned.

The principal defendants also cross-move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. "Pursuant to section 241 (6), '[a]ll areas in which construction . . . work is being performed shall be so constructed, . . . equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein. . .'" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 129 [2015]). To prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish the violation of a specific and concrete provision of the Industrial Code, and that such violation was a proximate cause of his or her injuries" (*Fonck v City of New York*, 198 AD3d 874, 876 [2d Dept 2021]).

Here, the plaintiff cites to six Industrial Code provisions as a predicate for his Labor Law §241 (6) claim; namely: 23-5.1 (b), 23-5.1 (j), 23-5.3 (g) (1), 23-5.18 (b), 23-5.18 (g), and 23-5.18 (h). The principal defendants have made a prima facie showing of the factual inapplicability of §23-5.1 (b) and §23-5.3 (g) which do not apply to manually propelled mobile scaffolds, such as the Baker scaffold here. Industrial Code §23-5.18 (h) is not relevant because the plaintiff here was not injured while the scaffold was being moved. In opposition, the plaintiff has failed to raise a triable issue of fact as to the applicability of the foregoing provisions.

On the other hand, the principal defendants have failed to establish prima facie that the three remaining Industrial Code provisions do not potentially apply to the facts of this case. Industrial Code 23-5.1 (j) (1) which requires safety railings to be installed in and around "[a]ny scaffold platform with an elevation of not more than seven feet," cannot be excluded, inasmuch as the plaintiff approximated the height of the scaffold platform as

being approximately six-to-seven feet above the floor (*see Debennedetto v Chetrit*, 190 AD3d 933, 937 [2d Dept 2021]). Industrial Code § 23-5.18 (b) requires safety railings on every manually propelled scaffold without regard to its height, is relevant because the scaffold is claimed to have lacked safety railings (*see Celaj v Cornell*, 144 AD3d 590, 591 [1st Dept 2016]; *Moran v 200 Varick St. Assoc., LLC*, 80 AD3d 581, 583 [2d Dept 2011], *lv dismissed* 17 NY3d 756 [2011]). Lastly, Industrial Code § 23-5.18 (g) provides that whenever a mobile scaffold is in use and is occupied by any person, "[a]ll [of its] casters or wheels shall be locked in position," cannot be excluded because the plaintiff was unsure in his pretrial testimony whether all of the scaffold wheels were locked when the scaffold was last moved before the accident.

Plaintiff's Labor Law § 200/Common-Law Negligence Claim

The principal defendants further cross-move for summary judgment dismissing the plaintiff's Labor Law § 200 claim. Labor Law § 200 "codifies the common-law duty of an owner or employer to provide employees a safe place to work" (*Yong Ju Kim v Herbert Const. Co., Inc.*, 275 AD2d 709, 712 [2d Dept 2000]). "Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" (*Aranda v Park E. Const.*, 4 AD3d 315, 316 [2d Dept 2004]). Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 [and in common-law negligence] unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Similarly, when a claim arises out of a defect in the equipment used by a plaintiff, an owner or contractor who did not supply the equipment may only be held liable if it had the authority to control and supervise plaintiff's work (*see Chowdhury v Rodriguez*, 57 AD3d 121, 129 [2d Dept 2008]). General supervisory authority to oversee the progress of the work is insufficient. Rather, "[a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62). Further, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010] [alterations and internal quotation marks omitted]). It follows that "[i]f the challenged means and methods of the work are those of a subcontractor, and *the owner or contractor exercises no supervisory control over the work*, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011] [emphasis added]).

Here, to the extent that the accident was caused as a result of defects in, or inadequacies of, the scaffold, the principal defendants have made a prima facie showing that they did not supply the scaffold and did not control/supervise the means and methods which the plaintiff used to perform his work. In particular, the plaintiff testified that he did not have communications with anyone from either Pacific or NYDM, and that neither of the them provided him with the scaffold, equipment, or any tools. Moreover, NYDM's job

superintendent, Joel Indig, testified at depositions that neither Pacific nor NYDM supplied any scaffolds for the project. Further, although Mr. Indig testified that he would stop any unsafe work practices if he witnessed any at the worksite, his authority to stop a contractor's work or to ensure compliance with safety regulations, is insufficient to impose liability under Labor Law § 200 or a common-law negligence theory. Accordingly, the principal defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claim.

Principal Defendants' Third-Party Claims Against Big Apple

The principal defendants cross-move for summary judgment against Big Apple on their contractual indemnification, common-law contribution/indemnification, and breach of contract claims.

"The right to contractual indemnification depends upon the specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009] [internal citations omitted]). Moreover, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, paragraph 1 of the rider to the subcontract requires Big Apple, as Velocity's assignee, to indemnify Pacific and NYDM "from and against all liability or claimed liability for bodily injury . . . , including all attorney['s] fees . . . , arising out of or resulting

from the Work covered by this Agreement to the extent such Work was performed or contracted through [Velocity] . . . , excluding only liability created by the sole and exclusive negligence of [Pacific or NYDM]."[6] The plaintiff's accident arose out of the work set forth in the subcontract which was assigned by Velocity to Big Apple and which was further subcontracted by Big Apple to Keystone. Accordingly, Big Apple's obligation to indemnify the principal defendants was triggered by the plaintiff's accident. As noted, the Court has determined that the plaintiff's accident was not proximately caused by any negligence on the principal defendants' part. Accordingly, the principal defendants are entitled to contractual indemnification from Big Apple.

As the proponents of summary judgment relief, the principal defendants are required to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate all triable issues of fact (*see Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1101 [2d Dept 2020]). Here, the principal defendants have failed to establish prima facie that either Big Apple was negligent or that it had the authority to direct, supervise and control the plaintiff's work. In that regard, the evidence regarding the extent of Big Apple's supervision (if any) of the plaintiff's work is unclear. The plaintiff testified at his pretrial deposition that he was supervised by a Velocity employee named "Raul,"[7] Big Apple's assistant project manager

[6] The rider, by its express terms, superseded the contents of the subcontract, including the indemnification provision in ¶ 12 thereof.

[7] Plaintiff's December 5, 2019 EBT at page 16, line 18 to page 17, line 8; page 18, line 21 to page 19, line 2; page 27, lines 15-16; plaintiff's April 29, 2021 EBT tr at page 110, lines 18-21; page 118, line 23 to page 119, line 6; page 146, lines 9-16; page 149, lines 17-23; page 180, lines 2-18; plaintiff's May 19, 2021 EBT tr at page 379, line 12 to page 380, line 2.

testified that he supervised, directed, and instructed workers of Keystone and those of Big Apple, albeit without specifying which entity the plaintiff worked for.[8] Accordingly, the branch of the principal defendants' motion for summary judgment on their common-law contribution and indemnification claims against Big Apple is denied without regard to the sufficiency of Big Apple's opposition (*see Daeira v Genting New York, LLC*, 173 AD3d 831, 836 [2d Dept 2019]).[9]

The principal defendants have failed to demonstrate prima facie that Big Apple breached the insurance-procurement provisions of the subcontract (*see Leon-Rodriguez*, 192 AD3d at 887). The record establishes that Big Apple purchased a liability policy from Scottsdale Indemnity Company with a blanket endorsement for contractually designated additional insureds (the "Scottsdale policy") (CG 20 33 04 13, page 1 of 2 [NYSCEF Doc No. 79]). The principal defendants, in reply, have failed to address the validity and effectiveness of the Scottsdale policy. Accordingly, the principal defendants' claim that Big Apple breached its obligation to procure insurance is untenable (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Also, the branch of the principal defendants' cross motion for summary judgment on their third-party claims against Velocity must be denied, inasmuch as Velocity has not

[8] Shloimy Landau EBT tr at page 22, lines 11-21; at page 76, lines 1-6; page 127, lines 8-18; page 128, line 24 to page 129, line 5; page 134, lines 9-12.

[9] Inasmuch as plaintiff was not employed by Big Apple, Workers' Compensation Law § 11 does not preclude the principal defendants' common-law contribution and indemnification claims against it.

joined issue in the third-party action. "A motion for summary judgment may not be made before issue is joined (CPLR 3212 [a]) and the requirement is strictly adhered to" (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

Lastly, the principal defendants cross-move for summary judgment dismissing Big Apple's "cross claims" (actually, counterclaims) against them for contribution and indemnification. The principal defendants have demonstrated their prima facie entitlement to judgment as a matter of law dismissing Big Apple's cross claim for contractual indemnification because the subcontract contains no provision requiring the principal defendants to indemnify Velocity (as the original contractor) or Big Apple (as Velocity's assignee) (*see Debennedetto,* 190 AD3d at 938). The principal defendants further have demonstrated their prima facie entitlement to judgment as a matter of law dismissing Big Apple's cross claim for common-law contribution and indemnification, inasmuch as the Court has found that the plaintiff's accident was not caused by any negligence on the part of either principal defendant. In opposition, Big Apple has failed to raise a triable issue of fact. Consequently, the principal defendants are entitled to dismissal of Big Apple's cross claims as against them.

The Court has considered the parties' remaining contentions and found them, in light of its determination, either unavailing or, academic.

Conclusion

Accordingly, it is

ORDERED that the plaintiff's motion seq. 3 for partial summary judgment on liability on his Labor Law § 240 (1) claim as against the principal defendants is *granted*; and it is further

ORDERED that the principal defendants' cross motion seq. 5 for summary judgment is *granted to the extent* that: (1) plaintiff's Labor Law § 241 (6) claim, predicated on violation of Industrial Code §§ 23-5.1 (b), 23-5.3 (g), and 23-5.18 (h), are *dismissed*; (2) plaintiff's Labor Law § 200/common-law negligence claim as against them is *dismissed*; (3) the principal defendants' third-party claim for contractual indemnification against Big Apple is *granted*; and (4) Big Apple's cross claims as against them are *dismissed*; and the remainder of their cross motion is denied.

The plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel (as well as on Velocity) and to electronically serve an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.