

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33130
O/prt

_____AD3d_____

Argued - October 27, 2011

ANITA R. FLORIO, J.P.
L. PRISCILLA HALL
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-09904

DECISION & ORDER

Jigar Jamindar, appellant-respondent, v Uniondale
Union Free School District, et al., defendants third-party
plaintiffs-respondents-appellants, Irwin Contracting, Inc., et al.,
defendants-respondents-appellants; Herrick's Mechanical
Corporation, third-party defendant-respondent-appellant.

(Index No. 7942/08)

Kramer & Pollack, LLP, Mineola, N.Y. (Larry Kramer of counsel), for appellant-respondent.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y. (Kathleen A. Foley of counsel), for defendants third-party plaintiffs-respondents-appellants.

Conway, Farrell, Curtin & Kelly, P.C., New York, N.Y. (Jonathan T. Uejio of counsel), for defendant-respondent-appellant Irwin Contracting, Inc.

Tromello, McDonnell & Kehor, Melville, N.Y. (Kevin P. Slattery of counsel), for defendant-respondent-appellant Conor Construction Consultants.

Cascone & Kluepfel, LLP, Garden City, N.Y. (Michael T. Reagan of counsel), for defendant-respondent-appellant Northgate Electrical.

Churbuck, Calabria, Jones & Materazo, P.C., Hicksville, N.Y. (George Jones and Nicholas P. Calabria of counsel), for third-party defendant-respondent-appellant.

December 6, 2011

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JAMINDAR v UNIONDALE UNION FREE SCHOOL DISTRICT

In an action to recover damages for personal injuries, (1) the plaintiff appeals from so much of an order of the Supreme Court, Nassau County (Sher, J.), dated August 10, 2010, as denied his motion for summary judgment on the cause of action alleging violations of Labor Law § 240(1) insofar as asserted against the defendants third-party plaintiffs, Uniondale Union Free School District and Uniondale High School, and the defendant Conor Construction Consultants, (2) the defendants third-party plaintiffs, Uniondale Union Free School District and Uniondale High School, cross-appeal, as limited by their brief, from so much of the same order as denied their cross motion for summary judgment dismissing the complaint insofar as asserted against them or, alternatively, for conditional summary judgment on their cross claim for contractual indemnification against the defendant Northgate Electrical and their third-party causes of action for contractual indemnification against the third-party defendant, Herrick's Mechanical Corporation, (3) the defendant Irwin Contracting, Inc., separately cross-appeals, as limited by its brief, from so much of the same order as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, (4) the defendant Conor Construction Consultants separately cross-appeals from so much of the same order as denied those branches of its cross motion which were for summary judgment dismissing the complaint insofar as asserted against it or, in the alternative, for conditional summary judgment on its cross claims for contractual and common-law indemnification against the defendant Northgate Electrical and the third-party defendant, Herrick's Mechanical Corporation, (5) the defendant Northgate Electrical separately cross-appeals from so much of the same order as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and (6) the third-party defendant, Herrick's Mechanical Corporation, separately cross-appeals, as limited by its brief, from so much of the same order as denied those branches of its cross motion which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1), the third-party complaint, and all cross claims and counterclaims alleging common-law indemnification, contribution, and contractual indemnification insofar as asserted against it.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the plaintiff's motion which was for summary judgment on the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against the defendants third-party plaintiffs, Uniondale Union Free School District and Uniondale High School, and substituting therefor a provision granting that branch of the plaintiff's motion, (2) by deleting the provision thereof denying that branch of the cross motion of the defendants third-party plaintiffs, Uniondale Union Free School District and Uniondale High School, which was for conditional summary judgment on their cross claim for contractual indemnification against the defendant Northgate Electrical and their third-party causes of action for contractual indemnification against the third-party defendant, Herrick's Mechanical Corporation, and substituting therefor a provision granting that branch of the cross motion, (3) by deleting the provision thereof denying the cross motion of the defendant Irwin Contracting, Inc., for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and substituting therefor a provision granting that cross motion, (4) by deleting the provision thereof denying that branch of the cross motion of the defendant Conor Construction Consultants which was for conditional summary judgment on its cross claims for common-law indemnification against the defendant Northgate Electrical, and substituting therefor a provision granting that branch of the cross motion, (5) by deleting the provision thereof denying that branch of the cross motion of the defendant Northgate Electrical which was for summary

judgment dismissing the cause of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against it, and substituting therefor a provision granting that branch of the cross motion, and (6) by deleting the provision thereof denying those branches of the cross motion of the third-party defendant, Herrick's Mechanical Corporation, which were for summary judgment dismissing all cross claims, counterclaims, and third-party causes of action for common-law contribution and indemnification, as well as the cross claim by the defendant Conor Construction Consultants for contractual indemnification, insofar as asserted against it, and substituting therefor a provision granting those branches of the cross motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs to the defendant Irwin Contracting, Inc., payable by the plaintiff, the defendants, the defendants third-party plaintiffs, and the third-party defendant, appearing separately and filing separate briefs.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for personal injuries he allegedly sustained in August 2007 when he fell approximately 25 feet from the top of a scissor lift owned by the defendant Northgate Electrical (hereinafter Northgate), while performing duct work demolition for his employer, the third-party defendant Herrick's Mechanical Corporation (hereinafter Herrick's). The plaintiff was performing the work at an auditorium of the defendants third-party plaintiffs Uniondale Union Free School District and Uniondale High School (hereinafter together Uniondale). The plaintiff alleged that, while he was removing air conditioning ducts, a portion of an air duct being removed struck the scissor lift, causing the scissor lift to fall over. In addition to Northgate, which was hired by Uniondale to perform electrical work, and Herrick's, which was hired by Uniondale to perform the duct work demolition, the defendants Irwin Contracting (hereinafter Irwin) and Conor Construction Consultants (hereinafter Conor), were also hired by Uniondale to work on the project in various capacities. The plaintiff alleged, inter alia, that the scissor lift was defective and not suitable to protect him from elevation related hazards.

The Supreme Court erred in denying that branch of the plaintiff's motion which was for summary judgment on the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against the property owner, Uniondale. "Labor Law § 240(1) provides exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured" (*Gonzalez v Turner Constr. Co.*, 29 AD3d 630, 631). The failure of an owner such as Uniondale "to furnish or erect suitable devices to protect workers when work is being performed" results in absolute liability against that owner under Labor Law § 240(1) (*Lombardi v Stout*, 80 NY2d 290, 295; see *Pineda v 79 Barrow St. Owners Corp.*, 297 AD2d 634). Here, in response to the plaintiff's prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) cause of action against Uniondale (see *Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938), Uniondale failed to raise a triable issue of fact. Contrary to Uniondale's contention, as well as similar contentions raised by the other defendants, this is not a case where it can be said that the plaintiff's own conduct was the sole proximate cause of the accident and his injuries since, inter alia, at the time of the accident, he was using the Northgate scissor lift at the direction of his foreman (see *Harris v City of New York*, 83 AD3d 104, 110; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879). Accordingly, the Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment on the cause of action alleging a violation of Labor Law § 240(1) against

Uniondale.

Conor made a prima facie showing of entitlement to judgment as a matter of law on its cross claim for common-law indemnification against Northgate, demonstrating that any liability to the plaintiff on its part would be purely statutory and vicarious to Northgate's direct liability. In opposition, Northgate failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of Conor's cross motion which was for conditional summary judgment on its common-law indemnification cross claims against Northgate (*see Hart v Commack Hotel, LLC*, 85 AD3d 1117).

The Supreme Court should have granted that branch of Herrick's cross motion which was for summary judgment dismissing all common-law contribution and indemnification claims insofar as asserted against it. Herrick's made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiff did not suffer a grave injury under the Workers Compensation Law, and no triable issue of fact was raised in opposition (*see Miranda v Norstar Bldg. Corp.*, 79 AD3d 42; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911; *Bradt v Lustig*, 280 AD2d 739). Further, that branch of Herrick's cross motion which was for summary judgment dismissing the cross claim for contractual indemnification asserted against it by Conor also should have been granted, since Herrick's established the absence of a contractual agreement to indemnify Conor in this action (*see Araujo v City of New York*, 84 AD3d 993, 994), and no triable issue of fact was raised in opposition.

Irwin made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it by establishing, inter alia, that it was merely one of several prime contractors hired by Uniondale as part of the subject renovation project, and that it was neither responsible for, nor controlled or supervised, any of the work allegedly giving rise to the plaintiff's injury (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905; *Hall v Smithtown Cent. School Dist.*, 82 AD3d 703). In response, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted Irwin's cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see George v Marshalls of MA, Inc.*, 61 AD3d 931; *O'Brien v Key Bank*, 223 AD2d 830, 831). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65; *see Tranchina v Sisters of Charity Health Care Sys. Nursing Home*, 294 AD2d 491, 493). However, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature (*see Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301; *State of New York v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758). Here, Uniondale met its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law on its contractual indemnification claims against

Northgate and Herrick's by submitting evidence establishing that it was free from any negligence and can only be held liable based on statutory or vicarious liability as the owner of the subject property where the accident occurred. In response, Herrick's and Northgate failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of Uniondale's cross motion which was for conditional summary judgment on its contractual indemnification claims against Northgate and Herrick's.

Northgate's argument that it should be treated as a "gratuitous bailee" of the scissor lift and, therefore, could not be held liable absent gross or wanton negligence, is raised for the first time on appeal and, thus, is not properly before this Court (*see Ponce-Francisco v Plainview-Old Bethpage Cent. School Dist.*, 83 AD3d 683).

However, Northgate met its initial burden of demonstrating entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against it by establishing that it was not an owner, a general contractor, or a statutory agent under those provisions (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905; *Hall v Smithtown Cent. School Dist.*, 82 AD3d 703). In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of Northgate's cross motion which was for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against it.

The parties' remaining contentions are without merit.

FLORIO, J.P., HALL, AUSTIN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court