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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN A. MADDEN PART 11

Index Number : 108852/2003

URENA, JOSE

VS

IBEX CONSTRUCTION

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/22/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...owing papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum, Decision+Order.

FILED

JUN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 24, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

JOSE URENA,

Plaintiff,

-against-

IBEX CONSTRUCTION, LLC, THE FEMALE ACADEMY OF SACRED HEART, and CONSTRUCTION SERVICES ASSOCIATES, INC.,

Defendants.

Index No. 108852/03

THE FEMALE ACADEMY OF SACRED HEART,

Third-Party Plaintiff,

-against-

CONSTRUCTION SERVICES ASSOCIATES, INC.,

Third-Party Defendant.

Third-party Index No. 590890/03

IBEX CONSTRUCTION, LLC, and THE FEMALE ACADEMY OF SACRED HEART,

Second Third-Party Plaintiff,

-against-

TYRONE INTERIOR CONTRACTING, INC.,

Second Third-Party Defendant.

Second Third-party Index No. 591304/03

Joan A. Madden, J.:

Defendants/second-third party plaintiffs Ibex Construction, LLC ("Ibex") and The Female Academy of Sacred Heart ("Sacred Heart") move for an order (i) granting summary judgment dismissing the common law negligence and Labor Law § 200 claims

against them, (ii) granting summary judgment in their favor on their claims against second-third party defendant Tyrone Interior Contracting, Inc. ("Tyrone") for contractual indemnification, and (iii) dismissing Tyrone's cross-claims against them (motion seq. no. 002). Plaintiff opposes the motion to the extent it seeks dismissal of the common law negligence and Labor Law § 200 claims, and Tyrone opposes the motion in its entirety.

Plaintiff moves for summary judgment as to liability on its Labor Law § 240(1)claim, and Ibex and Sacred Heart oppose the motion (motion seq. 003).[1]

BACKGROUND

Plaintiff was injured on June 18, 2001, at 1:40 pm, when he fell from a scaffold while working on a renovation project in the lobby of a school located at 1 East 91 Street, in Manhattan. Sacred Heart owns the school and retained Ibex as the general contractor for the project. Ibex hired Tyrone as the subcontractor performing demolition work on the project, and plaintiff was employed by Tyrone. Tyrone's foreman at the site was Jose Rodriguez ("Rodriguez").

According to plaintiff, Rodriguez was at the work site on the date of the accident, and instructed him as to the work to be performed on that day, and that he was not supervised by any one

[1]Motion seq. nos. 002 and 003 are consolidated for disposition.

else for the two weeks that he worked on the project. Plaintiff testified that after lunch, Rodriguez took him to the work area in the lobby and instructed him to tear down the cement ceiling with a crowbar, which required the use of a scaffold which plaintiff described as approximately seven feet high, made of metal, with a platform made from a plank of wood.

According to plaintiff, he did not have any safety equipment having been given only a crowbar. Plaintiff testified he had been working for about 10 minutes from a seated position on the scaffold tearing down the ceiling when the scaffold "went down" (Plaintiff's Dep. Testimony, at 35). Plaintiff further testified that he did not know "if it was the wooden plank that caved in or the scaffold fell. I just know I dropped...." Id. Plaintiff subsequently testified that "the scaffold went down... it just loosened and went down" (id at 91), and that he "fell through the middle of the scaffold... [and]... went down with everything" (id at 95).

Plaintiff, who was alone at the time of the accident, testified that he was unconscious afterwards, but when he came to he went to look for Rodriguez and reported the accident to him.

An accident report was filled out for plaintiff by an English speaking relative. The report indicates the time and date of the accident and contains the following description of

the accident:

> While I was [obeying] orders that my supervisor gave me, I felt [sic] down 5 ft. I was trying to thrown [sic] down the ceiling and a piece from the scaffo[ld] (where I was standing) came out and when I notice I felt [sic] into my arm on a pipe. The result was a serious injury to my left arm.

There were no representatives of either Sacred Heart or Ibex at the site at the time of the accident. At her deposition, Sacred Heart's employee, Kathleen Lydic, testified that in June 2001, she was responsible for coordinating construction at the school, and that she met with Ibex representatives at weekly work meetings where they discussed time restraints and the budget. She further testified that she did not know if Ibex employed subcontractors, that she did not attend any safety meetings, that no one reported the accident to her and she was unaware of any one at the school who had received an accident report[2].

Scott Yarmus ("Yarmus") testified on behalf of Ibex, where he has been employed as an Executive Vice President since 1999. At the time of the accident, Yarmus was in charge of construction operations and went to job sites. Yarmus testified that Ibex, as the general contractor on the project, hired various

[2]Ms. Lydic also testified that defendant/third-party defendant Construction Services Associates, Inc. was hired by Sacred Heart as its representative for the construction. The claims against Construction Services Associates, Inc. have apparently been dismissed.

subcontractors to perform work at the site, including Tyrone which was hired to do demolition and removal work. According to Yamus, Tyrone's work required the use of scaffolds which Tyrone provided themselves and that Ibex did not use any of their own scaffolds for the purposes of the project.

Yarmus testified that Ibex had a superintendent who walked through the job site every day to look for safety problems, that the superintendent would discuss with the subcontractor's foremen safety problems discovered during these daily walks through the site, and that the superintendent was required to report any "life threatening issues" such as "fires and open windows...[and] use of safety lines, depending on the heights" (Yarmus Deposition, at 20). Yamus also testified that the superintendent filled out daily reports.

Tyrone, which is no longer in business, did not produce a witness for deposition.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to

establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Labor Law § 240(1) claim

Section 240(1) of the Labor Law imposes absolute liability on building owners, general contractors, and their agents for injuries to workers engaged in "the erection, demolition, repairing...of a building or structure," which result from falls from ladders, scaffolding, or other similar elevation devices that do not provide "proper protection" against such falls. Melo v. Consolidated Edison of New York, Inc., 92 NY2d 909 (1998).

To establish liability, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries sustained. Bland v. Manocherian, 66 NY2d 452 (1985). Proximate cause is demonstrated based on a showing that a "defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury.'" Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993)(citation omitted). It is not necessary for plaintiff to demonstrate that the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable. Rodriquez v. Forest City Jay Street Associates, 234 AD2d 68 (1st Dept. 1996), citing Public Administrator of Bronx County v. Trump Village Construction Corp., 177 AD2d 258 (1st Dept 1991). Comparative negligence is not a defense. See Blake v.

Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 289-290 (2003).

Under these principles, plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim since the uncontroverted record demonstrates that his injuries were "proximately caused, in whole or in part, by a failure to provide him with a scaffold 'so constructed...as to give proper protection' against elevation-related hazards." Mendez v. Union Theological Seminary in the City of New York, 8 AD3d 32, 33 (1st Dept 2004), quoting, Labor Law § 240(1). Moreover, contrary to defendants' position, plaintiff has adequately shown that the scaffold was defective, notwithstanding his failure to identify the exact cause of its collapse and his resultant injuries. See Vergara v. SS 133 West 21, LLC, 21 AD3d 279, 280 (1st Dept 2005)(finding that plaintiff was entitled to summary judgment on his § 240(1) claim, and that "a lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create material issue of fact as to proximate cause"); Thompson v. St. Charles Condominiums, 303 AD2d 152, 154 (1st Dept), lv dismissed, 100 NY2d 556 (2003)("where a safety device is provided and collapses, a prima facie cause of liability under Labor Law § 240(1) is established")

In addition, although plaintiff was the sole witness to the accident, this fact does not prevent a grant of summary judgment

in his favor as the record raises no triable issues of fact as to plaintiff's credibility or as to whether he was injured as a result of the fall from a scaffold. See Klein v. City of New York, 89 NY2d 833, 835 (1996)(where plaintiff was the sole witness to accident and the record raised no issue of fact as to plaintiff's prima facie case or credibility summary judgment was appropriately granted on plaintiff's section 240(1) claim); Rodriquez v. New York City Housing Authority, 194 AD2d 460, 462 (1st Dept 1993)(plaintiff entitled to summary judgment on his Labor Law § 240(1) claim where he was the sole witness to accident in the absence of any conflicting evidence regarding the plaintiff's testimony that he fell from an unsecured ladder); Niles v. Shue Roofing Co., Inc., 219 AD2d 785 (3d Dept 1995)("fact that accident is unwitnessed does not preclude summary judgment" on section 240(1) claim when "plaintiff's account of the accident was never challenged").

Furthermore, the cases relied on by Ibex and Sacred Heart are irrelevant, as the equipment at issue in those cases was not shown to be defective. See e.g., Weber v. 1111 Park Ave. Realty Corp., 253 AD2d 376 (1st Dept 1998)(injury resulted from fall from ladder not alleged to be defective in any way); Karapati v. K.J. Rocchio, Inc., 12 AD3d 413 (2d Dept 2004)(ladder from which plaintiff fell was not defective); Olberding v. Dixie Contracting, Inc., 302 AD2d 574 (2d Dept 2003)(plaintiffs offered

no evidence that ladder was defective).

Finally, to the extent that cases from the Appellate Division, Second and Fourth Departments arguably suggest that summary judgment is not warranted in this case, (see e.g., Parsolano v. County of Nassau, 93 AD2d 815 [2nd Dept. 1983]; Doan v. Aiken & McGlaukin, 217 AD2d 908 [4th Dept 1995]), they are not controlling here, as this court is bound by the holdings of the Appellate Division, First Department.

Accordingly, plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim.

Labor Law § 200 and Common Law Negligence Claims

To establish a prima facie case of common-law negligence, a plaintiff is required to show that a defendant either created or had actual notice of the alleged dangerous or defective condition, and that the alleged dangerous condition was the proximate cause of the injury. See Pouso v City of New York, 177 AD2d 560 (2d Dept 1991).

An owner's or general contractor's common-law duty to maintain a safe workplace is codified in Labor Law section 200. See, Gasper v Ford Motor Co., 13 NY2d 104 (1963). To be charged with liability under that statute, an owner, general contractor, or construction manager must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." Russin v Louis N. Picciano & Son,

54 NY2d 311, 317 (1981).

"Where the alleged defect or dangerous condition arises from the contractor's methods and the owner [or contractor] exercises no supervisory control over the operation, no liability attaches to owner [or contractor] under the common law or under Labor Law § 200." Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993). Moreover, liability will not be found under section 200 "solely because the owner [or contractor] had notice of the unsafe manner in which work is performed." Id., at 878.

Recent First Department decisions dictate that to be charged with liability under Labor Law § 200, an owner or general contractor, must perform more than their "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept), lv denied, 100 NY2d 508 (2003). "[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003).

Here, there is no evidence that Sacred Heart, the owner of the school, exercised any control over the work, so that the

Labor Law § 200 claim against it must be dismissed. Next, contrary to the arguments of plaintiff and Tyrone, Ibex's level of supervision over plaintiff's work was insufficient to give rise to liability under Labor Law section 200, since Ibex did not have supervisory authority over the work causing injury to plaintiff, and any general responsibility it might have had for ensuring that safety lines were used with the scaffold does not provide a basis for liability. Comes v New York State Elec. and Gas Corp., 82 NY2d at 877; Dalanna v City of New York, 308 AD2d at 400. Notably, plaintiff testified that he took orders only from the foremen at Tyrone.

Moreover, there is no evidence that either Sacred Heart or Ibex had actual or constructive notice of any defect causing plaintiff's injury or were responsible for creating the condition, so as to warrant the imposition liability in the absence of supervision or control by IBEX and/or Sacred Heart over the injury producing work. Bonura v. KWK Associates, Inc., 2 AD3d 207 (1st Dept 2003).

Accordingly, Ibex and Sacred Heart are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims against them.

Third-Party Claim by Sacred Heart and Ibex Against Tyrone for Contractual Indemnification

Ibex and Sacred Heart move for summary judgment on their claims against Tyrone for contractual indemnification based on a

indemnification clause in the subcontract between Ibex and Tyrone which provides that:

> To the fullest extent permitted by law, Subcontractor [Tyrone] will defend, indemnify and hold harmless IBEX and Owner [Sacred Heart], their officers, directors, agents and employees from and against any and all claims, liens judgments, losses and expenses, including reasonable attorneys' fees, legal costs, arising in whole or in part and in any manner from the act, failure to act, omission, breach or default by subcontractor and/or its officers, directors, agents, employees, sub-subcontractors and suppliers in connection with performance of this order.

Tyrone argues that the motion should be denied as there is an issue of fact as to whether Ibex was negligent in supervising and controlling the work at the site, and that the indemnification clause is unenforceable as it violates § 5-322.1(1) of the General Obligations Law.

As indicated above, there is no evidence that either Ibex and/or Sacred Heart negligently supervised or controlled the injury producing work, or were otherwise negligent, so that their liability to plaintiff is based solely on their non-delegable duty under the Labor Law. Under these circumstances, any attempt to invalidate the indemnification clause based on General Obligations Law §5-322.1 is unavailing. See Brown v. Two Exchange Plaza Partners, 76 NY2d 172, 180-181 (1990)(holding that where there is no evidence of fault on the part of the general contractor "neither the wording or the intent of the

statute [i.e. General Obligations Law § 5-322.1] is violated by allowing it to allocate responsibility ... through an indemnification provision); Cabrera v. Board of Ed of the City of New York, 33 AD3d 641 (2d Dept 2006)(indemnification clause providing for indemnification to the fullest extent permitted by law did not violate the General Obligations Law where party to be indemnified is free from negligence).

Tyrone also argues that the indemnification clause is inapplicable as its subcontract with Ibex refers to the removal and carting of plaster or sheet rock ceilings, and plaintiff testified that he was working on a concrete ceiling at the time of the accident. This argument is without merit as the broad description of the demolition work under the subcontract unambiguously encompasses the work performed by plaintiff while in Tyrone's employ.

Accordingly, as the record establishes that plaintiff's work was supervised exclusively by Tyrone's foreman, and that the scaffold at issue was provided by Tyrone, Ibex and Sacred Heart are entitled to summary judgment as to liability on their contractual indemnification claim. See Rodriguez v. Metropolitan Life Ins. Co., 234 AD2d 156 (1st Dept 1996)(granting summary judgment as to liability on contractual indemnification claim against subcontractor as the only entity that supervised and controlled the work giving rise to plaintiff's injury).

Conclusion

In view of the above, it is

ORDERED that the motion by defendants/second-third party plaintiffs Ibex Construction, LLC and the Female Academy of Sacred Heart (motion seq. 002) is granted to the extent of (i) dismissing plaintiff's common law negligence and Labor Law § 200 claims, as well as any cross claims against them, and Tyrone's cross-claims against them, and (ii) granting them summary judgment as to liability on their contractual indemnification claim against second-third party defendant Tyrone Interior Contracting, Inc.; and it is further

ORDERED that the motion by plaintiff Jose Urena (motion seq. no. 003) for summary judgment as to liability on his Labor Law § 240 claim is granted; and it is further

ORDERED that a pretrial conference shall be held on May 31, 2007 at 2:30pm in Part 11, room 351, 60 Centre Street, NY, NY.

A copy of this order is being mailed by my chambers to counsel for the parties.

DATED: May 24, 2007

J.S.C.