Guaman v 1963 Ryer Realty Corp.
2014 NY Slip Op 30744(U)
February 26, 2014
Supreme Court, Bronx County
Docket Number: 307124/2010
Judge: Norma Ruiz
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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 307124/2010

NICHOLAS GUAMAN and PAULA MAYANCELA
Plaintiff,

-against-

Present:
HON. NORMA RUIZ

1963 RYER REALTY CORP., GAZIVODA REATLY CO. INC., and A SAAD CONTRACTING, INC.,

Defendants.

1963 RYER REALTY CORP.
Third-Party Plaintiff

Third-Party Index No.: 84186/10

-against-

AP TEK CONSTRUCTION INC., and AP TEK RESTORATION INC.,
Third-Party Defendants

AP TEK CONSTRUCTION INC. and
AP TEK RESTORATION INC.,
Second Third-Party Plaintiff

Second Third-Party
Index No.: 84186/10

-against-

MUSHTAQ AHMAD, DIN CONTRACTING, and
A SAAD CONTRACTING, INC.,
Second Third-Party Defendants

A SAAD CONTRACTING, INC.,
Third Third-Party Plaintiff

Third Third-Party
Index No.: 84186/10

-against-

AP TEK CONSTRUCTION INC. and AP TEK RESTORATION INC.,
Third Third-Party Defendants

The following papers numbered 1 to Read on this motion SUMMARY JUDGMENT
Noticed on_____ and duly submitted as No. __ on the Motion Calendar of 3/4/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motions and Affidavits Annexed.....	
Notice of Cross Motion and Answering Affidavits.....	
Replying Affidavits	
Memorandum of Law	
Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

This is a labor law action in which the plaintiff Nicolas Guaman ("Guaman") seeks damages for injuries he sustained when he fell off a scaffold on August 18, 2010 while performing pointing, caulking and lintel work on the brick exterior of the six story multiple dwelling building owned by defendant 1963 Ryer Realty Corp ("1963 Ryer Realty") and managed by defendant Gazivoda Realty Co. ("Gazivoda").

In August of 2010, Anthony Gazivoda the President of both corporate defendants Gazivoda Realty and 1963 Ryer Realty, hired defendant A Saad Contracting, Inc. (" Saad") to perform some window lintel replacement on the top floor, spot pointing and caulking. Saad applied for the necessary work permits and then contracted the work to the plaintiff's employer, third party defendant AP Tek Restoration Inc. ("Ap Tek").

On the day of the accident, Guaman reported to work, along with his foreman Shafaqat Ali ("Ali"), Santiago Pumaqueza ("Pumaqueza") and Chico Luis Mayancela ("Mayancela"). Guaman and Pumaqueza were working from a hanging two- point suspension scaffold. It is alleged that they both obtained "Certificates of Fitness" which permitted them to work on scaffolds. The scaffold in question was erected the day before (it was the second day of work) on the right side of the building. The necessary clamps, C-hook, wires and ropes which were needed to support the scaffold were all attached to the roof. The scaffold located parallel to the building had one railing which ran lengthwise.

Guaman and Pumaqueza each had a lifeline (rope) which was attached to the roof, went over the parapet wall and extended down to the ground. Each lifeline had a rope-grab (metal device).

In order to secure himself to the lifeline, Guaman would connect the clip at the end of the three feet long lanyard of his safety harness to the lifeline's rope-grab.

Guaman alleges that on August 17, 2010 he and Pumaqueza worked on the scaffold without incident. At the end of the day, the scaffold was lowered and left hanging about 10 feet above the ground level, over an adjacent parking lot. On the day of the accident, Guaman, Pumaqueza, Ali and Mayancela went to the roof to move and reposition the clamps, C-Hooks, wires and ropes to continue working on the next section of the area that needed pointing, caulking and lintel work. Then the scaffold was repositioned and lined up with the C-Hooks. While on the ground floor, Ali and Mayancela pulled on the scaffold's ropes to hoist it up to the roof level. Once raised to the top, the scaffold's platform was at the parapet level of the roof.

Guaman alleges that prior to entering the scaffold, he put on his safety harness with the three foot long lanyard. He then attached the metal clip of the lanyard onto the rope-grab already attached to the lifeline. Guaman contends that Ali attached the rope-grab onto the lifeline. He pulled on the lanyard to test it, to make sure it was snug and felt resistance. He believed he attached to the lifeline correctly. He then climbed over the parapet wall onto the scaffold. He intended to tie off the scaffold in order to take control of the scaffold (i.e. switch the control from the persons on ground level, to persons on the scaffold). He walked to his right and tied off the scaffold on its right side. He began walking over to the left side to tie it off. When he reached the middle of the platform, the scaffold suddenly tilted, propelled it into a vertical angle, causing Guaman to fall through the end of the platform which did not have a rail and plummet six floors to the ground level.

Guaman alleges he sustained the following injuries as a result of the fall: traumatic brain injury; cognitive impairment; memory loss and impairment; impaired speech and ability to communicate; multiple fractures of the left upper extremity resulting in amputation of the left arm above the elbow; ruptured aorta with surgical repair; multiple spinal fractures; comminuted fracture in the left iliac bone and ischium; bilateral fracture of the pelvis; comminuted fracture involving the right sacral wing; ruptured spleen with spleenectomy; kidney insufficiency; pulmonary and respiratory insufficinecy; aortic dessection, C1 traverse process fracture; right L5 pars fracture; right S1 pedicle fracture; left 2-7 rib fractures; right 3-6 rib fractures; left brachial artery transaction; left sacral iliac dislocation, left open humerus fracture; left comminuted distal radius fracture;

hydrocephalous; rhabdomyolitis; hemoperitoneum; multiple skull fractures; 3cm thoracic aortic injury; malnutrition; bacteremia; and urinary tract infection.

Plaintiffs contend that defendants violated 2008 New York City Building Code section 3314.10.1 which requires that the installation, or change of position of any suspended scaffold, be performed under the supervision of a licensed master, or special rigger, or a licensed sign hanger or a designated foreman, who shall ensure the safety of such operation. Shan Bhutta ("Bhutta"), the President of Ap Tek, was a licensed Master Rigger, who only visited the site for approximately one hour on August 17, 2010. There was no other Master Rigger present at the work site.

Bhutta testified on behalf of Ap Tek. He admitted that Ali was his employee but denied that he was a foreman. He also admitted that he employed Guaman in 2010. Prior to hiring the plaintiff, he had Guaman demonstrate his knowledge of scaffolds. He also testified that it is the responsibility of the person entering the scaffold to attach the rope grab onto the lifeline.

Bhutta learned of this job from Ali. According to Ali, the owners were willing to pay $28,000.00 to $ 30,000.00 for the work. After Ali described the size of the building and the number of windows that needed work, he agreed to do the work and instructed Ali to give his company's name to the building owner. He obtained the necessary "c-hook" hook confirmation number from the City and told Ali he would meet him with the crew at the job site. Upon arriving and seeing what work needed to be done, Bhutta decided the agreed upon amount was insufficient and he allegedly told Ali to inform Mr. Waris of Saad that he would complete the work for $45,000.00. Thereafter, he told Ali to remove his workers and equipment and only take the job if the price was increased. He then left the work site.

The following day, Ali called Bhutta and informed him of Guaman's accident. Bhutta asked why they were working at the subject premises, to which Ali responded that he spoke with Mr. Waris. Ali allegedly told Bhutta that the accident happened because Guaman did not clamp the harness with the lifeline and the guy holding the rope on the other side released it, causing the scaffold to become unbalanced. Subsequently, Ali visited Bhutta at his home and explained that Mr. Waris complained that $45,000.00 was too much money and offered Ali the job under his supervision. Mr. Waris allegedly stated that he would get the C-Hook confirmation and provide a supervisor

Ali was also produced for a deposition. Ali contends that Bhutta and Waris (the principle of Saad) were related, possibly cousins and are from a village in their native country of Pakistan. According to Ali, Bhutta wanted $60,000.00 to $70,000.00 for the job. After Bhutta left the job site, Ali purportedly communicated the price to Waris and he allegedly told him to forget about Bhutta. Waris allegedly stated he could provide Ali with a supervisor who was a licensed rigger and Ali and the laborers could split the $35,000 to $45,000.00. Ali then agreed. Ali contends that the necessary tools were on the roof and the scaffold was on the ground level on the side of the building adjacent to the parking lot. Since there was no supervisor they did not perform any work on August 17, 2010

On the day of the accident, a supervising licensed rigger had yet to appear on site. By that time, Ali informed Warris that because the scaffold was blocking the ingress and egress to a parking lot, not only were people complaining, but the owner of the lot was demanding its removal. Warris assured Ali that the supervisor was on the way so they should just raise the scaffold. As a result, Ali decided to move the scaffold despite the absence of the supervising licensed rigger.

When the scaffold was halfway up, Guaman went up to the roof. Ali saw him putting on the harness belt, but did not see the harness' lanyard clipped onto the rope-grab of the lifeline.

Admittedly, his perspective on the ground level did not allow him an opportunity to see whether the lanyard was clipped to the lifeline or not.

The scaffold would be secured once both ends were tied off. Accordingly, after Guaman stepped onto the scaffold, Ali and other laborers held onto the ropes on the ground level awaiting the tie-off, to then release the ropes.

After Guaman secured the ropes on the right side of the scaffold, he yelled down to Ali who was holding the corresponding rope, informing him that the right side was tied - off. At that point Ali released the rope and began to coil it. He then realized that the laborer (Mayancela) who had been holding on to the rope on the left side also let go of the rope before Guamnan had tied- off the left rope.

Although Ali estimated that a mere second elapsed between the time he let go of his side of the rope and Mayancella released the left - side, Ali was unable to grab that rope. Ali blamed the accident on Mayancela prematurely letting go of the rope. Guaman landed in front of Ali with

his safety harness still attached to his body, but not connected to the lifeline. The harness was eventually cut off by emergency responders at the scene.

Ali contends that when questioned, Pumaqueza stated that Guaman entered the scaffold without attaching his harness to the lifeline. The court notes that Pumaqueza was never deposed nor did he provide an affidavit.

PLAINTIFF'S MOTION

Plaintiff Guaman moves for partial summary judgment on the issue of liability. Plaintiff argues that defendants failed to provide adequate fall protection since the scaffold did not have any railings on either side, no one inspected the scaffold connections or plaintiff's connection to his lifeline and the connection to the lifeline was ineffective. Thus, they are entitled to partial summary judgment on the issue of liability pursuant to Labor Law §240(1).

With respect to causation, plaintiff argues that the scaffold tilted because Mayancela prematurely released the rope he was holding before Guaman tied off at the roof level. Tilting into a vertical position the premature release of the rope, coupled with a lack of a guardrail on the sides of the scaffold and the inadequate fall protection caused Guaman to plummet six stories and land on the ground floor. In addition, plaintiffs contend Guaman's amputation of his left arm resulted in a grave injury, as defined by Workers Compensation Law § 11. Thus, his employer Ap Tek is a proper third party defendant. Additionally, plaintiff contends that based on the Workers's Compensation Board's determination that the plaintiff was employed by Ap-Tek, Ap-Tek is estopped from denying it was Guaman's employer.

In support of the motion, Guaman annexed an affidavit, an affidavit from his expert, excerpts from deposition testimony of various witnessess, photographs, copies of the Workers' Compensation Board Decision and records from Occupational Safety and Health Administration ("OSHA") and the New York City Department of Buildings ("NYCDOB").

Plaintiff' s expert Herbert Heller, P.E. stated in his affidavit that because a worker's safety or even life depends, in part, upon the integrity of the hook - up of the rope grab to the safety line, as well as, the worker's hook - up of his clip to the safety line, it is imperative that a licensed rigger be present and actively participate in each phase of the scaffold operation which includes checking

all attachments. He opined: the defendants violated Labor Law § 240; 12 NYCRR 23 §23-5.1(j)(I) required the open sides of certain scaffold (including the subject scaffold) be provided with safety railings; 2008 New York City Building Code § 3314.4 required that all suspended scaffold be inspected by a licensed rigger or his foreman before each use; and OSHA Subpart L - Scaffolds § 1926.451(g)(1)(ii) required each employee on a single-point or two-point suspension scaffold be protected by both a personal fall arrest system and guardrail system. He further opined that based upon Guaman's testimony that he hooked his harness to the lifeline, the

Labor Law § 240 (1) provides as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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). The Court of Appeals has held that "the breadth of the statute's protection has ...been construed to be less wide than its text would indicate" *(Runner v. New York Stock Exchange, Inc.*, 13 NY3d 599, 603 (2009); see also *Harris v. City of New York*, 83 AD3d 104, 111 [1st Dept 2011][Section 240[1] must be construed as liberally as may be to accomplish its purpose]). The Court noted that Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate (Id at 604). When the circumstances of a worker's task create a 'risk related to an elevation differential, a basis for the imposition of liability under Labor Law § 240 (1) is established" (*Cruz v. Turner*, 279 AD2d 322, 322 [1st Dept 2001]).

The "single decisive question is whether plaintiff's injuries where the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, supra; *Ortega v City of New York*, 940 N.Y.S.2d 636[1st Dept 2012]). The court finds that plaintiff Guaman has met this burden and established that his injuries were a direct

consequence of the defendants failure to provide adequate protection against falling from the scaffold. He testified that he put on his harness and connected it to the lifeline prior to getting onto the scaffold. Notwithstanding, when the scaffold tilted he fell six stories to the ground.

The court is unpersuaded by the defendants' arguments raised in their respective opposition papers that the plaintiff was the sole proximate cause of the accident and was a recalcitrant worker. By now it is well settled that contractors and owners have a statutory duty to provide adequate safety devices for their workers. The failure to provide a safety device is a *per se* violation of the statute for which owners and contractors are strictly liable whether or not they supervised or controled the work. *Auriemma v. Biltmore Theatre*, LLC., 2011 WL 240404, 3 (N.Y.A.D. 1 Dept.). "Where the accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35, 39 [2004]). However, "where a plaintiff's own actions are the *sole* proximate cause of the accident, there can be no liability" *(id* emphasis added). The "sole proximate cause defense" requires the defendants to establish that the plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill, supra at* 40).

With respect to the recalcitrant worker, the Court of Appeals stated in *Cahill, supra* that, "the controlling question ... is not whether plaintiff was 'recalcitrant,' but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident." *Id* at 39-40.

It is undisputed that when the plaintiff entered the scaffold he had on a safety harness. He testified that he hooked the harness onto the safety line. It is undisputed that while on the scaffold, one of the suspension ropes was prematurely released and caused the scaffold to tilt into a vertical position. It is also undisputed that the subject scaffold lacked security side rails. The defendants gloss over Guaman's deposition testimony that he connected the harness to the rope-grab of the lifeline. Instead they argue, in essence, that had Guaman connected to the lifeline then he would not have fallen. However, none of the defendants offered proof sufficient enough to raise an issue of fact with regard to whether or not Guman tied-off to the lifeline. A close reading of Ali's deposition testimony makes it clear that he lacked personal knowledge of these facts. That is, he had

no actual view of the plaintiff's lanyard clip and the fact that he fell is insufficient to prove Guaman failed to attach himself to the lifeline. Moreover, Pumaqueza's are hearsay and is insufficient to raise an issue of fact.

On the one hand, the plaintiffs argue that the defendants are liable under Labor Law § 240(1) because the lifeline malfunctioned and failed to protect Guaman from falling. The proof offered is Guaman's testimony that he hooked onto the lifeline and the fact that he did indeed fall.

On the other hand, you have the defendants arguing the exact opposite, if the plaintiff would have attached himself to the rope-grab of the lifeline he would not have fallen. There was no proof submitted from anyone with personal knowledge that Guaman entered the scaffold without connecting to the lifeline. According to Ali, the only other person on the roof was Pumaqueza. Thus, he is the only individual who could have witnessed whether or not Guaman attached his harness to the lifeline. Yet, defendants did not procure an affidavit from Pumaqueza. Moreover, defendants' theory implies that the subject lifeline and all its components were infallible, something none of the defendants have proven. Defendant Saad's expert Terry Callendrillo ("Callendrillo") opined that based on the parties deposition transcripts and photographs taken after the accident that the plaintiff's fall arrest system did not fail. If the plaintiff had clipped the lanyard from his harness onto the rope- grab of the lifeline and the rope failed, the rope-grab would have been found on the ground next to the plaintiff after the fall. Or, plaintiff's lanyard, harness or lifeline would have broken the fall. He further opined that there was no evidence that this occurred. The court notes that Callendrillo did not annex a copy of the photographs he relied on in forming these conclusions. The court further notes that in the photographs annexed to Saad's cross motion at "exhibit 8" there is a photograph identified as "defendant's exhibit M" dated December 23, 2011 which appears to depict a rope-grab laying on the ground (it is unclear whether this is on the roof or on the street). Neither Callendrillo nor any defendant provided an explanation as to why the rope-grab depicted in the picture is not attached to any of the lifelines.

For the foregoing reasons, the court finds that the defendants failed to raise an issue of fact whether or not he was the sole proximate cause of the accident, or a rerecalcitrant worker.

Moreover, the court disagrees with defendants contention that Guaman's affidavit submitted in support of the motion is inconsisent with his prior deposition testimony. After reading through

the entire three days of deposition testimony (annexed to cross motion), the court finds his affidavit is consistent with Guaman's deposition testimony.

Accordingly, the plaintiff's motion is granted to the extent that plaintiff Nicolas Guaman is granted partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). Defendants' respective cross motions to dismiss the plaintiff's Labor Law § 240(1) claim are denied. In addition, the Court declines to consider defendants' motions for summary judgment dismissing the plaintiffs remaining claims based on Labor Law §§ 200, 241(6) and common law negligence. In granting plaintiff's motion for partial summary judgment based upon Labor Law 240(1), The plaintiff's damages are the same regardless of the theory of liability and plaintiff can only recover these damages once. As such, defendant's argument concerning the lack of merit of the other theories of liability contained in the complaint are academic *(see, Jallow v. Kew Gardens Hills Apartments Owners*, 803 N.Y.S.2d 18 [Sup. Ct. Bronx Cty. 2005] *citing Torino v. KLM Construction Co. Inc.*, 257 AD2d 541 [1st Dept 1999]).

A SAAD'S AMENDED CROSS MOTION

That portion of defendant Saad's cross which seeks to dismiss the claim of plaintiff Paula Mayancela is granted. Plaintiff Paula Myancela is not entitled to make a claim for loss of consortium since it is undisputed that she and Nicolas Guaman are not married.

The court denies the remaining branch of the motion in which Saad seeks summary judgment on its third party complaint against the third party defendant Ap Tek for common law indemnification. Movant failed to annex a copy of its second third party complaint and any of the pleadings related to the second third party complaint as required by CPLR § 3212.

Accordingly, defendant Saad's amended cross motion is granted only to the extent that the plaintiff Paula Mayancela's cause of action for loss of consortium is dismissed.

Ap Tek Cross Motion

The only remaining relief in Ap Tek's cross motion is that portion which seeks summary

judgment dismissing all third party causes as against it, essentially that it was not Guaman's employer at the time of the accident. Instead, Ap Tek contends that Guaman was working for Saad at the time of the accident. However, this very issue was litigated at a hearing before the Workers' Compensation Board ("WC Board"). After a hearing in which Ap Tek participated, WC Board determined that Ap Tek was Guaman's employer at the time of the accident. This decision is binding on this court (*Vogel v Herk Elevator Co. Inc.*, 229 AD2d 331, 332-333 [1st Dept 1996] citing *O'Conner v. Midiria*, 55 NY2d 538 [1982]) and Ap Tek is collaterally estopped from relitigating this issue in the instant action (Vogel, supra). Ap Tek's argument that Ali's employment status was not determined at the WC Board hearing and its attempt to litigate such issue now is unpersuasive.

Accordingly, Ap Tek's motion is denied.

1963 Ryer Realty and Gazivoda's Amended Cross Motion

Movants' cross motion for summary judgment on their cross-claim for contractual indemnification asserted against Saad and Ap Tek is denied. It is undisputed that the agreement between 1963 Ryer Realty and Ap Tek was oral, as was the agreement between Ap Tek and Saad. Thus, there is no contractual indemnification clause to substantiate this claim.

Movants cross motion for summary judgment on their cross claim for breach of contract for the defendants Saad and AP Tek failure to procure insurance for the benefit of movants is denied for the same reason. There was no written contract between the parties that required said defendants to obtain such insurance coverage.

Movants cross motion for summary judgment on their cross-claim and third party action for common law indemnification as against defendant Saad is denied on the grounds that the movant failed to meet its initial burden. The court finds movants failed to establish defendant Saad was actively at fault in bringing about the plaintiff's injury (*see generally McCarthy v. Turner Constr. Inc.*, 17 NY3d 369, 377-378 [2011]).

That portion of the motion which seeks common law indemnification against defendant Ap Tek, the plaintiff's employer, is granted for the following reasons: (1) it is undisputed the

plaintiff sustained a grave injury; (2) Ap Tek, having been deemed the plaintiff's employer can not deny control and supervision of its own employee; and (3) movants have shown they were not actively negligent and will be held responsible solely by operation of law (*McGarthy, supra*).

Accordingly, the motion is granted only to the extent that 1963 Ryer Realty and Gazivoda's motion for summary judgment on their cross-claim and third party action for common law indemnification as against Ap Tek is granted. The motion is denied in all other respects. The movants cross claim for contractual indemnification and breach of contract for failure to procure insurance is hereby dismissed.

This constitutes the decision and order of the court.

Dated: 2/26/14
Bronx, New York

HON. NORMA RUIZ, J.S.C.