Xiyi Chen v 111 Mott LLC
2020 NY Slip Op 34186(U)
December 18, 2020
Supreme Court, New York County
Docket Number: 157115/2016
Judge: W. Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

----------X

XIYI CHEN,

Plaintiff,

- v -

111 MOTT LLC, H&M CONTRACTING, INC., YU-MEI LIANG, H&M CONTRACTORS INC.

Defendant.

----------X

INDEX NO. 157115/2016

MOTION DATE 03/05/2020

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 104, 105, 118, 119, 120, 121, 123, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 122, 124, 135, 136, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence nos. 002 and 003 are consolidated for disposition. In motion sequence no. 002, plaintiff Xiyi Chen moves, pursuant to CPLR 3211 (a), for partial summary judgment, as to liability, on his Labor Law §§ 240 (1) and 241 (6) claims against defendants 111 Mott LLC (Owner), H&M Contracting Inc. (Contracting), and H&M Contractors, Inc. (H&M), and dismissing defendants' affirmative defenses alleging comparative negligence on his part. Owner cross-moves for summary judgment dismissing the complaint as to it and, in the alternative, for summary judgment on its cross claims against Contracting and H&M for common law indemnification. In motion sequence no. 003, H&M moves, pursuant to CPLR 3025 (b), for leave to amend its answer and, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint against it.

This action arises from an accident which occurred on April 23, 2016, when plaintiff was injured when he fell off a ladder on which he was standing, while installing a drop ceiling in a building located at 111 Mott St. in Manhattan (the Building). At the time of the accident, H&M was the general contractor at the site, and nonparty GD Contractor, Inc. (GD) was plaintiff's employer. H&M had retained GD to perform gut renovations in two apartments in the Building. Owner has withdrawn its previous argument that there is no proof that it owns the Building. Such ownership is now undisputed. Plaintiff offers no explanation of why Contracting is liable to him.

On the day of the accident, there was an opening in the floor of the room where plaintiff would be working. The floor was left open because electrical wiring, that had been installed below the level of the floor, still needed to be inspected. (NYSCEF Doc. No. 82 at 67). It is undisputed that the floor was uneven at the time as H&M's Proposal to Owner, indicates proposing, among other work, leveling the floor. (NYSCEF Doc. No. 100 at 1). Plaintiff placed a flat wooden board over the floor opening, in the spot where he would be working, and then placed an A-frame ladder atop the board. After ascending and descending the ladder uneventfully, plaintiff ascended again, carrying a drill in his left hand, and a piece of metal that he planned to screw to the ceiling, as part of the framing for the drop ceiling, in his right hand. In order to reach the surface to which he would affixing the metal, plaintiff stood on the fifth step of the ladder. As he began to use the drill, he felt the ladder wobble from side to side, and he, and it, crashed to the floor. (*See* NYSCEF Doc. No. 81 at 69-70).

Labor Law § 240 (1) imposes strict liability on owners and general contractors for injuries sustained by workers as the result of elevation-related accidents. *Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 597 (1st Dept. 2013).

> "'It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping so as to prevent plaintiff from falling were absent.'"

Curtaia v Board of Mgrs. of the Varick St. Condominium, 172 AD3d 424, 425 (1st Dept 2019), quoting *Orellano v 29 E. 27th St. Realty Corp.*, 292 AD2d 289, 291 (1st Dept 2002). *See also Betancour v Lincoln Ctr. for the Performing Arts*. 103 AD3d 429, (1st Dept 2012) (liability imposed where a ladder inexplicably wobbled and the worker standing on it fell); *Fenning v Rockrfeller Univ.*, 106 AD3d 429, (1st Dept 2013) (liability attached when an unsecured ladder moved and plaintiff fell). While there is no liability where an accident is exclusively the result of the worker's negligence, comparative negligence is not a defense to a Labor Law § 240 (1) claim. *Blake v Neighborhood Hous. Svs. of N.Y. City*, 1 NY3d 280, 288 (2003); *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 (1st Dept 2012). Plaintiff's expert, Kathleen Hopkins, R.N., CSMM, opines that, instead of being required to stand on the top step of a six-foot ladder, plaintiff "should have been provided with proper height scaffold or hoist." (NYSCEF Doc. No. 73 at 7). Inasmuch as plaintiff was not furnished with any appropriate safety devices, he could not have been the sole cause of his accident. *Padilla v Absolute Realty, Inc.* 188 AD3d 608 (1 st Dept 2020), 2020 WL 687744, citing *Gallagher v New York Post*, 14 NY3d 83, 88 (2010).

It is undisputed that plaintiff was required to cover, and then work on the covered-up opening, in an uneven floor, on an unsecured ladder that required him to stand on its top step to reach the spot where he would be drilling. Accordingly, liability, pursuant to Labor Law §240 (1) is mandated. Owner's argument, that the ladder, itself, was not defective, is unavailing. *See Pierrakes v 137 E.38th St. LLC*, 177 AD3d 574, 575 (1st Dept 2019); *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 433-434 (1st Dept 2015) (liability imposed where no equipment was provided to keep worker from falling from ladder, while operating a

drill). Whether the ladder wobbled prior to plaintiff's fall, or while he was attempting to regain his balance, is irrelevant, "since the ladder was an inadequate safety device for the work being performed." *Nieto v CLDN NY LLC*, 170 AD3d 431, 432 (1st Dept 2019). A violation of Labor Law § 240 (1) is "established by failure to provide adequate safety devises to secure the ladder [from which the plaintiff fell]." *Montalvo v J. Petrocelli Constr., Inc.,* 8 AD3d 173, 175 (1st Dept 2004). In sum, plaintiff is entitled to partial summary judgment, as to liability pursuant to Labor Law § 240 (1), against Owner.

Owner's liability, here, is not based on anything that it did, or failed to do. It is solely vicarious. Run Pei Leung (Leung), who was deposed as H&M's witness, testified that H&M exercised actual supervision over the job site, with Leung visiting it "[o]nce a day or twice or once every two days to manage and make sure everything goes . . . smoothly, according to the contract." (NYSCEF Doc. No. 83 at 12). Accordingly, plaintiff is entitled, in turn, to summary judgment on its claim for common law indemnification from H&M. *See McCarthy v Turner Constr. Inx.,* 17 NY3d 369, 377-378 (2011); *see also Stewart Tit. Ins. Co. v New York Tit. Research Corp.,* 178 AD3d618, 618 (1st Dept 2019).

Labor Law § 200 is a codification of common law negligence. It is undisputed that Owner neither supervised, nor controlled, the work being performed by GD, and that Owner had neither actual nor constructive notice of what equipment was, or was not, provided to plaintiff.

> "It is settled that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Section 200 of the Labor Law."

Lombardi v Stout, 80 NY2d 290, 295 (1992); *see also Brown v George,* 138 AD3d 466, 466-467 (1st Dept 2016). Accordingly, the Labor Law § 200 claim is dismissed as against Owner.

Labor Law § 241 (6) provides for liability where an applicable regulation of the Industrial Code, that imposes specific duties, has been violated. Plaintiff alleges violation of Industrial Code §§ 23-1.21 (b) (4), which provides, in relevant part, "[a]ll ladder footings shall be firm. ...insecure objects . . . shall not be used as ladder footings." 12 NYCRR 23-1.21 (b) (4). Here, plaintiff's accident was not caused by defective footings on the ladder that he used, but by his being required to work, while standing on the top step of an unsecured ladder that was placed on a wooden surface placed over an opening in an uneven floor.

H&M's cross motion seeks leave to amend its answer so as to assert an affirmative defense based upon Workers' Compensation Law § 11. In the alternative, H&M seeks summary judgment on the grounds that plaintiff was the sole proximate cause of his accident. As a general matter, leave to amend a pleading should be freely given, absent prejudice or surprise, so long as the proposed amendment is not utterly devoid of merit. CPLR 3025 (b); *Brummer v Wey,* 187 AD3d 566, 566 (1st Dept 2020); *LDIR, LLC v DB Structured Prods., Inc.* 172 AD3d 1,4 (2019). Here, for the following reasons, the cross motion for leave to amend is denied.

As an initial matter, the cross motion is not accompanied by a copy of the proposed pleading, as is required by CPLR 3025 (b); *Anonymous v Anonymous,* 167 AD3d 552, 553 (1st Dept 2018); *Dragon Head LLC v Elkman,* 102 AD3d (662, 563 (1st Dept 2013). Further, an assertion on the part of H&M, that it was plaintiff's employer, would contradict Leung's testimony that: (1) he is, and was at the time of plaintiff's accident, the general manager of H&M; (2) H&M was the general contractor, overseeing work at the Building; and (3) H&M subcontracted a portion of the work at the Building to GD. (NYSCEF Doc. No. 83 at 9-10). Leung identified the contract between H&M and GD (*id.* at 10), and he testified that H&M had contracted with GD to perform the work, a portion of which plaintiff was performing. When

asked whether plaintiff was employed by H&M, he replied "[h]e is not H&M." He was then asked "[h]e was not an employee of H&M; is that correct?" Leung responded "[y]es." (*Id.* at 15). While H&M is not bound by this testimony (CPLR 3117 [d]; *Spampinato v A.B.C. Consol. Corp.*, 35 NY2d 283, 287 [1974]), H&M offers no explanation of why it waited for a year after that testimony was given, and for three years after this action was commenced, to offer the evidence that it now seeks leave to introduce. Moreover, even now, H&M disputes neither Leung's testimony, nor the authenticity of the contract between H&M and GD.

Finally, an argument that H&M was plaintiff's employer, at the time of his accident, on the basis of a worker's compensation board finding, would severely prejudice plaintiff, who could not retroactively contest it, and whose lawyer at the hearing took no position on who plaintiff's employer was, so long as there was found to be coverage.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 002, plaintiff Xiyi Chen's motion for partial summary judgment, as to liability, pursuant to Labor Law § 240 (1), against defendants 111 Mott LLC and H&M Contractors, Inc. is granted and the motion to dismiss said defendants' affirmative defenses of contributory negligence is granted and the motion is otherwise denied; and it is further

ORDERED that defendant 111 Mott LLC's cross motion for summary judgment is granted to the extent that plaintiff's claim, pursuant to Labor Law § 241 (6) is dismissed and said defendant is granted conditional indemnification from defendant H&M Contractors, Inc. for such sums, as may be assessed against it in favor of plaintiff and the cross motion is otherwise denied; and it is further

ORDERED that, defendant H&M Contractors Inc.'s motion sequence no. 003, is denied; and it is further

ORDERED that the remaining claims shall continue.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/18/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE