Hernandez v Kiamie Indus., Inc.
2022 NY Slip Op 33136(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 160160/2017
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH**, ***Justice*** — **PART** **14**

---X

IGNACIO MARQUEZ HERNANDEZ,

Plaintiff,

- v -

KIAMIE INDUSTRIES, INC.,BEACH PLAZA CORPORATION, CITYVIEW WINDOW CORP.,

Defendants.

---X

INDEX NO. 160160/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

KIAMIE INDUSTRIES, INC.

Plaintiff,

-against-

CITYVIEW WINDOW CORP.

Defendants.

---X

Third-Party
Index No. 595570/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 88, 90, 92, 94, 95, 96, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 91, 93, 97, 98, 99, 108, 109, 110, 111, 112

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 002 and 003 are consolidated for disposition.

Plaintiff’s motion (MS002) for summary judgment on his Labor Law § 240(1) claim is granted. The motion (MS003) by defendant Kiamie Industries Inc. (“Kiamie”) for summary judgment dismissing plaintiff’s Labor Law §§ 200, 240(2), 240(3), and 241(6) claims is granted

and for summary judgment against third-party defendant Cityview Window Corp. ("Cityview") is granted.

Background

On October 11, 2017, plaintiff was working at a construction site in Manhattan sanding the ceiling in preparation for painting. He testified that he was standing on the sixth step of an 8-foot A-frame ladder when "all of a sudden the ladder moved…and it fell to the left and after I fell to the right" (NYSCEF Doc. No. 63 at 99-100). Plaintiff landed on his right hand and immediately fell on his shoulder (*id.* at 108). Plaintiff contends he was not wearing any safety equipment at the time of the accident and was not provided with additional safety measures such a lifeline, harness, or netting, and no one was holding the ladder at the time he was on it (*id.* at 113).

Defendant Kiamie, the property owner, contends there are genuine issues of material fact regarding the accident. First, defendant Kiamie points to whether a safety device could have prevented the accident and that plaintiff failed to provide evidence in support of such a claim. Additionally, defendant Kiamie asserts the plaintiff did not request alternative equipment such as scaffolding to sand the ceiling. In its motion, defendant Kiamie also moved for summary judgment against the third-party defendant Cityview, the general contractor with whom plaintiff's employer contracted for the construction work. Defendant Kiamie and Cityview entered into an agreement dated April 25, 2016, stating Cityview "shall indemnify and hold harmless [Kiamie]…from and against claims, damages, losses and expenses[.]" (NYSCEF Doc. No. 84). The contract also called for Cityview to take out a general liability insurance policy for all subcontractors (*id.*). Defendant Kiamie contends that if it is found liable for plaintiff's claims, then it is entitled to indemnification from defendant Cityview.

Plaintiff's Motion Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court grants plaintiff's motion for summary judgment as it pertains to Labor Law § 240(1). Plaintiff's testimony clearly established that he fell while working from a height because the ladder was not secured and no adequate protection from falling off the ladder was provided. Plaintiff indicated he was standing on the sixth step of a "seven, eight step," ladder, a height that would undoubtedly leave the plaintiff susceptible to losing his balance and falling (NYSCEF Doc. No. 63 at 97).

Defendants' arguments do not present an issue of material fact. Plaintiff's testimony indicated that no safety measures were present at the construction site and defendant did not present any testimony contradicting plaintiff's version of events upon which this Court can rely. Similarly, Defendant Cityview's contention that the plaintiff chose to use the ladder instead of

waiting for scaffolding to become available does not present an issue of material fact (NYSCEF Doc. No. 95 at 7). Plaintiff testified that there was just one scaffold available, which was used on a first-come-first-served basis (NYSCEF Doc. No. 63 at 113). Cityview did not show that painters were only supposed to use scaffolds, or that they were directed not to use the available ladders. Cityview's claim seems to be that plaintiff should have wasted his workday waiting around for the sole scaffolding even though ladders, which are not off limits, were available. While this could have been an alternative plan, it does not raise an issue of fact. There is no question that the ladder was available, it was not off limits for the work he needed to do, it was not secured, he was not harnessed, and he fell off.

Defendant's Motion

Defendant Kiamie moved for summary judgment dismissing plaintiff's claims asserted under Labor Law §§ 200, 240(2), 240(3), and 241(6). In addition, defendant Kiamie moved for summary judgment relating to its breach of contract and indemnification claims against third-party defendant Cityview.

With respect to Labor Law §§ 240(2) and 240(3), the Court dismisses those causes of action because plaintiff did not address those claims in his opposition papers.

Defendant Kiamie's motion seeking dismissal of plaintiff's Labor Law § 200 claim is granted. Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others

over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"Claims for personal injury under this statute and the common law fall under two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44, 950 NYS2d 35 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*id.* at 144).

"Where an alleged defect or dangerous condition arises from a subcontractor's methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or section 200" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272, 841 NYS2d 249 [1st Dept 2007]).

Plaintiff's accident was not the result of a dangerous condition on the premises. Similarly, there was no dangerous manner in which the work was performed that defendant Kiamie could have remedied. An A-frame ladder is self-supporting, and plaintiff himself testified to the safety mechanisms he used when setting up the ladder (*see* NYSCEF Doc. No. 63 at 92). Moreover, Kiamie established that it had no control over the means and methods of plaintiff's tasks that day. Plaintiff further testified he did not receive his task from anyone specific, it just "had to be finished" (NYSCEF Doc. No. 63 at 84). Plaintiff was working for a subcontractor who contracted with Cityview (the general contractor). Kiamie did not provide the ladder from which plaintiff fell.

The branch of defendant's motion that seeks dismissal of plaintiff's Labor Law § 241(6) claim is also granted. "The duty to comply with the Commissioner's safety rules, which are set

out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

Kiamie points out that plaintiff cited many Industrial Code sections and details why each one is inapplicable (NYSCEF Doc. No. 85 at 8). However, in his opposition, plaintiff only addresses 12 NYCRR 23-1.21(e). Therefore, as an initial matter, the Court dismisses those Industrial Code sections for which plaintiff did not offer any opposition.

With respect to 12 NYCRR 23-1.21(e), the Court finds that this section is inapplicable. This section provides that, "[s]tanding stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means" (12 NYCRR 23-1.21[e][3]). Here, plaintiff alleges that he was working from approximately 8 feet while standing on an A-frame ladder. Plaintiff's reliance on 12 NYCRR 23-1.21(e)(3) is inapplicable because it not only refers to a stepladder while plaintiff was using an A-frame ladder, but also requires a plaintiff to be working at a height of at least 10 feet or more above the footing. Accordingly, plaintiff's claim based on this section is severed and dismissed.

Defendant Kiamie's motion for summary judgment on its third-party claims against Cityview is granted. Defendant Cityview did not substantively oppose defendant Kiamie's

motion and presented no arguments in opposition that present an issue of material fact. Instead, it merely offers the conclusory argument that Kiamie failed to carry its burden (NYSCEF Doc. No. 94, ¶ 19). That is not sufficient to raise a material issue of fact to deny this branch of Kiamie's motion.

Accordingly, it is hereby

ORDERED that the motion (MS002) by plaintiff for summary judgment on liability with respect to his Labor Law § 240(1) claim is granted; and it is further

ORDERED that the motion (MS003) by defendant Kiamie is granted to the extent that plaintiff's Labor Law §§ 200, 240(2), 240(3), and 241(6) claims are severed and dismissed; and it is further

ORDERED that the branch of the motion by defendant Kiamie seeking summary judgment against defendant Cityview for breach of contract and indemnification is granted as to liability only and the amount of damages will be determined at trial.

9/13/2022					ARLENE BLUTH, J.S.C.
DATE					
CHECK ONE:	[ ] CASE DISPOSED			[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED		[ ] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER			[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN			[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE