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SHORT FORM ORDER

INDEX No. 09-41675
CAL No. 12-01784OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-22-13
ADJ. DATE 3-15-13
Mot. Seq. # 001 - MotD; CASEDISP

CHARLES FUCCI and JENNIFER FUCCI, Individually and as Husband and Wife,

Plaintiffs,

- against -

DOUGLAS S. PLOTKE, JR., DOUGLAS S. PLOTKE, JR., INC., d/b/a ROOFING SERVICES and ROOFING SERVICES,

Defendants.

DOUGLAS S. PLOTKE, JR., INC.

Third-Party Plaintiff,

- against -

CAJ HOME IMPROVEMENTS, INC.,

Third-Party Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants and third-party plaintiff, dated December 19, 2012, and supporting papers; (2) Affirmation in Opposition by the plaintiffs, dated February 7, 2013, and supporting papers; (3) Reply Affirmation by the defendants and third-party plaintiff, dated February 20, 2013, and supporting papers; (4) Affirmation in Partial Support and in Partial Opposition by the third-party defendant, dated March 6, 2013, and supporting papers; (5) Reply Affirmation by the defendants and third-party plaintiff, dated March 12, 2013, and supporting papers (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendants and the third-party plaintiff for an order pursuant to CPLR 3212 granting the defendants summary judgment dismissing the complaint and granting the third-party plaintiff summary judgment in its favor and against the third-party defendant is granted to the extent of dismissing the complaint and granting summary judgment in favor of the third-party plaintiff against the third-party defendant on its causes of action for common-law indemnification, contractual indemnification, and breach of contract, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by Charles Fucci ("the plaintiff") on September 1, 2007, when he stepped from a roof onto an unsecured ladder which shifted, causing him to fall. At the time of the accident, the plaintiff was working as a foreman for the third-party defendant, CAJ Home Improvements, Inc. ("CAJ"). Defendant Douglas S. Plotke, Jr., Inc. d/b/a Roofing Services ("Roofing Services") is a commercial contractor which had a subcontractor agreement with CAJ and referred this residential home improvement job to CAJ. Douglas S. Plotke, Jr. is a co-owner of Roofing Services.

In their complaint, the plaintiffs assert three causes of action. The first cause of action is for common-law negligence, the second cause of action is for violations of Labor Law §§ 200, 240 (1) and 241 (6), and the third cause of action is for loss of consortium. The plaintiff alleges that the defendants were negligent in, *inter alia*, failing to provide him with a safe place to work.

In the third-party complaint, the third-party plaintiff asserts four causes of action. The first is for common-law indemnification, the second is for contractual indemnification, the third is for contribution, and the fourth is for failure to procure insurance.

The plaintiff testified at his deposition that on the day of the accident, he was a foreman employed by CAJ and was removing and replacing metal flashing around the chimney at a residential home. CAJ received the job through Roofing Services. He helped his co-worker set up the ladder by holding it at the ground level while his co-worker climbed up the ladder and extended it. The ladder was supplied by CAJ. The footings of the ladder were placed in gravel. After they set it up, he went up and down the ladder multiple times and did not notice any problems with it. When he finished the job, he grabbed his tools and attempted to descend the ladder. When he stepped off of the base scaffold and onto the ladder, the ladder shifted to the left and he lost his balance. His feet became tangled up in the ladder and he held onto the plank with one hand and the gutter with his other hand. He used his feet to pull the ladder back towards him, made the ladder as secure as he could, and climbed down it. When he helped his co-worker retrieve the ladder from the house, he saw that it was not secured to the roof. He would always secure the ladder to the roof either using a rope or a bungee cord.

John Plotke, a co-owner of Roofing Services, testified at his deposition that he and his brother, Douglas S. Plotke, Jr. were co-owners of Roofing Services, a roofing contractor. Roofing Services received a phone call from the owners of a residential house requesting it to fix a leak in the roof of their house. When Roofing Services receives phone calls for repairs to residential homes, the first thing that

it does is give the owner an estimate of how much the repair will cost. After an estimate is given, the job is transmitted to the repair company, CAJ. All residential work is referred by them to CAJ. Mr. Plotke testified that while Roofing Services had a subcontractor agreement with CAJ, Roofing Services was not the general contractor nor the construction manager on the job. Roofing Services was merely the salesman. When CAJ finished a job, they would send their invoice to Roofing Services. However, he testified that Roofing Services had the authority to tell CAJ to go back and fix something if they received a complaint from a homeowner. Roofing Services could also visit CAJ's work sites while they were performing construction work and it had the authority to tell CAJ's workers to stop working if they noticed that its workers were not performing the work in a safe manner. Mr. Poltke further testified that Roofing Services did not provide CAJ with any materials or tools and did not instruct the plaintiff how to perform the work. Roofing Services did not perform inspections at CAJ's work sites and nobody from Roofing Services was present at the work site where the plaintiff was injured.

The defendants and third-party plaintiff now move for summary judgment dismissing the complaint and for summary judgment in favor of the third-party plaintiff and against the third-party defendant.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

As a preliminary matter, the Court notes that it cannot consider the unsigned deposition transcripts of non-party witnesses Lucas Anariba and Cesar Merello since they were submitted without an explanation as to why they were not signed (*see* ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). While the plaintiffs assert that their deposition transcripts should also not be considered since they were not signed and Roofing Services failed to establish that it had forwarded the transcripts to them for their signature, Roofing Services annexed to its reply papers copies of letters to the plaintiffs' attorney indicating that it had forwarded the transcripts to the plaintiffs' attorney and requested that the plaintiffs sign and return the deposition transcripts. Moreover, although the plaintiffs' transcripts are unsigned, since the plaintiffs have not raised any challenges to the accuracy of their deposition transcripts, they qualify as admissible evidence for purposes of the motion for summary judgment made by Roofing Services (*see* ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]).

"Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents . . . A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured . . . Similarly, where, as here, a claim against a defendant arises out of alleged defects or dangers in the methods or materials of the work, recovery cannot be had under Labor Law § 200 or pursuant to the principles of common-law negligence unless it is shown that the party to be charged under that theory of liability had the authority to supervise or control the performance of the work" (***Medina v R.M. Resources***, ___ AD3d ___, ___, 2013 NY Slip Op 04582 * 2 [internal citations omitted]). In order "to impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition . . . [i]t is not a defendant's title that is determinative, but the degree of control or supervision exercised" (***Rodriguez v JMB Architechture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40, 42 [2d Dept 2011] [internal citations omitted]). Thus, where "[t]he role of [the defendant is] only one of general supervision . . . [it] is insufficient to impose liability under the Labor Law" (*id.* at 951, 919 NYS2d at 42).

Here, the defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the complaint by demonstrating, through the deposition testimony of John Plotke, the plaintiff, and Maureen Cosby, a co-owner of CAJ, that the defendants' role at the job site where the plaintiff was injured was only one of general supervision and, as a result, no liability could be imposed against them (***Koat v Consolidated Edison of N.Y., Inc.***, 98 AD3d 474, 949 NYS2d 699 [2d Dept 2012]; ***Cabrera v Revere Condominium***, 91 AD3d 695, 937 NYS2d 98 [2d Dept 2012]; ***Rodriguez v JMB Architechture, LLC***, *supra*). Specifically, the plaintiff testified that nobody from Roofing Services was present at the job site and that Roofing Services did not have any supervisory authority over him. He did not receive any instructions from Roofing Services on how to perform his job. John Plotke testified that Roofing Services was not present at the job site, did not provide the plaintiff with any materials or tools for the job, did not instruct the plaintiff how to perform the work, and did not perform any inspections at the work site. In addition, Maureen Cosby testified that while Roofing Services referred jobs to CAJ, it did not supervise CAJ's employees.

In response to the defendants' motion, the plaintiffs failed to raise a triable issue of fact as to whether the defendants had the authority to supervise and control the plaintiff's work (*see* ***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]).

Turning to the branch of the motion made by Roofing Services for summary judgment in its favor and against CAJ on its causes of action for common-law indemnification, contractual indemnification, contribution, and breach of contract, since Roofing Services' motion for summary judgment dismissing the complaint was granted herein, Roofing Services is not entitled to contribution from CAJ. However, it is well settled that "[s]ummary judgment on a claim for common-law indemnity . . . is appropriate . . . where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (***La Lima v Epstein***, 143 AD2d 886, 888, 533 NYS2d 399, 401 [2d Dept 1988]). To be entitled to summary judgment, a party is required to establish "that no negligence act or omission on its part contributed to the plaintiff's injuries, and that its liability is therefore purely vicarious" (***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 489, 818 NYS2d 546, 551 [2d Dept

2006]). Here, since Roofing Services established that it cannot be held liable as a matter of law for any negligence since it did not have the requisite authority to supervise the plaintiff's work, Roofing Services is entitled to common-law indemnification against CAJ. With respect to its causes of action for contractual indemnification and breach of contract for failure to procure insurance, the agreement entered into between the parties states, in pertinent part:

> "This agreement is . . . for any and all work done for, with, or on behalf of Douglas S. Plotke, Jr., Inc. d/b/a Roof Services . . . for the period starting with 01/01/2007, and running until 12/31/2007.
>
> This agreement is being provided for Douglas S. Plotke Jr., Inc. d/b/a Roof Services by CAJ Home Improvement in full agreement to the insuring and hold harmless conditions outlined below, and pertains to all work performed during this indicated period of time whether via written or verbal agreements.
>
> Prior to commencement of any work under this contract and until its completion and final acceptance of the work, the subcontractor shall, at its sole expense maintain the following insurance on its own behalf, and furnish the owner and general contractor, certificate of insurance evidencing same and reflecting the effective date of such coverage as follows . . .
>
> A copy of the blanket additional insured endorsement should be attached. In absence of such, endorsements must be furnished reflecting the inclusion of the interests of owner, general contractor, their officers, directors, partners, representatives, agents and employees, and naming each as an additional insured on a primary basis . . .
>
> A copy of [the] policy and/or endorsement(s) and any other documents required to verify such insurance are to be submitted with the appropriate certificate(s), or upon request of [the contractor]. Failure to provide these documents is not to be construed as a waiver of the requirements to provide such insurance.
>
> The [sub]contractor shall file certificate of insurance prior to the commencement of work with the owner and the general contractor which shall be subject to the owner, general contractor, contractor, and to Douglas S. Plotke, Jr., Inc. d/b/a Roof Services approval of adequacy of protection and the satisfactory character of the insurer...
>
> Hold Harmless:

> To the fullest extent permitted by law, subcontractor will indemnify and hold harmless [the contractor] and owner, their officers, directors, partners, representatives, agents, and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability . . . arising in whole or in any part and in any manner from injury and/or death of a person or damage to or loss of any property resulting from the acts, omissions, breach, or default of subcontractor, its officers, directors, employees . . . in connection with the performance of any work by or for subcontractor pursuant to any contract . . . except those claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of the contractor, subcontractor will defend and bear all cost of defending any actions or proceeding brought against [the contractor] . . . arising in whole or in part out of any such acts, omission, breach or default. The foregoing indemnity shall include injury or death of any employee of the contractor or subcontractor and shall not be limited in any way . . ."

"[T]he right to contractual indemnification depends upon the specific language of the contract" (***Gillmore v Duke/Flour Daniel***, 221 AD2d 938, 939, 634 NYS2d 588, 590 [2d Dept 1995]). Since it has already been determined herein that Roofing Services cannot be held liable for the plaintiff's injuries because it lacked the requisite authority to supervise the plaintiff's work, based on the foregoing contract, Roofing Services is entitled to summary judgment on its claim for contractual indemnification. With respect to Roofing Services's request for summary judgment on its cause of action for breach of contract, alleging CAJ failed to procure insurance naming Roofing Services as an additional insured, it is likewise granted. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (***Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership***, 304 AD2d 738, 739, 759 NYS2d 107, 108 [2d Dept 2003]). Roofing Services established that the contract entered into between the parties required CAJ to obtain insurance and that CAJ failed to obtain the requisite insurance.

In opposition, CAJ failed to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). While CAJ asserts that Roofing Services is not entitled to indemnification because the contract is voidable pursuant to General Obligations Law § 5-3.22.1, General Obligations Law § 5-3.22.1 bars a party at fault from seeking indemnification. Moreover, "[a]lthough a clause in a construction contract that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such a clause may be enforced where the party to be indemnified is found to be free of any negligence" (***Cabrera v Board of Educ. of City of N.Y.***, 33 AD3d 641, 643, 823 NYS2d 419, 421 [2d Dept 2006]). Since this court has found herein that Roofing Services cannot be held liable as a matter of law for the plaintiff's injuries because it did not have the requisite authority to supervise the plaintiff's work, any clause in the contract between the parties which purports to indemnify Roofing Services for its own negligence may be enforced (*id.*).

Accordingly, the defendants and third-party plaintiff's motion for summary judgment dismissing the complaint and granting the third-party plaintiff summary judgment in its favor against CAJ is granted to the extent of dismissing the complaint and granting the third-party plaintiff summary judgment in its favor against CAJ on its causes of action for common-law indemnification, contractual indemnification, and breach of contract, and is otherwise denied.

Dated: 8/22/13

PETER H. MAYER, J.S.C.