

Sternkopf v 395 Hudson N.Y., LLC
2023 NY Slip Op 31713(U)
May 22, 2023
Supreme Court, New York County
Docket Number: Index No. 160764/2018
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK

PART

11M

Justice

-----X

EUGENE STERNKOPF,

Plaintiff,

- v -

395 HUDSON NEW YORK, LLC, EMMIS
COMMUNICATIONS CORPORATION,

Defendant.

-----X

395 HUDSON NEW YORK, LLC

Plaintiff,

-against-

JAMES E. FITZGERALD INC., PAR FIRE PROTECTION, LLC,
PAR PLUMBING CORP., EMMIS RADIO, LLC.

Defendant.

-----X

JAMES E. FITZGERALD INC.

Plaintiff,

-against-

ARI PRODUCTS INC.

Defendant.

-----X

EMMIS COMMUNICATIONS CORPORATION

Plaintiff,

-against-

JAMES E. FITZGERALD, INC., PAR FIRE PROTECTION,
LLC, PAR PLUMBING CORP., ARI PRODUCTS, INC.

Defendant.

-----X

INDEX NO. 160764/2018MOTION DATE 12/15/2022MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

Third-Party
Index No. 595983/2019Second Third-Party
Index No. 595370/2020Third Third-Party
Index No. 595415/2020

JAMES E. FITZGERALD INC.

Fourth Third-Party
Index No. 595490/2020

Plaintiff,

-against-

FINDLAY INSTALLATION SERVICES, L.L.C. D/B/A FINDLAY
INSTALLATION

Defendant.

-----X

EMMIS COMMUNICATIONS CORPORATION

Fifth Third-Party
Index No. 595578/2020

Plaintiff,

-against-

ARI PRODUCTS, INC.

Defendant.

-----X

EMMIS COMMUNICATIONS CORPORATION

Sixth Third-Party
Index No. 595579/2020

Plaintiff,

-against-

JAMES FITZGERALD, PAR FIRE PROTECTION LLC, PAR
PLUMBING CORP., EMMIS RADIO LLC, ARI PRODUCTS
INC., FINDLAY INSTALLATION SERVICES

Defendant.

-----X

ARI PRODUCTS, INC.

Seventh Third-Party
Index No. 595612/2020

Plaintiff,

-against-

FINDLAY INSTALLATION SERVICES, LLC D/B/A FINDLAY
INSTALLATION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 413, 414, 415, 416, 423, 424, 425, 426, 429, 434, 435, 436, 437, 438, 439, 444

were read on this motion to/for

REARGUMENT/RECONSIDERATION.

Various parties have moved to reargue and for clarification of this Court's order dated, November 2, 2022. The motions for reargument and clarification are granted. This Decision and Order will only address motion sequence 10 and its accompanying cross-motion.

Third-party defendant/third third-party defendant¹ PAR Fire Protection LLC ("PAR FIRE") moves this Court to reargue and modify its prior order. PAR FIRE specifically seeks to reargue the portion of the motion that denied summary judgment to them on the third-party complaints and cross claims brought against it by 395 Hudson New York, LLC ("395 HUDSON"), Emmis Communications Corporation, Emmis Radio, LLC (collectively "EMMIS"), Findlay Installation Services, LLC ("FIS"), and ARI Products, Inc. ("ARI") for common law indemnity and contribution; granting PAR FIRE's motion to reargue that portion of the Decision which denied summary judgment to PAR FIRE on James E. Fitzgerald, Inc.'s ("JEF") contractual indemnity claim and granted it to JEF; and granting PAR FIRE's motion to reargue the Decision as it did not address PAR FIRE's motion to dismiss HUDSON's, EMMIS' and ARI's contractual indemnity claims.

The Court erred in its prior decision and finds that any and all crossclaims as against PAR FIRE are barred by the workers compensation law as it is undisputed that plaintiff did not suffer a grave injury. Moreover, as to the contractual indemnification claims made by JEF, those claims are also dismissed. The record before this Court establishes that plaintiff was simply walking and not actively engaged in the performance of his job duties when the accident occurred. Simply stated his accident was not a result of the work he was hired to perform, rather his injury was caused by a negligence of another party, specifically either the negligent discarding of the carpet scraps or the negligence in failing to promptly remove the carpet scrap

¹ This Court's prior order dismissed all claims as against PAR Plumbing LLC, that portion of the Order remains unchanged.

debris or both, but neither flows directly from the work his employer was contracted to perform. As such there is no basis in which PAR Fire can be liable for contractual indemnification. Further as stated above, Workers' Compensation Law § 11 precludes recovery for common-law indemnification and contribution against an employer unless the employee suffered a "grave injury." Accordingly, the first third-party complaint and the third third-party complaint and all crossclaims as against PAR FIRE are dismissed.

Direct defendants' cross-motion

Defendant/first third-party plaintiff 395 Hudson New York, LLC ("395 Hudson") and defendant/third third-party plaintiff/fifth third-party plaintiff Emmis Communications Corporation ("Emmis Communications"), and first third-party defendant/fifth third-party defendant Emmis Radio LLC ("Emmis Radio") (collectively, "Emmis") cross-move to reargue the prior Decision and Order that denied 395 Hudson and Emmis' motion for summary judgment on the issues of liability under common law negligence, Labor Law § 200, and Labor Law § 241 (6) and granted plaintiff's cross motion for summary judgment on the issue of liability under Labor Law § 241 (6).

First, concerning common-law negligence and Labor Law § 200, the movants contend that the Court overlooked and/or misapprehended whether plaintiff's accident resulted from a dangerous condition existing on the worksite or from the manner in which work was being performed. The movants contend that the Court erred in determining that plaintiff's accident resulted from a dangerous condition existing on the worksite because the injury-producing condition, extraneous carpet scraps resulting from an ongoing installation project, was not a defect or dangerous condition inherent in the premises; rather, the plaintiff's accident resulted

from the manner in which the carpet installation project was being performed. The Court does not agree, however does in fact find that it erred in its underlying decision.

It is well-settled law that an owner or general contractor will not be found liable under common law or Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries, nor the ability to control the activity which caused the dangerous condition. *See Russin v Picciano & Son*, 54 NY2d 311[1981]; *see also Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]. The First Department has held that liability pursuant to Labor Law § 200 only attaches where the owner or contractor had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012] internal citations omitted).

Here, it is clear and undisputed that the condition that caused plaintiff's accident was not a defective condition on the premises that was caused or created by defendants 395 Hudson or Emmis, rather it was its was a condition created as a result of work being done at the premises, that neither 395 Hudson nor Emmis controlled or supervised (*see Cappabianca* at 145). As such, the Court erred in finding that 395 Hudson and/or Emmis had an obligation to establish a lack of notice of the defect, as the defect was transitory in nature and undisputedly created by the negligence of other parties in this action, rather 395 Hudson and Emmis were required to establish that neither entity controlled the means or methods of the injury producing activity.

The Court finds that 39 Hudson and Emmis did establish as a matter of law that neither entity controlled the means and methods of the injury producing work, thus liability cannot attach pursuant to either common law negligence or Labor Law § 200.

With respect to the Labor Law § 241 (6) claims, the Court does not find that the carpet scraps are integral to the work and does find that it erred when determining that a carpet scrap was a foreign substance within the meaning of the industrial code. I

It is well settled law that for there to be liability pursuant to Labor Law Section 241(6), there must be a violation shown of the Industrial Code. *See e.g., Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general contractors and their agents for violation of the statute).

Plaintiff's claim under §241(6) is based on a violation of the Industrial Code Section 12 NYCRR § 23-1.7(d), which reads in relevant part:

“[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

The Court misapplied the law. As stated by the First Department, carpet scraps are “not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease” (*Bazdaric v Almah Partners LLC*, 203 AD3d 643, 644 [1st Dept 2022]). This, however, does not preclude a finding of summary judgment as against defendants Emmis and 395 Hudson. Industrial Code Section 12 NYCRR § 23-1.7(d) was not the sole Industrial Code relied upon by plaintiff in its motion for summary judgment.

Plaintiff established that there was a violation of Industrial Code § 23-1.7(e)(2). Industrial Code § 23-1.7(e)(2) reads in relevant part

“[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials . . . insofar as may be consistent with the work being performed”

In its initial motion papers, Hudson and 395 Hudson failed to establish entitlement to judgment as a matter of law as to this industrial code violation nor have they raised a triable issue of fact in opposition to plaintiff's cross motion for summary judgment. As such, and to clarify this Court's prior Decision and Order, plaintiff's cross-motion for summary judgment pursuant to Labor Law § 241(6) predicated on a violation of Industrial Code § 23-1.7(e)(2) is granted and defendants' 395 Hudson and Emmis' motion for summary judgment seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims is granted. Accordingly, it is hereby

ORDERED that all direct claims and crossclaims are hereby dismissed as against third-party defendant/third third-party defendant PAR Fire Protection LLC; and it is further

ORDERED that defendants' 395 Hudson and Emmis' motion for summary judgment seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims is granted; and it is further

ADJUDGED that the prior Order of this Court is clarified in that plaintiff's cross-motion for summary judgment pursuant to Labor Law § 241(6) predicated on a violation of Industrial Code § 23-1.7(e)(2) is granted.

5/22/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

20230522133402LFRANK0104091668FC48E8B79DB5B649EC9438

LYLE E. FRANK, J.S.C.