Puppa v G. Garrity Contr. Corp.

2017 NY Slip Op 30654(U)

April 4, 2017

Supreme Court, New York County

Docket Number: 156622/12

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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ROBERT PUPPA and LORALEE RICHARDS PUPPA,

Plaintiffs,

-against-

Index No. 156622/12

G. GARRITY CONTRACTING CORP.,

Motion Sequence Nos. 001 & 002

Defendant.

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G. GARRITY CONTRACTING CORP.,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590483/13

ARISTA AIR CONDITIONING CORP.,

Third-Party Defendant.

---X

ELLEN M. COIN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this action arising out of a construction site accident, plaintiffs Robert Puppa (Puppa or plaintiff) and Loralee Richards Puppa (together, plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendant G. Garrity Contracting Corp. (Garrity) (motion sequence number 001).

Defendant/third-party plaintiff Garrity moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims; and (2) summary judgment on its contractual indemnification claim against third-party defendant Arista Air Conditioning Corp. (Arista) (motion sequence number 002).[1] Arista cross-moves, pursuant

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[1]Garrity's notice of motion seeks: (1) dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims; and (2) summary judgment on its contractual indemnification

to CPLR 3212, for summary judgment dismissing the third-party complaint.

BACKGROUND

Garrity was hired as the general contractor on a renovation project in a residential duplex apartment at 171 West 71st Street in Manhattan. By quotation dated July 13, 2010, which was accepted by Garrity on September 25, 2010, Garrity subsequently retained Arista as a subcontractor to install a heating, ventilation, and air conditioning (HVAC) system. Puppa was an employee of Arista on September 15, 2011, the date of the accident.

Puppa testified at his deposition that he has been employed by Arista for 15 years, and has been a project manager for the last six or seven years (plaintiff tr at 10-11). Arista was installing an HVAC system on the project (*id.* at 19-20). The project included two floors and an attic above the upper floor, where the HVAC equipment and corresponding ductwork were to be installed (*id.* at 20). Puppa stated that he called George Garrity earlier in the week to let him know that he would be coming to the work site on September 15th to assess the status of the work (*id.* at 34, 38, 101). The reason for Puppa's visit was "to see if everything was – if everything that [he] hadn't seen before was in place and done properly, specifically in the attic" (*id.* at 36-37). Delfino Elias (Elias), an employee of Garrity, was on site on the date of the accident (*id.* at 40). When Puppa arrived, he asked Elias how to gain access to the attic, because no stairs or pull-down ladder had been installed (*id.* at 41). Elias produced a six-foot A-frame ladder and proceeded to set it up underneath the opening in the ceiling that provided access to the attic (*id.* at 44).

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claim against Arista (Garrity's notice of motion at 1). However, Garrity's affirmation in support of summary judgment also requests: (1) dismissal of plaintiffs' Labor Law § 241 (6) claim; and (2) summary judgment on its breach of contract claim against Arista.

According to Puppa, Elias climbed the ladder and entered the attic space (*id.* at 47-48). Puppa waited a few seconds and then ascended the ladder himself (*id.* at 48). In order to reach the attic space, Puppa climbed six steps, including the top step (*id.* at 51-52). While he was standing on the top step, approximately half of Puppa's body, from the waist up, was in the attic space (*id.* at 107). Puppa's lower half remained below the attic space (*id.*). As Puppa was standing on the top step, Puppa attempted to pull himself up into the attic space (*id.* at 52). The ladder "tilted out from under [him]," causing him to lose his footing (*id.* at 52, 55). The ladder fell to one side and leaned against the hallway wall (*id.* at 53). Puppa used both arms to hold onto the flooring of the attic space (*id.* at 55). Puppa managed to hook the ladder with his right foot and pull it back to its upright position, thereby regaining his footing (*id.* at 56-57). He experienced immediate left shoulder pain (*id.* at 57).

Garrity, a general contractor on residential renovations, contracted with Lewis and Lisa Liman to renovate their duplex apartment located at 171 West 71st Street (Garrity tr. at 6-8, 9-11). Arista won the bid to perform the HVAC work on the Liman project (*id.* at 14). Garrity always had a representative at the site on days when work was being performed (*id.* at 16). Elias was an employee of Garrity (*id.* at 17). Garrity maintained equipment at the site, including ladders (*id.* at 21). Garrity kept six-foot, eight-foot, and ten-foot A-frame fiberglass ladders at the project site (*id.* at 22). Garrity kept these ladders in a locked closet (*id.* at 23). George Garrity (Mr. Garrity) testified that in September 2010, he prepared Arista's subcontract on a blank AIA contract, inserted the contract information and signed it on behalf of Garrity (*id.* at 98-100). However, he did not recall whether Arista returned an executed copy of the AIA contract to Garrity before work started on the project (*id.* at 116). Mr. Garrity re-sent the AIA contract to Arista in 2013

(*id.* at 145-146).

Garrity hired Arista to install an HVAC system, known as variable refrigerant flow, on the Liman project (Berger tr. at 39, 44). In September 2010, Garrity did not require Arista to enter into an AIA written contract (*id.* at 67). According to Arista's vice president, Craig Berger, Puppa's injury occurred during the punch-list period of the project (*id.* at 110).

Plaintiffs commenced this action against Garrity on September 24, 2012, asserting the following causes of action: (1) violations of Labor Law §§ 200, 240, and 241; (2) common-law negligence; and (3) loss of services, society, and consortium on behalf of Mrs. Puppa.

Garrity subsequently impleaded Arista, asserting causes of action for: (1) common-law indemnification and contribution; (2) failure to procure insurance; and (3) contractual indemnification.

DISCUSSION

"'On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment'" (*Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013], quoting *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). "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 this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3

NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

Labor Law § 240 (1)

Plaintiffs move for partial summary judgment under Labor Law § 240 (1) against Garrity, arguing that Puppa was engaged in a protected activity because he was inspecting an air conditioning unit as part of an ongoing construction contract. According to plaintiffs, Puppa suffered an injury directly resulting from the application of the force of gravity, even though he did not fall from the attic. In addition, plaintiffs contend that the unsecured six-foot ladder was inadequate to perform his job, because it was too short to provide safe access to the attic space. Additionally, plaintiffs contend that Puppa was not the sole proximate cause of his accident, and was not a recalcitrant worker.

In opposition, Garrity contends that the accident falls outside the purview of section 240 (1), because Puppa did not fall from a height. Garrity also argues that there are questions of fact as to whether section 240 (1) was violated, and whether any violation proximately caused Puppa's injuries, in light of the evidence showing that: (1) the ladder was in good condition, had rubber feet, and did not wobble or shake as he climbed it; (2) Puppa was already pushing himself up at the time that the ladder tilted, and did not seek medical treatment until two weeks after the accident; and (3) Puppa was diagnosed with vertigo after the accident, making it possible that the ladder did not move at all.

Labor Law § 240 (1), known as the Scaffold Law, provides, in relevant part, as follows:

> "All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give

proper protection to a person so employed."

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]). "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of . . . gravity to an object or person" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1st Dept 2017] [internal quotation marks and citation omitted]). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]; *Limauro v City of N.Y. Dept. of Envtl. Protection*, 202 AD2d 170, 171 [1st Dept 1994]).

1. Whether Puppa Was Engaged in a Protected Activity

Labor Law § 240 (1) applies to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240 [1]; *see also Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003]). "Altering" within the meaning of the statute "requires making a *significant* physical change to the configuration or composition of the building or structure and does not encompass simple, routine activities such as maintenance and decorative modifications" (*Panek v County of Albany*, 99 NY2d 452, 457-458 [2003] [internal quotation marks and citation omitted]). In determining whether a particular project constitutes "alteration," the court must examine the totality of the work (*see Saint v Syracuse*

Supply Co., 25 NY3d 117, 126 [2015]).

In *Prats*, an assistant mechanic, whose job typically entailed cleaning, repairing and rehabilitating air handling units, was injured while ascending a ladder in order to hand a wrench to a coworker who was inspecting an air handling unit (*Prats*, 100 NY2d at 880).

In concluding that the plaintiff was engaged in a covered activity under section 240 (1), the Court of Appeals stated that:

> "Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts"

(*id.* at 882).

In sum, the Court stated that:

> "the question whether a particular inspection falls within section 240 (1) must be determined on a case-by-case basis, depending on the context of the work. Here, a confluence of factors brings plaintiff's activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred",

(*id.* at 883; *see also* NY PJI 2:217.1 ["Whether plaintiff was involved in a protected activity under the statute depends on several factors, including whether plaintiff was employed by a company that was carrying out a construction or alteration project, whether plaintiff's work was ongoing and contemporaneous with that work, whether plaintiff was involved in performing alteration or construction work and whether plaintiff's work was part of a separate phase easily

distinguishable from the construction and alteration work"]).

Here, Puppa was employed by a company that was carrying out a construction or alteration project (*see Prats*, 100 NY2d at 883). Puppa testified that Arista was installing an HVAC system on the project (plaintiff tr at 10, 19-20). He stated that Arista made penetrations through the flooring of the attic into the lower level for the air conditioning equipment, and also made penetrations in two of the walls for the exhaust fan to be connected to the ductwork and dampers (*id.* at 39). Puppa's work was "ongoing and contemporaneous with the other work that formed part of a single contract" (*Prats*, 100 NY2d at 881). Arista was performing punch-list work at the time of Puppa's accident (Berger tr at 110). Puppa stated that the purpose of his visit on the date of the accident was "to see if everything was . . . in place and done properly" (plaintiff tr at 36-37). Mr. Garrity testified that Puppa was assigned to do "[t]he same work he'd do every time he'd come there, check on the installation, and make sure it was getting towards completion" (Garrity tr at 58). The construction project would not be complete until the punch-list was addressed (*id.* at 28). Therefore, Puppa was engaged in a protected activity under section 240 (1).

2. *Statutory Violation and Proximate Cause*

As explained by the First Department, in a Labor Law § 240 (1) case, "'[t]he plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations,' but only that it 'proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person'" (*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014], quoting *Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [1st Dept 2007] [citations omitted]).

The plaintiff may establish prima facie entitlement to summary judgment by establishing that the unsecured ladder on which he was standing shifted (*see Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 473-474 [1st Dept 2007]), but is not required to show that the ladder was defective (*see Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016]).

Moreover, courts have held that section 240 (1) applies even where a worker is injured in an attempt to prevent himself or herself from falling to the ground (*see Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978 [2003] ["The application of section 240 (1) does not hinge on whether the worker actually hit the ground"]; *Mathews v Bank of Am.*, 107 AD3d 495, 495 [1st Dept 2013] ["plaintiff was not required to show that she fell completely off the ladder to the floor so long as the harm directly flowed from the application of the force of gravity to an object or person"] [internal quotation marks and citation omitted]; *Suwareh v State of New York*, 24 AD3d 380, 381 [1st Dept 2005] ["That claimant did not fall completely off the roof . . . does not negate the fact that claimant's injuries were the direct result of a gravity-related risk"]; *Fernandes v Equitable Life Assur. Socy. of United States*, 4 AD3d 214, 215 [1st Dept 2004] ["It does not avail defendants that plaintiff did not actually fall off of the ladder but instead was injured in preventing himself from falling"]).

In this case, Puppa testified that he was using a six-foot A-frame ladder to access the attic (plaintiff tr at 44). In order to reach the attic space, Puppa climbed six steps, including the top step (*id.* at 52). He stated that he normally would not climb the top step (*id.*). According to Puppa, the ladder "tilted out from under [him]," and he held onto the floor in order to prevent himself from falling (*id.* at 52, 55-57). No one was holding the ladder (*id.* at 53). Therefore, plaintiffs have established prima facie entitlement to liability under Labor Law § 240 (1) (*see*

Cuentas v Sephora USA, Inc., 102 AD3d 504, 504 [1st Dept 2013] [worker's testimony that the "ladder he was using was both unsteady as he was ascending it and too short to enable him to reach the window he was cleaning establishe[d] prima facie" entitlement to judgment as a matter of law as to issue of liability under section 240 (1)]).

Garrity has failed to raise an issue of fact as to its liability under section 240 (1). Garrity has not pointed to any evidence that the ladder did not shift out from under Puppa. Garrity's claim that the custom and practice on the job was to use eight-foot ladders (Garrity tr at 33-35, 41) does not demonstrate that Puppa actually used an eight-foot ladder on the date of his accident, as Puppa stated that he used a six-foot ladder (plaintiff tr at 44). In addition, plaintiffs were not required to show that the ladder was defective (*see Hill*, 140 AD3d at 570). Even though Puppa did not fall to the floor, the evidence shows that Puppa was injured in attempting to prevent his fall. While Garrity points out that Puppa did not seek medical treatment until two weeks after the accident, Garrity has not raised a triable issue of fact as to plaintiffs' prima facie case or as to a material fact (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001]; *Perez v Chase Manhattan Bank*, 262 AD2d 160, 161 [1st Dept 1999]). Further, although Garrity points out that Puppa was diagnosed with vertigo after the accident, Garrity only speculates that this played a role in the happening of the accident. In any event, Puppa's medical condition was not the sole proximate cause of his accident, given the evidence that the ladder was unsecured and shifted (*see Lajqi v New York City Tr. Auth.*, 23 AD3d 159, 159 [1st Dept 2005] ["Even if plaintiff's medical condition may have caused him to faint or become dizzy, it was not the sole proximate cause of the accident such as would absolve defendants"]).

In light of the above, plaintiffs' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted as against Garrity.

Labor Law § 200 and Common-Law Negligence

Garrity argues that plaintiffs' Labor Law § 200 and common-law negligence claims should be dismissed, since it did not exercise supervision or control over Puppa's or Arista's work.

Plaintiffs counter that there are issues of fact as to whether Garrity controlled the manner in which Puppa performed his work. According to plaintiffs, Garrity supplied Puppa with a ladder of insufficient height to access the attic space for his work, which created the dangerous condition that caused his injury.

Labor Law § 200 (1) provides as follows:

> " All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). The statute is governed by the "generally applicable standards of the prudent [person], the foreseeability of harm, and the rule of reason" (*Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9

AD2d 379, 382 [1st Dept 1959]).

Where the worker is injured as a result of the manner in which the work is performed, including the equipment used, the "general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

By contrast, where the worker's injury stems from a dangerous or defective premises condition, a general contractor may be liable under section 200 and the common law if it had "control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury" (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]).

In *Flores v Infrastructure Repair Serv., LLC* (115 AD3d 543, 543 [1st Dept 2014]), the First Department held that,

> "the court properly denied defendants' motion for summary judgment dismissing the Labor Law § 200 claim as against [the general contractor]. As the essence of plaintiff's claim is that the safety equipment provided to him was inadequate, and [the general contractor] does not dispute that it provided the safety equipment plaintiff used, plaintiff may hold [the general contractor] liable under Labor Law § 200 for any negligence in its provision of safety equipment shown to have contributed to his injury."

In the instant case, Puppa testified that he had called Mr. Garrity earlier in the week, to inform him that he would be stopping by to "check up on stuff" (plaintiff tr at 34). According to Puppa, he needed to make sure that someone would be there, because he needed to see that the work was done in the attic (*id.* at 38, 101). On September 15, 2011, Arista did not have any equipment on site (*id.* at 42). Garrity's employee produced a six-foot ladder to access the attic space (*id.* at 42-44). Puppa further testified that under normal circumstances, he would not use

the top step of an A-frame ladder (*id.* at 51-52). However, Puppa's use of the top step was necessary to gain access to the attic (*id.*). As Puppa was standing on the top step, the ladder tilted out from under him (*id.* at 52, 55). Garrity has not disputed that it provided the ladder to Puppa. Since plaintiff asserts that the ladder provided was inadequate and too short to enable him to perform his work in the attic, plaintiffs may hold Garrity liable under section 200 (1) and the common law, to the extent that any negligence in its provision of safety equipment provision contributed to the accident (*see Flores*, 115 AD3d at 543).[2] As noted, the statute requires that all equipment provide "reasonable and adequate protection" to workers (Labor Law § 200 [1]). Whether the six-foot ladder provided reasonable and adequate protection under the circumstances presents an issue of fact for the jury. Therefore, the branch of Garrity's motion seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . , shall comply therewith."

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[2]Although Garrity characterizes plaintiffs' argument as one of negligent setting up or placement of the ladder, plaintiffs' argument is that he was "supplied by Defendant Garrity with a ladder that was of insufficient height to access an attic space necessary for his work, thereby creating the dangerous condition that caused plaintiff's injury" (Glass aff. in opposition, ¶ 5).

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. The statute requires that all areas in which construction, excavation or demolition work is being performed be made reasonably safe (*see Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct" rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). In addition, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

In opposition to Garrity's motion for summary judgment, plaintiffs do not address their Labor Law § 241 (6) claim, only their Labor Law § 200 and common-law negligence claims. Therefore, plaintiffs' Labor Law § 241 (6) claim must be dismissed as abandoned (*see Burgos v Premiere Props., Inc.*, 145 AD3d 506, 508 [1st Dept 2016]).

Garrity's Failure to Procure Insurance, Contractual Indemnification, and Common-Law Indemnification and Contribution Claims Against Arista

1. Failure to Procure Insurance and Contractual Indemnification

Garrity moves for partial summary judgment on its claim against Arista for failure to procure insurance, arguing that AIA contract A401 governed Arista's performance of work on

the project.[3] Garrity notes that: (1) Mr. Garrity prepared Arista's subcontract on an AIA contract A401 form, and then forwarded it to Arista; (2) Arista performed as per the contract; and (3) Arista provided a certificate of worker's compensation insurance and a certificate of insurance for a commercial general liability policy, which indicates that:

> "Re: 171 W 71st Street, 12B, PHW Liman Residence.
> G. Garrity Contracting Corp. is included as an Additional Insured *per written construction agreement*"

(Hutchinson aff. in support, ex. K [emphasis added]). Garrity argues that although Arista obtained insurance naming Garrity as an additional insured on its policies, Arista's insurer has refused to provide coverage, despite Arista's obligation to provide insurance under the contract.

In addition, Garrity moves for summary judgment on its contractual indemnification claim against Arista, based upon the contractual indemnification provision contained within AIA contract A401.[4] Garrity maintains that it is entitled to indemnification, because it did not control

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[3]With respect to insurance, the AIA contract provides that "Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Subcontractor's Work until the date of final payment" (Hutchinson aff. in support, exhibit I, § 13.2); "Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's work" (*id.*, § 13.3); and "The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations . . ." (*id.*, § 13.4).

[4]Section 4.6.1 of AIA contract A401 provides as follows:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the. . . . Contractor . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the

Puppa's work, and because the injury arose out of Arista's work.

In opposition to Garrity's motion, and in support of its cross-motion for summary judgment dismissing the third-party claims for contractual indemnification and failure to procure insurance, Arista argues that the quotation dated July 13, 2010 was the only contract document that governed Arista's work at the time of the accident (Baden aff. in support, ex. A). Arista maintains that the quotation does not contain any indemnification provision or requirement to procure insurance naming Garrity as an additional insured. As support, Arista also provides an e-mail dated September 25, 2010 from Mr. Garrity to Arista, which states:

> "Hi Christine,
>
> I have sent a copy of the signed contract & deposit to your office. You should receive it by Tuesday.
>
> I will need a copy of your workers compensation and general liability insurance. Additionally insured: *G. Garrity Contracting corp, 251 w 89th street, 9B, New York, NY 10024.*
>
> Certificate holder: *G. Garrity contracting corp*"

(*id.* [emphasis in original]).

Arista also submits an e-mail dated September 27, 2010 from Berger responding to Mr. Garrity, stating, "We received the sign [sic] proposal and the deposit. You should have the insurance by early Tuesday" (*id.*).

> Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6"

(Hutchinson aff. in support, ex. I).

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' *or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered*'"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005] [emphasis added]).

"[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005], *rearg denied* 5 NY3d 746 [2005]). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*id.* at 368 [internal quotation marks and citation omitted]). In *Flores*, the Court of Appeals held that "the common-law rule – which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract – governs the validity of a written indemnification agreement under Workers' Compensation Law § 11" (*id.* at 369-370).

In this case, Mr. Garrity testified that in September 2010, he prepared Garrity's subcontract on a blank AIA contract, onto which he wrote in the pertinent contract information and signed on behalf of Garrity (Garrity tr at 98-100). The project was the first time that Garrity worked with Arista (*id.* at 134). Mr. Garrity forwarded the original to Arista on or about September 25, 2010 (*id.* at 91-92, 100-101). He did not recall whether Arista ever sent back the AIA contract (*id.* at 116). Garrity's office subsequently sustained flooding (*id.* at 119). He looked for a copy of the original signed AIA contract "[w]hen [he] got the notification from the

insurance that they were looking for paperwork on the Puppa case," but he only found a draft copy of the contract that he had signed (*id.* at 119, 133, 157-158). Mr. Garrity re-sent the AIA contract to Arista in 2013, requesting that Berger sign and send back the contract (*id.* at 119, 145-146). Mr. Garrity said that he "needed a copy of the contract because [he] couldn't find it. Because there was some sort of insurance thing going on" (*id.* at 185). He did not say that he expected the terms and conditions of the AIA contract to apply to the work performed in 2010 and 2011 (*id.* at 184).[5] However, Berger testified that in September 2010, Garrity did not require Arista to enter into an AIA written contract (Berger tr at 67). Berger also stated that the first time that he saw the AIA contract was in 2012 or 2013, when Mr. Garrity e-mailed it to him and asked him to sign it (*id.* at 68). Nevertheless, Arista obtained a certificate of insurance, as required by the AIA contract, which indicates that Garrity was named as an additional insured on Arista's commercial general liability policy *"per written construction agreement*" (Hutchinson aff. in support, ex. K [emphasis added]). The quotation does not contain an indemnification provision or an insurance procurement provision (Baden aff. in support, ex. A). In light of the above evidence, there are issues of fact as to whether the parties intended to be bound by the terms and conditions of the AIA contract, including its contractual indemnification and insurance procurement provisions (*see Tullino v Pyramid Cos.*, 78 AD3d 1041, 1042-1043 [2d Dept 2010] ; *Staub v William H. Lane, Inc.*, 58 AD3d 933, 935 [3d Dept 2009] [issue of fact as to whether

[5]Garrity has not shown, as a matter of law, that the terms and conditions of the AIA contract, signed by Arista's representative in 2013, two years after the accident and after this litigation was commenced, should be applied retroactively (*see Elescano v Eighth-19th Co., LLC*, 13 AD3d 80, 81 [1st Dept 2004] ["(a) term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made as of (a pre-accident date), and that the parties intended that it apply as of that date"] [internal quotation marks and citation omitted]).

parties agreed to be bound by indemnification provision of AIA contract A401]).[6] "[W]here a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]).

2. *Common-Law Indemnification and Contribution*

Furthermore, although Arista seeks dismissal of Garrity's entire third-party complaint, Arista has not addressed the first cause of action, seeking common-law indemnification and contribution from Arista (third-party complaint, ¶¶ 10-14). Garrity may recover on these claims if Puppa suffered a "grave injury" (*see Rodrigues*, 5 NY3d at 429). Therefore, Arista is not entitled to dismissal of Garrity's common-law indemnification and contribution claims against it (*see Winegrad*, 64 NY2d at 853).

Consequently, the branches of Garrity's motion seeking summary judgment on its contractual indemnification and failure to procure insurance claims, and Arista's cross-motion seeking dismissal of the third-party complaint, are denied.

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[6]Even if the terms and conditions of the AIA contract did not apply, Arista has failed to demonstrate that it was not required to procure insurance for Garrity's benefit. While Arista claims that there was "no de facto contract relating to coverage" (Baden aff. in opposition, ¶ 3), Arista submits e-mails indicating that the parties may have come to an agreement as to the procurement of insurance – Mr. Garrity requested that Arista name Garrity as an additional insured on its worker's compensation and general liability policies, and Berger responded that Garrity would have the insurance soon (Baden aff. in support, ex. A). "[A]n exchange of e-mails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents, when the communications are 'sufficiently clear and concrete' to establish such an intent" (*Brighton Inv., Ltd. v Har-Zvi*, 88 AD3d 1220, 1222 [3d Dept 2011], quoting *Williamson v Delsener*, 59 AD3d 291, 291 [1st Dept 2009]). Arista does not argue that the September 2010 e-mails are insufficiently clear or concrete to establish such an intent, or that the e-mails violate the statute of frauds.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of plaintiffs Robert Puppa and Loralee Richards Puppa for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted against defendant G. Garrity Contracting Corp., with the issue of plaintiffs' damages to await the trial of this action; and it is further

ORDERED that the motion (sequence number 002) of defendant/third-party plaintiff G. Garrity Contracting Corp. for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 241 (6) claim, and is otherwise denied; and it is further;

ORDERED that the cross-motion of third-party defendant Arista Air Conditioning Corp. for summary judgment is denied.

Dated: April 4, 2017

ENTER:

Ellen M. Coin, A.J.S.C.