

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

RUBEN DARIO CABALLERO,	x	Index	
		Number	<u>4126</u> 2006
Plaintiff,		Motion	
-against-		Date	<u>June 3,</u> 2008
BENJAMIN BEECHWOOD, LLC., et al.,		Motion	
		Cal. Number	<u>5</u>
Defendants.		Motion Seq. No.	<u>5</u>

LCC CONTRACTING CORP.,
Third-Party Plaintiff,
-against-
SCALA INTERIOR CORP.,
Third-Party Defendant.

x

x

The following papers numbered 1 to 20 read on this motion by defendants Benjamin Beechwood, LLC. (Benjamin Beechwood) and Rockaway Beach Blvd. Construction Co., LLC (Rockaway Beach) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's claims of violations of Labor Law §§ 200, 241(6), 240(1) and common-law negligence and for summary judgment on their cross claims of common-law indemnity, contractual indemnity and breach of contract; on the cross motion by defendants LCC Contracting Corp. (LCC Contracting) and Linden Construction Corp. (Linden Construction) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's common-law negligence and Labor Law causes of action along with all cross claims; and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law § 240(1).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notices of Cross Motion - Affidavits - Exhibits..	5-12
Answering Affidavits - Exhibits.....	13-16
Reply Affidavits.....	17-20

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover personal injuries allegedly suffered as a result of a construction site accident. The accident occurred on January 23, 2008. The plaintiff was an employee of third-party defendant Scala Interior Corp. (Scala). The plaintiff was a taper and plasterer. He was working on the Arverne by the Sea development construction project in Far Rockaway, Queens, New York. This project involved the building of hundreds of new homes. The property and buildings being constructed were owned by defendant Benjamin Beechwood. Defendant Rockaway Beach was the general contractor for the project. Rockaway Beach subcontracted with defendant LCC Contracting to perform drywall and carpentry work. LCC Contracting subcontracted with Scala to install wallboard and do taping and spackling work.

On the day of the accident, the plaintiff was working in a garage that was being constructed. The plaintiff was performing taping work on the ceiling. He was working on a scaffold. There were no nets, railings, ropes, harnesses, belts, tail lines or lifelines in the garage. The metal scaffold had four wheels, two of which had locks. The plaintiff claims that he attempted to lock the wheels but they were broken and he was, thus, unable to lock the wheels. The accident occurred when the scaffold the plaintiff was working on moved and one of the wheels of the scaffold then fell into a hole in the floor. The scaffold then tipped against the wall and the plaintiff was thrown off the scaffold and fell to the floor below.

Robert Cavaliere, the director of purchasing for Benjamin Organization, testified on behalf of Benjamin Beechwood. He testified that the Benjamin Organization formed a joined venture to develop Arverne by the Sea project. He testified that LCC never notified Benjamin Beechwood that they subcontracted the taping work to Scala. He testified that Benjamin Beechwood did not control or supervise the work of the plaintiff.

Nicholas Masem, the project manager for the development, testified on behalf of Rockaway Beach. He testified that on the

day of the accident he became aware of the accident and went to the unit where the accident occurred and found a crowd congregating. He learned at that time that a taper had been injured. He testified that while he inspected the scaffolding, he did not look to see if the locks were operational. He testified that Rockaway Beach did not provide safety equipment to the subcontractors doing the taping work. He further stated that Rockaway Beach did not supervise or control the work done by the plaintiff.

Peter Kaplow, testified on behalf of LCC Contracting and Linden Construction. He testified that LCC entered into a contract with Rockaway Beach to perform drywall and carpentry work at the development site. LCC then subcontracted with Scala to do taping and spackling work. He testified that LCC Contracting never directed the plaintiff or any employee of Scala as to how to perform the work. He testified that he was also the owner of defendant Linden Construction and that Linden Construction was not involved with this construction project.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Here, inasmuch as the defendant LCC Contracting was not the owner or general contractor and did not have the authority to control the work that plaintiff was performing, the causes of action under Labor Law §§ 240(1) and 241(6) should be dismissed (see Kelarakos v Massapequa Water Dist., 38 AD3d 717 [2007]; Bopp v A.M. Rizzo Elec. Contrs., 19 AD3d 348 [2005]; Zervos v City of New York, 8 AD3d 477 [2004]). In opposition, the plaintiff failed to raise an issue of fact. The cross motion by defendant Linden Construction must also be granted. The defendant Linden Construction established its prima facie entitlement to summary judgment by showing that it was not involved in the construction project.

For an owner to be liable under Labor Law § 200 or common-law negligence, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. Here, the moving defendants established their prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence submitted by the defendants established as a matter of law that they had no actual or constructive knowledge of any allegedly defective condition on the premises and exercised no control or supervision over the work of the plaintiff (see Lopez v Port Auth. of New York & New Jersey, 28 AD3d 430 [2006]; Parisi v Loewen Dev. of Wappingers Falls, LP, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise

an issue of fact. Therefore, the branches of the motion and cross motion for summary judgment dismissing the causes of action for common-law negligence and Labor Law § 200 are granted and those claims are dismissed.

Turning next to the branch of the motion by defendants Benjamin Beechwood and Rockaway Beach for summary judgment dismissing the Labor Law § 240(1) claim and the cross motion by plaintiff for summary judgment on the issue of liability against defendants Benjamin Beechwood and Rockaway Beach under Labor Law § 240(1), owners and contractors are subject to strict liability under Labor Law § 240. To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]). Here, the plaintiff's injuries were caused by a fall from a height while performing a protected activity under Labor Law § 240(1) (see Ford v HRH Constr., 41 AD3d 639 [2007]). The plaintiff made a prima facie showing of entitlement to summary judgment by showing that the accident was caused by the failure to provide the plaintiff with adequate safety protection for the work being performed (see Hamilton v Kushnir Realty Co., 51 AD3d 864 [2008]; Rivera v Dafna Constr. Co, Ltd., 27 AD3d 545 [2006]). Additionally, the evidence established that the scaffold that was given to the plaintiff was defective (see Sozzi v Gramercy Realty Co. No. 2, LP, 304 AD2d 555 [2003]; Wesley v Long Is. Power Auth., 284 AD2d 391 [2001]).

In opposition, the defendants Benjamin Beechwood and Rockaway Beach failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). The defendants' argument that the motion should be denied because the plaintiff's own actions were the sole proximate cause of the accident is not supported by the evidence (see Valensisi v Greens at Half Hollow, LLC, 35 AD3d 693 [2006]; Cordova v 360 Park Ave. S. Assoc., 33 AD3d 750 [2006]). The affidavit submitted by Nick Masem does not raise an issue of fact. The statements in the affidavit that Mr. Masem checked the locks on the wheels a few days after the accident contradicts his earlier deposition testimony and, is, thus, a feigned factual issue designed to defeat the summary judgment motions, and is insufficient to raise a triable issue of fact (see Kaplan v DePetro, 51 AD3d 730 [2008]; Hughes-Berg v Mueller, 50 AD3d 856 [2008]).

On the branch of the motion by the defendants Benjamin Beechwood and Rockaway Beach for summary judgment dismissing the Labor Law § 241(6) cause of action, this cause of action is dismissed without opposition as the provisions relied

upon to support this claim are either general safety provisions or not applicable to the facts of the case.

Turning next to the branch of the motion by the defendants Rockaway Beach and Benjamin Beechwood for contractual indemnification, the plain language of the subcontract requires LCC Contracting to defend, indemnify and hold harmless Rockaway Beach and Benjamin Beechwood for all claims for personal injuries that arise out of or occur from the work that LCC Contracting agreed to perform at the construction site (see Great N, Ins. Co., v Interior Constr. Corp., 7 NY3d 412 [2006]; Argueta v Pomona Panorama Estates, Ltd., 39 AD3d 785 [2007]). Here, there is no dispute that the plaintiff's claim arose out of the work which LCC Contracting agreed to perform. In opposition, LCC Contracting failed to submit evidence to raise a triable issue of fact which would preclude the granting of summary judgment on the contractual indemnification claim (see Reborchick v Broadway Mall Props., 10 AD3d 713 [2004]). Therefore, summary judgment on the issue of contractual indemnification must be granted. The claim for common-law indemnification, however, must be dismissed. The defendant LCC Contracting established that it was free from negligence and, therefore, cannot be held liable for common-law indemnification.

Finally, the branch of the motion by defendants Benjamin Beechwood and Rockaway Beach for summary judgment on their breach of contract claims against defendant LCC Contracting for failure to procure insurance is granted. Under the terms of the contract, LCC Contracting was required to procure insurance naming Benjamin Beechwood and Rockaway Beach as additional insureds. In opposition, defendant LCC Contracting has failed to show that it properly satisfied its contractual obligations. However, to the extent that defendants Benjamin Beechwood and Rockaway Beach had their own liability insurance policy in place at the time of the accident, their damages are limited to their out-of-pocket expenses (see Inchaustequi v 666 5th Ave. Ltd. Partnership, 96 NY2d 111 [2001]).

Accordingly, the branch of the motion by the defendants Benjamin Beechwood and Rockaway Beach for summary judgment dismissing the Labor Law § 240(1) claim is denied. The branches of the motion by the defendants Benjamin Beechwood and Rockaway Beach for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) causes of action is granted and those claims are dismissed. The branch of the motion by the defendants Benjamin Beechwood and Rockaway Beach for summary judgment on their cross claim for common-law negligence is denied. The branches of the motion by the defendants Benjamin Beechwood and Rockaway Beach

for summary judgment on their cross claims for contractual indemnification and for breach of contract for failure to procure insurance are granted.

The cross motion by the defendant Linden Construction is granted and the complaint and cross claims against Linden Construction are dismissed.

The branches of the cross motion by the defendant LCC Contracting for summary judgment dismissing the complaint is granted. The branch of the cross motion by the defendant LCC Contracting for summary judgment dismissing the common-law indemnification cross claim is granted. The branches of the cross motion by the defendant LCC Contracting for summary judgment dismissing the cross claims for contractual indemnification and breach of contract for failure to procure insurance is denied.

The branches of the cross motion by the plaintiff against the defendants Benjamin Beechwood and Rockaway Beach for summary judgment on the issue of liability on the Labor Law § 240(1) claim are granted. The branches of the cross motion by the plaintiff against the defendants LCC Contracting and Linden Construction Corp. for summary judgment on the issue of liability on the Labor Law § 240(1) claim is denied.

Dated: September 8, 2008

LAWRENCE V. CULLEN, J.S.C.