SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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BAKHTIYOR MELIKOV, NICOLOV MELIKOV,

Plaintiff,

- v -

66 OVERLOOK TERRACE CORP., PATRIOT PLUMBING AND HEATING INC.,OMAR FAKHOURY, TUDOR REALTY SERVICES, CORP.,

Defendants.

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INDEX NO. 153504/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 242, 243, 244, 245, 247, 248, 249, 266, 267, 268, 269, 270, 271, 272

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 237, 238, 239, 240, 241, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 273, 274

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

Motion Sequence Numbers 008 and 009 are consolidated for disposition. 66 Overlook Terrace Corp. and Tudor Realty Services Corp. (collectively, "Moving Defendants")'s motion (MS008) for summary judgment dismissing all claims and crossclaims against them is granted in part and denied in part. Plaintiff's motion (MS009) for summary judgment on his Labor Law § 240(1) claim is denied.

Background

Plaintiff Bakhtiyor Melikov (referred hereinafter as "plaintiff") brings this Labor Law case arising out of his work at defendant Fakhoury's coop apartment as part of a renovation of the unit. He claims he was painting the crown molding in the vestibule area of the apartment while standing on an A-frame ladder when the ladder slipped and he fell. Mr. Melikov testified that he had been painting for about fifteen to twenty minutes and was standing on the second to top step of the A-frame ladder when "the ladder slipped which caused me to lose balance" (NYSCEF Doc. No. 195 at 157, 163, 166). Plaintiff insisted that the ladder did not have any problems and was secured before he started painting in this area, meaning the ladder had "clicked" in the open position (*id*. at 166-67). Defendant Fakhoury is a party to a proprietary lease with the coop, 66 Overlook Terrace Corp. ("66 Overlook"). Defendant Tudor Realty Services Corp. ("Tudor") manages the building for 66 Overlook.

In motion sequence 007, the Court previously dismissed plaintiff's claims against defendant Fakhoury as well as the common law indemnification claim against him. The contractual indemnification claim remained.

MS009- Plaintiff's Motion

In this motion, plaintiff claims he is entitled to summary judgment on his Labor Law § 240(1) claim on the ground that he was not provided with proper protection against an elevation risk. He insists he established his prima facie burden for summary judgment on this claim because he fell due to the ladder shifting. Plaintiff argues that an unsecured ladder that moves or shifts is a clear violation of the Labor Law.

In opposition, the Moving Defendants claim that plaintiff's testimony is not credible and that the accident could not have occurred in the way he claims. They insist that plaintiff admitted that the subject ladder was stable and did not shift before he fell. Moving Defendants argue that plaintiff continually repositioned the ladder while painting and that the ladder had the requisite rubber feet on the bottom. They emphasize that plaintiff admitted the floor was dry and could not describe the exact timeline of how he fell.

Moving Defendants insist that the ceilings in the apartment are only 8 feet high and so there is no way such a ladder could be used to paint in the apartment. They point to various deposition testimony excerpts from the apartment owner (defendant Fakhoury) from an employee of White Star (plaintiff's employer), and from the owner of White Star, who all insist that there was no A-frame ladder on site. Moving Defendants observe that there may have been a small stepladder.

In reply, plaintiff argues that the testimony of White Star's owner is irrelevant because he did not witness the accident and that plaintiff's co-worker (Mr. Kuroski) could not confirm or deny whether or not plaintiff was in an accident. He insists that Mr. Kuroski claimed he found plaintiff on the floor and that plaintiff stated that he had fallen off a ladder.

The Court denies plaintiff's motion as there are issues of fact with respect to the accident itself. Specifically, it is unclear whether there was an A-frame ladder present in the apartment at all. Plaintiff's co-worker (Mr. Kuroski) testified that they "did not use tall ladders at that project at all" (NYSCEF Doc. No. 240 at 17). He added that when he encountered plaintiff after the alleged incident, he did not see the ladder and it was "probably . . . around the corner" (*id*. at 18). Mr. Kuroski added that he did not see any paint spilled either on the floor or on the wall (*id*. at 19).

Plaintiff's boss, Mr. Laptev, (who did not witness the accident either) noted that the ceiling in the area where plaintiff was painting was about seven and a half feet high (NYSCEF Doc. No. 260 at 17). He claimed he could reach the ceiling by hand while standing in that area of the apartment. Mr. Laptev added that there was no A-frame ladder in the apartment although there was a two-foot stepladder (*id*.)

Of course, plaintiff's insistence that he fell from the second highest rung of an A-frame ladder and not a stepladder raises an issue of fact. Plaintiff's version is that he was standing on a ladder that was about six or seven feet high (NYSCEF Doc. No. 195 at 160). A fact finder must consider if it credits plaintiff's version (that he was painting a seven and a half foot or eight foot high ceiling from the second-to-highest rung of a seven-foot ladder) or credit Moving Defendants' view that the unwitnessed accident could not possibly have occurred the way that plaintiff says it did because (1) there was no A-frame ladder on the premises and (2) even if there was such a ladder, there is no way an adult could be painting the ceiling molding which were at most eight feet from the floor while standing on the second-to-top rung of a seven foot ladder. The Court cannot grant summary judgment where a plaintiff, the only witness to his own accident, claims the alleged accident happened a certain way and Moving Defendants present admissible and logical evidence that the accident occurred in an entirely different way (if it occurred at all).

The conflicting testimony about whether there was an A-frame ladder or a small stepladder on site also compels the Court to deny plaintiff's motion (*Saaverda v E. Fordham Rd. Real Estate Corp.*, 233 AD2d 125, 126, 649 NYS2d 416 [1st Dept 1996] [denying plaintiff's motion for summary judgment on a Labor Law § 240(1) claim where there was conflicting evidence about a defect in the ladder]). In other words, the Court cannot ignore the fact that

witnesses testified that plaintiff's version of how the accident occurred could not have happened as it is not clear as a matter of law whether the key apparatus at issue—the A-frame ladder—was even present on the job site. And the Court cannot simply assume that plaintiff meant to say that he fell from a small stepladder. First, that is not the testimony that plaintiff offered and, second, falling from a small stepladder (as opposed to nearly the top of an A-frame ladder) may have significant implications for the viability of plaintiff's Labor Law § 240(1) claim, if he fell at all.

MS008- Moving Defendants' Motion

In this motion, Moving Defendants (the coop and the managing agent) seek to dismiss all of the claims asserted against them and for contractual indemnification against Fakhoury.

With respect to the claims asserted by plaintiff against the Moving Defendants, the Court dismisses all of these claims except for those related to Labor Law § 240(1). Plaintiff did not offer arguments in opposition to Moving Defendants' motion except in opposition to the Labor Law § 240(1) claim. As noted above, the Court finds that there are issues of fact with respect to this claim. Although the Moving Defendants make many significant arguments about why the accident could not have happened in the way plaintiff asserts, the Court observes that the accident was unwitnessed and Mr. Kuroski admits that he found plaintiff lying on the floor after the alleged accident (although no ladder was in the room). A fact finder could, theoretically, believe plaintiff and could conclude that plaintiff fell off an A-frame ladder and suffered injuries.

The Court recognizes that the Moving Defendants insist that there was no A-frame ladder in the apartment and that using that tall of a ladder was impossible and impractical. But there is no question that the ladder could have theoretically fit in the apartment (the ladder was about six to seven feet according to plaintiff and the ceiling was about eight feet tall). Questions about

whether it was likely or practical that plaintiff used such a ladder to paint the ceiling are credibility determinations that must be decided by a jury. Put another way, the Court cannot determine as a matter of law the likelihood of the accident happening the way plaintiff says it did. The Court also observes that Moving Defendants' repeated assertions about plaintiff's character are irrelevant on a motion for summary judgment as these also relate to questions of credibility. And, on a motion for summary judgment, it is not the Court's role to determine whether plaintiff is making the whole thing up.

Indemnification

In Fakhoury's previous motion, the Court dismissed the Moving Defendants' claim for common law indemnification against him. Therefore, the key remaining claim on this motion is for contractual indemnification. Moving Defendants' arguments rely on two claimed contracts – the alteration agreement and the proprietary lease.

As an initial matter, the Court finds that it cannot rely on the alteration agreement. Although the Moving Defendants insist that the Court should bind Fakhoury to this agreement, they also admit that they do not possess a signed copy of this agreement and Fakhoury says he never signed it. The Court therefore declines to enforce an unsigned agreement. Moving Defendants are sophisticated parties who are more than capable of keeping records; it is not sufficient to simply assert that a few emails show Fakhoury is bound by the alteration agreement. Defendants' attempt to persuade the Court to rely on a phantom alteration agreement fails.

But the Court's analysis does not end there. Fakhoury admitted at his deposition that he was doing an alteration of his apartment – it wasn't just a paint job (NYSCEF Doc. No. 223 at 86, 100). The proprietary lease required there be an executed alteration agreement before undertaking such work:

> "The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld, make in the apartment or building, or on any roof, penthouse, terrace-or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment in the building" (NYSCEF Doc. No. 226 § 21[a]).

And the failure to enter into an alteration agreement violates the lease, which provides that:

> "The Lessee agrees to save the Lessor harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee" (*id*. § 11).

As the Moving Defendants point out, defendant Fakhoury cannot have it both ways. If he did not sign the alteration agreement (there is no evidence he did and he insists he didn't), then he violated a term of the proprietary lease that requires written consent from 66 Overlook in order to do the work in his apartment. This constitutes a basis for contractual indemnification—that Fakhoury violated the proprietary lease by doing a renovation and not obtaining an alteration agreement (the written consent) and where a contractor in his apartment was allegedly injured during that alteration project. Fakhoury admitted at his deposition that he knew that "generally speaking" he was required to execute an alteration agreement to do projects in his apartment (NYSCEF Doc. No. 223 at 94).

Fakhoury's assertion that Moving Defendants never "followed up" about the alteration agreement (*id*. at 96) is not a basis to invalidate this provision of the proprietary lease. He did not submit anything to show he repeatedly asked for the required written consent and that Moving Defendants ignored him (which might constitute "unreasonably withheld consent" under the proprietary lease). And he admitted he knew about the existence of alteration agreements in this building and had seen one in connection with a prior renovation (*id*. at 85). Put another way, the burden in the proprietary lease is on Fakhoury to get written consent from the Moving Defendants prior to doing an alteration and he did not do that. That provision, combined with paragraph 11, compels the Court to find that Fakhoury must indemnify the Moving Defendants.

The Court grants the branch of the Moving Defendants' motion for contractual indemnification to the extent that the Moving Defendants are granted conditional indemnity based on the proprietary lease. There is no evidence here that the Moving Defendants were negligent (the only remaining basis for their liability is Labor Law § 240[1], a strict liability regime that does not require a negligence finding). Nobody claims that the Moving Defendants controlled or supervised the work performed in the apartment at the time of the alleged accident. This means that if the Moving Defendants are found liable under Labor Law § 240(1), then Fakhoury will be required to indemnify the Moving Defendants for those damages. Whether or not an alteration agreement was signed is of no moment because the proprietary lease requires Fakhoury to indemnify the Moving Defendants under these circumstances.

Fakhoury's argument that the Court already decided this issue (and it is therefore law of the case) is incorrect. In the previous motion, the Court merely denied Fakhoury's motion for summary judgment dismissing the contractual indemnification claim against him. The Court did not opine about the validity of the Moving Defendants' affirmative contractual indemnification

claim against Fakhoury. In other words, the Court declined (in that previous motion) to *sua sponte* grant the Moving Defendants any affirmative relief where they had not yet made a motion for such relief.

Accordingly, it is hereby

ORDERED that 66 Overlook Terrace Corp. and Tudor Realty Services Corp.'s motion (MS008) is granted to the extent that all of plaintiff's claims, *except* for his Labor Law § 240(1) claim, are severed and dismissed against them, all crossclaims alleged against these defendants are severed and dismissed and they are entitled to conditional contractual indemnity as against defendant Omar Fakhoury; and it is further

ORDERED that plaintiff's motion (MS009) for partial summary judgment is denied.

9/7/2023
DATE

ARLENE P. BLUTH, J.S.C.

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