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

PART 54

Index Number : 110046/2005
CHOY, PENG-TAK
vs
BOWERY HOLDINGS
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO. 110046/2005
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
MAR 27 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/19/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

PENG-TAK CHOY and YOKE-WAN CHANG,	INDEX NO. 110046/2005
Plaintiffs,	
- against -	DECISION AND ORDER
BOWERY HOLDINGS, LLC., and GOLDEN BRIDGE RESTAURANT, LLC ,	
Defendants.	

GOLDEN BRIDGE RESTAURANT, LLC.,	
Third-Party Plaintiff,	
-against-	
NK CONSTRUCTION, INC.,	
Third-Party Defendant.	

KORNREICH, SHIRLEY WERNER, J.:

Plaintiffs Peng-Tak Choy and Yoke-Wan Chang (Choy's wife) seek partial summary judgment as to liability against defendant Bowery Holdings, LLC (Bowery) and defendant/third-party-plaintiff Golden Bridge Restaurant, LLC (Golden Bridge), pursuant to Labor Law §§ 240(1) and 241(6). Bowery and Golden Bridge jointly (1) oppose plaintiffs' motion and a motion for summary judgment filed by third-party-defendant NK Construction, Inc.; and (2) cross-move for summary judgment pursuant to Labor Law §§ 200, 240(1) and 241(6), or alternatively to preclude plaintiffs from introducing evidence at trial of permanent disability from work. Third-party defendant NK Construction, Inc. (NK) filed a motion for summary judgment on the third-

party complaint for indemnity seeking summary judgment pursuant to Workers' Compensation Law § 11 dismissing plaintiffs' complaint, or alternatively, denial of plaintiffs' motion for partial summary judgment. Plaintiffs filed a single affirmation in reply, in further support of their motion for summary judgment and in opposition both to the defendants' cross-motion for summary judgment and third-party defendant NK's motion for summary judgment.

I. *Summary of Undisputed Facts.*

Based upon the evidence presented by the parties in support of and in opposition to these three summary judgment motions, the court finds the following material facts to be undisputed. On November 5, 2004, plaintiff was employed as a construction worker for third-party defendant NK Construction. Originally from Malaysia, plaintiff was not a United States citizen and did not have either a green card or a work visa, factors relevant to his recovery of damages for future lost earnings, but not his standing to sue for such damages. *Balbuena v. IDR Realty LLC,* 6 N.Y.3d 338, 362 (2006). Plaintiff had worked with NK for two weeks. After paying its workers, however, NK did not retain records.

NK had been hired by defendant Golden Bridge as a construction contractor for a renovation job at 50-52 Bowery, New York City. Golden Bridge had leased a floor in the building from the property owner, defendant Bowery, and was renovating it for use as a restaurant. Although NK's owner Cheuk Kit Yu denied at deposition that there was a written contract between Golden Bridge and NK, Golden Bridge subsequently produced, pursuant to this court's order of February 22, 2007, two documents on NK's letterhead that appear by their terms to constitute a letter contract between the parties for the job in question. Exh. I, NK Motion. There also was abundant testimony evidencing that Golden Bridge hired and paid NK to do the

construction job.

NK's owner Yu was on the job site daily, supervising NK's employees and telling them what to do. Plaintiff recalled at his deposition that someone from Golden Bridge showed up on occasion and criticized some of his work, but there was no evidence that either Golden Bridge or Bowery exercised control over the work site itself. NK had purchased four mobile scaffolds that were being used on the construction site. These scaffolds had wheels on the bottom, were made of metal piping and had a wooden plank on the top where a worker would stand. The wheels could be locked, but there was no safety railing around the top of the scaffold to prevent a worker from falling off. Nor were the workers provided any other safety equipment, such as hard hats. At different times while plaintiff worked, the scaffold he was standing on would be moved while he remained on top of it.

On the day of the accident, plaintiff was standing on top of the scaffold assembling a metal frame grid for an acoustical drop ceiling. The scaffold had just been moved to the spot where he was working. Shortly before he fell, plaintiff had gone down the scaffold to get a pliers. He re-ascended the scaffold and proceeded to work with his hands over his head, using the pliers to secure pieces of the grid. Plaintiff felt the scaffold shake and then fell off of it, falling six or seven feet and landing on his face. Plaintiff lost consciousness and did not wake up until after he was taken to Bellevue Hospital.

The experts agree that plaintiff sustained an acquired injury to the brain caused by an external force from the fall. Plaintiff was fifty-four at the time of the accident and has not worked since. There is some dispute regarding the extent and permanence of Choy's injuries, as well as the impact of them on his ability to work in the future. This issue of "grave injury" is material to

the third-party complaint filed by Golden Bridge against NK, Choy's employer. Choy has filed a claim with the Workers' Compensation Board. Exh. H, NK motion.

II. *Legal Discussion and Rulings*

A. *Summary Judgment Standard*

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. CPLR 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. CPLR 3212 (b); *id.* at 560. *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

B. *Labor Law § 200*

Defendants Bowery and Golden Bridge, in their cross-motion, seek partial summary judgment also as to plaintiffs' claim under Labor Law § 200. Labor Law § 200(1), which codifies landowners' and general contractors' common-law duty to maintain a safe workplace, specifically provides,

> 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.

Recovery against the owner cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation. *See Allen v. Cloutier Constr. Corp.*, *supra,* 44 N.Y.2d at 299. This rule is an outgrowth of the basic common-law principle that "an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control." *Id.*

Defendants Bowery and Golden Bridge have presented sufficient evidence to establish that they did not have supervision or control over the worksite being run by NK. Through EBT testimony of NK's and Golden Bridge's owners, defendants established that NK had supervision and control of the worksite. NK also attached as an exhibit to its motion for summary judgment a copy of its contract (on NK letterhead) with Golden Bridge, which states "We will supervise." Exh. I. Plaintiffs have not even addressed this claim in their moving papers or in response to defendants' cross-motion, as would be required under CPLR 3212(b). Accordingly, defendant Bowery's and Golden Bridge's cross-motion for partial summary judgment on plaintiffs' claim under Labor Law § 200 is granted against plaintiffs and dismissed.

C. *Labor Law § 240(1)*

Labor Law § 240 (1), known as the "Scaffold Law," was enacted to provide absolute liability for construction activities involving a significant risk due to elevation. It provides in relevant part:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Scaffold Law was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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.* Labor Law § 240(1). (Emphasis added) As the owner of the property, Bowery is subject to absolute liability under the Scaffold Law. *Coleman v City of New York*, 91 N.Y.2d 821, 822-823 (1997). Lessee Golden Bridge also is subject to absolute liability because it hired the contractor NK, and, thus, was in "control of the work site." *Guzman v. L.M.P. Realty Corp., et. al.*, 262 A.D.2d 99 (1st Dept. 1999). *See Bell v. Bengomo Realty, Inc.*, 36 A.D.3d 479 (1st Dept. 2007) (finding Scaffold Law applies to lessee who contracts for the work). The Court of Appeals in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1993), referred to the "well established" rule that the duty imposed by the Scaffold Law is "nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work."

In *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991) the court held that "[it] is settled that section 240 (1) 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'. (See *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596, 3 Bradb. 251).' (*Koenig v Patrick Constr. Corp.*, 298 N.Y. 313, 319, 83 N.E.2d 133)." The *Rocovich* court, at 513, looked at the "*the nature of those occupational*

hazards which the Legislature intended should warrant the absolute protection that the statute affords." Further, at 514, the Court found that "the contemplated hazards are those related to the effects of gravity where protective devices are called for . . . ." The requirement to have safety railings on scaffolds was undoubtedly included in the Labor Law to protect workers from the "contemplated hazard" of falling from a dangerous height, which is a direct effect of gravity.

Defendants and third-party plaintiff NK argue that plaintiff Choy's fainting, or his failure to lock the wheels of the scaffold were the "sole proximate cause" of his accident, which precludes liability under the Scaffold Law. Where a "plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240(1) [does] not attach" *Weininger v Hagedorn & Co.*, 91 N.Y.2d 958, 960 (1998). *See Cahill v Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35 (2004); *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280 (2003). If adequate safety devices are available at the job site, but the worker either does not use or misuses them, and that failure or misuse is the *sole* proximate cause of the accident, then liability does not attach. Even without adequate safety devices, if the worker's own actions are the *sole* proximate cause of the accident, then liability will not attach. The word "sole" is key in the analysis, as comparative fault does not bar recovery under Labor Law § 240(1). *Blake, supra,* 1 N.Y.3d at 289-290.

Section 240 (1) required that this scaffold, like all scaffolds, be "constructed, placed and operated as to give proper protection" to those working on it. Law provisions specifically applicable to manually propelled scaffolds, like the one from which plaintiff Choy fell, require safety railings. Industrial Code (12 NYCRR) § 23-5.18(b); New York Building Law (Administrative Law) § 27-1048(2). It is undisputed that the scaffold here had *no safety railings*.

Defendants were obligated under the law to equip the scaffold with railings that would have reasonably stopped plaintiff's fall, regardless of why he fell. *See Vergara v. SS 133 West 21, LLC*, 21 A.D.3d 279, 280 (1st Dept. 2005). The *Vergara* case is dispositive on this issue. In *Vergara* the Appellate Division reversed the lower court's order denying the plaintiff partial summary judgment where a manually propelled scaffold had no safety railings. The court explained, "[a] lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause." *Id.* at 280. Accordingly, summary judgment on the issue of liability is granted against defendants Bowery and Golden Bridge.

D. *Labor Law § 241(6)*

Plaintiffs also rely on Labor Law § 241(6), which states:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Morris v. Pavarini Constr., 9 N.Y.3d 47, 50 (2007) explained that this statute is,

> "in a sense, a hybrid" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 503, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]). Its first sentence merely reiterates common-law standards of care, and thus cannot be a basis for civil liability by persons who are not themselves negligent; the first sentence "cannot by itself be relied upon as the source of an owner's or general contractor's nondelegable duty" (*id.* at 504). The second sentence, however, requiring owners and contractors to comply with rules of the Commissioner of Labor, does create a nondelegable duty -- but only where the regulation in question contains a "specific positive command[]" (*Allen v Cloutier Constr. Corp.*, 44 N.Y.2d 290, 297, 376 N.E.2d 1276, 405 N.Y.S.2d 630 [1978]), not where the regulation itself, using terms like

> "adequate," "effective," "proper," "safe," or "suitable," merely incorporates "the ordinary tort duty of care" (*Ross*, 81 N.Y.2d at 504).

Id. See, e.g., Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 297 (1978) (discussing the history of § 241(6). The statute creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where, and only where, a "specific, positive command[]" (*Ross*, 81 N.Y.2d at 503) or a "concrete specification" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 350 [1998]) of a regulation promulgated by the Commissioner pursuant to the statute has been violated. As with the plaintiff in *Morris*, Choy has cited a "specific regulatory requirement," but unlike *Morris*, Choy has also presented sufficient admissible evidence to establish beyond dispute that this requirement was violated.

In their complaint, plaintiffs allege that Bowery and Golden Bridge violated the Industrial Code of the State of New York (12 NYCRR 23), §§ 23-1.5, 23-1.7, 23-1.16 and 23-1.21. Plaintiffs then flesh out these allegations in their Bill of Particulars, adding sections 23-1.15, 23-1.17 and 23-5.1 through 23-5.22. Exh. E, Plaintiffs' Motion. It is not necessary to address the specificity of all of these regulations since one in particular, Industrial Code § 23-5.18(b), is dispositive. That regulation provides,

> (b) Safety railings required. The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this part (rule).

As discussed above, the court has found it undisputed that there were no safety railings present. It would appear that since owner control is no longer necessary for liability under section 241 [*see, e.g., Lagzdins v United Welfare Fund-Security Div. Marriott Corp.*, 77 AD2d 585, 587 (2d Dept. 1980)], notice would similarly be irrelevant [*see Miller v Perillo*, 71 AD2d 389, 391 (1st

Dept.), *appeal dismissed,* 51 N.Y.2d 770 (1980)], and case cited; *Monroe v City of New York*, 67 AD2d 89, 108 (2d Dept. 1989)], even though said liability is otherwise determined on negligence principles [*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 (1982)]. The proof, including violation of the administrative rule which is some evidence of negligence (*Id.*), supports such a finding.

That *some* evidence of negligence must be considered with the undisputed fact that neither the scaffold nor Choy had been provided any other safety device to prevent a fall. No railing, no hard hat, no safety harness, and not to mention the fact that the other workers were rolling the scaffold around the worksite with Choy standing on top of it across uneven flooring in further violation of the Industrial Code, 12 NYCRR § 23-5.18(h). Labor Law § 241(6) requires those controlling worksites "to provide reasonable and adequate protection and safety to" the workers, and the regulations implementing that statute specifically require railings on manually propelled scaffolding ("safety railings" [Industrial Code § 23-5.18(b)], "guard railing" [Administrative Code § 27-1048(2)]). The evidence presented by both sides suggests that Choy either lost his balance or fainted, a manner of falling reasonably contemplated by the regulating authorities that implemented these guidelines. Consequently, Choy's employer NK should have reasonably foreseen that without appropriate railings or other safety devices a worker could fall off of the scaffolding and sustain injuries like Choy. Under these circumstances Bowery and Golden Bridge would be liable because NK 's negligence proximately caused Choy to fall off of the scaffold. *See Vergara, supra,* 21 A.D.3d at 280-281.

Again defendants allege Choy's comparative or contributory fault as a defense to liability. Although comparative fault is not a defense to violations of Labor Law § 240(1), it is a

defense to violations of § 241(6). *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 350 (1998). The evidence presented by plaintiffs establishes a material factual dispute on this issue.

Plaintiff Choy testified that he felt the scaffold shake before he fell. It is undisputed that the wheels on the scaffold were not locked when he fell. Choy testified that it was not his job to lock the wheels, but also that he had descended the scaffold to get a tool shortly before he re-ascended then fell. Yu, NK's owner, testified that he told all the workers they had to lock the scaffold wheels. The reason for Choy's fall remains in dispute. Whether he fainted or simply lost his balance is material to liability here; if he lost his balance because the scaffold moved, then his failure to lock the wheels could have been a contributing cause of the accident, but not if he fainted. As the Court of Appeals explained in *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 517-518 (1980),

> [C]ontributory negligence should not be charged 'if there is no or insufficient evidence to support it'" *(Willis v Young Men's Christian Assn. of Amsterdam*, 28 NY2d 375, 378, quoting 65A CJS, Negligence, § 293, p 1032). In truth, whether the issue is the negligence of the defendant or the contributory negligence of the plaintiff, the test for determining whether the facts pose a question for resolution by the jury remains the same: is there a "valid line of reasoning and [are there] permissible inferences which could possibly lead rational men to the conclusion [of negligence] on the basis of the evidence presented at trial"? *(Cohen v Hallmark Cards*, 45 NY2d 493, 499.) If no such "valid line of reasoning" exists, it is proper for the trial court to make a legal determination without resorting to the fact-finding function of the jury.

50 N.Y.2d 517-518. Based solely on plaintiffs' evidence in support of summary judgment, there is a "valid line of reasoning" (*Id.*) that could lead to the conclusion of comparative negligence. Plaintiffs' motion for partial summary judgment pursuant to Labor Law § 241(6) against Bowery and Golden Bridge, and the latter's cross-motion for summary judgment on the claim, are both denied.

E. *NK's Motion for Summary Judgment on Third Party Action*

NK argues that it is entitled to summary judgment on, and dismissal of the third-party complaint against it pursuant to the "exclusive remedy" and "grave injury" provisions of Workers' Compensation Law (WCL) § 11. Where an employee is injured in the course of employment, his exclusive remedy against his employer is ordinarily a claim for workers' compensation benefits filed with the Workers' Compensation Board. Choy has filed a claim for benefits with the Workers' Compensation Board. WCL § 11 also prohibits third-party indemnification or contribution claims against employers, except in the case of a "grave injury" or where based upon a written contract entered into prior to the accident. Defendants Bowery and Golden Bridge have withdrawn the claim for contractual indemnity. Therefore, NK's burden as the moving party here is to show a lack of grave injury as a matter of law.

NK has not met its burden to show that Choy has not suffered a "grave injury" within the meaning of the statute. In support of the motion, NK attaches plaintiffs' verified bill of particulars alleging that Choy sustained "significant scarring over face and head." Exh. D at 4. NK also attaches photographs of Choy's face and head (Exh. K), as well as expert reports finding both "well healed facial and scalp scars" (Exh. L: Reid, MD report), and "permanent scars of the forehead/suprabrow regions, right eyebrow, and left upper eyelid," "[d]epression of the right forehead," and "[n]asal septal deviation" (Exh. L: Cooper, MD report). The report from a Dr. Greenwald (Exh. J.) notes a "bony defect of his forehead bilaterally." The expert reports do not speak to the issue of *permanent* facial disfigurement, and they are not relevant on the issue of severity. *Krollman v. Food Automation Serv. Techniques, Inc.*, 13 A.D.3d 1209, 1210 (4th Dept. 2004). Further, the photographs of Choy's face do not clearly show that his facial

scarring was *not* a severe facial disfigurement. The photographs do show some scarring and what appears to be a dent in the side of Choy's forehead. The court is not prepared to find as a matter of law that the evidence produced by NK shows without dispute that Choy's facial disfigurement was less than severe and permanent. On this ground the motion is denied.

As for the second ground, that Choy suffers from "an acquired injury to the brain caused by an external physical force resulting in permanent total disability," *supra*, the only dispute is whether Choy's brain injury has resulted in a "permanent total disability." In *Rubeis v. The Aqua Club*, 3 N.Y.3d 408 (2004), the Court of Appeals resolved a conflict among the Appellate Divisions on the meaning of the phrase "permanent total disability" in relation to brain injuries. The court in *Rubeis* concluded that, "the test we adopt for permanent total disability under Section 11 is one of unemployability *in any capacity*." *Id.* at 417 (emphasis included). Under this standard NK had to come forward with undisputed evidence of Choy's employability. NK has not met that burden. Dr. Greenberg opines that Choy is "permanently disabled." Exh. J. Dr. Reid opines that the "fall did not result in permanent total disability nor unemployability." Exh. L. Reports from neuropsychologists Hibbard and Barr provide conflicting results, with Hibbard finding a loss of cognitive functioning, and Barr finding that Choy did not experience "any form of residual cognitive or brain impairment." Exh. L. The disputed material issue of "permanent total disability"will have to be decided by a jury. Accordingly, it is

ORDERED that the cross-motion of defendants/third-party plaintiffs for partial summary judgment against plaintiffs on the issue of liability pursuant to Labor Law §§ 200, 240(1) and 241(6) is granted as to § 200 and 241(6) , and denied as to §§ 240(1); and it is further

ORDERED that plaintiffs' motion for partial summary judgment against defendants/third-party plaintiffs Bowery Holdings, LLC and Golden Bridge Restaurant on the issue of liability pursuant to Labor Law §§ 240(1) is granted; and it is further

ORDERED that the motion of third-party defendant NK Construction, Inc. for summary judgment against both defendants/ third-party plaintiffs and the plaintiffs is denied; and it is further

ORDERED that the motion of defendants/third-party plaintiffs to preclude plaintiffs from introducing evidence at trial of Choy's permanent disability from work, is denied.

ENTER:

Date: March 19, 2008
New York, N. Y.

J.S.C.