[* 1 ]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LUTHER V. DYE IA Part 7
Justice

LUIS COQUE

- against -

WILDFLOWER ESTATES DEVELOPERS, INC., et al.

Action No. 1
Index Number 18365 2001

Motion Date June 17, 2003

Motion Cal. Numbers 11 & 12

WILDFLOWER ESTATES DEVELOPERS, INC.,

Third-party Plaintiff,

- against -

CITY WIDE BUILDING CORP.,

Third-party Defendant.

Action No. 2
Index No. 350541/01

CLASSIC CONSTRUCTION,

Second Third-party Plaintiff,

- against -

BROTHERS HOME RENOVATION, INC.,

Second Third-party Defendant.

Action No. 2
Index No. 350750/01

Motion calendar numbers 11 and 12 are consolidated herein for disposition.

The following papers numbered 1 to 29 read on this motion by plaintiff for summary judgment on the issue of liability on his Labor Law § 240(1) claim against defendants Wildflower Estates Developers, Inc. ("Wildflower Estates") and Classic Construction; and on this motion by Wildflower Estates for summary judgment on its common-law and contractual indemnification claims against Classic Construction and third-party defendant City Wide Building Corp.

Plaintiff was standing on what has been described as a makeshift scaffold or platform consisting of two pieces of wood resting on the wooden beams that made up the frame of the stairwell. Directly above the area where the makeshift scaffold/platform was placed, was an opening in the roof for the installation of a skylight.

During his deposition, plaintiff testified that he was standing on the makeshift scaffold/platform for approximately thirty minutes when he was suddenly struck by a bag of roofing shingles that had fallen through the skylight opening. The makeshift scaffold/platform broke as a result of the impact causing plaintiff to fall approximately 25 feet to the basement floor.

Lucero testified that immediately prior to the accident he was approximately five feet from plaintiff cutting wood which was to be used on the stairs being erected. Lucero testified that he heard a noise, saw that the plaintiff was no longer standing on the makeshift scaffold/platform, looked down through the open stairwell and saw plaintiff and the broken wooden boards lying on the basement floor. Lucero testified he went down to the basement and saw the package of roofing shingles laying next to the plaintiff's body. Lucero stated he also saw another package of the same roofing shingles laying across the skylight opening and, upon going up on the roof 30 minutes later, observed many of the same packages stacked on the sloped portion of the roof, none of which were secured in any way to the roof. Moreover, Lucero's testimony corroborates that no safety devices were provided to protect from objects falling from the work site on the roof.

Labor Law § 240(1) prescribes safety precautions to protect laborers from unique gravity-related hazards such as falling from an elevated height or being struck by a falling object where the work site is positioned below the level where materials or loads are being hoisted or secured (see, Narducci v Manhasset Bay Assocs., 96 NY2d 259; Misseritti v Mark IV Constr. Co., Inc., 86 NY2d 487; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494; Rocovich v Consolidated Edison Co., 78 NY2d 509). This section of the Labor Law statute imposes a nondelegable duty upon owners and general contractors to provide protective equipment, devices and other adequate and reasonable protection to persons employed in the construction of a building (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494; Cannon v Putnam, 76 NY2d 644).

An owner, general contractor or agent will be held strictly liable, without regard to plaintiff's own negligence, where a violation of this section of the Labor Law statute is the proximate cause of a plaintiff's injuries (Ross v Curtis-Palmer Hydro-Elec. Co., supra; Rocovich v Consolidated Edison Co., supra; Zimmer v

Chemung County Perf. Arts, Inc., 65 NY2d 513). Moreover, an owner or general contractor may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (Ross v Curtis-Palmer Hydro-Elec. Co., supra; Rocovich v Consolidated Edison Co., supra).

Falling from an elevated height poses a different hazard from being hit by a falling object, and involves different construction practices, therefore, "the hazard from one type of activity cannot be 'transferred' to create liability for a different type of accident" (Narducci v Manhasset Bay Assocs., supra, at 268; see, Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 NY2d 914). Here, however, plaintiff was directed to perform a task which exposed him to both an elevation-related hazard and the risk of being hit by a falling object.

The elevation-related risk was created by the need to elevate plaintiff to a height above the three-story stairwell which was open from the basement to the third floor of the house. The makeshift scaffold/platform falls within the category of enumerated safety devices provided to protect plaintiff from the risk of falling through the stairwell. The undisputed fact that this safety device collapsed causing plaintiff to fall through the open stairwell "constitutes a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker's injuries, thereby establishing plaintiff's entitlement to judgment as a matter of law on the issue of liability" (Dos Santos v State of New York, 300 AD2d 434; see, Saeed v NY/Enterprise City Home Hous. Dev. Fund Corp., 303 AD2d 484; La Lima v Epstein, 143 AD2d 886).

Moreover, the other height-related risk was created by plaintiff's having to place the makeshift scaffold/platform under the skylight opening in the roof. The failure to provide any safety device to protect plaintiff from the risk of objects falling through the opening from the work area on the roof to the work area below also leads to liability under Labor Law § 240(1) (see, Orner v Port Auth. of N.Y. & N.J., 293 AD2d 517; Outar v City of New York, 286 AD2d 671; see generally, Felkner v Corning, Inc., 90 NY2d 219; Zimmer v Chemung County Perf. Arts, supra [failure to provide any safety device at all constitutes a violation of § 240(1) as a matter of law]).

As Wildflower Estates admits in its answer that it is the owner of the site, plaintiff has met his burden of establishing a prima facie case against Wildflower Estates under Labor Law § 240(1). However, since Classic Construction is a prime contractor, it cannot be held liable under § 240(1) unless it has

been "delegated the authority to supervise and control that portion of the project on which the injury occurs" (Kenny v George A. Fuller Co., 87 AD2d 183, 187-188, appeal denied 58 NY2d 603; see, Russin v Picciano & Son, Inc., supra).

Here, it is not disputed, indeed, Nocella conceded during his deposition that Classic Construction was responsible for arranging for the delivery and storage of the roofing shingles at issue herein. Additionally, Nocella testified that he subcontracted a portion of the roofing job to second third-party defendant Brothers Home Renovation, Inc. Therefore, Classic Contractors was a statutory agent under § 240(1) and was delegated the authority to supervise and control the area and the activity which precipitated plaintiff's accident and resulting injuries (see, Russin v Picciano & Son, supra; Kenny v George A. Fuller Co., supra). Hence, plaintiff also has met his burden and established a prima facie case against Classic Construction.

In opposition, Wildflower Estates and Classic Construction have failed to submit sufficient evidence to rebut plaintiff's prima facie showing. The argument that a jury could find that the negligence of plaintiff in erecting the makeshift scaffold/platform or his co-workers in failing to place a cover over the skylight is unavailing. The contentions in opposition revolve around speculation that plaintiff may have been negligent. At best, plaintiff may have been guilty of contributory negligence, which is not a defense to a Labor Law § 240(1) claim (see, Kyle v Citv of N.Y., 268 AD2d 192; Angeles v Goldhirsch, 268 AD2d 217; Lawless v Kera, 259 AD2d 596; Iannelli v Olympia & York Batterv Park Co., 190 AD2d 775). In any event, neither Wildflower Estates nor Classic Construction have proffered any evidence that would remotely establish that the accident was caused exclusively by plaintiff's own willful or intentional acts (see, Kyle v City of N.Y., supra; Angeles v Goldhirsch, supra).

Similarly, the inference that plaintiff is unable to demonstrate the precise manner in which his accident and resulting injuries occurred does not alter the results (see, Gordon v Eastern Ry. Supply, 82 NY2d 555; Gambino v Crow Constr. Co., 238 AD2d 190; see generally, Derdiarian v Felix Contr. Corp., 51 NY2d 308). In any event, the circumstantial evidence presented clearly indicates that plaintiff was hit by shingles which fell through the skylight opening in the roof and that no safety devices were provided to prevent this accident (see, Cosgriff v Manshul Constr. Corp., 239 AD2d 312; see also, Fitzgibbons v Olympia & York Batterv Park Co., 182 AD2d 1069). Contrary to the argument in opposition, the fact that the shingles were not being hoisted is of no moment as liability has been found where unsecured materials fell from a roof

(see, Orner v Port Auth. of N.Y. & N.J., 293 AD2d 517; Outar v Citv of N.Y., 286 AD2d 671).

Accordingly, plaintiff is entitled to summary judgment on the issue of liability against Wildflower Estates and Classic Construction on his Labor Law § 240(1) cause of action.

The court will now address Wildflower's indemnification claims. "Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive and, thus, its liability is purely vicarious" (Charles v Eisenberg, 250 AD2d 801, 802; see also, Kemp v Lakelands Precast, Inc., 55 NY2d 1032). As a matter of law, Wildflower is such a party, as the deposition testimony submitted demonstrates its lack of supervision, direction or control over the plaintiff's work (see, Kemp v Lakelands Precast, Inc., supra; Livecchi v Eastman Kodak Co., 258 AD2d 916).

The obligation of common-law indemnification runs against the party, who by virtue of its direction and supervision over the injury-producing work, was actively at fault in bringing about the injury (see, Felker v Corning, Inc., 90 NY2d 219; Chapel v Mitchell, 84 NY2d 345; Glielmi v Toys "R" Us, Inc., 62 NY2d 664; Kennelty v Darlind Constr., Inc., 260 AD2d 443). As a matter of law, Classic Construction is that party as its contract with Wildflower specifically provides that Classic Construction "shall be responsible for the acts, omissions, work, materials and equipment of [Classic Constructionl's employees, subcontractors and suppliers and their agents and employees and any other persons directly or indirectly employed by any of them" (see, Felker v Corning, Inc., supra; see also, Colyer v K Mart Corp., 273 AD2d 809). Accordingly, Wildflower is entitled to summary judgment on its common-law indemnification claim against Classic Construction.

To properly state a claim for indemnification or contribution against City Wide, plaintiff's employer, it must be shown by competent medical evidence that plaintiff suffered a "grave injury" as defined by Workers' Compensation Law § 11 (see, Dunn v Smithtown Bancorp, 286 AD2d 701, lv denied 97 NY2d 610; McCoy v Queens Hydraulic Co., Inc., 286 AD2d 425; Ibarra v Equipment Control, Inc., 268 AD2d 13). Here, although it *is* alleged in the bill of particulars that plaintiff's injuries include complete and permanent paralysis to his lower extremities, Wildflower has failed to submit any medical evidence, and, thus, has failed to meet its burden of demonstrating a "grave injury" (see, Ibarra v Equipment Control, Inc., supra). Therefore, Wildflower is not entitled to

summary judgment on its common-law indemnification claim against City Wide.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Dzrewinski v Atlantic Scaffold & Ladder Co., Inc., 70 NY2d 774, 777, quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153). Wildflower's agreement with each of its prime contractors contains identical indemnification clauses. City Wide and Classic Construction explicitly agreed to indemnify Wildflower "from and against any and all claims, damages, losses, liability, suits, judgment, actions and all expenses (including attorney's fees and disbursements), arising out of any negligent or wrongful act, error of omission...in connection with the performance of the work." Contrary to the assertions in opposition, the general authority *of* Wildflower to coordinate the work of its various contractors, and to inspect the work and enforce safety standards is insufficient to raise an issue of fact as to whether Wildflower was actively negligent (see, Werner v East Meadow Union Free Sch. Dist., 245 AD2d 367; Richardson v Materest, 206 AD2d 354; see also, Buccini v 1568 Broadway Assocs., 250 AD2d 466; Newell v Almeter-Barry Constr. Mgt., Inc., 245 AD2d 108). Accordingly, Wildflower has established its entitlement to summary judgment on its contractual indemnification claims against Classic Construction and City Wide.

To summarize, the motion by plaintiff for partial summary judgment on his Labor Law § 240(1) claim is granted against Wildflower Estates Developers, Inc. and Classic Construction. The branch of the motion by Wildflower Estates Developers, Inc. for summary judgment on its cross claim against Classic Construction for contractual and common-law indemnification is granted. The branch of the motion by Wildflower Developers, Inc. for summary judgment on its third-party claim against City Wide Building Corp. for contractual indemnification is granted; summary judgment is denied as to the common-law indemnification claim.

Dated: 10/9/03

J.S.C.