SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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ANTONIO ANCONA,

Plaintiff,

- v -

ESRT EMPIRE STATE BUILDING, L.L.C., EMPIRE STATE REALTY TRUST, INC.,

Defendant.

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INDEX NO. 151955/2016

MOTION DATE 07/15/2022, 07/15/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

ESRT EMPIRE STATE BUILDING, L.L.C., EMPIRE STATE REALTY TRUST, INC.

Plaintiff,

-against-

TOTAL FIRE PROTECTION, INC., TOTAL FIRE PROTECTION, TFP1 INC. D/B/A TOTAL FIRE PROTECTION

Defendant.

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Third-Party
Index No. 595672/2016

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 94, 95, 96, 97, 98, 99, 102, 103, 106

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 100, 101, 104, 105

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is ordered that defendants/third-party plaintiffs ESRT Empire State Building, LLC and Empire State Realty Trust, Inc.'s (collectively "ESRT") motion for summary judgment and third-party defendant Total Fire Protection, Inc., Total Fire Protection, and TFP1 Inc. d/b/a Total Fire Protection's (collectively "Total Fire") motion for summary judgment are determined as follows:

Plaintiff commenced the instant action alleging that he was injured on October 13, 2015 while cutting tape in a stairwell in the Empire State Building (the "premises"). It is undisputed that ESRT is the fee owner of the premises. ESRT engaged Total Fire to perform, *inter alia*, Local Law 26 inspections and repairs on the premises. Plaintiff, in his complaint, asserts claims for common-law negligence and violations of Labor Law §§ 200 and 241 (6). ESRT, in its third-party complaint, seeks contribution, common-law indemnification, and contractual indemnification and alleges breach of contract to procure insurance.

ESRT's motion pursuant to CPLR 3212 for summary judgment (sequence number 003) seeks dismissal of plaintiff's complaint and contractual indemnification against Total Fire. Total Fire's motion pursuant to CPLR 3212 for summary judgment (sequence number 004) seeks dismissal of ESRT's third-party complaint.

BACKGROUND

Plaintiff testified that he was employed by Total Fire as a fire safety technician. He began working at Total Fire about seven months prior to the accident. Plaintiff's job was to inspect and replace or repair photoluminescent tape and exit signage. Plaintiff purchased the tools necessary to complete the work, including a box cutter. When repairing the photoluminescent tape, plaintiff would scrape off the old tape, clean the area, lay down glue, and then lay down the new tape. He would cut the tape along the floor with a box cutter.

Plaintiff testified that he began Local Law 26 inspection and repair work at the premises in early October of 2015. Plaintiff described "very poor lighting conditions" on the stairwells. He said that on some of the staircase landings there was no lighting and on most landings a motion sensor would cause the lights to shut off. Plaintiff further testified that "it was very hard to cut the tape because the floor was very bumpy due to how they painted it." Plaintiff complained to his

boss about the conditions on the stairwell, including dust, the bumps on the floor, and the poor lighting. Plaintiff's boss informed him that he would contact the building manager. Plaintiff also complained to the Empire State Building engineers regarding the cleanliness of the stairs.

On the date of the accident, plaintiff was continuing repair work on one of the stairwells on the premises. Plaintiff's injury occurred as he was putting down photoluminescent tape on a landing. Plaintiff described the incident as such: "Took my knife out, you know, placed the knife on the floor at the corner of the tape to cut the tape and that's when I hit a bump in the floor, the blade, you know, jumped up and that's when it went through my finger, my right index finger." Plaintiff explained that the bump was underneath the tape. Plaintiff testified that he was using his left (non-dominant) hand to cut the tape because of the angle. Plaintiff also said that the blade he was using was loose because of loose screws in the box cutter. Plaintiff said that he tightened the screws with his fingernails. Plaintiff further testified that his right pinky was fractured before the accident and was in a metal splint on the date of the accident.

Riccardo Fazzolari, assistant director of operations for ESRT at the time of the accident, testified that he was not aware of any complaints about the lighting in the stairwells. James Rose, first assistant chief engineer for ESRT, testified that Total Fire would inspect the photoluminescent tape on an annual basis. He said that at the time of accident, the stairwells had fluorescent lighting and "[t]hey don't turn off." He did not know if the lights were working at the time of the accident but testified that the stairwells were inspected daily by security and/or custodial staff.

Beth Scarpati, who worked in numerous capacities for Total Fire including scheduling coordinator, testified that she would schedule work for technicians to serve their clients. Among the services provided by Total Fire were Local law 26 inspections and maintenance. Ms. Scarpati explained that Local Law 26 required buildings to have markings that would glow in the dark in

their stairwells and on exit doors in case there was an emergency and there were no lights. She stated that the law required Local Law 26 inspections be conducted annually. Total Fire would email or call clients when an inspection was due. The inspection would consist of "walking each stairwell, noting any ripped tape, missing signs." The client would be billed for the inspection and a proposal would be created for the repairs needed.

DISCUSSION

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73–74 [2020] [internal quotation marks and citation omitted]; *see also* CPLR 3212 [b]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553–554 [1st Dept 2010]).

A. Labor Law § 200 and Common-Law Negligence

It is well settled that Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases involving the duty to provide a safe workplace fall under two 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" (*Jackson v Hunter Roberts Constr., L.L.C.*, -- AD3d -- , 2022 NY Slip Op 03321,

*1 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [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. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work"

(*id.* [internal quotation marks omitted]).

ESRT argues that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed because plaintiff was the sole proximate cause of his accident and ESRT did not control or supervise the means and methods of plaintiff's work. Plaintiff, in opposition, argues that the accident resulted from a dangerous condition in his workplace, namely the poor lighting and the bumps on floor of the staircase landing, which resulted in plaintiff's knife jumping and injuring his finger. Plaintiff contends that ESRT failed to meet its burden that it did not have actual or constructive notice of the alleged conditions. In its reply, ESRT does not address whether it had notice of the bumps on the floor. As to the lighting, ESRT argues that the lighting had nothing to do with the accident.

To the extent that plaintiff's causes of action are predicated upon the dangerous conditions in the stairwell — the poor lighting and the bumps on the floor — ESRT has failed to establish prima facie entitlement to summary judgment. ESRT did not address the fact that paint had created bumps on the floor and asserted in a conclusory fashion that the lighting conditions were not related to the accident. ESRT did not provide specific evidence as to when the stairwell was last inspected. However, plaintiff testified that there was poor lighting in the stairwell during the time he was working there and that he complained to his boss about the lighting and bumps on the floor. Thus,

triable issues of fact remain as to whether ESRT had actual or constructive notice of these conditions.

Accordingly, the branch of ESRT's motion for summary judgment regarding plaintiff's Labor Law § 200 and common-law negligence claims is denied.

B. Labor Law § 241 (6)

Labor Law § 241 (6) imposes a "nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). By its terms, liability under Labor Law § 241 (6) is limited to accidents that occur in "areas in which construction, excavation or demolition work is being performed." Part 23 of the Industrial Code defines "construction work" as "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures . . . ." (12 NYCRR 23-1.4). While Labor Law § 241 (6) applies to repairs that arise during construction, demolition, or excavation, it does not apply to repairs that constitute routine maintenance (*see Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002] ["The Industrial Code definition of 'construction work,' which includes maintenance, must be construed consistently with this Court's understanding that section 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation"]).

ESRT argues that replacing worn tape does not fall within the protected activities of construction, excavation, or demolition. Plaintiff, in opposition, contends that there is at least a question of fact as to whether his work at the time of the accident constitutes "construction" under Labor Law § 241 (6) (*see Becker v ADN Design Corp.*, 51 AD3d 834 [2d Dept 2008] [running wires in an attic crawl space to rewire telephone system constituted "altering," which falls within the definition of "construction" under Labor Law § 241 (6)]). ESRT, in its reply, argues that

replacing tape that was worn or missing in normal wear and tear and performing work on a yearly basis constitutes routine maintenance (*see Cremona v Venture Holding & Mgt. Corp.*, 189 AD3d 994 [2d Dept 2020] [plaintiff was engaged in routine maintenance work outside the scope of Labor Law § 240 (1) when his work "involved replacing components that require replacement in the course of normal wear and tear"]).

Here, plaintiff's work on the premises consisted first of completing an annual inspection for compliance with Local Law 26. This included walking each stairwell and checking for worn or missing photoluminescent tape and exit signage. Plaintiff would then come back and complete the necessary repair work by scraping off the old, damaged tape and laying down new tape. ESRT demonstrated entitlement to summary judgment, as they have established that plaintiff was replacing components damaged in the course of normal wear and tear as part of annual inspection and maintenance. This constitutes routine maintenance outside the scope of work covered by Labor Law § 241 (6) (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Nagel*, 99 NY2d 98). Plaintiff failed to raise a triable issue of fact.

Accordingly, the branch of ESRT's motion for summary judgment under Labor Law § 241 (6) is granted.

C. ESRT's Contractual Indemnification Claim Against Total Fire

ESRT moves for contractual indemnification against Total Fire. In its motion for summary judgment, Total Fire seeks to dismiss ESRT's claim for contractual indemnification.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]).

ESRT produced a purchase order dated May 9, 2013 (the "2013 Purchase Order") between ESRT and Total Fire. The 2013 Purchase Order covers yearly Local Law 26 inspections for "photoluminescents" for 2013, 2014, and 2015, in addition to "repairs and maintenance when necessary." The 2013 Purchase Order included an indemnification provision by which Total Fire would indemnify and hold ESRT harmless. The 2013 Purchase Order was unsigned. ESRT also produced a proposal dated April 3, 2013 (the "2013 Proposal") that purports to be signed by Total Fire. ESRT contends that plaintiff's accident was covered by the 2013 Purchase Order and the 2013 Proposal because it occurred within the three-year period. ESRT argues that any additional purchase orders were supplemental to the original 2013 Purchase Order.

Total Fire produced a proposal dated August 4, 2015 (the "2015 Proposal") for Total Fire to provide Local Law 26 repairs for ESRT. The 2015 Proposal does not include an indemnification provision. Total Fire contends that plaintiff's work was pursuant to the 2015 Proposal, and not the 2013 Purchase Order. Total Fire argues that the 2013 Purchase Order did not govern plaintiff's work at the time of the accident because: (1) the 2013 Purchase Order was itself unsigned, (2) there is no evidence Total Fire ever received the 2013 Purchase Order, (3) subsequent purchase orders included pricing and terms distinct from the 2013 Purchase Order, (4) witnesses testified that Total Fire could only have performed repairs after a proposal was approved, and (5) there is no evidence of Total Fire's intent to indemnify ESRT.

While the lack of an executed document does not end the inquiry (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363 [2005]), there remains a triable issue of fact as to whether the 2013 Purchase or the 2015 Proposal governed the relationship between ESRT and Total Fire at the time of plaintiff's accident. Thus, summary judgment on the issue of contractual indemnification is inappropriate.

D. ESRT's Breach of Contract Claim Against Total Fire

Total Fire moves for summary judgment on ESRT's claim for breach of contract to procure insurance coverage. ESRT's breach of contract claim is based on a provision in the 2013 Purchase Order. As discussed above, there remains a triable issue of fact as whether the 2013 Purchase governed the relationship between ESRT and Total Fire. Summary judgment on the issue of breach of breach of contract is thus inappropriate.

E. ESRT's Contribution and Common-Law Indemnification Claims Against Total Fire

ESRT does not oppose the branch of Total Fire's motion for summary judgment as to claims for contribution and common-law indemnification.

CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party plaintiff ESRT's motion for summary judgment (sequence number 003) is granted to the extent that plaintiff's Labor Law § 241 (6) claim is dismissed, and the motion is denied in all other respects; and it is further

ORDERED that third-party defendant Total Fire's motion for summary judgment (sequence number 004) is granted to the extent of dismissing ESRT's claims for contribution and common-law indemnification, and the motion is denied as to ESRT's claim for contractual indemnification and breach of contract.

This constitutes the decision and order of this Court.

151955/2016

10/20/2022
DATE

RICHARD LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE