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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
CIVIL TERM IAS PART 3

JOHN F. SCHWEIN, X BY: Justice John A. Milano
: :
: Index No. 12265/98
Plaintiff, : :
: Motion Date: July 5, 2000
- against - : :
: Motion Cal. No. 17
YALE UNIVERSITY, DESIGN BUILD, INC. :
and SPEEDY CONCRETE CORP., :
: :
Defendants. :
X

Plaintiff John F. Schwein has moved for summary judgment on the issue of liability against defendant Yale University and defendant Design Build, Inc. ("DBI") on his cause of action based on Labor Law § 240(1). Defendant DBI has cross moved for an order, inter alia, permitting the service of an amended complaint. Defendant Speedy Concrete Corp. ("Speedy") has cross moved for summary judgment dismissing the complaint and all the other claims against it. Defendant Yale University has cross moved for summary judgment on its cross claims for common law indemnification against defendant DBI and defendant Speedy.

Defendant Yale University owns premises known as Douglaston Plaza, located at 242-02 61st Ave., Douglaston, New York. The defendant owner hired defendant DBI to act as the general contractor on a project undertaken at the premises, and the defendant owner hired defendant Speedy to do concrete work on the project. Defendant Speedy subcontracted work to ALC Enterprises,

Inc., the employer of plaintiff Schwein. On April 11, 1996, the plaintiff performed construction work at the premises, which involved the removal of a brick wall and its replacement with another wall. The plaintiff and William Bellamy, a DBI foreman, tied and secured pipes and conduits which were located on the wall. The plaintiff and Bellamy used a twenty foot extension ladder during the course of their work, and they tied one of the upper rungs of the ladder to a vent pipe to prevent the ladder from moving. After finishing his work, the plaintiff, while still on the ladder, untied the rope, whereupon the ladder moved and fell to the right. The plaintiff fell about twenty feet to the ground, and, as a result, he sustained personal injuries, including torn medial collateral ligaments in each of his knees and a fracture of his right middle finger.

The cross motion by defendant DBI for an order, inter alia, permitting the service of an amended answer is denied. "While leave to amend should be freely given (see, CPLR 3025[b]), a proposed amendment which is devoid of merit should not be permitted." (West Branch Realty Corp. v Exchange Ins. Co., 260 AD2d 473; Biney v Rodriguez, 262 AD2d 592.) Defendant DBI proposes to amend its answer to include the affirmative defense that this action is barred by the exclusive remedy provisions of the Worker's Compensation Law. (See, Egan v Harlequin Books, Inc., 229 AD2d 935; Schulze v Associated Universities, 212 AD2d 588.) Defendant DBI contends that on the day of the accident, the plaintiff was its "special employee." (See, Thompson v Grumman

Aerospace Corp., 78 NY2d 553; Martin v Baldwin Union Free School District, ___ AD2d ___, 706 NYS2d 712.) "A special employee is defined as 'one who is transferred for a limited time of whatever duration to the service of another'***." (Martin v Baldwin Union Free School District, supra, quoting Thompson v Grumman Aerospace Corp., supra, 557-578.) "Principal factors in determining whether a special relationship exists include the right to control, the method of payment, the furnishing of equipment, the right to discharge, and the relative nature of the work***." (Martin v Baldwin Union Free School District, supra; see, Shoemaker v Manpower, Inc., 223 AD2d 787.) In the case at bar, defendant DBI failed to proffer sufficient evidence that, under all of the circumstances of this case, plaintiff Schwein was its special employee. (See, Biney v Rodriguez, supra; see also, Gonzalez v John B. Lovett Assoc. Ltd., 228 AD2d 342.) Although defendant DBI may have had the responsibility for the work that the plaintiff was performing when he fell from the ladder and although the plaintiff may have been working with DBI's foreman, the plaintiff took his orders from several sources involved in the construction project, the plaintiff reported daily to the owner of ALC, the plaintiff received his wages from ALC, and defendant DBI did not have the right to hire or discharge the plaintiff.

The cross motion by defendant Speedy for summary judgment dismissing the complaint and all the other claims against it is granted. Defendant Speedy did not control or direct the work being done by the plaintiff at the time of his accident. Where a

defendant does not control the work being performed at the time of the plaintiff's injury, liability does not arise pursuant to common law negligence principles or pursuant to Labor Law § 200. (See, Comes v New York State Electric and Gas Corp., 82 NY2d 876; DeCotes v Merritt Meridian Corp., 245 AD2d 864.) Similarly, a prime contractor such as defendant Speedy with no responsibility for or control over the work from which the plaintiff's injury arose has no liability under section 240 and section 241 of the Labor Law. (See, Russin v Louis N. Picciano & Son, 54 NY2d 311.) "With respect to plaintiff's Labor Law sections 240 and 241 causes of action, only owners and general contractors are absolutely liable for statutory violations***. All other parties, such as prime contractors, are liable 'only if they are acting as the "agents" of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at the time of the injury'***." (DeCotes v Merritt Meridian Corp., *supra*, 866, quoting Walsh v Sweet Assocs., 172 AD2d 111, 113; Russin v Louis N., Picciano & Son, *supra*.) There are no issues of fact which preclude summary judgment dismissing causes of action asserted against defendant Speedy pertaining to common law negligence and duties imposed by the Labor Law. With respect to defendant DBI's supposed cross claim against defendant Speedy which concerns a breach of contract to procure insurance (see, Kinney v G.W. Lisk, Co., 76 NY2d 215), the answer of defendant DBI dated January 21, 1999 does not contain a cause of action against defendant Speedy which concerns a breach of contract to procure

insurance. Moreover, the relevant contract in this case is the one dated September 17, 1993 between Yale Investments and defendant Speedy. The contract relied upon by defendant DBI whose Attachment B required defendant DBI to "list as 'additional insured' on his insurance policy:***Design Build Incorporated" is not relevant since it was signed with Federated Corporate Services, Inc.

The motion by plaintiff Schwein for summary judgment against defendant Yale University and defendant DBI on the issue of liability arising on the cause of action based on Labor Law § 240(1) is granted. The opponent of a motion for summary judgment has the burden of producing evidence sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Defendant Yale University and defendant DBI failed to carry that burden. Labor Law § 240(1) provides in relevant part that "[a]ll contractors and owners***shall furnish or erect, or cause to be furnished or erected***scaffolding, hoists, stays, ladders***or other devices which shall be so constructed, placed, and operated as to give proper protection to a person so employed." Labor Law § 240(1) "imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure." (Bland v Manocherian, 66 NY2d 452, 459.) The duty imposed upon owners and contractors pursuant to Labor Law § 240(1) is nondelegable, meaning that they are liable for a violation even if they exercised no supervision or control over the work. (See, Rocovich v

Consolidated Edison Company, 78 NY2d 509.) In the case at bar, the plaintiff established his cause of action by showing that a violation of Labor Law § 240(1) occurred and that the violation was a proximate cause of his injury. (See, Walsh v Baker, 172 AD2d 1038; Heath v Soloff Construction, Inc., 107 AD2d 507.)

That branch of the cross motion by defendant Yale University which is for summary judgment on its cross claims for common law indemnification against defendant DBI is granted. (See, Jellema v 66 West 84th Street Owners Corp., 248 AD2d 117.)

That branch of the cross motion by defendant Yale University which is for summary judgment on its cross claims for common law indemnification against defendant Speedy is denied. The dismissal of the plaintiff's action against defendant Speedy requires the dismissal of cross claims for contribution and indemnification. (See, Stone v Williams, 64 NY2d 639; Armatys v Edwards, 229 AD2d 906.)

Settle order.

Dated: September 7, 2000

Justice John A. Milano