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SHORT FORM ORDER

INDEX No. 99-28272
CAL. No. 07-00905-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-7-07 (007 & 008)
9-10-07 (009)
ADJ. DATE 10-26-07
Mot. Seq. # 007 - MotD
Mot. Seq. # 008 - XMotD
Mot. Seq. # 009 - MotD

MARYANNE LENGEFELD ARENA as Administratrix of the Estate of JOSEPH LENGEFELD, deceased,
Plaintiff,
- against -

STEWART AVENUE REALTY, LLC, NALPAK CONSTRUCTION CO., INC. and VTA CONSTRUCTION CORP.,
Defendants.

SIBEN & SIBEN, LLP
Attorneys for Plaintiff
90 East Main Street
Bay Shore, New York 11706

STEWART AVENUE REALTY, LLC,
Third-Party Plaintiff,
- against -

VTA CONTRACTING CORPORATION, INC.,
Third-Party Defendant.

HUENKE & RODRIGUEZ
Attorneys for Stewart Avenue Realty, LLC
One Huntington Quadrangle, Suite 2S02
Melville, New York 11747-4412

NALPAK CONSTRUCTION CO., INC.,
Second Third-Party Plaintiff,
- against -

VTA CONTRACTING CORP.,
Second Third-Party Defendant.

TORINO & BERNSTEIN, P.C.
Attorneys for Nalpak Construction Co., Inc.
200 Old Country Road, Suite 220
Mineola, New York 11501

NALPAK CONSTRUCTION CO., INC.,
Third Third-Party Plaintiff,
- against -

CJV MASON CONTRACTOR, INC.,
Third Third-Party Defendant.

WHITE QUINLAN & STALEY, LLP
Attorneys for VTA Contracting Corp.
377 Oak Street, P.O. Box 9304
Garden City, New York 11530

STEWART AVENUE REALTY, LLC,
Fourth Third-Party Plaintiff,
- against -

CJV MASON CONTRACTOR, INC.,
Fourth Third-Party Defendant.

MONTFORT HEALY McGUIRE & SALLEY
Attorneys for CJV Mason Contractor, Inc.
1140 Franklin Avenue, P.O. Box 767
Garden City, New York 11530-7677

VTA CONTRACTING CORP.,
Fifth Third-Party Plaintiff,
- against -

CJV MASON CONTRACTOR, INC.,
Fifth Third-Party Defendant.

Upon the following papers numbered 1 to 78 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 39 - 55; Notice of Cross Motion and supporting papers 22 - 38; Answering Affidavits and supporting papers 56 - 57; 58 -59; 60 - 62; 63 - 64; 65 - 66; 67 - 69; Replying Affidavits and supporting papers 70 - 77; 72 - 73, 74 - 76; Other sur-reply 77 - 78; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#007) by defendant Nalpak Construction Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action, and an order of conditional summary judgment on its claim for indemnification as against VTA Contracting Corp. and/or CJV Mason Contractor, Inc., is granted to the extent that plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against it, and it is granted summary judgment on its claim for contractual indemnification over and against VTA Contracting Corp., and on its claim for common-law indemnification over and against CJV Mason Contractor, Inc., and is otherwise denied; and it is further

ORDERED that the cross motion (#008) by defendant Stewart Avenue Realty, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action, and an order of conditional summary judgment on its claim for indemnification as against Nalpak Construction Co., Inc., VTA Contracting Corp. and/or CJV Mason Contractor, Inc., is granted to the extent that plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against it, and it is granted summary judgment on its claim for contractual indemnification over and against VTA Contracting Corp., and on its claim for common-law indemnification over and against CJV Mason Contractor, Inc., and is otherwise denied; and it is further

ORDERED that the motion (#009) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment as to defendants' liability pursuant to Labor Law § 240(1) and for a special preference, is granted to the extent that plaintiff is granted summary judgment on the Labor Law § 240(1) claim, and is otherwise denied.

This action was commenced on behalf of plaintiff's decedent, Joseph Lengefeld, pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for his injuries and subsequent death resulting from his fall from a scaffold. The property owner, Stewart Avenue Realty, LLC, (Stewart Ave.) hired Nalpak Construction Corp. (Nalpak) to act as the general contractor for renovation of its building. Pursuant to a written subcontract with Nalpak, VTA Construction Corp. (VTA) agreed to perform the masonry work. VTA, in turn, subcontracted its work to CJV Mason Contractor, Inc., (CJV) via an oral agreement. CJV provided the men and material to perform the masonry work set forth in VTA's contract with Nalpak. VTA's principal was Walter Vita, Jr.; his son, Walter Vita III, known as "Chip," was CJV's principal.

The decedent's brother, Christopher Lengefeld, testified at his deposition that he and Joseph were employed as laborers by "Vita Mason," and that they were supervised by either "Chip" Vita or his father, Walter Vita.[1] Joseph was a member of a laborers union, although it appears that he had worked for years

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[1] It appears that the decedent's injuries prevented his deposition prior to his demise.

with the Vitas in a nonunion capacity. Christopher had worked for Vita Mason, on and off, for about five years. He worked closely with his brother and witnessed the accident. On that day, Joseph was directing the erection of the subject scaffold. The pipe scaffolding consisted of two sections and was over 20 feet high. Christopher and Joseph had erected the pipe frame and placed the boards on top, which acted as a work area for the masons. A lull had delivered a load of blocks to the top and Christopher was in the process of moving blocks to different locations on the work area. There was an eight-foot long copper pipe extending from the ceiling area and Joseph was attempting to move it off of, and away from, the work area. However, as Joseph was pushing it out of the way, the top section of the pipe broke off and he fell head-first off the scaffold to the concrete floor below, suffering the grave injuries complained of herein. Christopher also testified that there were no guardrails on the scaffold to prevent his brother's fall nor were they provided with safety harnesses.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable and an owner or general contractor, or agent, who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). Specifically, Labor Law § 240(1) requires that safety devices be "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). A violation of this duty will result in strict liability where the violation was the proximate cause of the accident (***Crespo v Triad, Inc.***, 294 AD2d 145, 742 NYS2d 25 [2002]).

Here, the uncontroverted facts established that the scaffold failed to protect plaintiff from a specific gravity-related accident, the precise harm the statute is intended to prevent (***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*; ***Rocovich v Consolidated Edison,*** *supra*). Where the scaffold fails to perform its function of safely supporting the worker, a statutory violation, and thus prima facie entitlement to summary judgment, has been established (***LoVerde v 8 Prince St. Assoc.***, 35 AD3d 1224, 1226, 829 NYS2d 300 [2006]; ***Hanna v Gellman***, 29 AD3d 953, 815 NYS2d 713 [2006]; ***O'Connor v Enright Marble & Tile Corp.***, 22 AD3d 548, 802 NYS2d 506 [2005]; ***Vergara v SS 133 W. 21***, 21 AD3d 279, 800 NYS2d 134 [2005]). "Once the plaintiff makes a prima facie showing, the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 289, 771 NYS2d 484 [2003]; ***Squires v Robert Marini Bldrs.***, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

Defendants, in opposition, rely upon the deposition testimony of Chip Vita, who testified that he was the decedent's employer, and that he was present on the day of the accident and supervising the decedent. Although he did not recall seeing the decedent working on the scaffold and did not witness his fall, he came to learn that the decedent was in the process of erecting posts for scaffold guardrails when

he fell.[2] Chip also testified that there were harnesses in the on-site gang box, although he did not recall if the decedent was wearing a harness, and he also testified that the decedent did not disobey any direct safety instructions. Therefore defendants argue, there are questions of fact as to how the accident happened. However, the absence of a safety railing or any other safety device to prevent the decedent's fall constituted a violation of § 240(1). Even assuming, for the purposes of this motion, that plaintiff was placing posts for the guardrails and that there were safety harnesses available at the site, such facts could not defeat plaintiff's entitlement to summary judgment (***LoVerde v 8 Prince St. Assoc.***, *supra*; ***Vergara v SS 133 W. 21***, *supra*). Further, the decedent's actions could not be the sole proximate cause of his accident as there is no evidence that he engaged in unforeseeable, reckless activities or misused a safety device that was provided to him (***Beharry v Public Storage***, 36 AD3d 574, 575, 828 NYS2d 458 [2007]). Accordingly, plaintiff is granted summary judgment as to the liability of defendants Stewart Ave. and Nalpak pursuant to Labor Law § 240(1).

A subcontractor will be held liable under Labor Law § 240(1) where it has become an agent of the owner or general contractor (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; ***Miller v Yeshiva Zichron Mayir Gedola*** , __ AD3d __, 2007 NY Slip Op 8202, 2007 NY App Div LEXIS 11046; ***Piazza v Frank L. Ciminelli Constr. Co.***, 12 AD3d 1059, 1060, 785 NYS2d 207 [2004]; ***Everitt v Nozkowski***, 285 AD3d 442, 443-444, 728 NYS2d 59 [2001]). Here, plaintiff established that VTA had authority to supervise and control the work which gave rise to the decedent's injuries and therefore was a statutory agent of the owner or general contractor (***Miller v Yeshiva Zichron Mayir Gedola*** , *supra*; ***Piazza v Frank L. Ciminelli Constr. Co.***, *supra*; ***Everitt v Nozkowski***; *supra*; ***Sog v G.S.E Dynamics***, 239 AD2d 489, 491, 658 NYS2d 351 [1997]), and VTA failed to raise a triable issue of fact as to this issue. Accordingly, plaintiff is also granted summary judgment as to the liability of defendant VTA pursuant to Labor Law § 240(1).

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see*, ***Russin v Louis N. Picciano & Sons,*** *supra*) who exercised control or supervision over the work and either created an alleged dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor's own contractor and the owner and general contractor exercised no supervision or control over the injured employee's work, no liability attaches under the common law or Labor Law § 200 (***Comes v New York State Elec. & Gas Corp.,*** 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Accordingly, defendants Stewart Ave. and Nalpak are granted summary judgment dismissing these causes of action.

Defendants Nalpak and Stewart Ave. also move for conditional summary judgment on their third-party claims for indemnification over and against VTA and CJV. The contract between Nalpak and VTA provides, in pertinent part at section 4.6.1:

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[2] Chip does not dispute that the decedent was attempting to move the copper pipe out of the way when he fell off the scaffold.

> To the fullest extent permitted by law the Subcontractor (VTA) shall indemnify and hold harmless the Owner, [and] Contractor . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damages, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omission of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Although a claim for indemnification "does not generally accrue until payment is made by the party seeking" indemnification (***Bay Ridge Air Rights v State of New York***, 44 NY2d 49, 53, 404 NYS2d 73 [1978]), "a conditional judgment may be entered where indemnification is based upon an express contract to indemnify against loss" (***Martinez v Fiore***, 90 AD2d 483, 454 NYS2d 475 [1982]). Moreover, there is no need to condition summary judgment on a finding of actual liability where, as here, the plaintiff has been granted partial summary judgment as to the moving defendants' vicarious liability under Labor Law § 240(1) (***Boshnakov v Higgins-Kieffer, Inc.***, 255 AD2d 983, 680 NYS2d 337 [1998]). Therefore, both Nalpak and Stewart Ave. established their entitlement to contractual indemnification (***Perez v Spring Creek Assoc.***, 283 AD2d 626, 725 NYS2d 875 [2001]; ***Werner v East Meadow Union Free School Dist.***, 245 AD2d 367, 667 NYS2d 386 [1997]) and VTA failed to refute this with admissible evidence to the contrary (*see,* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Fabbricatore v Lindenhurst Union Free School Dist.***, 259 AD2d 659, 686 NYS2d 822 [1999]). Further, General Obligations Law § 5-322.1, which does not permit indemnification where the party being indemnified is also at fault (*see also,* ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 786, 658 NYS2d 903 [1997]), is not a bar here in that defendants' liability is not based upon fault but is vicarious and imposed by statute, and VTA agreed to provide safety precautions and to comply with applicable rules and regulations pursuant to section 4.3.1 of the contract (*see also*, ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, 10 AD3d 493, 781 NYS2d 506 [2004]; ***Santos v BRE/Swiss***, 9 AD3d 303, 780 NYS2d 585 [2004]). Accordingly, Nalpak and Stewart Ave. are granted summary judgment on their third-party claims for contractual indemnification over and against VTA.

As a general rule, an owner or general contractor held vicariously liable for a plaintiff's injuries pursuant to Labor Law § 240(1) is entitled to full common-law indemnification from the "actor who caused the accident" (***Chapel v Mitchell***, 84 NY2d 345, 618 NYS2d 626 [1994]; ***Rivera v D'Alessandro***, 248 AD2d 522, 669 NYS2d 877 [1998]; ***Werner v East Meadow Union Free School Dist.***, *supra*). To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (***Perri v Gilbert Johnson Enter.***, 14 AD3d 681, 685, 790 NYS2d 25 [2005]; ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, *supra*) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (***Hernandez v Two E. End Ave. Apt. Corp.***, 303 AD2d 556, 557, 757 NYS2d 65 [2003]). Since CJV, as

the decedent's employer, had the authority to direct, supervise, and control the decedent's work and the liability of Nalpak and Stewart Ave. is solely vicarious, they are entitled to summary judgment on their third-party claims for common-law indemnification over and against CJV (***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, *supra*). Further, in light of decedent's grave injury, his employer is not exempt from a claim for common-law indemnification as provided by Worker's Compensation Law § 11 (*see also*, ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Accordingly, Nalpak and Stewart Ave. are granted summary judgment on their third-party claims for common-law indemnification over and against CJV.

To the extent that Stewart Ave. is seeking indemnification over and against its general contractor, Nalpak, it has not established its entitlement to contractual indemnification as a matter of law. While a party "who is held liable in the absence of negligence, pursuant to Labor Law § 240(1), may be entitled to contractual indemnification, it is elementary that the right to contractual indemnification depends upon the specific language of the contract" (***Moss v McDonald's Corp.***, 34 AD3d 656, 825 NYS2d 497 [2006]; ***Kader v City of New York Hous. Preserv. & Dev.***, 16 AD3d 461, 463, 791 NYS2d 634 [2005], quoting ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [1995]). Here, the contract between Stewart Ave. and Nalpak is a form agreement drafted to apply to a contract between a contractor and a subcontractor but it was modified by substituting the owner, Stewart Ave., for the subcontractor. It is not clear that the contract, as written, provides for the indemnification sought by Stewart Ave. Further, since Nalpak exercised no supervision or control over the decedent's work, Stewart Ave. cannot establish its right to common-law indemnification. Accordingly, summary judgment on its claim for indemnification over and against Naplak is denied.

Lastly, plaintiff seeks a special preference. To be entitled to a trial preference pursuant to CPLR 3403(a)(3), the movant must allege facts sufficient to establish that the anticipated lag in reaching the subject action for trial is likely to cause undue and unusual hardship (***Rago v Nationwide Insurance Co.***, 120 AD2d 579, 502 NYS2d 66 [1986]). Here, plaintiff has offered no support for the request and it is denied. Nevertheless, because plaintiff has been granted summary judgment as to defendant's liability, upon service of a copy of this order with notice of entry the Calendar Clerk of this Court is directed to place this action on the CCP Calendar for the next available trial date.

Dated: DEC 18 2007

J.S.C.

___FINAL DISPOSITION __X__NON-FINAL DISPOSITION