

Ramos v WBB Constr., Inc.
2021 NY Slip Op 32716(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 153130/2016
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

-----X

JURANDY RAMOS,

Plaintiff,

- v -

WBB CONSTRUCTION, INC. and MADISON 33 OWNER
LLC.,

Defendants.

-----X

WBB CONSTRUCTION, INC. and MADISON 33 OWNER LLC,

Defs./Third-Party Plaintiffs,

-against-

SKY MATERIALS CORP.,

Third-Party Defendant.

-----X

INDEX NO. 153130/2016

MOTION SEQ. NO. 002, 003, and
004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595573/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 102, 103, 104, 105, 106, 107, 108, 109, 121, 122, 123, 124, 125, 134, 135, 136, 137, 138

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 110, 112, 113, 114, 115, 126, 127, 128, 129, 130, 131, 132, 133, 139, 140

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 111, 116, 117, 118, 119, 120, 141, 142

were read on this motion to/for SUMMARY JUDGMENT.

Motion sequence 002, 003 and 004 are consolidated for disposition.

This personal injury action arises from an incident on September 10, 2015 in which plaintiff Jurandy Ramos was injured at a construction site located at 172 Madison Avenue, New York, New

York. Plaintiff was employed as a carpenter and stripper by third-party defendant Sky Materials Corp. (“Sky”). Sky was hired by the general contractor, defendant/third-party plaintiff WBB Construction, Inc. (“WBB”), which had entered into a contract with the owner, defendant/third-party plaintiff 33 Madison LLC (“33 Madison”), for the construction of a mixed-use building.

At the time of the accident, plaintiff was engaged in removing pieces of plywood from the third-floor ceiling. He was standing on a beam that he claims was approximately 9 ½ inches wide and 16 feet long. The beam had no side or safety rails. At his deposition, plaintiff testified that the distance between the floor and the ceiling was approximately eighteen (18) feet, and he was almost able to touch the ceiling with his hands from where he was standing. Plaintiff was equipped with a harness and lanyard that was attached to a strap in the ceiling. The accident occurred when plaintiff, after removing a piece of plywood from above, bent down and attempted to pass the plywood to a co-worker located below him. The plywood had a nail or nails that were protruding from its surface. When the co-worker grabbed the plywood, the nail caught in the plaintiff’s harness, causing him to lose his balance and fall onto another beam located approximately four to six feet below where he had been standing. The plaintiff alleges that the safety line of his harness was too long and not sufficient to protect him from falling and striking the beam below him.

The plaintiff thereafter commenced this action, alleging common-law negligence and violations of Labor Law §§ 200, 240(1), 241(6). In motion sequence 002, the plaintiff moves for partial summary judgment against WBB and 33 Madison, on the issue of liability for violations of Labor Law §240(1). In motion sequence 003, third-party defendant Sky moves for summary judgment and a dismissal of the complaint and all cross claims and/or third-party claims asserted against it. In motion sequence 004, defendants/third-party plaintiffs WBB and 33 Madison move for summary judgment and a dismissal of the complaint and/or summary judgment on their third-

party claims against Sky for contractual indemnification and breach of contract for failure to procure insurance.

Plaintiff filed a note of issue on April 28, 2021. Doc. 52.

LABOR LAW § 240(1) (MOTION SEQUENCES 002 AND 004)

Plaintiff moves for partial summary judgment as to liability on his Labor Law §240(1) claim against defendants. Defendants move for summary judgment dismissing said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

All contractors and owners and their agents...in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, aligns, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) was designed to prevent those types of accidents in which a scaffold or other protective device proves inadequate to shield a worker from injuries caused by the application of the force of gravity to an object or person (*see Ross v Curtis-Palmer Hydro-Elec, Co.*, 81 NY2d 494, 501[1993]; *John v Bahaarestani*, 281 AD2d 114, 118 [1st Dept 2001]). The statute imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes injury (*see Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]).

The hazards subject to the protection of Labor Law §240(1) encompass gravity-related accidents such as falling from a height or being struck by or coming into contact with a falling object (*see Ross*, 81 NY2d at 501). However, not every worker who falls at a construction site is covered by the protections of Labor Law 240 § (1). A distinction must be made between those accidents proximately caused by the failure to provide an enumerated safety device and those

accidents proximately caused by a general hazard specific to a workplace (*see Makarius v Port Auth. Of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010]). The former gives rise to liability under the statute, the latter does not (*id.*) Additionally, the accident must be attributable, at least in part, to the failure to provide or use, or to the inadequacy of, a proper safety device of the kind enumerated in the statute (*see Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001]).

Plaintiff alleges that the accident was due to the inadequacy of the safety line or strap because it did not arrest or prevent his fall. He also claims that the beam he was standing on when his harness came into contact with the nail was inadequate because it lacked any side safety or guard rails.

Defendants maintain that the statute is inapplicable to plaintiff's accident because it was not caused by the lack or inadequacy of a safety device. They assert that plaintiff's fall was not related to any issue with the beam, which was secure and stable, but that it occurred because he was pulled or caught by a protruding nail. Defendants also maintain that the plaintiff was adequately protected from falling objects and that, in any event, his accident was not caused by the application of gravity to the piece of plywood.

This Court concludes that the plaintiff is entitled to summary judgment as to liability on his claim pursuant to Labor Law 240(1). Plaintiff has established that the safety devices employed by defendants, including the beam, harness and lanyard, were inadequate to shield him from harm directly flowing from the application of gravity (*see Stigall v State*, 189 AD3d 469 [1st Dept 2020]). The safety cable was too low and thus improperly secured, resulting in plaintiff striking the beam below him before the lanyard could arrest his fall. This is a prima facie violation of the Labor Law (*see Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402-403 [1st Dept 2017]; *Hoffman v SJP TS, LLC*, 111 AD3d 467 [1st Dept 2013]; *Fernandez v BBD Developers, LLC*, 103

AD3d 554, 555 [1st Dept 2013]; *Corderio v TS Midtown Holdings, LLC*, 87 AD3d 904, 905 [1st Dept 2011]).

Additionally, the beam lacked any side or guard rails, a condition that is also a prima facie violation of the Labor Law (*see Ordonez v One City Block, LLC*, 191 AD3d 412, 413 [1st Dept 2021]; *Marulanda v Vance Assoc., LLC*, 160 AD3d 711 [2d Dept 2018]; *Chong v 457 W.22d Street Tenants Corp.*, 144 AD3d 591 [1st Dept 2016]). In a situation such as this, where the intended safety devices clearly failed to protect the injured worker from a gravity-related fall, plaintiff is entitled to judgment as a matter of law against the owner and general contractor for violations of Labor Law §240(1) (*see Stigall*, 189 AD3d at 469-470).

In opposition to the motion, defendants fail to raise any triable issues of fact. Indeed, most of defendants' arguments constitute unsupported conjecture at odds with the record and/or not responsive to plaintiff's claims regarding how the accident occurred. Defendants argue, in essence, that, since no object struck plaintiff prior to his fall, the provisions of § 240(1) are not applicable herein. Initially, plaintiff's claims are not primarily based on a claim that the accident was caused by a failure to properly secure a falling object. Rather, he alleges that the safety devices provided, i.e., the harness and beam, were inadequate to prevent him from falling *after* he lost his balance. Since plaintiff established that the safety devices provided were inadequate to protect him against falling after he lost his balance, summary judgment must be granted in his favor pursuant to the statute.

Further, as plaintiff's counsel correctly asserts, summary judgment must also be granted on a "falling object" theory. Labor Law §240(1) imposes absolute liability on owners and contractors when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see e.g., Willinski v 334 East*

92nd Hous. Dev. Fund Corp., 18 NY3d 1, 3 [2011]). The plywood that was being lowered both to and from plaintiff constituted a load that required adequate securing to properly control its descent and minimize the risk of injury. Instead of being passed freehand, the form should have been secured by a safety device that would have controlled its descent, and the failure to provide such a device was a proximate cause of plaintiff's accident (*see Gutierrez v 610 Lexington Property, LLC*, 179 AD3d 513 [1st Dept 2020]; *Kollbeck v 417 FS Realty*, 4 AD3d 314, 314[1st Dept 2004]).

The unsworn C-3 workers' compensation report submitted by defendants does not raise a question of fact regarding the nature of plaintiff's accident. The report does not contradict plaintiff's deposition testimony concerning any of the material facts in the case. At most, it merely raises issues of fact regarding the height from which plaintiff fell which are not material (*see Sanchez v 1 Burgess Rd.*, 195 AD3d 531[1st Dept 2021]; *Ordonez*, 191 AD3d at 414).

Defendants also attempt to rebut plaintiff's prima facie showing by submitting an affidavit from an expert who claims that the harness and lanyard that were provided to plaintiff were appropriate and that no additional safety devices were required. The affidavit is conclusory, speculative, and totally unsupported by any evidence. Accordingly, plaintiff is entitled to partial summary judgment as to liability on his Labor Law §240(1) claims against WBB and the 33 Madison and the branch of said defendants' motion seeking to dismiss this claim are denied.

COMMON-LAW NEGLIGENCE AND LABOR LAW §§200 and 241(6) (MOTION SEQUENCES 003 and 004)

In his papers, plaintiff does not oppose the branches of defendants' motions for summary judgment seeking the dismissal of his common-law negligence claim and his claims pursuant to Labor Law §§200 and 241(6) and common law negligence. In any event, these claims are academic given the granting of summary judgment in plaintiff's favor pursuant to Labor Law §

240(1) (*See Golubowski v City of New York*, 131 AD3d 900 [1st Dept 2015]). Accordingly, these claims are dismissed.

**CONTRACTUAL IDEMNIFICATION AND FAILURE TO PROCURE INSURANCE
(MOTION SEQUENCE 004)**

In motion sequence 004, defendants/third-party plaintiffs WBB and 33 Madison move for summary judgment dismissing the complaint or, in the alternative, for summary judgment on their third-party claims against Sky for contractual indemnification and breach of contract for failure to procure insurance.

A party is entitled to contractual indemnification for damages so long as the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and surrounding facts and circumstances (*Drzewinski v. Atlantic Scaffold 4 Ladder Co.*, 70 NY2d 774, 777 [1987]). In addition, "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 therefore." (*Reisman v Bay Shore Union Free School Dist.*, 74 A.D.3d 772, 773 [2d Dept 2010]). A party's vicarious liability to a plaintiff under Labor Law §§ 240(1) and 241(6), if any, will not bar full contractual indemnity (*see Quiroz v Wells Reit-222 E. 41st St., LLC*, 128 AD3d 442 [1st Dept 2015]).

Here, Sky entered into a subcontract with WBB that requires it to indemnify both WBB and 33 Madison for the subject accident. Plaintiff was a Sky employee engaged in the performance of Sky's work pursuant to the subcontract. (Ex. "M", Subcontract Agreement Rider, Schedule C, § 1). Additionally, he was exclusively supervised by other Sky employees, and was in no way directed by WBB or 33 Madison in the performance of his work. Finally, Sky's subcontract contained saving language allowing it to be contractually indemnified "[t]o the fullest extent permitted by law...". (Ex. "M", Subcontract Agreement Rider, Schedule C, § 1). Thus, plaintiff's

accident unquestionably triggered Sky's obligation to defend and indemnify WBB and 33 Madison pursuant to § 1 of the Subcontract Agreement Rider, Schedule C. Therefore, WBB and 33 Madison are entitled to summary judgment on their contractual indemnification claim against Sky.

Although WBB and 33 Madison claim that the insurance policy procured by Sky did not meet all the requirements set forth in the subcontract, and that Sky's insurer initially declined to defend and indemnify WBB and 33 Madison pursuant to the policy, they fail to specify how or why the requirements were not met and have therefore failed to set forth their prima facie entitlement to summary judgment on this claim. Accordingly, WBB and 33 Madison are not entitled to summary judgment against Sky for breach of contract for failure to procure proper insurance.

Accordingly, it is hereby:

ORDERED that the motion (mot. seq. 002) by plaintiff Jurandy Ramos seeking partial summary judgment as to liability on his Labor Law §240(1) claim is granted as against defendants/third-party plaintiffs WBB Construction, Inc. and 33 Madison LLC; and it is further

ORDERED that the motion (mot. seq. 003) by third-party defendant Sky Materials Corp. seeking summary judgment dismissing all claims against it is granted to the extent that plaintiff's common-law negligence claim and claims pursuant to Labor Law §§ 241(6) are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the branch of the motion (mot. seq. 004) by defendants/third-party plaintiffs WBB Construction, Inc. and 33 Madison LLC seeking summary judgment dismissing all claims against them is granted to the extent that plaintiff's common-law negligence claim and claims pursuant to Labor Law §§ 241(6) are dismissed; and it is further

ORDERED that the branch of the motion (mot. seq. 004) by defendants/third-party plaintiffs WBB Construction, Inc. and 33 Madison LLC seeking summary judgment on their claim against third-party defendant Sky Materials Corp. for contractual indemnification is granted; and it is further

ORDERED that the branch of the motion (mot. seq. 004) by defendants/third-party plaintiffs WBB Construction, Inc. and 33 Madison LLC seeking summary judgment on their claim against third-party defendant Sky Materials Corp. for breach of contract to procure insurance is denied; and it is further

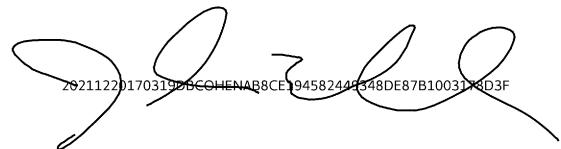
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days of entry of this order, counsel for defendants/third-party plaintiffs WBB Construction, Inc. and 33 Madison LLC shall serve a copy of this order, with notice of entry, upon all parties, as well as on the Clerk of the Court (Room 141B) and the General Clerk's Office (Room 119); and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh).

12/20/2021

DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE