

Ortiz v 115 Kingston Ave. LLC
2021 NY Slip Op 33122(U)
November 12, 2021
Supreme Court, Queens County
Docket Number: Index No. 712223/15
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Supreme Court Justice

IAS TERM, PART 33

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JOSE ORTIZ

Index No. 712223/15

Plaintiff,

-against -

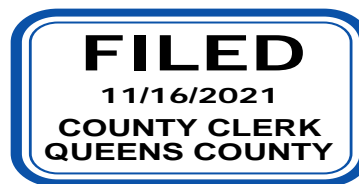
Motion Date: 6/1/21

115 KINGSTON AVENUE LLC,
BLACKSTONE CONTRACTORS LLC
and HKS CONSTRUCTION CORP.,
Defendants.

Seq: 10

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115 KINGSTON AVENUE LLC,
Third-Party Plaintiff,



-against -

KINGS COUNTY DEMOLITION, INC.,
Third-Party Defendant

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The following papers numbered 1 - 3 below read on this motion by Plaintiff for an Order pursuant to C.P.L.R. 3212 granting the plaintiff summary judgment as against the defendants, 115 KINGSTON AVENUE LLC, BLACKSTONE CONTRACTORS LLC., pursuant to New York Labor Law §§ 240(1), 241(6), 200 and common law negligence causes of action and; the cross motion by Defendant/Third-Party Plaintiff 115 KINGSTON AVENUE LLC, for (a) An Order denying Plaintiff's Motion (Mot. Seq. #10) seeking summary judgment on New York Labor Law §§ 241(6), 240(1), 200, common-law negligence causes of action against Defendant/Third-Party Plaintiff, 115 KINGSTON AVENUE LLC on grounds there are triable issues of fact; (b) An Order pursuant to CPLR § 3212, granting partial summary judgment dismissing Plaintiff's New York Labor Law § 200 and common-law negligence claims in their entirety on the grounds that said claims against Defendant/Third-Party Plaintiff, 115 KINGSTON AVENUE LLC are without merit and presents no issue of triable fact for a jury; (c) An Order pursuant to CPLR § 3212, granting partial summary judgement in favor of

Defendant/Third-Party Plaintiff, 115 KINGSTON AVENUE LLC against Defendant, BLACKSTONE CONTRACTORS, LLC for contractual indemnification and damages for breach of contract claims; (d) An Order dismissing all cross-claims asserted by codefendants BLACKSTONE CONTRACTORS LLC, HKC CONTRACTORS LLC and KINGS COUNTY DEMOLITION, INC. against 115 KINGSTON AVENUE LLCC on grounds that the latter is not actively negligent for the underlying alleged accident.

PAPERS
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	274-289
Cross Motion, Affirmation, Affidavits and Exhibits.....	301-321
Answering Affirmations, Affidavits And Exhibits.....	296-300, 329-339, 340, 341- 342
Reply Affirmations, Affidavits And Exhibits.....	322-327, 343-346
Other	

Upon the foregoing papers, the motion is denied and the cross-motion is granted.

Plaintiff alleges that he was injured in a workplace accident on October 12, 2015. Plaintiff was working for Kings County Demolition. Plaintiff was working on a construction site on that date located at 115 Kingston Avenue, Brooklyn NY.

In this action, there three conflicting versions of how the accident occurred. Plaintiff alleges that he and his coworkers were removing a sign from the side of a building. Plaintiff was working on a ladder, holding the sign, while a coworker cut the sign loose with a sawzall. When the sign came loose, it struck the ladder, causing plaintiff to fall. On the other hand, Ross Goldenberg, the principal of plaintiff's employer, testified that at the time of the accident plaintiff was "fooling around" by standing on the bars of the sidewalk shed, at about waist height, and that plaintiff was not performing a work-related function at the time of the

accident. Goldenberg also testified that the plaintiff's accident took place before their workday started. Finally, at the emergency room, plaintiff related that the accident occurred while he was working in his backyard at his place of residence.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the courts function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York, supra*).

Labor Law Section 240(1) provides, in pertinent part, that:

"All contractors and owners.....who contract for but do not direct or control the work, in the erection, demolition.....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, slings, hangers, blocks, pulleys, irons, ropes and other devices which shall be so constructed, placed and operated as to give protection to a person so employed."

"To recover on a cause of action pursuant to Labor Law §240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Przyborowski v A & M Cook, LLC*, 120

In order to establish a cause of action under Labor Law § 241(6), the plaintiff must allege and prove violation(s) of the New York State Industrial Code, which mandates compliance with concrete specifications as is applicable to the facts and circumstances of the given case (*Ross v. Curtis- Palmer Hydroelectric Co.*, 81 N.Y.2d 494[1993]; *DeMattia v. Vanwesterhaut Moler Social and Sport Club, Inc.*, 204 A.D.2d 594 [2d Dep't 1994]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed” (*Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Thus, plaintiff must establish a dangerous or defective condition or negligence in the manner of the work performed to be entitled to summary judgment.

As a threshold matter, Goldenberg’s testimony is sufficient to establish material issues of fact as to plaintiff’s claims. However, plaintiff argues that Goldenberg’s testimony is barred by collateral estoppel.

Collateral estoppel “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500). The doctrine is applicable to determinations made by the Workers' Compensation Board (*see Ryan v. New York Tel. Co.*, *supra* at 499).

In the instant case, the New York State Workers Compensation Board found that the plaintiff had a work-related injury as a result of the subject accident. However, the Board did not make any determination that the injury arose from a breach of the scaffold law, that an industrial code section was violated or that a defendant was negligent. Goldenberg’s testimony is sufficient to establish material issues of fact as to all of these issues.

Accordingly, there are material issues of fact and plaintiff’s summary judgment motion is denied.

Defendant/Third-Party Plaintiff 115 KINGSTON AVENUE LLC (“Kingston”), cross-moves for partial summary judgment dismissing plaintiff’s New York Labor Law § 200 and common-law negligence claims. Kingston is the

owner of the property where the accident occurred. Plaintiff alleges Kingston had actual or constructive notice of a defective sidewalk condition. However, there is no evidence that any defective sidewalk condition was a proximate cause of the accident. Accordingly, this branch of the cross motion must be granted.

Kingston also moves for partial summary on its claims against Defendant, Blackstone Contractors, LLC (“Blackstone”) for contractual indemnification and damages for breach of contract claims. With respect to the contractual indemnification claim, The contract between Kingston and Blackstone provides for defense and indemnification that runs in favor of Kingston and reads in pertinent part as follows:

“...[t]o the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless Owner and its officers, directors, employees, representatives, affiliates, and agents ("Indemnified Parties") from and against all claims, damages, demands, losses, expenses, fines, causes of action, suits or other liabilities, (including all costs reasonable attorneys' fees, consequential damages, and punitive damages), arising out of or resulting from, or alleged to arise out of or arise from, the performance of the Work under the Contract, whether such claim, damage, demand, loss or expense is attributable to bodily injury, personal injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom to the extent attributable to the acts or omissions of the Contractor or any entity for which it is legally responsible and; regardless whether the claim is presented by an employee of Contractor...”

Blackstone argues that summary judgment is premature because it has not been established that the accident is attributable to the acts or omissions of Blackstone, or an entity for which it is legally responsible. However, to obtain conditional relief on a claim for contractual indemnification, “the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability” (*Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65). In the instant case, Kingston met its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law on its contractual indemnification claims against Blackstone by submitting evidence establishing that it was free from any negligence and can only be held liable based on statutory or vicarious liability as the owner of the subject property where the accident occurred. Blackstone has failed to raise a material issue of fact in opposition. Accordingly, this branch of

the motion is granted.
 Kingston also moves for summary judgment on its breach of contract claim against Blackstone for Blackstone's failure to procure insurance. It is undisputed that Blackstone was contractually obligated to obtain insurance. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (*Rodriguez v. Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dep't. 2003]).

Kingston did obtain an insurance policy and, on February 24, 2016, Kingston tendered its defense to Blackstone and its carrier Mt. Hawley Insurance Company. By letter dated March 1, 2016, Mt. Hawley disclaimed coverage on the grounds that the policy excluded "[a]ny exterior work or exterior project if the work or project involves exterior work above 2 stories or 30 feet, which ever is closer to the ground." This is sufficient to establish, prima facie, that Blackstone breached its contractual obligation to obtain insurance. Blackstone fails to raise an issue of fact in opposition. Accordingly, Kingston is entitled to summary judgment on this claim.

Next, Kingston moves for summary judgment dismissing all cross-claims by Blackstone, HKS Construction Corp. ("HKS"), and Kings County Demolition Inc. ("KCD") for common-law indemnification and contribution. In order to establish a claim for common-law indemnification, "a party must prove not only that it was not negligent, but also that the proposed indemnitor...was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Hart v Commack Hotel, LLC*, 85 A.D.3d 1117 [2nd Dep't 2011]). In order " '[t]o sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries' " (*Guadalupi v. Morelli*, 127 A.D.3d 1016, 1017, 7 N.Y.S.3d 477, quoting *Guerra v. St. Catherine of Sienna*, 79 A.D.3d 808, 809, 913 N.Y.S.2d 709).

In the instant case, Kingston has established that it was not actively negligent and that it may only be held vicariously liable. Thus, the cross-claims for common-law indemnification and contribution must be dismissed.

Accordingly, the plaintiff's motion for summary judgment is denied and the cross-motion is granted to the extent that it is,

ORDERED, that plaintiff's New York Labor Law § 200 and common-law negligence causes of action are dismissed as against defendant Blackstone; and it is further,

ORDERED, that defendant 115 Kingston Avenue LLC is granted conditional contractual indemnification over and above defendant Blackstone Contractors LLC; and it is further,

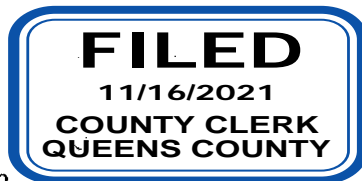
ORDERED, that defendant 115 Kingston Avenue LLC is granted summary judgment on its breach of contract for failure to obtain insurance claim against defendant Blackstone Contractors LLC; and it is further,

ORDERED, that all cross-claims asserted by Blackstone Contractors LLC, HKC Contractors LLC, and Kings County Demolition, Inc. against 115 Kingston Avenue LLC are dismissed on grounds that 115 Kingston Avenue LLC is not actively negligent for the underlying alleged accident.

Any other or further relief not specifically requested is denied.

This constitutes the Order of the Court.

Dated: November 12, 2021



A handwritten signature in black ink, appearing to read "Leonard Livote".

Leonard Livote, J.S.C.