

Gonzalez v 310 West 38" LLC
2003 NY Slip Op 30105(U)
October 7, 2003
Supreme Court, Sullivan County
Docket Number: 0107109/2001
Judge: Leland G. DeGrasse
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART25

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ALBERTO GONZALEZ and MARIBEL GONZALEZ, :

Plaintiffs,

Index No.: 107109/01

-against-

Cal. No. 47 of 5/27/03

310 WEST 38" LLC and FELISE GARAGE CORP.

Defendants.

----- X

DeGRASSE, J.:

SCANNED
OCT 16 2003

In this personal injury action arising from a workplace accident, defendant Felise Garage Corp. ("Felise") moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' claims for common-law negligence and violations of Labor Law §§ 200,240 (1) and § 241 (6). Defendant 310 West 38* LLC ("West") cross-moves for the same relief and for summary judgment dismissing the cross claim by Felise for common-law indemnification and/or contribution. West also moves for summary judgment on its cross claim for contractual indemnification against Felise.

FACTS

Plaintiff Alberto Gonzalez ("Gonzalez") was employed as a painter by Quik Park Garage Corp. ("Quik Park"), located at 310 West 38" Street in Manhattan. On July 26,2000, Gonzalez was injured when he fell from a ladder while painting the subject garage. At the time of the accident the premises was owned by Leon Weinreb, Sabrina Weinreb, Leon Scharf and Irene Scharf (collectively "Overlandlord"), which is not a party to this action. The Overlandlord leased the premises to West

who in turn leased the building to Felise to be occupied as a parking garage/car leasing business.

The complaint alleges that Gonzalez sustained severe and serious injuries when he fell from a ladder. Gonzalez testified at his deposition that the accident occurred when he was using a spray gun to paint the top part of the entrance ramp wall of the garage which measured approximately 20 feet in height. While standing near the top of a 12 to 14 foot A-frame aluminum ladder that was positioned on an incline approximately two and a half feet away from the wall, Gonzalez felt the ladder begin to twist toward the left. Immediately thereafter, Gonzalez and the ladder fell to the floor. Although a co-worker held the ladder in place when Gonzalez climbed it, he does not know if the co-worker was holding the ladder just before his fall. After the accident, Gonzalez received workers' compensation benefits from his employer, Quik Park. Subsequently, Gonzalez and his wife derivatively commenced the underlying action against defendants alleging common law negligence and violations of Labor Law §§ 200, 240 and § 241 (6) based upon defendants' failure to furnish proper safe equipment. Felise now moves for summary judgment dismissing plaintiffs' claims. West cross-moves for the same relief and for summary judgment dismissing the cross claim by Felise for common-law indemnification and/or contribution. West also cross-moves for summary judgment seeking contractual indemnification from Felise.

DISCUSSION

Summary Judgment Standard

The purpose of a summary judgment motion is "[i]ssue-finding, not issue determination" (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521). Thus, summary judgment is to be granted only when there are no genuine issues of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320). In

determining whether summary judgment is appropriate, the “Court should draw all reasonable inferences in favor of the nonmoving party” (see *Assaf v Ropog Cab Corp.*, 153 AD2d at 521).

Felise’s Motion for **Summary** Judgment

A. *Workers’ Compensation Defense*

Felise contends that this action is barred insofar as asserted against it by the exclusivity provisions of Workers’ Compensation Law §§ 11 and 29 (6) because Gonzalez’s employer, Quik Park, was its alter ego at the time of his accident. In support of its motion Felise submits the affidavit of Rafael Llopiz, Quik Park and Felise’s Vice President, who asserts that although the two companies are separate entities, they have the same owner (Jacob Sopher) and corporate address. In addition, both companies are covered under the same insurance policy. Llopiz further asserts that “Quik Park Garage is the trade name for many different garages in the City of New York which are under its control. Felise Garage Corp. is one of those garages.” In further support of its motion Felise submits two documents from the *NY S* Department of State Division of Corporation showing that Jacob I. Sopher is the Chief Executive Officer of both corporations and their principal place of business is 425 East 61st Street, New York, New York. Felise also submits a Workers Compensation and Employers’ Liability policy, issued to Quik Park on December 16, 1999, showing that Felise is one of the workplaces covered under the policy. Felise also submits a list of Quik Park’s “named insureds”, dated October 21, 1999, in which Felise is designated as a limited liability company. Felise claims that this list is attached to the general liability policy issued to Quik Park, and establishes that Felise is an insured under that policy. Plaintiffs argue that summary judgment is inappropriate where, as here, Felise has exclusive knowledge of the facts as to whether Quik Park was its alter ego.

“If a corporation is the alter ego of or the joint venturer with the injured plaintiffs employer, and/or the corporate veil between the employer and the defendant should be pierced, then Workers’ Compensation is the plaintiffs’ exclusive remedy against the corporation” (Romano v **Curry Auto Group**, Inc., 301 AD2d 509,510; see Workers’ Compensation Law §§ 11, 29 [6]). For a subsidiary corporation to be considered the alter ego of the parent corporation, “there must be direct intervention by the parent in the management of the subsidiary to such an extent that ‘the subsidiary’s paraphernalia of incorporation, directors and officers’ are completely ignored” (*Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152,163, reargdenied 52 NY2d 829, quoting *Lowendahl v Baltimore & Ohio R. R. Co.*, 247 App Div 144,155, *affd* 272 **NY** 360, *rearg denied* 273 **NY** 584). “The defendant has the burden of establishing the defense of workers’ compensation by a preponderance of the credible evidence” (Williams v Forbes, 175 AD2d 125, 126).

Contrary to Felise’s contention, it is not dispositive that the two corporations have the same officers and directors (see *Wernig v Parents & Bros. Two Inc.*, 195 AD2d 944). Although Felise presents some evidence that the two companies were related entities, this evidence fails to demonstrate Quik Park’s control, if any, over the day-to-day operations of Felise (see *Kaplan v Bayley Seton Hosp.*, 201 AD2d 461; *Smith v R. C. Diocese of Syracuse*, 252 AD2d 805; *Dennihy v Episcopal Health Sews.*, 283 AD2d 542; cf. *Pappas v Greek Archdiocese*, 178 AD2d 104). Under the circumstances, there are triable issues of fact as to whether Gonzalez’s employer and Felise were alter egos and therefore, whether plaintiffs’ action is barred by the exclusivity of the Workers’ Compensation Law (see *Cruceta v Funnel Equities*, 286 AD2d 747). Accordingly, this portion of Felise’s motion is denied.

B. Labor Law §240 (1)

Felise seeks dismissal of plaintiffs' Labor Law §240 (1) claim as asserted against it based on the ground that at the time of the accident, Gonzalez was engaged in routine maintenance of the building which is not the type of work envisioned by the statute. Labor Law § 240 (1) provides in pertinent part:

All contractors and owners and their agents * * * who contract for but do not direct or control the work, in the * * * painting * * * of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The plain language of this statute affords safeguards to those engaged in the "painting * * *" of a building." Moreover, "there is no requirement or condition that [painting] be incidental to the other listed activities, such as construction, repair or alteration activity, to be covered" (*Chapman v Intl. Bus. Machs.*, 253 AD2d 123,127; *see also Bustamante v Chase Manhattan Bank*, 241 AD2d 327). At his deposition Felise's Supervisor and Claims Manager, Lincoln Llopiz, testified that he hired Gonzalez and two other workers for the sole purpose of painting the interior and exterior of the three level garage. In the instant case, Gonzalez was standing near the top of a 12 to 14 foot ladder spray painting a wall that measured approximately 20 feet in height when the accident happened. Clearly, the work Gonzalez was engaged in at the time of his injury was not routine maintenance and therefore, falls within the term "painting * * *" of a building" encompassed by Labor Law § 240 (1) (*see Rivers v Sauter*, 26 NY2d 260 [painter hired to paint the outside of a house is engaged in an activity protected under Labor Law § 240]).

In opposition to the motion plaintiffs argue that inasmuch as Felise was the sole entity occupying the garage at the time of Gonzalez's accident, a question of fact exists as to whether Felise was an "owner" within the meaning of the Labor Law and, therefore, can be held liable for plaintiffs injuries. The duty to protect workers under Labor Law § 240 (1) is non-delegable and an owner (or contractor) will be held liable for a violation of this statute even in a situation in which the work is performed in the absence of the owner's supervision or control over the activity (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 513; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500). The term "owner" has been held to include, *inter alia*, those entities who although not fee owners, either had some interest in or exercised some control over the property (*see e.g. Lynch v City of New York*, 209 AD2d 590; *DeFreece v Penny Bag*, 137 AD2d 744; *Vigliotti v Exec. Land Corp.*, 186 AD2d 646). In this regard, Felise, as the sublessee of the premises, "is liable under the statute only where it can be shown that it was in control of the work site" (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99). One test of such control may be proved by contractual or statutory provisions granting such right (*see Bart v Universal Pictures*, 277 AD2d 4). It is the right to control safety practices that determines liability, not the actual exercise or non-exercise of control (*HoJohn v Beltrone Constr. Co.*, 255 AD2d 658).

The sublease between West and Felise, dated October 1, 1992, provides in pertinent part:

Article 111. The leased premises may be used and occupied as a parking garage and as a garage for rent-a-car and car leasing and for any other legal use.

Article IV. Tenant [Felise], at its own cost and expense, shall take good care of the leased premises and * * * shall make all necessary repairs thereto, structural and non-structural, interior and exterior, ordinary as well as extraordinary * * *.

Article XX. Landlord [West] shall have the right to enter the leased premises at all reasonable times during business hours upon reasonable notice to Tenant [Felise] * * * for the purpose of (a) inspecting the same, and (b) making any repairs to the leased premises and performing any work therein that may be necessary by reason of Tenant's [Felise's] default under the terms of this lease continuing beyond the applicable periods of grace, and

* * *

Nothing in this lease shall imply any duty upon the part of Landlord [West] to do any such work which, under any of the provisions of this lease, Tenant [Felise] may be required to perform, and the performance thereof by Landlord [west] shall not constitute a waiver of Tenant's [Felise's] default.

Here, the sublease provided for exclusive possession and control of the property by Felise. The sublease also provided that repairs would be made by Felise, at no cost to West. Even though West retained the right to inspect the property upon notice, and to make repairs at Felise's expense in the event that Felise failed to fulfill its obligations, a clear reading of the above provisions establishes that West merely retained a general right to reenter the premises (*e.g. Young v Moran Properties, Inc.*, 259 AD2d 1037, 1038 [question of fact existed as to whether owner was liable for common-law negligence where owner leased premises but retained responsibility for structural repairs]). Thus, under the terms of the sublease, Felise had full control over the operation and maintenance of the garage. It is not relevant whether Felise actually exercised its authority, what is significant here is that the sublease vested Felise with the authority to insist that proper safety practices were followed on the premises (*see Bart v Universal Pictures.*, 277 AD2d at 5). Accordingly, Felise, as the sublessee and entity which assumed the exclusive right to operate a parking garage/car leasing business on the premises, pursuant to the sublease, is considered an "owner" for liability purposes under Labor Law § 240 (1) (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560; *see also Frierson*

v Concourse Plaza Assocs., 189 AD2d 609).

In order to prevail under § 240 (1) a plaintiff must show that the statute was violated and that this violation was the proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452; *Bahrman v Holtsville Fire Dist.*, 270 AD2d 438). It is well settled that where a safety device has been furnished, the question of whether it provided proper protection is ordinarily an issue of fact (*see Blair v Rosen-Michaels, Inc.*, 146 AD2d 863). However, ““where the device collapses, slips or otherwise fails to perform its function of supporting the workers and their materials,”” a prima facie case is established by the plaintiff (*Longshore v Paul Davis Sys. of the Capital Dist.*, 304 AD2d 964,966, quoting *Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853, 854). Here, the uncontroverted evidence establishes that Gonzalez was furnished with a 12 to 14 foot A-frame aluminum ladder in order to spray paint the top part of a garage wall measuring approximately 20 feet in height. The record also establishes that the ladder was positioned on an incline approximately two and a half feet away from the wall. While Gonzalez was standing on the ladder, it twisted to the left causing him and the ladder to fall. Clearly, the safety device provided to Gonzalez while performing his elevated task did not provide him with the “proper protection” (*see* Labor Law § 240 [1]; *Fernandez v MHP Land Assocs.*, 188 AD2d 417; *Place v Grand Union Co.*, 184 AD2d 817; *see also Urrea v Sedgwick Ave. Assocs.*, 191 AD2d 319; *Barnaby v A. & C. Props.*, 188 AD2d 958). Accordingly, the branch of Felise’s motion for summary judgment dismissing plaintiffs’ Labor Law § 240 (1) claim is denied.

C. Labor Law §241 (6)

In reply Felise asserts that summary judgment should be granted dismissing plaintiffs' Labor Law § 241 (6) claim as asserted against it because plaintiffs neglected to set forth the particular code violations either in their complaint or bill of particulars. Felise further contends that plaintiffs have failed to prove that the subject ladder actually violated provisions of the Industrial Code. The court notes that while plaintiffs alleged violations of 12NYCRR 23-1.7, 23-1.16, 23-1.17 and 23-1.21 in their complaint, and in their bill of particulars plaintiffs alleged violations of 12NYCRR 23-1.5 and 23-1.21, they now limit their claims to violations of 12NYCRR 23-1.21 (b) (1), 23-1.21 (b) (3) (iv), (23-1.21 (b) (4) (ii), 23-1.21 (b) (4) (iv) and 23-1.21 (e) (3).

While a plaintiff asserting a cause of action under Labor Law § 241 (6) "must allege that defendant violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (*Adams v Glass Fab*, 212 AD2d 972, 973), a failure to identify ~~the~~ code provision in the complaint or bill of particulars is not fatal to such a claim (*see Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231; *White v Farash Corp.*, 224 AD2d 978). Here, although plaintiffs did not allege violations of specific provisions of the Industrial Code until Felise moved for summary judgment, plaintiffs did state in their complaint and bill of particulars that defendants violated § 23-1.21, which requires that certain safety measures must be taken with respect to "ladders and ladderways." Plaintiffs further stated that defendants' negligence consisted of "failing to secure the ladder against slippage," and "failing to provide appropriate safety devices and fall protection equipment." Therefore, plaintiffs' belated identification of the specific codes allegedly violated involves no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendants (*see*

Snowden v New York City Tr. Auth., 248 AD2d 235).

Turning to plaintiffs' Labor Law § 241 (6) claim, the statute provides in pertinent part:

All Contractors and owners and their agents *** when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements.

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

Labor Law § 241 (6) places a nondelegable duty on owners and contractors, without regard to direction and control, to keep worksites safe for those employed at such places (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 503; *DeSilva v Jantron Indus.*, 155 AD2d 510). Whether a defendant is an owner for purposes of § 241 (6) is determined by the same standard as that applied under Labor Law § 240 (1) (*see Gordon v Eastern Ry. Supply*, 82 NY2d at 559-560; *Celestine v City of New York*, 86 AD2d 592, *affd* 59 NY2d 938). Accordingly, pursuant to the sublease between Felise and West, Felise is considered an "owner" for liability purposes under Labor Law § 241 (6).

The Industrial Commissioner has enacted 12NYCRR 23-1.4 [b][13] defining construction work as "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (*see Joblon v Solow*, 91 NY2d 457). Thus, the activity in which Gonzalez was engaged when he was injured falls within the scope of Labor Law § 241 (6) (see 12 NYCRR 23-1.4[b][13]; *Blair v Cristani*, 296 AD2d 471; *Cornacchione v Clark Concrete Co.*, 278 AD2d 800). As stated, in order to make out a claim pursuant to § 241 (6) a plaintiff must allege that defendant violated a code regulation that embodies

“concrete specifications” as opposed to “general safety standards” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Biszick v Ninnie Constr. Corp.*, 209 AD2d 661). Allegations of a violation of Industrial Code regulations that are inapplicable to the facts of the case will not suffice (*see McCole v City of New York*, 221 AD2d 605).

The court finds that the Industrial Code sections relied upon by plaintiff, namely, 12NYCRR 23-1.21 (b) (1) (ladder must be capable of sustaining at least four times the maximum load intended), 23-1.21 (b) (3) (iv) (ladder may not be used “[i]f it has any flaw or defect of material that may cause ladder failure”), 23-1.21 (b) (4) (ii) (ladder footings must be firm) and 23-1.21 (e) (3) (“[w]hen work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means”) state specific standards that appear to apply to the facts of this case since plaintiff asserts that the ladder twisted and caused him to fall (*see Borowicz v Intl. Paper Co.*, 245 AD2d 682). However, 12NYCRR 23-1.21 (b) (4) (iv) (requirements relating to securing leaning ladders) is not applicable to the facts of this case because Gonzalez’s deposition testimony establishes that at the time of the accident he was standing on an A-frame ladder that was approximately two and a half feet from the wall. Thus, it is clear that Gonzalez was not standing on a leaning ladder at the time of his accident.

Accordingly, the branch of Felise’s motion for summary judgment dismissing plaintiffs’ Labor Law § 241 (6) claim is granted with respect to 12NYCRR 23-1.21 (b) (4) (iv) and denied with respect to 12NYCRR 23-1.21 (b) (1), 23-1.21 (b) (3) (iv), 23-1.21 (b) (4) (ii) and 23-1.21 (e) (3).

D. Labor Law §200/Common -Law Negligence

The branch of Felise's motion for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 causes of action as asserted against it is granted. Labor Law § 200 codifies the common law duty imposed on an owner (or contractor) to provide a safe workplace (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876). **An** implicit precondition to this duty is that the party charged with that responsibility "exercised supervision and control over the work performed at the site or had actual or constructive notice of the [dangerous] condition" (*Giambalvo v Chemical Bank*, 260 AD2d 432,433; *Haghighi v Bailer*, 240 AD2d 368, 369). In the present case there is no evidentiary showing that Felise exercised supervision and control over Gonzalez's work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877-878; *Lombardi v Stout*, 80 NY2d 290, 295), or had actual or constructive notice of any defect in the ladder from which Gonzalez fell (see *Schuler v Kings Plaza Shopping Ctr. and Marina, Inc.*, 294 AD2d 556, 558). At his deposition Gonzalez testified that he reported to Quik Park's supervisor and claims manager, Lincoln Llopiz. Further, Llopiz testified at his deposition that he decided that the garage needed to be painted and hired Gonzalez and two other workers to perform the job. Llopiz also testified that Quik Park supplied the equipment (paint, brushes, rollers, spray machines and ladders) used to paint the garage. Accordingly, the branch of Felise's motion dismissing plaintiffs' common-law negligence and Labor Law § 200 claims is granted.

West's Cross-Motion for Summary Judgment

A. *Labor Law §§ 240 (1) and § 241 (6)*

The branch of West's cross motion for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims as asserted against it is granted. It is well settled that an owner will be held liable under Labor Law §§ 240 (1) and 241 (6) even when the owner had no control over the premises and did not benefit from the work performed (*see Gordon v Eastern Ry. Supply*, 82 NY2d at 559-560; *Celestine v City of New York*, 86 AD2d at 593). However, as stated, West, as lessee/sublessor of the premises, is liable under the statute only where it can be shown that it "had the right or authority to control the work site" (*Bart v Universal Pictures*, 277 AD2d at 5-6). Where as here, the premises has been leased and subleased and the sublessee assumes the exclusive right to control and maintain the premises, the out-of-possession lessee/sublessor will not be subject to liability under the Labor Law (*see Imling v Port Auth. of New York and New Jersey*, 289 AD2d 104). Accordingly, West, as lessee/sublessor, is not subject to liability under the Labor Law since there is no evidence tending to show that it had the right or authority to insist that proper safety measures were followed at the work site.

B. *Labor Law §200/Common-Law Negligence*

In opposition to the motion plaintiffs consent to withdraw their Labor Law § 200 and common law negligence claims against West. However, Felise asserts in its reply that this court should deny West's cross motion for summary judgment dismissing plaintiffs' Labor Law § 200 claim. "Ordinarily, a suitor has a right to discontinue any action or proceeding commenced by **him**

* * * A party should no more be compelled to continue a litigation than to commence one, except

when substantial rights of other parties have accrued, and injustice will be done to them by permitting the discontinuance” (*Park East Co. v Frederick Cerrato*, 76 Misc2d 1066, 1069). Therefore, in the face of the objection by Felise, the court will reach the adequacy of this claim.

As stated, an implicit precondition to the common law duty imposed on an owner to provide a safe workplace is that the party charged with that responsibility “exercised supervision and control over the work performed or had actual or constructive notice of the [dangerous] condition” (*Giambalvo v Chemical Bank*, 260 AD2d at 433,434; *Haghighi v Bailer*, 240 AD2d 368, 369). Here, there is no evidentiary showing that West exercised supervisory control over Gonzalez’s work, or had actual or constructive notice of any defect in the ladder from which Gonzalez fell (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877-878; *Schuler v Kings Plaza Shopping Ctr. and Marina, Inc.*, 294 AD2d at 558). Accordingly, the branch of West’s cross motion for summary judgment dismissing plaintiffs’ Labor Law § 200 and common law negligence claims is granted.

C. Common-Law Indemnification and/or Contribution

The branch of West’s cross motion seeking summary judgment dismissing Felise’s counterclaims for common-law indemnification and/or contribution is granted. Felise asserts in its counterclaim that if it is found to be at fault then it is entitled to common-law indemnification and/or contribution from West. The obligation of common-law indemnification runs against those parties who, by virtue of their direction and supervision over the injury-producing work, were actively at fault in bringing about the injury (*see Colyer v K Mart Corp.*, 273 AD2d 809; *Felker v Corning Inc.*, 90 NY2d 219). As a matter of law, West is not such a party, given the uncontroverted

evidence that it relinquished all of its rights and responsibilities regarding the use of the premises to Felise who had the contractual obligation to control safety practices at the work site (*see e.g. Felker v Corning Inc.*, 90 NY2d at 226; *Golda v Hutchinson Enters.*, 247 AD2d 863). Under the circumstances, Felise is not entitled to common-law indemnification from West.

Nor is Felise entitled to contribution. A contribution claim may be interposed when two or more parties are alleged to be liable for damages for the same injury (*see CPLR § 1401*). "[C]ontribution is available 'whether or not the culpable parties are allegedly liable for the injury under the same or different theories' " (*Raquet v Braun*, 90 NY2d 177, 183, quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599,603). "The critical requirement for apportionment under * * * CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*id.*, at 603). Here, the record fails to show that West participated in the supervision or control of Gonzalez's work at the job site, or that it was in any way negligent in causing his injuries. Accordingly, the branch of Felise's motion seeking summary judgment on its common-law indemnification and/or contribution claim against West is denied.

D. Contractual Indemnification

West moves for summary judgment on its cross claim for contractual indemnification against Felise based on the indemnity clause in the sublease agreement. "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' " (*Drzewinski v Atl. Scaffold & Ladder Co.*, 70 NY2d 774, 777, quoting *Margolin v New York Life*

Ins. Co., 32 NY2d 149, 153). Pursuant to Article XVII of the sublease between West and Felise, dated October 1, 1992, Felise agreed to indemnify West as follows:

Tenant [Felise] shall indemnify and save harmless Landlord [West] against and from all costs, expenses, liabilities, losses, damages, injunctions, suits, actions, fines, penalties, claims and demands of every kind of nature, including reasonable counsel fees, by or on behalf of any person; party or governmental authority whatsoever arising out of (a) any failure by Tenant [Felise] to perform any of the agreements, terms, covenants or conditions of this lease on Tenant's [Felise's] part to be performed (b) any accident, injury or damage which shall happen in or about the demised premises or appurtenances or on or under the streets, sidewalks, curbs or vaults in front of or adjacent thereto, however occurring and any matter of thing growing out of the condition, occupation, maintenance, alterations, repair, use or operation of the demised premises, or any part thereof, and/or of the streets, sidewalks, curbs or vaults adjacent thereto during the terms (c) failure to comply with any laws, ordinances, requirements, orders, directions, rules or regulations of any federal, state, county or city governmental authority ***.

The indemnification provision at issue here clearly entitles West to indemnification for the costs, including reasonable counsel fees, incurred in the defense of plaintiffs' action, but not for costs in the prosecution of its cross claim against Felise (*see Perchinsky v State of New York*, 232 AD2d 34, *lv dismissed in part and denied in part* 91 NY2d 830; *DiPerna v Am. Broadcasting Cos.*, 200 AD2d 267; *Lavorato v Bethlehem Steel Corp.*, 91 AD2d 1184). "A party is not entitled to contractual indemnification for those attorney's fees and costs incurred in establishing its right to indemnification" (*Klock v Grosodonia*, 251 AD2d 1050; *Perchinsky v State of New York*, 232 AD2d at 39; *see Lavorato v Bethlehem Steel Corp.*, 91 AD2d at 1185).

CONCLUSION

The motion for summary judgment by Felise Garage Corp. is granted to the extent that: (1) plaintiffs' claims under Labor Law § 200 and common law negligence are dismissed, and (2) plaintiffs' claim under Labor Law § 241 (6) is dismissed with respect to 12NYCRR 23-1.21 (b) (4) (iv). In all other respects, Felise's motion is denied.

West's cross motion for summary judgment is granted to the extent that all claims and cross claims against 310 West 38" LLC are dismissed. The Clerk shall enter judgment accordingly. The action is severed and continued with respect to Felise. The branch of the cross motion by which West seeks contractual indemnification against Felise is granted. **An** assessment of West's damages for costs including counsel fees incurred in the defense of plaintiffs' action shall be conducted at trial.

This constitutes the decision and order of the court.

OCT 07 2003.

DATED:



J.S.C.