

Bartlett v American Real Estate Holdings, LP

2008 NY Slip Op 30421(U)

February 5, 2008

Supreme Court, New York County

Docket Number: 0116610/2003

Judge: Walter Tolub

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

PRESENT: _____
Justice _____

PART _____

Index Number : 116610/2003
BARTLETT, MARK
vs.
AMERICAN REAL ESTATE HOLDINGS
SEQUENCE NUMBER : # 005
SUMMARY JUDGMENT

INDEX NO. 116610-03
MOTION DATE #005
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

re 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 consolidated with mtn. seqs. 006, 007, 008, 009 for disposition and that in accordance with the accompanying memorandum decision

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

FILED

FEB 13 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/5/08

WALTER B. TOLUB

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: PART 15**

-----x
MARK BARTLETT,

Index No.: 116610/03

Plaintiff,

-against-

AMERICAN REAL ESTATE HOLDINGS, LP, LEVITZ HOME FURNISHINGS, INC., LEVITZ FURNITURE CORPORATION, LEVITZ FURNITURE LLC, LEVITZ FURNITURE COMPANY OF THE MIDWEST, INC., LEVITZ FURNITURE COMPANY OF THE PACIFIC, INC., SEAMAN FURNITURE COMPANY INC., SEAMAN FURNITURE COMPANY OF UNION SQUARE, INC. and INTERNATIONAL STORAGE SYSTEMS, INC.,

Defendants.

-----x
INTERNATIONAL STORAGE SYSTEMS, INC.,

Index No.: 590809/04

Third-Party Plaintiff,

-against-

HEATLEY INSTALLATIONS,

Third-Party Defendant.

-----x
SEAMAN FURNITURE COMPANY, INC. and SEAMAN FURNITURE COMPANY OF UNION SQUARE, INC.,

Second-Third Party Plaintiffs,

-against-

HEATLEY INSTALLATIONS,

Second-Third Party Defendant.

-----x
Tolub, J.:

FILED
FEB 13 2008
NEW YORK
COUNTY CLERKS OFFICE

Motion sequence numbers 005, 006, 007, 008 and 009 are hereby consolidated for disposition.

This is an action to recover damages sustained by a worker when he fell from a wooden platform of a large furniture racking system, which he was in the process of dismantling, while inside a warehouse located at 90 Price Parkway in Farmingdale, New York on November 12, 2001.

In motion sequence number 005, defendants American Real Estate Holdings, LP (American) and Levitz Furniture Corporation (Levitz) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Mark Bartlett's complaint as against them and granting indemnity as against defendant and third-party plaintiff International Storage Systems, Inc. (International) and third-party defendant and second-third party defendant Heatley Installations (Heatley).

Plaintiff cross-moves, pursuant to CPLR 3212, for an order (1) granting summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants American, Levitz and International; (2) granting a Special Trial Preference in his favor; and (3) directing that plaintiff be entitled to a lower burden of proof due to his cognitive injuries.

In motion sequence number 006, defendants and second-third party plaintiffs Seaman Furniture Company, Inc. and Seaman Furniture Company of Union Square, Inc. (collectively, Seaman) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint as against them.

In motion sequence number 007, defendant and third-party plaintiff International moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, as well as all

cross claims against it.

In motion sequence number 008, third-party defendant and second-third party defendant Heatley moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party and second third-party actions against it in accordance with Section 23 of the Massachusetts Workers' Compensation Law which bars all third-party actions against the employer in common law; or, in the alternative, in the absence of a finding of "grave injury," in accordance with Section 11 of the New York Workers' Compensation Law. Heatley also moves for summary judgment on the ground that plaintiff's actions were the sole proximate cause of his injuries.

In motion sequence number 009, defendants American and Levitz move for an order compelling Heatley to provide discovery consisting of various documents and files relating to The Hartford Workers' Compensation Policy, which policy allegedly insures Heatley for the losses associated with plaintiff's accident.

BACKGROUND

Defendant American, an out-of-possession owner, leased the building where plaintiff's accident occurred to defendant Levitz. The building consisted of a furniture showroom, an office and warehouse space. Prior to plaintiff's accident, Levitz had sold a large furniture shelving rack unit (furniture rack system), as well as other similar units, to defendant and third-party plaintiff International. International was in the business of buying, dismantling, selling and then reinstalling large furniture rack systems. Pursuant to an oral agreement, which is reflected in various invoices and purchase orders, International then hired plaintiff's employer, third-party and second-third party defendant Heatley, to disassemble the furniture rack system and transport it to another location.

Plaintiff testified that, just prior to his accident, he was in the process of disassembling the free-standing furniture rack system while standing on a particle-board deck (the deck) located on the third level of the rack. As plaintiff was removing beams from the level above, and dropping them onto the deck, the deck broke, causing him to fall and sustain injuries.

At the time of his accident, plaintiff was not utilizing an available order selector provided for use in retrieving furniture at higher levels. An order selector is a piece of equipment resembling a forklift, which has a platform upon which a worker can stand. In addition, although he was wearing the safety belt provided to him by his employer, plaintiff had not properly tethered to the order selector, despite having been directed to do so less than one hour before his accident.

DISCUSSION

“The proponent of a summary judgment motion 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” (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

LABOR LAW § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting ... shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff’s injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]).

In spite of defendants’ urging that the court not consider plaintiff’s cross motion, this court will consider plaintiff’s cross motion for summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants American, Levitz and International, along with the timely and still-pending motion of defendants American and Levitz (see James v Jamie Towers Housing Company, 294 AD2d 268, 272 [1st Dept 2002], affd 99 NY2d 639 [2003]; Rosa v R. H. Macy Company, 272 AD2d 87, 87 [1st Dept 2000]).

Pursuant to a stipulation of discontinuance, dated January 7, 2004, plaintiff discontinued his claims as against defendant Levitz. As such, Levitz's motion to dismiss plaintiff's claims as against it is denied as moot.

In addition, in plaintiff's cross motion for summary judgment in its favor, plaintiff stated that he does not oppose defendant Seaman's motion for summary judgment dismissing plaintiff's claims against it, as Seaman was not the owner of the structure at issue, nor did it function in the capacity of a general contractor. Thus, defendant Seaman is entitled to summary judgment dismissing plaintiff's claims as against it.

Initially, it should be noted that the furniture rack from which plaintiff fell was a "structure" within the meaning of the Labor Law, as a structure is viewed as "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (Cun-En Lin v Holy Family Monuments, 18 AD3d 800, 801 [2d Dept 2005], quoting Caddy v Interborough Rapid Transit Company, 195 NY 415, 420 [1909]; Hodges v Boland's Excavating and Topsoil, Inc., 24 AD3d 1089, 1091 [3d Dept 2005]; Pino v Robert Martin Company, 22 AD3d 549, 551 [2d Dept 2005] [shelving, which consisted of metal poles which held shelves, was considered a structure for Labor Law purposes]; Sinzieri v Expositions, Inc., 270 AD2d 332, 333 [2d Dept 2000] [exhibit, which was composed of interlocking parts, fell within the definition of a structure]).

In addition, since the furniture rack is to be considered a "structure" for Labor Law purposes, and because plaintiff was directed to dismantle it, plaintiff was engaged in demolition work covered by the Labor Law (Pino v Robert Martin Company, 22 AD3d at 552; Sinzieri v Expositions, Inc., 270 AD2d at 332-333). Further, testimony in the record indicates that the

furniture rack was being used by plaintiff, as well as other workers, as the functional equivalent of a scaffold at the time of plaintiff's accident (see Beard v State of New York, 25 AD3d 989, 991 [3d Dept 2006] [bridge was deemed functional equivalent of a scaffold where it was being used to support claimant and half of the cruise air's weight as the demolition project proceeded]).

American moves to dismiss plaintiff's claims against it on the ground that it was an out-of-possession owner who lacked notice or knowledge of the work being performed at the site.

It is well settled that, to recover under Labor Law §§ 200, 240 and 241 as a member of the special class for whose protection these provisions were adopted, a plaintiff must establish two criteria: (1) that he was permitted or suffered to perform work on a structure and, (2) that he was hired by the owner, the general contractor or an agent of the owner or general contractor

(Brown v Christopher Street Owners Corporation, 211 AD2d 441, 442 [1st Dept 1995], affd 87 NY2d 938 [1996]; Whelen v Warwick Valley Civic & Social Club, 47 NY2d 970, 971 [1979]; Personius v Mann, 20 AD3d 616, 617 [3d Dept], affd as mod 5 NY3d 857 [2005])[Labor Law causes of action dismissed in absence of proof that owner defendants contracted for work or had any notice that plaintiff was on their property until after the accident]; Ceballos v Kaufman, 249 AD2d 40, 40 [1st Dept 1998] [where it was clear that none of the defendants hired, or even knew of the retention of the cable television contractor in whose employment plaintiff was at the time of the accident, summary judgment dismissing the Labor Law causes of action was properly granted]).

In order for the Labor Law to be applied to an out-of-possession owner, "[t]here must be a connection between the defendant and the worker, 'whether by a lease agreement or grant of an easement, or other property interest'" (Passante v Peck & Sander Properties, LLC, 33 AD3d 980, 980 [2d Dept 2006], quoting Abbatiello v Lancaster Studio Associates, 3 NY3d 46, 51 [2004]).

In the case of Abbatiello v Lancaster Studio Associates (*supra*), the Court of Appeals expressly rejected the theory of the Second and Third Departments that “ownership alone” may determine whether an owner is liable under Labor Law § 240 (1) (*id.*; Morales v D & A Food Service, 41 AD3d 352, 353 [1st Dept 2007]). In Abbatiello, the owner was wholly unaware that the injured plaintiff, a cable television technician dispatched to the property in response to a complaint of a tenant cable subscriber, was working on the property. In that case, the Court made clear that, although the purpose of Labor Law § 240 (1) is to place the ultimate responsibility for safety practices on owners and contractors, rather than on the workers themselves, an owner “cannot be charged with the duty of providing the safe working conditions contemplated by Labor Law § 240 (1) for [workers] of whom it is wholly unaware” (*id.* at 52; Morales v D & A Food Service, 41 AD3d at 354 [because tenant hired repairmen without notifying or obtaining landlord’s approval, landlord could not be held liable under Labor Law § 240 (1)]). Thus, in order to impose liability on an out-of-possession landlord, there must be some nexus between the owner and the worker (*id.* at 50; Sanatass v Consolidated Investing Company, 38 AD3d 332, 334 [1st Dept 2007]).

Here, a review of the record reveals no proof that defendant American contracted for the work at issue or that it had any notice whatsoever that plaintiff was on its premises until after the accident. In fact, under a triple net lease between American and Levitz, Levitz was responsible for all structural and non-structural repairs, maintenance and costs. American did not employ anyone to supervise any work on the property. As no nexus has been shown to have existed between American and plaintiff in this case, American cannot be charged with the duty of providing the safe working conditions contemplated by Labor Law §§ 240 (1) and 241 (6). Thus,

American is entitled to summary judgment dismissing plaintiff's section 240 (1) and 241 (6) claims as against it.

However, as evidence in the record indicates that defendant International not only owned the furniture racks at issue at the time of plaintiff's accident, but that it also contracted with third-party defendant Heatley for their disassembly and removal, International is to be considered an owner of the structure within the meaning of the Labor Law.

Defendant International asserts that plaintiff's Labor Law § 240 (1) claim must be dismissed as against it, as plaintiff's own negligent actions in not wearing his safety harness, despite being told by his employer that he had to be tied off in order to work, as the sole proximate cause of his injuries. Where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (Robinson v East Medical Center, LP, 6 NY3d 550, 554 [2006] [plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; Montgomery v Federal Express Corporation, 4 NY3d 805, 806 [2005]; Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d at 290).

In a not dissimilar case, Aragon v 233 West 21st Street, Inc. (201 AD2d 353 [1st Dept 1994]), the plaintiff was properly granted summary judgment on the issue of liability the court found that the collapse of the scaffold was prima facie evidence of a violation of Labor Law §

240 (1), which shifted the burden to the defendants to raise a factual issue on liability. The Court noted that “the duty to see that safety devices are furnished and employed rests on the employer in the first instance” and that “the proximate cause of the scaffold’s collapse was the breaking of one of the supporting ropes, not the plaintiff’s decedent’s failure to wear a safety harness [internal citation omitted]” (*id.* at 354).

Here, even if plaintiff was negligent for his failure to properly tether his safety harness, utilize the order picker, or for dropping beams onto the decking, the testimony indicates that such alleged failures were not the sole proximate cause of his injuries in light of the fact that the particle board shelving that plaintiff was utilizing as a scaffold collapsed. Where “the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff’s injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]” (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]). In other words, “[e]ven if the plaintiff was partially at fault, a worker’s contributory negligence is not a defense to a Labor Law § 240 (1) claim” (Moniuszko v Chatham Green, Inc., 24 AD3d 638, 639 [2d Dept 2005] [although plaintiff had temporarily removed his safety harness, the sole proximate cause of the accident was a broken hook which caused the scaffold to fall]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]). Neither comparative fault nor assumption of the risk is a defense to a Labor Law § 240 (1) cause of action (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Dos Santos v State of New York, 300 AD2d 434, 434 [2d Dept 2002]; Hauff v CLXXXII Via Magna Corporation, 118 AD2d 485, 486 [1st Dept 1986]).

Thus, defendant International is not entitled to summary judgment dismissing plaintiff’s

Labor Law § 240 (1) claim against it, however plaintiff is entitled to summary judgment on the issue of liability under Labor Law § 240 (1) as against defendant International.

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

“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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Although plaintiff alleges multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 12 NYCRR 23-1.11 (a), 23-1.22 (c) (1) and 23-5.1 (c) (1), (f) and (g), plaintiff failed to address these Industrial Code violations in his moving papers. Thus, this court deems these claims as abandoned, and as such, defendant International is entitled to summary judgment on those alleged Industrial Code violations (see

Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

In addition, as defendant International failed to address plaintiff's Labor Law § 241 (6) claim against it in any way, International has not sustained its burden of proof so as to be entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code sections 12 NYCRR 23-1.11 (a), 23-1.22 (c) (1) and 23-5.1 (c) (1), (f) and (g).

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work’ [citation omitted]” (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

Initially, it should be noted that plaintiff only addressed his common-law negligence and Labor Law § 200 claims as against defendant Levitz in his opposition papers, and as plaintiff withdrew his claims against Levitz in a prior stipulation, the court need not address these claims. In addition, this court deems these claims as abandoned as against defendants American and International, and these defendants are entitled to summary judgment dismissing those claims

(see Genovese v Gambino, 309 AD2d at 833).

COMMON-LAW INDEMNIFICATION

Defendants American and Levitz move for summary judgment in their favor on their cross claims for common-law indemnification as against International and Heatley.¹ In addition, Heatley moves for summary judgment dismissing International's third-party action for indemnification and Seaman's second third-party action for indemnification on the ground that, under Massachusetts Workers' Compensation Law § 23, all third-party actions against the employer in common law are barred. In the alternative, in the event that the court finds that New York Workers' Compensation Law applies to this case, Heatley argues that the third-party and second third-party claims against it should be dismissed, as plaintiff has not sustained a grave injury and was not hired pursuant to a written contract containing an express indemnification provision.

"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 Enterprises, Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Management., 259 AD2d 60, 65 [1st Dept 1999]; Priestly v Montefiore Medical Center/Einstein Medical Center, 10 AD3d 493, 495 [1st Dept 2004]). In the absence of any negligence, a claim for common-law indemnity may be established upon a showing that the proposed indemnitor "had the authority to direct, supervise,

¹It should be noted that, although American and Levitz also cross-claimed for contribution as against International and Heatley, they only address common-law indemnification in their motion for summary judgment.

and control the work giving rise to the injury” (Hernandez v Two East End Avenue Apartment Corporation, 303 AD2d 556, 557 [2d Dept 2003]).

Here, defendants American and Levitz have not been shown to be guilty of any negligence. In addition, although vicariously liable for plaintiff’s injuries under Labor Law § 240 (1), such liability is not tantamount to negligence. Moreover, defendant International did not exercise a degree of control over plaintiff’s work so as to predicate liability based on common-law negligence. In fact, a review of the record indicates that plaintiff’s work was supervised solely by his employer, Heatley.

Gerald Zapara (Zapara), International’s president, testified that he contracted with Heatley to perform the actual disassembly of the furniture rack system. Zapara maintained that International did not supervise or play any role in the removal of the furniture rack system. In addition, Zapara stated that International never employed any workers to observe Heatley perform its work. He also noted that it was Heatley’s obligation to provide appropriate safety equipment for its workers, although Levitz provided the order pickers at the site. Plaintiff, as well as his co-worker, Blumsden, also confirmed that Heatley gave plaintiff all of his instructions regarding how to perform his work.

“General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed” (Hughes v Tishman Construction Corporation, 40 AD3d 305, 306 [1st Dept 2007]; Burkoski v Structure Tone, Inc., 40 AD3d 378, 380-381 [1st Dept 2007] [defendant construction manager did not exercise degree of control over operations of its subcontractors required to predicate liability based on common-law negligence

or violation of Labor Law § 200 for plaintiff's injuries where construction manager's personnel did not tell subcontractor or employees how to perform subcontractor's work, despite evidence that construction manager monitored safety at the work site and may have been aware of the specific condition that caused the accident]).

Thus, defendants American and Levitz are not entitled to summary judgment in their favor on their cross claim for common-law indemnification as against defendant and third-party plaintiff International. In addition, International is entitled to summary judgment dismissing American and Levitz's cross claim for indemnification against it.

However, before deciding whether defendants American and Levitz are entitled to summary judgment in their favor on their cross claim for indemnification as against Heatley, and whether Heatley is entitled to summary judgment dismissing International's third-party claim and Seaman's second third-party claim for indemnification as against it, the court must first conduct a choice of law analysis to determine which of the following applies: Massachusetts Workers' Compensation Law § 23, which bars third-party claims against an employer, or New York Workers' Compensation Law, which allows third-party claims against employers where it can be demonstrated that plaintiff suffered a "grave injury," or where plaintiff was hired pursuant to a written contract containing an express agreement to indemnify.

"The first step in choice of law analysis is determining whether an actual conflict exists between the jurisdictions involved" (K.T. v Dash, 37 AD3d 107, 110 [1st Dept 2006]; Matter of Allstate Insurance Company [Stolarz - - New Jersey Manufacturers Insurance Company], 81 NY2d 219, 223 [1993]; Bodea v TransNat Express, Inc., 286 AD2d 5, 8 [4th Dept 2001]). As indicated above, a conflict between Massachusetts and New York law exists.

“Once an actual conflict is established, the court must turn to consideration of which jurisdiction, ‘because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation’” (*id.*, quoting Babcock v Jackson, 12 NY2d 473, 481 [1963]). This so-called “interest analysis” (see Cooney v Osgood Machinery, Inc., 81 NY2d 66, 72 [1993]) raises two inquiries: “(1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss” (Padula v Lilarn Properties Corporation, 84 NY2d 519, 521 [1994]; Schultz v Boy Scouts of America, 65 NY2d 189, 197 [1985]).

“In applying the interest analysis test, we must first determine ‘what are the significant contacts and in which jurisdiction ... they [are] located’” (Bodea v TransNat Express, Inc., 286 AD2d at 9, quoting Padula v Lilarn Properties Corporation, 84 NY2d at 521). In this case, the significant contacts are the domiciles of the parties and the place of the tort (see *id.* at 9). Here, plaintiff and his employer, Heatley, are domiciliaries of Massachusetts; American, Levitz, International and Seaman are domiciliaries of New York; and the place of the tort is New York.

“We must next determine whether the purpose of the law is to regulate conduct or allocate loss” (see *id.*; Padula v Lilarn Properties Corporation, 84 NY2d at 521). “The Court of Appeals has differentiated loss-allocating from conduct-regulating rules with the explanation that loss-allocating rules are applicable once there is admittedly tortious conduct, while conduct-regulating rules are those people use as a guide to governing their primary conduct” (K.T. v Dash, 37 AD3d at 112-113; Schultz v Boy Scouts of America, 65 NY2d at 198). Loss-allocating laws are those that “prohibit, assign, or limit liability after the tort occurs” (Padula v Lilarn Properties Corporation, 84 NY2d at 522). The New York Court of Appeals has held that New

York's Workers' Compensation Law is a loss-allocation rule (Cooney v Osgood Machinery, 81 NY2d at 74-75; see Mihalic v K-Mart of Amsterdam, N.Y., 363 F Supp 2d 394, 400 [ND NY 2005]).

Where the conflicting laws are loss-allocating, as in the instant case involving a conflict of workers' compensation laws, a court should apply one of the three rules set forth in the case of Neumeier v Kuehner (31 NY2d 121, 128 [1972]) (Mihalic v K-Mart of Amsterdam, N.Y., 363 F Supp 2d at 400; Bodea v TransNat Express, Inc., 286 AD2d at 9). The rules set forth by the Court in Neumeier, wherein it determined whether Ontario's guest statute applied to a New York defendant, have since been applied to other tort actions involving conflicting loss-allocation laws (see Bodea v TransNat Express, Inc., 286 AD2d at 10).

"The first Neumeier rule applies when the parties share a common domicile; in that situation, the law of the common domicile controls" (Bodea v TransNat Express, Inc., 286 AD2d at 10; Cooney v Osgood Machinery, Inc., 81 NY2d at 73). The second Neumeier rule, which essentially adopts a "place of injury" test, "applies when the parties are domiciled in different states, the situs of the tort is in a state in which a party is domiciled, and 'the local law favors the respective domiciliary'" (id.; quoting Cooney v Osgood Machinery, Inc., 81 NY2d at 73; id.). The third Neumeier rule applies in situations when parties are domiciled in different states with conflicting local laws. In that case, "the law of the situs of the tort usually applies, unless 'it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants'" (id., quoting Neumeier v Kuehner, 31 NY2d at 128). Where the interest of each jurisdiction in enforcing its laws is "roughly equal," the situs of the tort is

considered an appropriate tie-breaker, as “that is the only State with which the parties have purposely associated themselves in a significant way” (Cooney v Osgood Machinery, Inc., 81 NY2d at 74; see Thompson v International Business Machines Corporation, 862 F Supp 79, 82 [SD NY 1994] [wherein a Massachusetts resident was injured while employed by a Massachusetts corporation and while on the New York premises of a New York corporation, the Court found troublesome the “[i]nability of a New York property owner hiring a Massachusetts contractor to obtain any relief from tort damages if the contractor was actually negligent and for that reason responsible for an accident”]).

A straightforward application of the second Neumejer rule, which specifies that, where the parties are domiciled in different states and the local law favors the respective domiciliary, the place of injury governs, applies to this case (see Glunt v ABC Paving Company, Inc. (247 AD2d 871, 872 [4th Dept 1998] [wherein an Ohio resident of an Ohio employer was killed on the job in New York, the plaintiff brought suit against a New York company, which impleaded the Ohio employer. The Court allowed the action under New York’s Workers’ Compensation Law, because in the case of irreconcilable interests, Ohio’s Worker’s Compensation Law barred contribution suits where benefits had been paid; held the place of the tort governed).

Here, New York law favors its domiciliaries in that the third-party claims against Heatley for indemnification would survive under New York law in the event that plaintiff is found to have sustained a “grave injury.”² The Massachusetts Workers’ Compensation Law favors third-party defendant Heatley in that it would bar the third-party claim and relieve it of liability (see

²It should be noted that no written contract existed between International and Heatley by which Heatley expressly agreed to contribution or indemnification of the claimant asserting the cause of action for the type of loss suffered.

Mihalic v K-Mart of Amsterdam, N.Y., 363 F Supp 2d at 401). As competing laws favor their domiciliaries in this case, New York law will be applied to the third-party action, as the law of the place of injury is to be applied.

Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (Rubeis v Aqua Club, Inc., 3 NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (Way v Grantling, 289 AD2d 790, 793-794 [3d Dept 2001]).

The Court in Rubeis v Aqua Club, Inc. (*supra*) considered that, as the Workers' Compensation Law deals with employment benefits, and the term "disability" generally refers to inability to work, "a brain injury results in 'permanent total disability' under section 11 when the

evidence establishes that the injured worker is no longer employable in any capacity” (id. at 413, 417; Chelli v Banle Associates, LLC, 22 AD3d 781, 783 [2d Dept 2005] [Court considered that “permanent total disability” envisioned by Legislature relates to the injured party’s employability and not to his or her ability to otherwise care for himself or herself and function in a modern society]; Way v Grantling, 289 AD2d at 792).

Here, due to conflicting expert opinions put forth by the parties in this case, material issues of fact exist as to whether plaintiff sustained a grave injury so as to render him incapable of employment in any capacity (see Mendez v Union Theological Seminary in City of New York, 26 AD3d 260, 261 [1st Dept 2006] [although plaintiff’s physicians concurred that he had suffered brain injury resulting in permanent disabilities, an issue of fact existed as to whether plaintiff had been rendered incapable of employment in any capacity]; Olszewski v Park Terrace Gardens, Inc., 18 AD3d 349, 351 [1st Dept 2005] [record was insufficient to determine whether plaintiff was unemployable in any capacity]).

“Conflicting expert evidence concerning the nature and extent of an alleged ‘grave injury’ under Section 11 is especially likely to preclude summary judgment” (Solorio v Asplundh Tree Expert Company, 402 F Supp 2d 490, 497 [SD NY 2005] [summary judgment denied where there existed conflicting expert opinions as to whether plaintiff suffered a grave injury]). Thus, this issue must be determined at trial, and defendants American and Levitz are not entitled to summary judgment in their favor on their cross claim for indemnification as against Heatley. Because Heatley is not entitled to summary judgment dismissing International and Seaman’s claims for indemnification as against it, the court need not address that part of Heatley’s motion for summary judgment in his favor on the ground that plaintiff’s actions were the sole proximate

cause of his injuries.

PLAINTIFF'S CROSS MOTION FOR LESSER BURDEN OF PROOF

Plaintiff seeks an order directing that he be entitled to a lower burden of proof due to his cognitive injuries. "A plaintiff who suffers amnesia as a result of a defendant's acts is not held to as high a degree of proof in establishing his right to recover for injury as a plaintiff who can describe the events" (Sawyer v Dreis & Krump Manufacturing Company, 67 NY2d 328, 333 [1986]; Schechter v Klanfer, 28 NY2d 228, 232 [1971]). "It is only where the memory loss has effectively prevented a plaintiff from describing the occurrence that invocation of the rule of Schechter v Klanfer is warranted" (Jarrett v Madifari, 67 AD2d 396, 403 [1st Dept 1979] [plaintiff gave a sufficient description of the occurrence to make application of a lesser degree of proof improper]; Fitzgibbon v County of Nassau, 182 AD2d 670, 670 [2d Dept 1992]).

In the case of Schechter v Klanfer (*supra*), wherein the plaintiff, who was injured while operating a motorboat, was unable to recall the events of his accident, the Court noted:

The danger is, of course, that amnesia is easily feigned. The dangers may be ameliorated. Plaintiff has the burden of proof on the issue of amnesia as on other issues. A jury should be instructed that before the lesser burden of persuasion is applied, because of the danger of shamming, they must be satisfied that the evidence of amnesia is clear and convincing, supported by the objective nature and extent of any other physical injuries sustained, and that the amnesia was clearly a result of the accident

(Schechter v Klanfer, 28 NY2d at 232; *see* Sawyer v Dreis & Krump Manufacturing Company, 67 NY2d at 333-334).

"In the absence of expert evidence establishing a loss of memory and its causal relationship to defendant's fault, the jury may not consider the question or apply a lesser degree of proof in evaluating plaintiff's claim" (Sawyer v Dreis & Krump Manufacturing Company, 67

NY2d at 334 [wherein plaintiff relied solely upon his own statement that he had no memory of the event of his accident and of the circumstances surrounding it; the Court held that the plaintiff did not satisfy his burden in establishing his entitlement to a lesser degree of proof]).

On this record, it is clear that plaintiff, although he suffers from a memory defect caused by his accident, is not entitled to application of this rule. When plaintiff was asked if, other than taking medication, there was any reason that he was not able to testify in his deposition, plaintiff replied in the negative.

Plaintiff, who at the time of his deposition was taking medications for depression, anger and seizures, testified that his memory has been affected as a result of his accident. Plaintiff maintained throughout his deposition that he has no recollection of the date of his accident or the events of that day. When asked about what he was doing at the time of his accident, he did not even remember going to work.

However, plaintiff was able to testify in detail about various facts concerning his personal history. In addition, plaintiff was able to state that his employer used to give him a ride to work, gave him work instructions and provided him with his tools. Plaintiff also remembered the nature of his former work, as well as the types of equipment needed to perform his work. Plaintiff noted that he also understood that if he did not wear his safety equipment, he might become hurt.

In support of his motion for a lesser burden of proof, plaintiff put forth the medical report of Dr. Steven Newman. In his report, which was based on Dr. Newman's evaluation of plaintiff on September 15, 2005, Dr. Newman concluded that plaintiff had bi-hemispheric dysfunction, a history of post-traumatic seizures and poor mentation. However, his report does not indicate that

plaintiff is not able to remember details of his accident.

In addition, based upon his January 15, 2007 evaluation of plaintiff, Dr. Richard Schuster noted in his medical report only that plaintiff suffered from short-term memory loss. In fact, a review of the subject report indicates that plaintiff was quite able to remember and report a number of facts concerning his personal history.

Further, on October 10, 2004, a report was generated by Dr. Brian Healy, wherein Dr. Healy stated that, although plaintiff reported frequent forgetfulness of recent events and of things and people he had known a year or more before, plaintiff rarely reported losing things or forgetting things he needed to do or had agreed to do. No mention was made in Dr. Healy's report as to whether plaintiff suffered from amnesia. Thus, as plaintiff has failed to prove by clear and convincing evidence that he suffers from amnesia, plaintiff is not entitled to a lower burden at the time of trial.

It should also be noted that plaintiff's co-worker, Blumsden, was able to testify in detail as to his first-hand observations of the events leading up to plaintiff's accident, including how plaintiff's work was being performed, what safety instructions were given to plaintiff, whether plaintiff was properly utilizing his safety harness, where plaintiff was standing and what plaintiff was doing immediately prior to his accident. Thus, as here, where the parties are on equal footing insofar as accessibility to the facts, there is no need to afford preferential treatment (see Gayle v City of New York, 256 AD2d 541, 542 [2d Dept 1998]; Fitzgibbon v County of Nassau, 182 AD2d at 670).

PLAINTIFF'S CROSS MOTION FOR TRIAL PREFERENCE

CPLR 3403 (a) (3) allows for a trial preference in an action in which the interests of

justice will be served by an early trial. Under the circumstances of this case, and in light of evidence of plaintiff's indigency, plaintiff's application for a trial preference is granted in the interests of justice (see Shomron v Fuks, 26 AD3d 304, 305 [1st Dept 2006] [in consideration of defendants' finances, court granted trial preference]; Smith v City of New York, 5 AD3d 759, 759 [2d Dept 2004] [plaintiff was entitled to trial preference on ground of indigency where she was receiving public assistance, food stamps and medical assistance due to her indigency]; Hoyt v Kazel, 265 AD2d 527, 528 [2d Dept 1999]). Plaintiff testified that he currently resides in a homeless shelter in Chicago, which provides food to him. Plaintiff, who has not worked since his accident, also testified that he does not know if he can care for himself. Plaintiff also stated that he receives no workers' compensation and does not have a bank account.

In addition, in his medical report, Dr. Schuster concurs that, as a result of plaintiff's brain injury, plaintiff is indigent and existing in a city shelter. Kim Allen, the manager of the facility where plaintiff currently resides, stated that at the time that plaintiff was referred to the facility, plaintiff had been wandering the streets in Chicago for several days. She also maintained that, other than cashing his Social Security Disability checks, plaintiff does not manage his own finances. Thus, plaintiff is entitled to trial preference in this action.

AMERICAN AND LEVITZ'S MOTION TO COMPEL VARIOUS DISCOVERY DOCUMENTS FROM HEATLEY

As Heatley will be subject to common-law liability based on negligence in the event that plaintiff's brain injury is deemed a "grave injury" within the meaning of Workers' Compensation Law Section 11, defendants American and Levitz move for an order compelling Heatley to provide certain discovery relating to the Workers' Compensation and Employer's Liability Policy

from The Hartford, which policy allegedly insures Heatley for the losses associated with plaintiff's accident. Specifically, defendants American and Levitz seek a completed certified copy of The Hartford Workers' Compensation Policy, all endorsements to this policy, the insurance application and related documents, letters tendering plaintiff's claim and the third-party action to The Hartford, any responses sent by or on behalf of The Hartford, the underwriter's file and/or notes and any other documentation reflecting the amount of employer's liability coverage available to Heatley for the losses herein.

American and Levitz assert that Heatley procured both a general liability and workers' compensation liability policy from The Hartford for the policy period inclusive of the date of the loss herein, and that the policy, which was issued in Massachusetts, carries a \$100,000 coverage limit. However, an endorsement in the policy allows for the limits required by the state in which the work and injury occurred, if different from the limits afforded in Massachusetts. New York recognizes no liability limits in the Workers' Compensation and Employer's Liability policies (Oneida Ltd. v Utica Mutual Insurance Company, 263 AD2d 825, 825-826 [3d Dept 1999]).

American and Levitz contend that a review of the subject documentation might shed light on the amount they might expect to receive, as the amount of workers' compensation coverage afforded to Heatley under The Hartford policy will determine the success of an effective pass through of any statutory liability imposed from the defendants to Heatley.

In opposing the motion, Heatley notes that counsel for American and Levitz have already filed a similar motion seeking the same or similar relief requesting insurance information from Heatley in a pending declaratory judgment action in Nassau County previously brought by defendant International. In that case, declaratory action proceedings were commenced by

TransContinental Insurance Company and International against The Hartford Fire Insurance Company with regard to whether The Hartford was obligated to defend and indemnify International under Heatley's general liability policy.

Heatley maintains that it already fully complied with the requested insurance discovery on both November 7, 2005 and October 23, 2006, at which times Heatley provided to all parties a certified complete policy of insurance, including The Hartford Workers' Compensation and Employer's Liability Policy, which it has attached to its opposition papers. In addition, Heatley asserts that it is not in possession of the requested documents in the declaratory judgment action, as it is being handled by counsel for The Hartford. In addition, Heatley argues that it does not have access to the insurance files, underwriters' files and coverage opinions which reference any interpretation of the meaning of insurance clauses or declarations of the policy at issue.

Here, as all discoverable insurance policies have been provided previously by Heatley, American and Levitz are not entitled to an order compelling Heatley to produce the discovery documents requested in their motion.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of American Real Estate Holdings, LP's (American) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Mark Bartlett's complaint against it is granted; and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the part of defendant Levitz Furniture Corporation's (Levitz) motion,

pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it is denied as moot; and it is further

ORDERED that the parts of defendant and third-party plaintiff International Storage Systems, Inc.'s motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims predicated on violations of Industrial Code 12 NYCRR §§ 23-1.11 (a), 23-1.22 (c) (1) and 23-5.1 (c) (1), (f) and (g) as against it are denied; and it is further

ORDERED that the parts of International's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as American and Levitz's cross claims for indemnification as against it, are granted; and it is further

ORDERED that the parts of defendants American and Levitz's motion, pursuant to CPLR 3212, for summary judgment in their favor on the issue of indemnity as against defendant and third-party plaintiff International Storage Systems, Inc. (International) and third-party and second third-party defendant Heatley Installations (Heatley) are denied; and it is further

ORDERED that the parts of plaintiff's cross motion, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants American and Levitz and directing that plaintiff be entitled to a lower burden of proof due to his cognitive injuries are denied; and it is further

ORDERED that the parts of plaintiff's cross motion, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim as against International, and granting a Special Trial Preference in his favor are granted; and it is further

ORDERED that defendants and second-third party plaintiffs Seaman Furniture Company, Inc. and Seaman Furniture Company of Union Square, Inc.'s (collectively, Seaman) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint as against them is granted; and the complaint is severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further


ORDERED that third-party defendant and second-third party defendant Heatley's motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party and second third-party actions against it is denied; and it is further

ORDERED that defendants American and Levitz's motion for an order compelling third-party and second third-party defendant Heatley to provide discovery is denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: 2/5/08

ENTER:



Hon. Walter B. Tolub J.S.C.

FILED
FEB 13 2008
NEW YORK
COUNTY CLERK'S OFFICE