Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

MANUEL ANTONIO PALAGUACHI x

- against -

UNITED PARCEL SERVICES, INC., et al.
x

Index Number 22504 2004

Motion Date February 21, 2007

Motion Cal. Numbers 47-51

Motion Seq. Nos. 1-5

The following papers numbered 1 to 62 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability; on the motion by third-party defendants York Suspended Scaffolds, Inc. and York Ladders, Inc. (collectively York) pursuant to CPLR 3212 dismissing all claims against York; on the motion by defendant/second third-party plaintiff United Parcel Service, Inc. (UPS) for summary judgment dismissing the complaint, for summary judgment on it cross-claims against defendants 325 Spring Street, LLC and NYC Restaurant Group, LLC for contractual indemnity and failure to procure insurance, for summary judgment on its common law indemnity claim against second third-party defendant Sukamo Construction, Inc. (Sukamo), and for summary judgment dismissing all cross claims and counter claims; on the motion by defendants/third-party plaintiffs 325 Spring Street, LLC, NYC Restaurant, LLC and Savanna Partners, LLC for summary judgment dismissing the complaint and dismissing all cross-claims; and on the motion by third-party defendant/second third-party defendant Sukamo pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and the second third-party complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-22
Answering Affidavits - Exhibits.....	23-45
Reply Affidavits.....	46-62

Upon the foregoing papers it is ordered that the motions are

determined as follows:

This is an action to recover for personal injuries allegedly sustained as a result of a work site accident. The accident occurred on May 10, 2003 in a building located at 325 Spring Street, New York, N.Y. The building was owned by defendant UPS and the portion of the building where the accident occurred was leased to defendant 325 Spring Street, LLC. 325 Spring Street, LLC subleased a portion of the premises it leased to NYC Restaurant Group, LLC. The plaintiff brought claims for violations of Labor Law §§ 200, 240(1) and 241(6), and common law negligence.

The plaintiff was a laborer employed by third-party defendant Sukamo. 325 Spring Street, LLC had previously retained third-party defendant Sukamo as a general contractor to build a restaurant in the leased space. At the time of the accident 325 Spring Street, LLC and NYC Restaurant Group, LLC were in the process of renovating the space and planned to change the theme of and open a new restaurant in the space. The accident occurred while the plaintiff was on a scaffold working on a light fixture. The plaintiff and a co-worker were standing on the scaffold to reach wires and check cables as part of the installation of the fixture. The plaintiff testified that the scaffold broke and he fell through the middle of the scaffold. The plaintiff was standing on a piece of wood that he and the co-worker had placed on the scaffold. Plaintiff had moved the piece of wood from the bottom of the scaffold to the top of the scaffold but did not fasten it to the scaffold. The accident occurred when the wood on the scaffold collapsed and plaintiff fell from the scaffold. Third-party defendant York Suspended Scaffolds was the party which owned the scaffold involved in the accident and leased it to use on the premises.

The deposition testimony of all parties were submitted both in support and in opposition to the motion. The parties also submitted the deposition testimony of non-party James Walrod, who was an interior design consultant for the work done redesigning the restaurant, and Millree Hughes, who was hired to paint murals at the restaurant. The plaintiff alleges that the work he was doing was part of a renovation of the premises. The defendants argue that the plaintiff was not engaged in covered work at the time of the accident, characterizing the work done by the plaintiff as cosmetic. Mr. Walrod testified that the plaintiff was working installing a light fixture.

Owners and contractors are subject to strict liability under Labor Law §§ 240(1) and 241(6). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (Blake v

Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]). Due to the conflicting descriptions of the work done at the premise an issue of fact exists as to whether the work being done falls under Labor Law §§ 240(1) and 241(6) (see Prats v Port Auth. of New York & New Jersey, 100 NY2d 878 [2003]; Hernandez v Ten Ten Co., 31 AD3d 333 [2006]; Fitzpatrick v State of New York, 25 AD3d 755 [2006]). Additionally, there is a question of fact as to whether the plaintiff's action of placing the board across the scaffold to create a work platform, was the sole proximate cause of the accident (see Marin v Levin Props, LP, 28 AD3d 525 [2006]; Costello v Hapco Realty, 305 AD2d 445 [2003]). Therefore, summary disposition of those claims is unwarranted.

Defendants UPS and 325 Spring Street, LLC and New York Restaurant Group, LLC further seek summary judgment on the issue of liability under plaintiff's Labor Law § 200 and common law negligence claims. For an owner or general contractor to be liable the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. On this issue, defendants have established as a matter of law that they had no actual or constructive knowledge of the defective condition at the work site and exercised no control or supervision over plaintiff's work. The deposition testimony submitted established that the plaintiff was only directed and supervised by his employer, third-party defendant Sukamo. In opposition, the plaintiff failed to raise an issue of fact that would warrant denial of the motion. Therefore, these causes of action must be dismissed (see DeBlase v Herbert Const. Co., Inc., 5 AD3d 624 [2004]; Miller v Shah, 3 AD3d 521 [2004]).

Defendant Savanna Partners, LLC moves for summary judgment dismissing the complaint and all cross claims on the grounds that they did not own or lease the premises and was not involved in this matter. Furthermore, Savanna Partners, LLC did not operate or manage the subject restaurant located on the premises and did not have any involvement with the work on the premises. In opposition, plaintiff and defendant UPS argues that Savanna Partners, LLC is the alter ego of defendant 325 Spring Street, LLC. This contention is not supported by the evidence. The mere fact that some of the members of the defendants 325 Spring Street, LLC and NYC Restaurant Group, LLC were also principals of Savanna Partners, LLC is insufficient to pierce the corporate veil (see Kok Choy Yeen v NWE Corp., 37 AD3d 547 [2007]; John John, LLC v Exit 63 Dev., LLC, 35 AD3d 540 [2006]).

Third-party defendants York move for summary judgment on the grounds that they did not direct, supervise or control at the accident site. Here, York only supplied the scaffolding to the work site and did not erect the scaffold nor did they direct

supervise or control any of the work being done, including the work by the plaintiff. Under these circumstances York cannot be held liable and the third-party complaint against York must be dismissed (see Wysocki v Balalis, 290 AD2d 504 [2002]).

Turning next to the branches of the motion by defendant UPS for summary judgment on its claims for indemnification and failure to procure insurance against defendant 325 Spring Street, LLC, they should be granted. UPS entered into a lease with non-party Sensenet, Inc. This lease was assigned to defendant 325 Spring Street, LLC, which assumed all obligations under the lease. The lease required the tenant to maintain liability insurance of $5,000,000. Here, the evidence submitted indicates that defendant 325 Spring Street, LLC only procured $1,000,000 in insurance. The statements contained in the affidavit submitted by Christopher Schlank in opposition to the motion that 325 Spring Street, LLC had $10,000,000 in insurance contradicts his sworn deposition testimony and prior affidavit, and, thus, is a feigned factual issue and will not be considered (see Koller v Leone, 299 AD2d 396 [2002]).

Furthermore, the plain language of the lease requires 325 Spring Street, LLC to indemnify UPS for the accident that occurred (see Great N, Ins. Co., v Interior Constr. Corp., 7 NY3d 412 [2006]). In opposition, 325 Spring Street, LLC failed to submit evidence to raise a triable issue of fact which would preclude the granting of summary judgment on the contractual indemnification claim (see Reborchick v Broadway Mall Props., 10 AD3d 713 [2004]). The argument that indemnity provision is invalid because it does not contain language excluding liability for UPS's own negligence is not supported by the law (see Davis v All State Assoc., 23 AD3d 607 [2005]). Such an indemnity provision may be enforced where there party to be indemnified is shown to be free from of any negligence (see Rogers v Rockefeller Group Intl., 38 AD3d 747 [2007]). Finally, 325 Spring Street, LLC's contention that the motion is premature is without merit (CPLR 3212[f]; see Argueta v Pomona Panorama Estates, Ltd., 39 AD3d 785 [2007]).

However, the branches of the motion by defendant UPS for summary judgment on its claims for indemnification and failure to procure insurance against defendant NYC Restaurant Group, LLC are denied. There is no contract between NYC Restaurant Group, LLC and UPS. UPS was not a party to the sublease and, thus, there is no obligation running from NYC Restaurant Group, LLC to UPS (see Chock Full O'Nuts Corp. v NRP LLC I, 11 AD3d 385 [2004]; Tefft v Apex Pawnbroking & Jewelry Co., 75 AD2d 891 [1980]). Furthermore, while the sublease imposed the rights and obligations of the Overlease on the respective parties, it did so by substituting the Sublandlord for Overlandlord and Subtenant for Sublandlord with respect to the Overlease and, therefore NYC

Restaurant Group, LLC obligations only ran to 325 Spring Street, LLC.

Workers' Compensation Law § 11 bars common law claims against an employer, as well as third party claims for contribution or indemnity, except those based on a written contract, unless the employee suffered a grave injury (see Tonking v Port Authority of New York & New Jersey, 3 NY3d 486, 490 [2004]; Konior v Zucker, 299 AD2d 320, 321 [2002]). Under Rubeis v Aqua Club (3 NY3d 408 [2004]) a plaintiff suffering a traumatic brain injury suffers a "grave injury" when he or she is rendered incapable of employment in any capacity. In support of its motion, Sukamo submitted the affidavits of medical experts who opined to a reasonable degree of certainty that the plaintiff is capable of employment. In opposition to the motion, the parties submitted affidavits from medical experts who opined to a reasonable degree of certainty that the plaintiff was incapable of employment. Here, in light of the conflicting medical reports submitted there is issue of fact, as to whether the plaintiff suffered a grave injury (see Sexton v Cincinnati, 2 AD3d 1408 [2003]).

Accordingly, the motion by plaintiff for summary judgment on liability is denied. The motion by third-party defendant York for summary judgment is granted and the third-party complaint against York is dismissed. The branches of the motion by defendant UPS for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims are denied. The branches of the motion by defendant UPS for summary judgment dismissing the common law negligence and Labor Law § 200 claims and all cross claims are granted. The branch of the motion by defendant UPS for summary judgment on its common law indemnity claim against second third-party defendant Sukamo is denied. The branches of the motion by defendant UPS for summary judgment on its contractual indemnification and failure to procure insurance claims against defendant 325 Spring Street, LLC is granted. The branches of the motion by defendant UPS for summary judgment on its contractual indemnification and failure to procure insurance claims against defendant NYC Restaurant Group, LLC is denied. The branches of the motion by defendants 325 Spring Street, LLC and NYC Restaurant, LLC for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) and all cross claims are denied. The branches of the motion by defendants 325 Spring Street, LLC and NYC Restaurant, LLC for summary judgment dismissing the claims for common law negligence and Labor Law § 200 are granted. The motion by defendant Savanna Partners, LLC to dismiss the complaint and all cross claims is granted. The motion by third-party and second third-party defendant Sukamo for summary judgment dismissing the third-party complaint and the second third-party complaint is denied.

Dated: June 8, 2007

J.S.C.