

**Keenan v Simon Prop. Group**

2012 NY Slip Op 32612(U)

October 10, 2012

Sup Ct, New York County

Docket Number: 114134/2008

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN  
J.S.C Justice

PART 23

Index Number : 114134/2008  
KEENAN, PETER  
vs.  
SIMON PROPERTY GROUP, et al.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/31/12  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1, 2, 3, 4 were read on this motion to for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2, 3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is withdrawn in part, by  
May 31, 2012 stipulation. RB 10/14/12  
It is further ORDERED that the balance of the motion is denied. This constitutes the decision and order of the Court. See separate opinion.

**FILED**

OCT 16 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: New York, New York, October 16, 2012 ENTERED: RB  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

-----X

PETER KEENAN and JOAN KEENAN,

Index No. 114134/08

Plaintiffs,

**OPINION**

-against-

THE ART OF SHAVING-NY, LLC,  
ALERT GLASS & ARCHITECTURAL  
METALS CORP., and  
THE RETAIL PROPERTY TRUST

**FILED**

**OCT 16 2012**

Defendants.

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COUNTY CLERK'S OFFICE

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**RICHARD F. BRAUN, J.:**

This is a personal injury action arising out of a construction accident alleging violations of Labor Law §§ 200, 240 (1) and 241 (6), and common law negligence. Defendants Simon Property Group, Inc., The Art of Shaving, Inc., The Art of Shaving-NY, LLC (Art of Shaving), The Retail Property Trust (Retail Property), and Simon DeBartolo Group, Inc. moved for summary judgment dismissing the complaint against them, and for summary judgment against co-defendant Alert Glass & Architectural Metals Corp. (Alert Glass) on the movants' common law indemnity claim.<sup>1</sup> Plaintiffs move separately for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1), and defendant Alert Glass moves separately for summary judgment dismissing the complaint and all cross claims against that defendant. Defendants contend that plaintiff Peter Keenan (plaintiff) was the sole proximate cause of his accident by using an A-frame ladder in a closed position. Plaintiff contends that he was not provided with a proper safety device.

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<sup>1</sup>By Stipulation, dated May 31, 2012, the claims against defendants Simon Property Group, Inc., The Art of Shaving, Inc., and Simon DeBartolo Group, Inc. were discontinued, and the branches of the motion on behalf of those defendants were withdrawn.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1<sup>st</sup> Dept 2011]). The inability to make such a demonstration must lead to denial of the motion, no matter how inadequate the opposition papers may be (*Santiago v Filstein*, 35 AD3d 184, 186 [1<sup>st</sup> Dept 2006]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]). The party moving for summary judgment has the initial burden on the motion (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Uddin v City of New York*, 88 AD3d 489, 490 [1<sup>st</sup> Dept 2011]; *Jaroslawicz v Prestige Caterers*, 292 AD2d 232, 233 [1<sup>st</sup> Dept 2002]).

An issue of fact exists as to whether plaintiff was the sole proximate cause of the accident (see *Blake v Neighborhood Hous. Serv. of New York City, Inc.*, 1 NY3d 280, 289 n 8 [2003]; *Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 159-160 [1<sup>st</sup> Dept 2003]). Although there is evidence that plaintiff misused the A-frame ladder, plaintiff testifies that a cause of the accident was his foot getting stuck on the points of a step of the ladder, which is sufficient to raise an issue of fact as to whether a defect in the ladder was a proximate cause of the accident. Defendants simply presented no evidence that the ladder was not defective.

Defendants Art of Shaving and Retail Property are not entitled to summary judgment on their cross claim for common law indemnification against defendant Alert Glass. Common law indemnification is available to a solely vicariously liable party from an actually negligent party (see *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 374, 378 [2011]; *Correia v Professional Data Mgt.*,

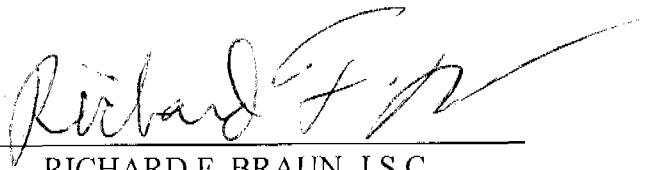
259 AD2d 60, 65 [1<sup>st</sup> Dept 1999]). While defendants Art of Shaving and Retail Property may have had no role in supervising and controlling plaintiff's work so that any liability on their part would be entirely vicarious, defendants Art of Shaving and Retail Property have failed to come forward with evidence that defendant Alert Glass was actually negligent. Even if it was shown that defendants Art of Shaving and Retail Property had the authority to supervise the work and implement safety procedures, that would be insufficient because actual supervision of the means and methods of the work is required (*see McCarthy v Turner Const., Inc.*, 17 NY3d at 378 [2011]; *Arteaga v 231/249 W 39 St. Corp.*, 45 AD3d 320, 321 [1<sup>st</sup> Dept 2007]).

Defendant Alert Glass is entitled to summary judgment dismissing the complaint against that defendant as defendant Alert Glass was not an owner, general contractor or a statutory agent that had supervisory authority and control over the work being performed, so there is no basis for liability against that defendant under Labor Law §§ 240(1) and 241(6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Blake v Neighborhood Hous. Serv. of New York City, Inc.*, 1 NY3d at 292-293; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Mocarska v 200 Madison Assoc.*, 262 AD2d 163 [1<sup>st</sup> Dept 1999]). Further, defendant Alert Glass did not direct, supervise or control plaintiff's work, so that there is no basis for liability under Labor Law § 200 or common law negligence (*see O'Sullivan v. IDI Const. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Hughes v Tishman Const. Corp.*, 40 AD3d 305, 306 [1<sup>st</sup> Dept 2007]; *cf. Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 163 [1<sup>st</sup> Dept 2004] ["While defendant might inspect the work to insure that it was done according to specifications, 'general supervisory authority at the work site for the purpose of overseeing the progress of the work and inspecting the work

product' is insufficient to impose liability (under Labor Law § 200).”]). Moreover, in the absence of any evidence that defendant Alert Glass supervised or controlled plaintiff's work, the cross claims for common law indemnification and contribution against defendant Alert Glass should be dismissed (*see Arteaga v 231/249 W 39 Street Corp.*, 45 AD3d at 321).

Accordingly, by separate decisions and orders of this date, plaintiffs, and defendants Art of Shaving and Retail Property were denied summary judgment. Defendant Alert Glass was granted summary judgment dismissing the complaint, and the common law indemnification and contribution cross claims against that defendant.

Dated: New York, New York  
October 10, 2012

  
RICHARD F. BRAUN, J.S.C.

**FILED**

**OCT 16 2012**

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