

<b>Ardaya v Park &amp; 76th St. Inc.</b>
2018 NY Slip Op 33109(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 158295/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----X  
MARTHA PARADA ARDAYA and STIVENS A.  
SANQUINO, as Co-Administrators of the  
Estate of ANTONIO PELAGIO URQUIZA  
CARDENAS a/k/a ANTONIO URQUIZA,  
Deceased,

Index No. 158295/2013

Plaintiffs

- against -

PARK AND 76TH ST. INC., MARY L.  
CARPENTER, EDMUND M. CARPENTER, NORDIC  
CUSTOM BUILDERS INC., MITCHELL STUDIO,  
LLC, GUMLEY-HAFT LLC, CUMMINS PAINTING  
SPECIALISTS INC., ARTHUR C. KLEM, INC.,  
ALKLEM PLUMBING, INC., AA SERVICES LLC,  
GT CARPENTRY, LLC, CONNECTICUT  
THERMOFOAM LLC a/k/a CONNECTICUT  
THERMOFOAM LIMITED LIABILITY COMPANY,  
ERIN CUSTOM INTERIORS INC., W.M.  
SANFARDINO ELECTRIC LTD., and PLASTER  
WORKS, INC.,

Defendants

-----X  
-----X

PARK AND 76TH ST. INC. and GUMLEY-HAFT  
LLC,

Index No. 590917/2013

Third Party Plaintiffs

- against -

STEPHEN GAMBLE, INC.,

Third Party Defendant

-----X  
-----X

MARY L. CARPENTER & EDMUND M. CARPENTER,

Index No. 590134/2014

Second Third Party Plaintiffs

- against -

STEPHEN GAMBLE, INC.,

Second Third Party Defendant

-----X  
-----X

NORDIC CUSTOM BUILDERS INC.,

Index No. 590180/2014

Third Third Party Plaintiff

- against -

STEPHEN GAMBLE, INC.,

Third Third Party Defendant

-----X  
-----X

MITCHELL STUDIO, LLC,

Index No. 595081/2014

Fourth Third Party Plaintiff

- against -

STEPHEN GAMBLE, INC.,

Fourth Third Party Defendant

-----X  
-----X

STEPHEN GAMBLE, INC.,

Index No. 595287/2017

Fifth Third Party Plaintiff

- against -

DECLAN O'MEARA and EURO WOOD TRIM, INC.,

Fifth Third Party Defendants

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

## I. BACKGROUND

Plaintiffs sue to recover damages, including punitive damages, for personal injuries and death sustained by the decedent Antonio Urquiza due to defendants' negligence and violation of New York Labor Law §§ 200, 240, and 241(6). The decedent, an employee of first through fourth third party defendant Stephen Gamble, Inc., was injured and died May 24, 2012, after falling out a window as he worked on a construction project for which defendant Nordic Custom Builders Inc. was the general contractor in a cooperative unit owned by the Carpenter defendants. The unit was on the third story in a building owned by defendant cooperative corporation Park and 76th St. Inc. and managed by defendant Gumley-Haft LLC.

Defendants Park and 76th St. and Gumley-Haft have moved for summary judgment dismissing plaintiffs' claims for violation of Labor Law §§ 200, 240(1), and 241(6), for negligence, and for punitive damages and all cross-claims against Park and 76th St. and Gumley-Haft and for summary judgment on their third party indemnification claim against Stephen Gamble, Inc. C.P.L.R. § 3212(b). For the reasons explained below, the court grants the motion in part.

## II. PLAINTIFFS' CLAIMS

### A. Labor Law § 200 and Negligence

Labor Law § 200 codifies an owner's duty of care to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v. New York State Elec. & Gas

Corp., 82 N.Y.2d 876, 877 (1993). If a dangerous condition arising from a contractor's work caused the decedent's injury and death, defendant site owner and its agent may be liable for negligently allowing that condition and violating Labor Law § 200, if they supervised or exercised control over the activity that caused his injury. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352-53; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 627 (1st Dep't 2015). See Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877-78; Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144-45 (1st Dep't 2012). They also may be liable for negligence and violation of the statute if they received actual or constructive notice of an unsafe condition on their premises that caused the decedent's injury. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626. See Santos v. Condo 124 LLC, 161 A.D.3d 650, 656 (1st Dep't 2018); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144. Park and 76th St. and Gumley-Haft contend that they were not negligent and are not liable under Labor Law § 200 because the evidence establishes that they did not supervise or control the decedent's work and did not receive notice of any unsafe condition in the area where the decedent was injured and died.

Plaintiff opposes dismissal of these claims based on the order dated May 22, 2018 (Mendez, J.), which denied plaintiffs' motion for summary judgment on their Labor Law § 200 claim and is

law of the case. That decision, however, concluded only that plaintiffs had failed to establish "that the Carpenters, Mitchell, Park and 76th Street, Inc., and Gumley-Haft, LLC, exercised authority or controlled the manner in which the work was performed." Aff. in Opp'n of Steven I. Brizel Ex. B, at 4.

The law of the case doctrine precludes parties in an ongoing action from relitigating issues resolved after a full and fair opportunity to address them. Goldstein v. Zabel, 146 A.D.3d 624, 631 (1st Dep't 2017); Delgado v. City of New York, 144 A.D.3d 46, 53 (1st Dep't 2016); Carmona v. Mathisson, 92 A.D.3d 492, 493 (1st Dep't 2012). Plaintiffs' failure to establish that Park and 76th St. and Gumley-Haft, among other defendants, exercised authority to control the decedent's work does not equate to an affirmative showing by Park and 76th St. and Gumley-Haft that they never exercised such authority and control. Park and 76th St. and Gumley-Haft did not previously seek the dismissal of plaintiffs' Labor Law § 200 and negligence claims now sought. Nor did any party in litigating plaintiffs' prior motion for summary judgment on the Labor Law § 200 claim or the court in deciding that motion rely on any of the evidence that Park and 76th St. and Gumley-Haft now rely on to support dismissal of that claim and plaintiffs' negligence claim. Goldstein v. Zabel, 146 A.D.3d at 631; Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d 89, 99 (1st Dep't 2012); Carmona v. Mathisson, 92 A.D.3d at 493; Board of Mgrs. of Europa Condominium v. Orenstein, 1 A.D.3d 206, 207 (1st Dep't 2003).

Park and 76th St. and Gumley-Haft present the deposition testimony by employees of defendant Nordic Custom Builders, the general contractor, and Stephen Gamble, Inc., that Declan O'Meara served as the site supervisor and directed the employees of Stephen Gamble, Inc., to stain the window jambs in the library of the Carpenters' unit, where the decedent fell out the window. O'Meara himself admitted that Nordic Custom Builders hired him as the site supervisor. He specifically directed the decedent not to stand on a finished radiator cover to perform his work. The foreman for Stephen Gamble, Inc., Marcello Urquiza, carried out its employees' work on the window jambs.

Park and 76th St.'s building superintendent testified that he was not even aware that Stephen Gamble, Inc., employees were working on the windows or standing on the radiator cover, was not in the unit when any work was being performed on the windows, and did not direct any workers how to perform their work in the unit. Gumley-Haft's manager for the building testified that Gumley-Haft did not supply any materials or equipment for the work in the unit.

Park and 76th St. and Gumley-Haft thus present evidence that O'Meara, on Nordic Custom Builders' behalf, and Stephen Gamble, Inc., not Park and 76th St. or Gumley-Haft, supervised and controlled how and where the decedent performed work on the project and were aware of the conditions surrounding the windows where he was working. Absent any contrary evidence, the record supports dismissal of plaintiff's Labor Law § 200 and negligence

claims against Park and 76th St. and Gumley-Haft. Matter of 91st St. Crane Collapse Litig., 133 A.D.3d 478, 479 (1st Dep't 2015); Stier v. One Bryant Park LLC, 113 A.D.3d 551, 552 (1st Dep't 2014); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144-45; Lopez v. Dagan, 98 A.D.3d 436, 438 (1st Dep't 2012).

B. Labor Law §§ 240(1) and 241(6)

Park and 76th St. and Gumley-Haft have withdrawn their motion insofar as it sought dismissal of plaintiffs' Labor Law §§ 240(1) and 241(6) claims, since the court (Mendez, J.) already decided plaintiffs' motion for summary judgment on those claims in the order dated May 22, 2018, granting plaintiffs summary judgment based on § 240(1), and denying them summary judgment based on § 241(6). The current motion by Park and 76th St. and Gumley-Haft presents no defense to either of those statutory claims in any event and therefore fails to meet their initial burden to support summary judgment in their favor on either claim. Linhart v. Rojas, 154 A.D.3d 440, 440 (1st Dep't 2017); Lee v. New York City Tr. Auth., 138 A.D.3d 579, 579 (1st Dep't 2016); Ruiz v. RHO Assoc., LLC, 92 A.D.3d 410, 410 (1st Dep't 2012); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609, 609 (1st Dep't 2011).

III. THIRD PARTY INDEMNIFICATION AND CONTRIBUTION CLAIMS

A. Third Party Claims by Park and 76th St. and Gumley-Haft

Since the court granted summary judgment to plaintiffs on their Labor Law § 240(1) claim against Park and 76th St. and Gumley-Haft, they contend that they are entitled to summary

judgment on their indemnification claims against Stephen Gamble, Inc. They further contended that, had the court granted summary judgment to Nordic Custom Builders dismissing plaintiffs' claims against it, such a determination would have left Stephen Gamble, Inc., as the only negligent party for which Park and 76th St. and Gumley-Haft would be vicariously liable under Labor Law § 240(1). A separate order dated May 22, 2018 (Mendez, J.), however, denied the motion for summary judgment by Nordic Custom Builders, thus keeping all the claims against it in the action. Park and 76th St. and Gumley-Haft nevertheless insist that the record here, establishing negligence by Stephen Gamble, Inc., and the absence of negligence by them, entitles them to indemnification from Stephen Gamble, Inc.

Stephen Gamble, Inc., opposes summary judgment to Park and 76th St. and Gumley-Haft on their indemnification claim as precluded by law of the case: a third order dated May 22, 2018 (Mendez, J.), denying indemnification from Stephen Gamble, Inc., to the Carpenter defendants. The court found that: "Issues of fact and credibility issues remain on the negligence claims against both Nordic and Stephen Gamble Inc. and whether supervision and control over the work on the exterior jamb was exercised exclusively by Stephen Gamble Inc." Aff. of Michael T. Reagan Ex. B, at 4.

Workers' Compensation is an employee's exclusive remedy against his employer for an injury sustained in the course of his employment and bars any other claims against his employer for

that injury. N.Y. Workers' Comp. Law §§ 11, 29(6); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Macchirole v. Giamboi, 97 N.Y.2d 147, 149-50 (2001); Heritage v. Van Patten, 59 N.Y.2d 1017, 1019 (1983); Alba v. Dani Michaels, Inc., 303 A.D.2d 257, 257 (1st Dep't 2003). Where the employee's injuries qualify as "grave," however, the employer may be liable for non-contractual, implied indemnification or for contribution to other parties that the employee sues. N.Y. Workers' Comp. Law § 11; New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d 501, 505 (2014); Fleming v. Graham, 10 N.Y.3d at 299; Netzahual v. At Will LLC, 145 A.D.3d 492, 492 (1st Dep't 2016). Since Antonio Urquiza's death constitutes a grave injury, Park and 76th St. and Gumley-Haft may seek indemnification and contribution against Stephen Gamble, Inc. N.Y. Workers' Comp. Law § 11; Tedesco v. A.P. Green Industries, Inc., 8 N.Y.3d 243, 248 (2007); Public Adm'r of Bronx County v. 485 E. 188th St. Realty Corp., 116 A.D.3d 1, 8 (1st Dep't 2014). See New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d at 505; Fleming v. Graham, 10 N.Y.3d at 299.

Parties seeking implied indemnification in the absence of any contract for that relief must demonstrate that they were not negligent and that the claimed indemnitor against which recovery is sought was negligent. McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 377-78 (2011); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2013); Blank Rome, LLP v.

Parrish, 92 A.D.3d 444, 445 (1st Dep't 2012). While Justice Mendez referred to factual issues regarding "whether supervision and control over the work . . . was exercised exclusively by Stephen Gamble Inc.," Reagan Aff. Ex. B, at 4 (emphasis added), because defendants seeking indemnification need only show the indemnitor's negligence, not exclusive negligence, Justice Mendez necessarily found an issue whether Stephen Gamble was negligent at all. Otherwise he would have awarded implied indemnification to the Carpenters, since he found them free from negligence and dismissed plaintiffs' Labor Law § 200 claim against them.

Nevertheless, whether or not the Carpenters prevailed on their motion for summary judgment on their indemnification claim against Stephen Gamble, Inc., Park and 76th St. and Gumley-Haft were not aggrieved and therefore lacked any grounds to support or oppose that relief. The Carpenters' motion for that relief provided no opportunity for Park and 76th St. to show that Stephen Gamble, Inc., was negligent, and to urge that, even if Nordic Custom Builders also was negligent, the negligence by Stephen Gamble, Inc., and the absence of negligence by the Carpenters were enough to award implied indemnification to the Carpenters. Because the Carpenters, not Park and 76th St. or Gumley-Haft, are aggrieved by the denial of indemnification to the Carpenters, Park and 76th St. and Gumley-Haft may neither appeal that ruling nor seek reargument or renewal of the Carpenters' motion for that relief.

The only remedy for Park and 76th St. and Gumley-Haft is to

seek their own opportunity to show that Stephen Gamble, Inc., was negligent and to urge that, even if Nordic Custom Builders also was negligent, the negligence by Stephen Gamble, Inc., and the absence of negligence by Park and 76th St. and Gumley-Haft are enough to award implied indemnification to them. They do so now.

The record here, which is entirely consistent with Justice Mendez's findings potentially implicating both Stephen Gamble, Inc., and Nordic Custom Builders in the decedent's death, establishes unequivocally that Stephen Gamble, Inc., failed to provide any safety devices to protect its employee from falling out the open window where he was working. The foreman for Stephen Gamble, Inc., at the construction site, Marcello Urquiza, allowed his co-workers to proceed with the work on the window jambs, unchecked by his supervisor from Stephen Gamble, Inc., David Gamble. David Gamble was not at the site, but was aware of requests for and discussions about work on the window jambs, which could be performed only when the windows were open. The foreman specifically testified that he knew the decedent was performing work on the window jambs and might need to stand on the radiator cover to reach the areas to be stained, but was provided no safety devices to perform the elevated work or to prevent him from falling three stories to the ground.

The employer presents no rebuttal evidence, other than that O'Meara on Nordic Custom Builders' behalf also was negligent in failing to protect the workers on the construction site that he was supervising. Because this motion is the moving defendants'

first opportunity to litigate this issue, the court's prior finding of factual issues regarding whether Stephen Gamble, Inc., was negligent does not preclude summary judgment on the third party claims for indemnification by Park and 76th St. and Gumley-Haft against Stephen Gamble, Inc. Goldstein v. Zabel, 146 A.D.3d at 631; Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d at 99; Carmona v. Mathisson, 92 A.D.3d at 493; Board of Mgrs. of Europa Condominium v. Orenstein, 1 A.D.3d at 207. See Joynes v. Acadia-P/A 161st St., LLC, 117 A.D.3d 651, 651 (1st Dep't 2014); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014); Mouta v. Essex Mkt. Dev. LLC, 106 A.D.3d 549, 551 (1st Dep't 2013); Hernandez v. Argo Corp., 95 A.D.3d 782, 783 (1st Dep't 2012).

B. Cross-Claims Against Park and 76th St. and Gumley-Haft

Park and 76th St. and Gumley-Haft also seek dismissal of the cross-claims by the Carpenters and Nordic Custom Builders for implied indemnification and for contribution against Park and 76th St. and Gumley-Haft. The Carpenters and Nordic Custom Builders do not oppose this relief and agree that, once the court has dismissed plaintiffs' Labor Law § 200 and negligence claims against Park and 76th St. and Gumley-Haft, they also are entitled to dismissal of the cross-claims for implied indemnification and for contribution. C.P.L.R. § 3212(b) and (e); Vivas v. VNO Bruckner Plaza LLC, 113 A.D.3d 401, 402 (1st Dep't 2014); Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d 234, 247-48 (1st Dep't 2013); Casey v. New York El. & Elec. Corp., 107 A.D.3d 597,

599 (1st Dep't 2013); Vargas v. New York City Tr. Auth., 60 A.D.3d 438, 441 (1st Dep't 2009).

#### IV. PUNITIVE DAMAGES

The factfinder may award punitive damages if defendants caused plaintiffs' injury purposely or with gross indifference. Marinaccio v. Town of Clarence, 20 N.Y.3d 506, 512 (2013). See Dupree v. Giugliano, 20 N.Y.3d 921, 924 (2012); Gonzalez v. 231 Ocean Assoc., 131 A.D.3d 871, 872 (1st Dep't 2015); Hauptner v. Laurel Dev., LLC, 65 A.D.3d 900, 904 (1st Dep't 2009). More than the commission of a tort alone is necessary to support punitive damages. Marinaccio v. Town of Clarence, 20 N.Y.3d at 512; Dupree v. Giugliano, 20 N.Y.3d at 924; Munoz v. Puretz, 301 A.D.2d 382, 384 (1st Dep't 2003).

Although Park and 76th St. and Gumley-Haft are liable under Labor Law § 240(1) and still may be found liable under Labor Law § 241(6), they have demonstrated conclusively that they were not negligent. The absence of their negligence precludes a finding that their conduct was sufficiently egregious to warrant imposition of punitive damages. Marinaccio v. Town of Clarence, 20 N.Y.3d at 512; Dupree v. Giugliano, 20 N.Y.3d at 924; Schwartz v. Hotel Carlyle Owners Corp., 132 A.D.3d 541, 543 (1st Dep't 2015); Hauptner v. Laurel Dev., LLC, 65 A.D.3d at 904.

#### V. CONCLUSION

For the reasons explained above, the court grants the motion by defendants Park and 76th St. Inc. and Gumley-Haft LLC for summary judgment to the following extent. C.P.L.R. § 3212(b) and

(e). The court dismisses plaintiffs' claims for violation of Labor Law § 200, for negligence, and for punitive damages and dismisses all cross-claims against Park and 76th St. Inc. and Gumley-Haft LLC and awards summary judgment on their third party indemnification claim against Stephen Gamble, Inc. The court otherwise denies the motion, insofar as it seeks dismissal of plaintiffs' claims for violation of Labor Law §§ 240(1) and 241(6). C.P.L.R. § 3212(b).

DATED: November 26, 2018

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**