

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Guevara-Ayala v. Trump Palace/Parc LLC

2022 NY Slip Op 03049 (App. Div. 2022) · No. Appeal No. 15883; Case No. 2021-00902 · Decided May 5, 2022

SUMMARY

The New York Appellate Division, First Department reversed portions of an order denying summary judgment in a construction-site accident case. The court dismissed the Labor Law §§ 240(1) and 241(6) claims against the scaffold subcontractor, dismissed the Labor Law § 200 and common-law negligence claims against the condominium board, and held that the board was conditionally entitled to contractual indemnification from the general contractor.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Gische, J.P.; Kern, J.; Oing, J.; González, J.; Scarpulla, J.
JURISDICTION	New York
DECIDED	May 5, 2022
DOCKET	Appeal No. 15883; Case No. 2021-00902
DISPOSITION	reversed
PROCEDURAL POSTURE	Appeal from an order denying Swing Staging, LLC's motion for summary judgment dismissing Labor Law §§ 240(1) and 241(6) claims, and denying the Board of Managers' motion for summary judgment dismissing Labor Law § 200 and common-law negligence claims and awarding contractual indemnification against 4 Star Contracting, Inc.
STANDARD OF REVIEW	Summary judgment is appropriate where the movant establishes entitlement to judgment as a matter of law and no material factual issue requires trial; the appellate court reviewed the legal sufficiency of the defendants' summary-judgment motions and the admissibility and enforceability of the indemnification contract.
PRECEDENTIAL VALUE	published and precedential

PARTIES

The Board of Managers of Trump Parc Condominium, Swing Staging, LLC v. Juan Guevara-Ayala, The Board of Managers of Trump Parc Condominium, Swing Staging, LLC, 4 Star Contracting, Inc.

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Swing Staging, LLC was an owner, contractor, or statutory agent subject to liability under Labor Law §§ 240(1) and 241(6).
2. Whether the Board of Managers was subject to liability under Labor Law § 200 and common-law negligence where the accident arose from the means and methods of work controlled by contractors and the Board did not supervise or control that work.
3. Whether the Board's contract with 4 Star was admissible despite a hearsay objection not raised in the parties' motion papers.
4. Whether the contractual indemnification clause requiring 4 Star to indemnify the Board to the extent of 4 Star's or its subcontractor's negligence was enforceable under General Obligations Law § 5-322.1.
5. Whether the Board was entitled to contractual indemnification before a determination that 4 Star or Swing was negligent and before apportionment of fault.

HOLDINGS

1. Swing was not an owner, contractor, or statutory agent within the meaning of the Labor Law and therefore was entitled to summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims against it.
2. The Board was entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims because the accident arose from the means and methods of the contractors' work and the Board did not supervise or control that work.
3. The contract was admissible because the parties waived any hearsay objection by failing to raise it in their motion papers, and the contract was independently admissible because both the Board and 4 Star, adversaries in the action, relied on it.
4. The indemnification clause was enforceable because it required indemnification only to the extent caused by the negligent acts or omissions of 4 Star, its subcontractors, or persons for whose acts they were responsible.
5. The Board was entitled to contractual indemnification only conditionally, pending a determination of whether 4 Star or Swing was negligent and an apportionment of fault.

KEY QUOTATIONS

*“The lower court should have dismissed the Labor Law §§ 240(1) and 241(6) claims as against Swing, the scaffold system subcontractor to general contractor 4 Star, because it is undisputed that Swing was not a contractor or owner within the meaning of the statutes.” (*1)*

*“The case therefore falls into the means-and-methods category of Labor Law § 200 cases, in which liability depends on the exercise of supervision and control over the work, and it is undisputed that the Board did not exercise supervision or control over either 4 Star's or Swing's work.” (*1)*

*“However, while we have determined that there is no basis for finding that the Board was negligent in connection with plaintiff's accident, as yet, there has been no finding that either 4 Star or Swing, its subcontractor, was negligent in that connection.” (*2)*

FACTUAL BACKGROUND

The Board contracted with 4 Star Contracting, Inc. to perform facade repairs on the roof of a Manhattan building, and 4 Star subcontracted with Swing Staging, LLC to construct a scaffold system. Plaintiff, a 4 Star employee, crossed the roof over pipes that were part of the scaffold system instead of using the scaffold walkway. As he attempted to descend to the wooden walkway, a plank broke and he fell.

PROCEDURAL HISTORY

Plaintiff, a construction worker, sued after falling at a Manhattan construction site. Supreme Court, New York County, denied the specified portions of the defendants' summary-judgment motions. The Appellate Division unanimously reversed, granted Swing's motion, granted the Board's motion as to the Labor Law § 200 and common-law negligence claims, and granted the Board's contractual-indemnification motion conditionally.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The Board's contractual indemnification entitlement remains conditional pending a determination of negligence and apportionment of fault as to 4 Star or Swing.

CASES CITED

- Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 293 [2003]
- Morales v Spring Scaffolding, Inc., 24 AD3d 42, 46-47 [1st Dept 2005]
- Persichilli v Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145 [1965]
- Lombardi v Stout, 178 AD2d 208 [1st Dept 1991], mod on other grounds 80 NY2d 290 [1992]
- Lois v Flintlock Constr. Servs., LLC, 202 AD3d 481, 481 [1st Dept 2022]
- Brooks v Judlau Contr., Inc., 11 NY3d 204, 210 & n 4 [2008]
- Cackett v Gladden Props., LLC, 183 AD3d 419, 421-422 [1st Dept 2020]

OPINION

PER CURIAM.

Guevara-Ayala v Trump Palace/Parc LLC (2022 NY Slip Op 03049) Guevara-Ayala v Trump Palace/Parc LLC 2022 NY Slip Op 03049 Decided on May 05, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: May 05, 2022 Before: Gische, J.P., Kern, Oing, González, Scarpulla, JJ. Index No. 157610/15, 595726/16, 595479/18 Appeal No. 15883 Case No. 2021-00902 [*1] Juan Guevara-Ayala, Plaintiff-Respondent, v Trump Palace/Parc LLC, et al., Defendants, The Board of Managers of Trump Parc Condominium, Defendant-Respondent-Appellant, Swing Staging, LLC, Defendant-Appellant-Respondent.

The Board of Managers of Trump Parc Condominium, Third-Party Plaintiff- Respondent-Appellant, v Swing Staging, LLC, Third-Party Defendant- Appellant-Respondent. Swing Staging, LLC, Second Third Party Plaintiff- Appellant-Respondent, v 4 Star Contracting, Inc., Second Third-Party Defendant- Respondent. [And a Third Third-Party Action] Index Nos. French & Casey, LLP, New York (Lance E. Benowitz of counsel), for appellant-respondent.

Fuchs Rosenzweig PLLC, New York (Marisa Carpentiere of counsel), for respondent-appellant. David Horowitz, P.C., New York (David Fischman of counsel), for Juan Guevara-Ayala, respondent. Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for 4 Star Contracting Inc., respondent. Order, Supreme Court, New York County (Paul A. Goetz, J.), entered March 2, 2021, to the extent it denied the motion of defendant Swing Staging, LLC (Swing) for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against it and denied the motion of defendant Board of Managers of Trump Parc Condominium (the Board) for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it and on its third third-party contractual indemnification claim against 4 Star Contracting, Inc., (4 Star), unanimously reversed, on the law, without costs, Swing's motion granted and the Board's motion granted as to the Labor Law § 200 and common-law negligence claims and, conditionally, as to its contractual indemnification claim against 4 Star.

This action stems from a construction site accident at premises located at 105 West 58th Street in Manhattan. The Board contracted with 4 Star to perform façade repairs on the roof of the premises. 4 Star in turn subcontracted with Swing to construct a scaffold system on the roof of the building.

On the day and at the time of the accident, rather than using the scaffold system walkway, plaintiff, a 4 Star employee, crossed directly over the roof via pipes that had been laid as part of the scaffold system and attempted to descend from the pipes to the wooden walkway.

As plaintiff brought his foot or feet down, a wooden plank broke, and he fell. The lower court should have dismissed the Labor Law §§ 240(1) and 241(6) claims as against Swing, the scaffold system subcontractor to general contractor 4 Star, because it is undisputed that Swing was not a contractor or owner within the meaning of the statutes. Nor was it a contractor or owner's statutory agent.

Although it contractually retained the right to reenter the premises and inspect the scaffold system, Swing did not have any employees on site during 4 Star's work, and it did not inspect the scaffold system while it was in place (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47 [1st Dept 2005]).

For all intents and purposes, once Swing constructed the scaffold system, it returned to the premises only to deliver supplies and to disassemble the scaffold system at the end of the project. The Labor Law § 200 and common-law negligence claims should have also been dismissed as against the Board because plaintiff's accident arose out of his use of a scaffold system supplied by either 4 Star, the general contractor, or Swing, a subcontractor.

The case therefore falls into the means-and-methods category of Labor Law § 200 cases, in which liability depends on the exercise of supervision and control over the work, and it is undisputed that the Board did not exercise supervision or control over either 4 Star's or Swing's work (see *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; see e.g. *Lombardi v Stout*, 178 AD2d 208 [1st Dept 1991[*2]], mod on other grounds 80 NY2d 290 [1992]).

The motion court erred in ruling that the Board's contract with 4 Star was inadmissible; the parties to the contract waived any hearsay objection by failing to raise any in their respective motion papers (see *Lois v Flintlock Constr. Servs., LLC*, 202 AD3d 481, 481 [1st Dept 2022]).

The contract is admissible for the additional reason that both the Board and 4 Star — adversaries in this case — rely on it. Contrary to 4 Star's argument that the indemnification clause in its contract with the Board violates General Obligations Law § 5-322.1, the clause is enforceable, because it requires 4 Star to indemnify the Board for claims "arising out of or resulting from performance of the Work... only to the extent caused by the negligent acts or omissions of [4 Star], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (see *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 and n 4 [2008]).

However, while we have determined that there is no basis for finding that the Board was negligent in connection with plaintiff's accident, as yet, there has been no finding that either 4 Star or Swing, its subcontractor, was negligent in that connection.

Thus, the Board is entitled to indemnification only conditionally, pending a determination of negligence and apportionment of fault (see *Cackett v Gladden Props., LLC*, 183 AD3d 419, 421-

422 [1st Dept 2020]). THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: May 5, 2022

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