

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALAN B. WEISS IA Part 2
Justice

JOSE ROBERTO ANIBAL ORELLANA, x
Plaintiff, Index
Number 1029 2006

- against - Motion
Date October 31, 2007

STANDARD MICROSYSTEMS CORPORATION,
TRITEC BUILDING COMPANY, TRITEC Motion
Cal. Numbers 33 & 34
REAL ESTATE, SMSC SUCCESS BY DESIGN, Motion Seq. Nos. 3 & 6

Defendants.

STANDARD MICROSYSTEMS CORPORATION, x
TRITEC BUILDING COMPANY,

Third-Party Plaintiffs,

- against -

UNITED PANEL TECHNOLOGIES, CORP.,

Third-Party Defendant.

x

The following papers numbered 1 to 29 read on this motion by plaintiff for summary judgment on his claim for violation of Labor Law § 240(1); a cross motion by defendants/third-party plaintiffs Tritec Building Company, Inc. s/h/a Tritec Building Company (Tritec) and Standard Microsystems Corporation (SMC) for summary judgment dismissing the complaint and for summary judgment on their contractual indemnification claim against third-party defendant United Commercial Construction d/b/a United Panel Technologies, Corp. s/h/a United Panel Technologies, Corp. (United); a separate motion by plaintiff to assert a direct action against United and for summary judgment pursuant to Labor Law § 240(1) against United; and a cross motion by third-party defendant United for summary judgment dismissing the complaint and dismissing the third-party claim for contractual indemnification.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits 1-8
Notices of Cross Motion - Affidavits - Exhibits .. 9-16
Answering Affidavits - Exhibits 17-24
Reply Affidavits 25-29

Upon the foregoing papers it is ordered that the motions and cross motions are consolidated for the purpose of disposition and are determined as follows:

Plaintiff allegedly sustained personal injuries when he fell from a scaffold while installing sheetrock during a construction project for the expansion of premises owned by SMC. Plaintiff alleges that he was caused to fall when the scaffold on which he was working moved. Tritec, the general contractor for the project, had contracted with United to perform interior work, including framing and sheetrocking. United then hired Master Drywall Corporation (Master Drywall), plaintiff's employer, to perform the sheetrocking and taping. In this action, plaintiff seeks to recover for his injuries based upon defendants' negligence and violation of Labor Law §§ 200, 240 and 241-a.

Labor Law § 240(1) requires that contractors, owners, and their agents provide workers with appropriate safety devices to protect them against such specific gravity-related accidents as falling from a height. (See, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Godoy v Baisley Lumber Corp., 40 AD3d 920 [2007].) To prevail on a cause of action under section 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries sustained. (See, Bland v Manocherian, 66 NY2d 452 [1985]; Tylman v School Constr. Auth., 3 AD3d 488 [2004].) A defendant cannot be held liable if the plaintiff's actions were the sole proximate cause of the accident. (See, Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39-40 [2004]; Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]; Florio v LLP Realty Corp., 38 AD3d 829 [2007].)

On the record presented, it cannot be determined as a matter of law whether the scaffold being used by plaintiff provided the adequate protection required by Labor Law § 240(1), whether plaintiff had access to other adequate safety devices, or whether plaintiff's own actions were the sole proximate cause of his accident. Questions of fact exist as to whether the wheel locks on the scaffold provided were in working order, whether plaintiff

properly attempted to secure the locks, whether other scaffolds were available to plaintiff, and whether plaintiff was directed by a supervisor to use the scaffold to complete the work despite a problem with the wheel locks. Under these circumstances, summary relief on the Labor Law § 240(1) claim is precluded. (See, D'Angelo v Builders Group, ___ AD3d ___, 2007 NY Slip Op 8403 [2d Dept 2007]; Santo v Scro, 43 AD3d 897 [2007]; Bonilla v State of New York, 40 AD3d 673 [2007]; Florio v LLP Realty Corp., *supra*; Berenson v Jericho Water Dist., 33 AD3d 574 [2006].) Accordingly, plaintiff's motion for summary judgment against defendants SMC and Tritec, and those parts of the cross motion by SMC and Tritec and the cross motion by United that address the section 240(1) claim, are denied.

Defendants SMC and Tritec have made a prima facie showing that they did not own or supply the scaffold used by plaintiff, and did not supervise or control the manner in which plaintiff performed his work. No triable issues of fact have been raised in this regard. Thus, defendants SMC and Tritec cannot be subjected to liability based on common-law negligence or Labor Law § 200, a codification of the common-law duty to maintain a safe workplace, and are awarded summary judgment dismissing those claims asserted against them. (See, Burkoski v Structure Tone, Inc., 40 AD3d 378 [2007]; Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681 [2005]; see also, Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993].)

Tritec and SMC are also awarded summary judgment dismissing any claims based upon Labor Law §§ 240(2) and 241-a. Although not mentioned in the complaint, plaintiff's bill of particulars asserts a violation of Labor Law § 240(2). This subdivision sets forth requirements for scaffolding that is more than 20 feet from the ground and is inapplicable to the facts herein where the top of the scaffold is alleged to have been 12 feet from the ground. Section 241-a pertains to the protection of workers in or at elevator shaftways, hatchways and stairwells, and is similarly inapplicable to the facts of this case.

The subcontract between Tritec and United contains an express indemnification provision in favor of SMC and Tritec. Since it has been established as a matter of law that SMC and Tritec were not negligent and their liability, if any, is vicarious, the provision may be enforced without running afoul of the proscriptions of General Obligations Law § 5-322.1. (See, Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 n 5 [1997]; Colozzo v National Ctr. Found., Inc., 30 AD3d 251 [2006]; *cf.*, Maranco v Commander Elec., Inc., 12 AD3d 571 [2004].) The indemnification clause obligates United to indemnify SMC and Tritec for claims,

damages, losses and expenses arising out of or resulting from the performance of United's work under the subcontract provided they are attributable to the negligent acts or omissions of United, United's sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Thus, the indemnification provision is effective whether plaintiff's accident was the result of the negligence of United, the negligence of Master Drywall, plaintiff's own negligence, or the negligence of any other employee of United or Master Drywall. Under the circumstances of this case, and in view of the specific language of the subcontract (see, Kader v City of New York, 16 AD3d 461 [2005]), SMC and Tritec are granted summary judgment on their third-party claim for contractual indemnification from United. The part of United's cross motion that is for summary judgment dismissing the third-party claim for contractual indemnification is denied.

United has not established that it cannot be held directly liable to plaintiff. Liability under Labor Law § 240(1) may be imposed on a party to whom an owner or a contractor has delegated the authority to supervise and control a particular part of the work, with the party thereby becoming the statutory agent of the owner or contractor for those areas and activities within the scope of that work. (See, Russin v Louis N. Picciano & Son, 54 NY2d 311 [1981]; Chimborazo v WCL Assocs., 37 AD3d 394 [2007].) The nondelegable liability imposed by section 240 attaches to a subcontractor such as United as a statutory agent when the subcontractor has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of the injury. (See, Coque v Wildflower Estates Devs., 31 AD3d 484 [2006]; Armentano v Broadway Mall Props., 30 AD3d 450 [2006]; Everitt v Nozkowski, 285 AD2d 442 [2001].) The sheetrock work plaintiff was engaged in was within the scope of the work delegated to United by Tritec (see, Russin v Louis N. Picciano & Son, supra), and United has not made a prima facie showing that it did not have the authority to supervise or control the work being performed by plaintiff when he was injured.

Furthermore, contrary to United's assertions, a review of the deposition testimony presented on these applications demonstrates the existence of triable issues of fact concerning whether the subject scaffold was supplied by United or Master Drywall as well as whether United, through its foreman, supervised plaintiff's work. Plaintiff's application to assert a direct claim against United was made within a reasonable time after the depositions of United and Master Drywall, and United has not demonstrated that it will suffer any prejudice if the relief sought is granted. Thus, plaintiff is granted leave to serve an amended complaint alleging

direct claims for negligence and violation of Labor Law §§ 200 and 240(1) against United. (See, Micari v Van Kesteren, 121 AD2d 524 [1986].) The part of plaintiff's motion against United that is for summary judgment is denied. Issue has not been joined on plaintiff's claims against United (CPLR 3212[a]) and, in any event, the relief would not be warranted due to the aforementioned issues of fact. (CPLR 3212[b].)

Dated: 1/28/08

J.S.C.