SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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GERMAN PAUCAY,

Plaintiff,

-against-

D.P. GROUP GENERAL CONTRACTORS/DEVELOPERS, INC., HP MAPLE MESA HOUSING DEVELOPMENT FUND COMPANY and MC&O BUILDERS, INC.,

Defendants.

Index No. 156347/2013

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D.P. GROUP GENERAL CONTRACTORS/DEVELOPERS, INC.,

Third-Party Plaintiff,

-against-

MC&O BUILDERS, INC.,

Third-Party Defendant.

Third-Party Index No. 590887/2013

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MC&O BUILDERS, INC.,

Fourth-Party Plaintiff,

-against-

DONNREILL, INC.,

Fourth-Party Defendant.

Fourth-Party Index No. 595176/2015

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D.P. GROUP GENERAL CONTRACTORS/DEVELOPERS, INC. and HP MAPLE MESA HOUSING DEVELOPMENT FUND COMPANY,

Second Third-Party Plaintiffs,

-against-

DONNREILL, INC.,

Second Third-Party Defendant.

Second Third-Party Index No.

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Schecter, J.

Motion sequence numbers 003 and 004 are consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on June 19, 2013, when he fell from a scaffold while working at a construction site located at 601 East 163rd Street, New York, New York (the Premises).

In motion sequence number 003, plaintiff German Paucay moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240(1) claim against defendant/third-party plaintiff/second third-party plaintiff D.P. Group General Contractors/Developers, Inc. (DPG), defendant/second third-party plaintiff HP Maple Mesa Housing Development Fund Company (Maple) and defendant/third-party defendant/fourth-party plaintiff MC&O Builders, Inc. (MC&O).

MC&O cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.

DPG and Maple cross-move, pursuant to CPLR 3212, for summary judgment in their favor on DPG's third-party complaint against MC&O.[1]

In motion sequence number 004, MC&O moves, pursuant to CPLR 3212, for

[1] By stipulation dated April 15, 2015, the third-party action, third-party index No. 590887/2013, was discontinued.

summary judgment in its favor on its fourth-party claim for contractual indemnification against fourth-party defendant/second-third party defendant Donnreill, Inc (Donnreill).[2]

BACKGROUND

On the day of the accident, Maple owned the Premises where the accident occurred. Maple hired DPG to be the general contractor on a project, which entailed the construction of a new six story building at the Premises (the Project). DPG hired MC&O to perform masonry work at the Project, including brickwork, blockwork and stucco work. MC&O subcontracted the stucco work to Donnreill. Plaintiff was employed by Donnreill as a laborer on the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by Donnreill as a stucco installer. Plaintiff's duties on the Project included preparing and installing stucco, as well as some metal work. Plaintiff's supervisor on the Project, a Donnreill employee named "Vincente," gave him instructions regarding his work (Plaintiff's tr at 32). When Vincente was not present at the Premises, plaintiff's supervisor was Clever Paucay (Clever), also a Donnreill employee. Plaintiff owned his own hardhat, and Donnreill provided him

[2] MC&O does not move with respect to its other fourth-party claims.

with a safety harness. In addition, Donnreill provided and erected the scaffolding at the Project.

Plaintiff further testified that, on the day of the accident, he was directed by his supervisor to install metal flashing to the outside walls, which were located at the rear of the second floor of the building. Plaintiff explained that he, Clever and a third Donnreill employee walked to the back of the building, climbed a metal scaffold to the work area and prepared to install the metal flashing.

Plaintiff testified that, typically, the scaffolding from which he worked at the Project had lifelines/tie-off points, which were hung from the roof of the building. However, at the time of his accident, the rear of the building did not have any lines available where he could attach his harness. Specifically, when asked whether the scaffold from which he worked had a place to secure his harness, plaintiff responded, "No" (*id.* at 40). When further asked whether the scaffold had any guardrails, plaintiff responded, "No" (*id.* at 55).

Plaintiff testified that the accident occurred just after he had finished removing dust from an area of the wall with a vacuum. After he put the vacuum down, he turned and fell approximately seven feet from the platform of the scaffold to the ground below.

Deposition Testimony of Paula Murphy (DPG's Office Manager)

Paula Murphy testified that, on the day of the accident, she was DPG's office manager, as well as an assistant project manager for the Project. Although she visited the

Premises a few times, she was not there regularly. DPG had a superintendent at the Premises, who primarily was responsible for removing construction debris and other tripping or slipping hazards from the work site and the sidewalks.

When asked whether it was part of the superintendent's role to ensure that the work at the Project was performed safely, Murphy asserted that the "[s]ubcontractors are required to do that" (Murphy tr at 30).

Deposition Testimony of Giovanni Gianfrancesco (DPG's Superintendent)

Gianfrancesco stated that, on the day of the accident, he was employed by DPG as a superintendent at the Project. He confirmed that DPG was the Project's general contractor. Gianfrancesco was present at the Project every day, and his duties included walking around the Project to "see if everything is ok, the work that's got to be done, work that's done, work that's not done" (Gianfrancesco tr at 14). Gianfrancesco also held weekly progress meetings with DPG's subcontractors. However, these meetings did not involve discussions about safety. During his walkthroughs, if Gianfrancesco observed an unsafe practice, he had the authority to stop work and direct the "person in charge" of the subcontractor to fix the problem (*id.* at 15). That said, he never had to stop work, nor did he ever witness anything that he considered unsafe.

Gianfrancesco also testified that DPG hired MC&O to perform brickwork, blockwork and stucco work. As part of its work, MC&O erected scaffolding at the Project when necessary. Gianfrancesco described the pipe scaffolding involved in the accident as "one frame high . . . like six feet" (*id.* at 29). In addition, it was typically equipped with three-foot high guard rails. Gianfrancesco acknowledged that, if he had observed any scaffolding without protective railing, he would have considered it unsafe, and he would have stopped work until the issue was remedied.

With respect to safety equipment, Gianfrancesco testified that workers who used scaffolds were supposed to wear harnesses, and that tie-off lines were to be made available to them. These tie-off lines were typically hung from "a safe place, [or] on some place high," such as the roof (*id.* at 41). He also maintained that it was the subcontractor's duty to provide such safety equipment at the Project.

Deposition Transcript of Gerald O'Hare (MC&O's Foreman)

O'Hare testified that, at the time of plaintiff's accident, he served as a foreman on the Project. DPG hired MC&O to install all brickwork and blockwork at the Project. O'Hare's duties included directing MC&O's work, maintaining safety, ordering materials and overseeing the "layout of the bricks, blocks, precast stone" (O'Hare tr at 20). O'Hare noted that Donnreill was hired to perform stucco work on the exterior of the building. Donnreill's foreman, "Calvin," was "responsible for the safety and the stucco" (*id.* at 26).

O'Hare explained that MC&O owned and assembled the scaffolds that they used to perform their work, and that Donnreill's workers assembled the scaffolds that they used at the Project.

O'Hare also testified that, as "[he] was foreman for MC&O . . . [he] just had to make sure what [Donnreill workers] were doing was right" (*id.* at 39). O'Hare also assessed Donnreill's safety at the Project, and, in fact, stopped Donnreill's work on several occasions when he observed that there were no safety rails on the scaffolds (*id.* at 40).

Deposition Testimony of Owen O'Reilly (President of Donnreill and Owner of MC&O)

Owen O'Reilly testified that he was the president of Donnreill and an owner of MC&O on the day of the accident. O'Reilly maintained that Donnreill did not provide any safety equipment or gear for the Project. He testified that MC&O provided the harnesses and scaffolding used at the Project. In addition, MC&O employees were "responsible" for Donnreill employees (O'Reilly tr at 52).

Deposition Transcript of Patrick O'Reilly (MC&O's Foreman)

Patrick O'Reilly, a/k/a Vincent (Patrick) testified that, at the time of the accident, he was a foreman for MC&O. In addition, Patrick was involved in the installation of an "EIFS" at the Project (Patrick tr at 22). Patrick explained that EIFS involves the installation of

waterproofing, cement, mesh and insulation, as well as finishing work. When Patrick was present at the site, he personally directed plaintiff's work.

Patrick also testified that the scaffolding at the Project was owned and installed by MC&O. Patrick testified that MC&O provided safety harnesses and tie-lines "[i]f needed" (*id.* at 44).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240(1) Claim (Motion Sequence 003, MC&O's Cross Motion)

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240(1) claim against Maple, DPG and MC&O. MC&O cross-moves for dismissal of the §240(1) claim asserted against it.

Labor Law § 240(1), also known as the Scaffold Law, provides, as relevant:

> "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) 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 the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240(1) "is designed to protect workers from gravity related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). Not every worker who falls

at a construction site is afforded the protections of Labor Law § 240(1). "Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Indeed, to prevail on a section 240(1) claim, a plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Initially, Maple, the owner of the Premises, and DPG, the general contractor on the Project, may be liable for plaintiff's injuries under Labor Law § 240(1). It must be determined, however, whether MC&O, as the masonry subcontractor, may also be liable for plaintiff's injuries as an agent of the owner and/or general contractor.

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] [citations omitted]). To hold a subcontractor liable as a statutory agent, "the subcontractor must have been 'delegated the

supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011]).

Here, plaintiff was injured when, while installing stucco at the Project, he fell from a scaffold that lacked a guardrail. In addition, plaintiff was not provided with proper tie-off points. Accordingly, MC&O would be liable for plaintiff's injuries, as an agent, if it supplied the scaffold and tie off points and supervised their installation.

Here, O'Reilly testified that MC&O provided the scaffolding for the Project. In addition, Patrick, an MC&O foreman, testified that MC&O owned and constructed the scaffolding at the Project, and provided tie-off lines, when needed. O'Hare, an MC&O foreman, however, testified that Donnreill provided and constructed its own scaffolding for its work. Plaintiff also testified that Donnreill employees hung tie-off lines at the site on previous occasions.

Because there remains a question of fact as to whether MC&O supervised and controlled the injury producing work at issue in this case, so as to be considered an agent for the purposes of Labor Law § 240(1), plaintiff is not entitled to summary judgment in his favor on the Labor Law 240(1) claim against MC&O and MC&O is not entitled to dismissal of the § 240(1) claim on the ground that it is not a proper Labor Law defendant.

Plaintiff argues that he is entitled to summary judgment in his favor as to liability on the Labor Law § 240(1) claim because he was subjected to an elevation related risk and the scaffold provided was not properly equipped with a safety device--a railing--to keep him from falling (*see Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 413 [1st Dept 2008] [plaintiff established entitlement to judgment on the section 240(1) claim, where it was "undisputed that the scaffold had no safety railings" and plaintiff fell from said scaffold]; *see also Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] [whether "the device provided proper protection is a question of fact, except when the device . . . fails to support the plaintiff"]). In addition, plaintiff argues that there were no tie-off points or safety lines to which he could secure his harness (*see Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [upholding summary judgment in plaintiff's favor where plaintiff had a safety harness, but "there was no appropriate anchorage point to which the [line] could have been tied-off"]).

In opposition, MC&O, DPG and Maple argue that plaintiff is not entitled to judgment in his favor, because plaintiff was a recalcitrant worker due to his failure to secure his safety harness to a tie-off line and his failure to install guardrails on the scaffold prior to performing his work.

The recalcitrant worker defense requires that a plaintiff know "both that [adequate safety devices] 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,* 4 NY3d at 40; *see also Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 679 [2d Dept 1996], *affd* 88 NY2d 946 [1996] [the recalcitrant worker defense is "premised upon the principle that 'the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it'"]).

Here, Maple, DPG and MC&O have not established that the safety equipment available to plaintiff was adequate to protect him from the gravity related risks inherent in his job. Nor have they established that said devices were provided to plaintiff, but that he chose, for no good reason, to disregard such devices. In fact, plaintiff's testimony establishes that the scaffold was not equipped with guardrails and that he was not provided with a line to which he could have tied his safety harness. Paucay explained that when working at other locations on the project, he was able to secure his harness on a rope attached to the roof but in the back part of the building, where he was working immediately prior to the accident, there was no place to secure his harness (Paucay tr at 40). Defendants do not provide evidence to refute that testimony. Gianfrancesco's testimony that generally harnesses could be connected on "a safe place, on some place high . . . some place on the roof" (Gianfrancesco tr at 41) does not establish that at the time and place of the accident Paucay actually had a place where he could secure his harness. Accordingly, where, as here,

adequate safety devices were not provided to plaintiff, the recalcitrant worker defense has no application (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]).

Moreover, with respect to plaintiff's claimed failure to install the guardrails on the scaffold, there is no evidence that plaintiff was specifically directed by anyone to perform such work, or that he ignored such directive. Importantly, under the Labor Law, a worker is not charged with securing his own safety. Indeed, "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place [in the Labor Law]" (*DeRose v Bloomingdales, Inc.*, 120 AD3d 41, 47 [1st Dept 2014]).

In any event, any such alleged misuse of the scaffold on plaintiff's part would go to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240(1) cause of action, because the statute "impose[s] a flat and unwavering duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]). Indeed, "[i]t is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law 240(1) claim as against Maple and DPG. As there remains a question of fact as to

whether MC&O is a proper Labor Law defendant, plaintiff is not entitled to summary judgment.

It should be noted that MC&O also seeks relief with respect to all other claims alleged in the complaint, including the claims for common-law negligence and Labor Law §§ 200 and 241 (6). However, MC&O raises no arguments with respect to these causes of action. Thus, MC&O is not entitled to summary judgment dismissing those claims.

MC&O's Fourth-Party Claim for Contractual Indemnification Against Donnreill (Motion Sequence 004)

MC&O moves for summary judgment in its favor on the fourth-party claim for contractual indemnification against Donnreill. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also, Murphy v*

WFP 245 Park Co., L.P., 8 AD3d 161, 162 [1st Dept 2004]). Although the applicable indemnification provision is extremely broad, New York law prohibits a party from being indemnified for its own negligence in connection with a construction-related accident involving personal injuries (General Obligations Law [GOL] § 5-322.1). As there has been no finding that MC&O was not negligent and questions remain regarding whether its negligence may have caused or contributed to plaintiff's accident, summary judgment must be denied (*see supra* at 15).

DPG and Maple's Third-Party Claim for Contractual Indemnification

In their cross motion, DPG and Maple seek summary judgment in their favor on the third-party claim for contractual indemnification against MC&O. This cross motion is moot, as the third-party action has been withdrawn by stipulation.

Accordingly, it is

ORDERED that plaintiff German Paucay's motion (motion sequence number 003), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240(1) claim is granted as against defendant/third-party plaintiff/second third-party plaintiff D.P. Group General Contractors/Developers, Inc. (DPG), and defendant/second third-party plaintiff HP Maple Mesa Housing Development Fund Company (Maple), and the motion is otherwise denied; and it is further

ORDERED that the part of defendant MC&O Builders, Inc.'s (MC&O) cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that Maple and DPG's cross motion, pursuant to CPLR 3212, for summary judgment in their favor on the third-party claim for contractual indemnification against MC&O is denied, as moot; and it is further

ORDERED that MC&O's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment in its favor on the fourth-party claim for contractual indemnification against fourth-party defendant/second third-party defendant Donnreill, Inc. is denied; and

The parties are further reminded that there is an appearance in this matter in the Early Settlement Conference Part on September 26, 2017, at 9:30 A.M.

This is the decision and order of the court.

Dated: July 21, 2017

HON. JENNIFER G. SCHECTER