

**Tapia v 125th St. Gateway Ventures LLC**

2012 NY Slip Op 32416(U)

September 4, 2012

Supreme Court, Queens County

Docket Number: 221/10

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

-----x  
JUAN TAPIA,

Index No.: 221/10

Plaintiff,

Motion Dated:  
May 1, 2012

-against-

Cal. No.: 38 & 39

125<sup>TH</sup> STREET GATEWAY VENTURES LLC,  
ET AL.,

Defendants.

M# 3 & 4

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The following papers numbered 1 to 18 read on this motion by defendants Gateway Development II, LLC (Gateway) and Cats Paw Builders, Inc. (Catspaw) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint and for summary judgment in favor of Gateway and Catspaw on their cross claims against defendant Vezandio Contracting Company (Vezandio); and on the motion by defendant Vezandio pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint.

Papers  
Numbered

Notices of Motion - Affidavits - Exhibits.....	1-9
Answering Affidavits - Exhibits.....	10-15
Reply Affidavits.....	16-18

Upon the foregoing papers it is ordered that the motions are jointly determined as follows:

The plaintiff was injured in accident that allegedly occurred on December 9, 2009. The accident took place at a construction project located at 2082 Lexington Avenue, New York, New York. The plaintiff alleges that he was struck by part of the wall of a plywood construction fence as he was entering the construction site. The project site was owned by defendant Gateway. The general contractor for the construction project was the defendant Catspaw. Catspaw retained Vezandio to provide construction supervision services. The plaintiff was a laborer employed by FPS Contracting, Inc. (FPS).

The plaintiff testified at an examination before trial. He testified that he was employed by FPS as a construction worker. He testified that he was working on the fourth floor conducting framing and interior work. He testified that he was only supervised by FPS employees. He testified that there was a construction fence that surrounded the project. He described the fence as a plywood fence with two doors, one that swung in towards the jobsite and one that swung out towards the sidewalk. He stated that the accident occurred after he had been at the jobsite working for one and one half hours. He testified that he was notified that a delivery had arrived and was told to go downstairs to receive the delivery. He stated that the delivery van was parked outside the fence. He testified that he made a few trips unloading the van. The accident occurred as he passed the entrance, a portion of the wall fell and struck him. The portion that fell and struck him had been attached to the construction fence and was made of two sheets of plywood, was approximately 3/4 of an inch thick that were joined by four by four pieces of wood. He stated that he lost consciousness and when he regained his consciousness, his co-workers were removing him from beneath the wall. The plaintiff identified his boss as Peter and said that Peter was his immediate supervisor on the jobsite.

Demetrios Koutsouras testified on behalf of Vezandio. He testified that he was president of Vezandio. He testified that Vezandio and Catspaw executed an Agreement in March 2008 under which Vezandio agreed to provide project management and site supervision services. He stated that FPS was working on the fourth and fifth floors of the project. He testified that the entrance to the construction fence was sixteen feet wide consisting of double doors that were approximately eight feet high and that each door was approximately eight feet wide. During the construction he was at the project on a daily basis from 7:30 a.m. or 8:00 a.m. until 4:00 p.m. He testified that it was his practice to maintain the fence as well as the entire work site and that prior to the accident the door never came off the hinges. He conducted inspections of the site every day noting that he did not observe any problems or issues with the door or the construction fence prior to the date of the accident. On the day of the accident build outs were taking place by FPS. He testified that the plaintiff was an employee of FPS. He first learned of the accident when he was driving to the construction site when he received a phone call from the night security guard. When he arrived at the site the security guard told him that work had not begun for the day that the gate to the site was only opened to let workers inside the site. He testified that when he looked at the fence, he noticed the door was on the floor, but

he was unable to determine what had occurred.

Terrance Moan testified at an examination before trial on behalf of Catspaw and Gateway. He testified that Vezandio was hired to provide project management and site supervision services. Vezandio was also responsible for erecting, maintaining and inspecting the construction fence. He testified that in accordance with the parties' executed contract, Vezandio erected a construction fence around the jobsite. He testified that he only checked on the project occasionally, doing periodic walkthroughs of the construction site. He stated that Gateway and Catsspaw never received any complaints about the construction fence door, and he never noticed any defects. He testified that he learned about the accident from Mr. Koutsoras. He also testified that he was told by Maurice Stevens, the night security guard, that as Mr. Stevens was opening the gate for some workers, the wind caught the gate and knocked it over and then it struck the plaintiff.

Maurice Stevens testified at an examination before trial. He testified that he is currently employed by the defendant Catspaw. At the time of the accident, however, he was employed as a security guard by the defendant Vezandio. He testified that he conducted night security at the subject construction project. He described the construction fence as being approximately eight feet tall and had a double door entrance. He testified that the accident occurred on the morning of December 9, 2009 between 7:00 a.m. and 7:15 a.m. after he opened the construction fence door to let construction workers in to the site. He testified that the accident occurred as the plaintiff was entering the jobsite for the first time on the day of the accident. He testified that right before the accident the wind was blowing hard and rain was falling. He testified that shortly after he opened the door, after returning upstairs he witnessed the door come off its hinges and make contact with the plaintiff, causing the plaintiff to fall. After the accident, he called his boss at Vezandio to report the accident.

Non-party Peter Alesci, an employee of FPS testified at an examination before trial. He testified that on the day of the accident FPS workers were unloading tools and materials from a FPS van. He testified that the plaintiff had not performed any work prior to the accident, but was unloading the van at the time of the accident.

Non-party witness Edgar Eusebio Vargas testified at an examination before trial. He testified that he was an employee of FPS and worked at the project site on the day of the accident.

On the day of the accident he was unloading the FPS van with the plaintiff. He and the plaintiff would bring a load from the van and drop it just inside the worksite. He testified that the accident occurred when the plaintiff was removing the last bundle from the van, and the door from the construction fence fell off its hinges, striking the van and then falling on the plaintiff.

Non-party Wilson Bermeo, an employee of FPS testified at an examination before trial. On the day of the accident he was working on the fourth floor. He testified that he never saw the plaintiff working on the fourth floor on the day of the accident. He testified that he learned later that morning from his co-workers that something had happened to the plaintiff.

Owners and contractors are subject to strict liability under Labor Law § 240(1). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (see *Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280 [2003]). Here, the Labor Law § 240(1) cause of action must be dismissed because the collapse of a completed construction wall is not the type of elevated-related accident that Labor Law § 240(1) is intended to guard against (*Misseritti v Mark IV Contr. Co.*, 86 NY2d 487 [1995]; see *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). Furthermore, the falling door of a construction wall is not a falling object under Labor Law § 240(1) as it was not a object being hoisted or a load that required securing that was left unsecured (cf. *Outar v City of New York*, 5 NY3d 731 [2005]). In opposition, the plaintiff failed to raise a triable issue of fact. Plaintiff's argument that this case falls under a falling object case is without merit. Here, there is no evidence that the wall collapsed due to a failure to provide a protective device or that the fence was improperly secured (see *Wilinski v 334 E. 92<sup>nd</sup> Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]). Therefore, the plaintiff's cause of action under Labor Law § 240(1) is dismissed.

Under Labor Law § 241(6) liability is imposed on an owner or contractor for failing to comply with the Industrial Code, even if the owner or contractor did not supervise or control the worksite. To support his claim under Labor Law § 241(6) the plaintiff has alleged in his bill of particulars violations of 12-1.5, 23-1.7, 23-1.9, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.21, 23-1.24, 23-2.1, 23-3.2, 23-3.3, 23-5.1, 23-5.2, 23-5.3, 23-5.7, 23-5.8, 23-5.9, and 23-5.10. The plaintiff does not oppose the dismissal of the claims based upon all provisions except 12 NYCRR 23-1.18, as these provisions are either general safety provisions or not applicable to the facts of the case.

Therefore, the portion of the Labor Law § 241(6) claims predicated on those provisions of the Industrial Code will be dismissed. In opposition to the motion, the plaintiff argues that the Labor Law § 241(6) claims are predicated on violations of 12 NYCRR 23-1.18. This section requires a substantial barricade to prevent unauthorized people from entering a construction site that is not less than six feet in height and of solid construction provided with solid doors. The evidence submitted by the defendants establish that a construction fence was built in conformity with this section and a violation of this section was not the proximate cause of the accident. In opposition, the plaintiff failed to raise an issue of fact. The plaintiff's argument that because an accident occurred there must be violation is speculative and without merit. Therefore, the Labor Law § 241(6) cause of action must be dismissed.

For an owner or general contractor to be liable under Labor Law § 200 and common law negligence, the plaintiff must show that the owner or general contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. The defendants Gateway and Catspaw established their prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence submitted by these defendants established as a matter of law that they had no actual or constructive knowledge of any allegedly defective condition on the premises and exercised no control or supervision over the work of the plaintiff (see *Ortega v Puccia*, 57 AD3d 54 [2008]; *Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact.

The defendant Vezandio, on the other hand, failed to establish its prima facie entitlement to summary judgment on the Labor Law § 200 and common law negligence causes of action. While the defendant Vezandio did not supervise the plaintiff, the accident was allegedly caused by a defective condition rather than the method of the plaintiff's work (see *Chowdhury v Rodriguez*, 57 AD3d 121 [2008]). Here, the defendant Vezandio built and maintained the construction fence and door at issue. The defendant Vezandio did not establish that it did not create or have actual or constructive notice of the alleged defective condition (*Harsch v City of New York*, 78 AD3d [2010]; *Navarro v City of New York*, 75 AD3d 590 [2010]).

The court will now address the branch of the motion by defendants Gateway and Catspaw for summary judgment on their cross claims against Vezandio. The contract between Catspaw and

Vezandio requires the indemnification of Catspaw only if Vezandio is negligent. As there are issues of fact concerning whether Vezandio was negligent, the motion for summary judgment on the cross claim for contractual indemnification must be denied. Additionally, summary judgment on a claim for common-law indemnification is only appropriate where there are no triable issues of fact as to the degree of fault attributable to each party involved (see *Tama v Gargiulo Bros.*, 61 AD3d 958 [2009]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]). Here, issues of fact remain as to the fault of the defendant Vezandio.

Finally, the Court turns to the branch of the motion by defendants Gateway and Catspaw for summary judgment on its claim against Vezandio for failure to procure insurance. A party seeking summary judgment based on an alleged failure to procure insurance must demonstrate a contract provision required that such insurance be procured and that the provision was not complied with (*DiBuono v Abbey, LLC*, 83 AD3d 650 [2011]). Here, there is an issue of fact as to whether Vezandio properly procured insurance naming Gateway and Catspaw as additional insureds. Therefore, summary judgment is not warranted.

Accordingly, the branch of the motion by defendant Vezandio dismissing the Labor Law §§ 240(1) and 241(6) causes of action are granted and those causes of action are dismissed. The branch of the motion to dismiss the Labor Law § 200 and common law negligence causes of action are denied.

The branch of the summary judgment motion by the defendants Gateway and Catspaw to dismiss the Labor Law §§ 200, 240(1) and 241(6) and common law negligence causes of action are granted and the complaint is dismissed against those defendants. The branch of the motion by the defendants Gateway and Catspaw for summary judgment in their favor on their cross-claims against defendant Vezandio is denied.

Dated: September 4, 2012

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AUGUSTUS C. AGATE, J.S.C.