

<b>Ai-Zhong Lin v Woodrow Constr., Inc.</b>
2008 NY Slip Op 31788(U)
June 25, 2008
Supreme Court, New York County
Docket Number: 0106649/2005
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK  
Justice

PART 12

LIN, AI-ZHONG

INDEX NO.

106649/05

CHAO SHEXIG DEVELOPMENT  
SUMMARY JUDGMENT

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion are decided in accordance with the accompanying memorandum decision.*

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

**FILED**  
JUN 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/25/08



**BARBARA R. KAPNICK**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X  
AI-ZHONG LIN and XIU-PING CHEN,

Plaintiffs,

- against -

WOODROW CONSTRUCTION, INC., PAO KUANG  
HUANG and CHAO SHENG DEVELOPMENT, LLC,

Defendants.  
-----X

BARBARA R. KAPNICK, J.:

This is an action pursuant to Labor Law §§ 240(1)(7), 241(1)(c) and 200 and for common law negligence.

Plaintiffs seek to recover damages for personal injuries sustained by plaintiff Ai-Zhong Lin on November 13, 2004, while working as a laborer at a project involving the construction of a four story apartment building located at 74-12 and 74-14 Woodside Avenue in Queens. Plaintiff claims that while moving a portable generator on the unfinished concrete floor on the third floor, his left foot went into an uncovered hole and he fell through the opening down to the second floor below.

Defendant Woodrow Constuction, Inc. ("Woodrow Construction") was the general contractor of the project. Defendant Pao Kuang Huang ("Huang") was the principal of defendant Chao Sheng Development, LLC ("Chao Sheng") the owner of the premises.

DECISION/ORDER  
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**FILED**

JUN 26 2008

COUNTY CLERK'S OFFICE  
NEW YORK, NY

Plaintiff was employed by Chen Lin Construction, a subcontractor working at the site.

Plaintiffs now move for partial summary judgment against all the defendants on the issue of liability on their claims pursuant to Labor Law §§ 240(1) and 241(6).

Defendant Woodrow Construction opposes the motion and cross-moves for summary judgment: (i) dismissing plaintiffs' claims pursuant to Labor Law §§ 241(6), 200 and common law negligence; and (ii) dismissing the co-defendants' cross-claims for contractual and common law indemnity.

Defendants Huang and Chao Sheng also oppose the motion, and the cross-motion to the extent that it seeks relief against them, and cross-move for summary judgment on the issue of liability on their cross-claims against defendant Woodrow Construction.

Labor Law § 240(1)

Plaintiffs argue that they are entitled to summary judgment on their claim pursuant to Labor Law § 240(1) because plaintiff Al-Zhong Lin was not provided with a belt, harness, rope or other safety equipment to prevent him from falling through a hole from an opening in the floor.

[\* 4]

Defendant Woodrow Construction argues in opposition that there are triable issues of fact as to whether plaintiff's own actions were the sole proximate cause of his accident, because plaintiff testified that he was aware of the opening and its location, that he used the stairwell openings and their covers immediately prior to his accident, and that he was caused to fall when he 'tripped himself' while pushing the generator closer to the opening.

It is well settled that "[w]here no violation of the statute is shown, a Labor Law § 240(1) claim will not lie where the plaintiff's actions were the sole proximate cause of the accident as 'it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury' (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 290, ...[2003])." *Davidson v Ambrozewicz*, 12 AD3d 902, 903 (3rd Dep't 2004).

Here, however, there is no dispute that defendants failed to provide plaintiff with any safety devices. "Under these circumstances, plaintiff cannot be deemed the sole proximate cause of his injuries." *Hernandez v Bethel United Methodist Church of New York*, 49 AD3d 251, 253 (1st Dep't 2008). See also, *Hart v Turner Const. Co.*, 30 AD3d 213 (1st Dep't 2006).

Moreover, "[a]s the Court of Appeals has instructed, where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, '[n]egligence, if any, of the injured worker is of no consequence.' (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513,...; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524...)." *Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 291 (1st Dep't 2002).

Accordingly, based on the papers submitted and the oral argument held on the record on April 30, 2008, that branch of plaintiffs' motion seeking summary judgment on their claim pursuant to Labor Law § 240(1) is granted, and that portion of defendant Woodrow Construction's cross-motion seeking to dismiss said claim is denied.

Labor Law § 241(6)

Plaintiffs argue that they are entitled to summary judgment on their claim pursuant to Labor Law § 241(6) on the ground that defendants violated 12 NYCRR § 23-1.7(b)(1)(i) which provides as follows:

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Defendant Woodrow Construction argues in opposition to this branch of plaintiffs' motion and in support of its cross-motion that plaintiffs' claim pursuant to Labor Law § 241(6) must be dismissed because the various sections of the Industrial Code listed in plaintiffs' Bill of Particulars are inapplicable. Specifically, defendant argues that section 23-1.7 does not apply because the opening was covered by planking to prevent exactly this type of accident.

Defendant Woodrow Construction also argues, in the alternative, that that portion of the plaintiffs' motion seeking summary judgment on their Labor Law § 241(6) claim must be denied because there are triable issues of fact regarding whether plaintiff was the sole proximate cause of his accident and as to the applicability of the cited sections of the Industrial Code.

This Court finds that plaintiff has made a prima facie showing that section 23-1.7 was violated since there is no evidence that the wood planking was "fastened in place", as required by that provision, and this Court has already determined that plaintiff's actions were not the sole proximate cause of his accident.

[\*7]  
Accordingly, that portion of plaintiffs' motion seeking summary judgment on their claim pursuant to Labor Law § 241(6) based on section 23-1.7(b)(1)(i) is granted.

Woodrow Construction's cross-motion is granted without opposition only to the extent that it seeks to dismiss plaintiffs' claim pursuant to Labor Law § 241(6) based on other provisions of the Industrial Code.

Labor Law § 200/common law negligence

Defendant Woodrow Construction argues that plaintiffs' claims pursuant to Labor Law § 200 and for common law negligence must be dismissed because it did not supervise, direct or control plaintiff's work at the job site, and it did not create or have notice of any defective condition at the work site.

This portion of the cross-motion is granted without opposition and said claims are hereby dismissed with prejudice and without costs or disbursements.

Cross-claim for contractual indemnification

Defendant Woodrow Construction argues that the co-defendants' cross-claim against it for contractual indemnification must be dismissed on the ground that there was no indemnification language in the contract between Woodrow Construction and Chao Sheng.

[\* 8]

Defendants Huang and Chao Sheng argue that it was the intention of the parties to create a contract of indemnity in their favor, as evidenced by Woodrow Construction's agreement (i) to conduct the construction 'in compliance with' applicable laws, (ii) to remain responsible for the completion of the contract by subcontractors, (iii) to obtain adequate liability insurance, and (iv) to deliver a certificate of insurance to Huang and Chao Sheng naming Huang as an additional insured.

It is well settled that

[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed (citations omitted). The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (citations omitted).

*Hooper Associates, Ltd v AGS Computers, Inc.*, 74 NY2d 487, 491-492 (1989). See also, *Tonking v Port Authority of New York and New Jersey*, 3 NY3d 486 (2004).

No such promise can be implied from the language and purpose of the subject agreement and/or the surrounding facts and circumstances.

Accordingly, that portion of defendant Woodrow Construction's motion seeking to dismiss the cross-claim for contractual

[9]  
indemnification must be granted and that portion of the cross-motion by defendants Huang and Chao Sheng must be denied.

Cross-claim for common law indemnification

Defendant Woodrow Construction argues that the co-defendants' cross-claim against it for common law indemnification must also be dismissed on the ground that it was not actively negligent with respect to plaintiff's accident.

Defendant Huang and Chao Sheng argue that they are entitled to common law indemnification from the general contractor since they did not exercise any control or supervision over plaintiff's work and are only statutorily liable based on this Court's finding herein of violations of Labor Law §§ 240(1) and 241 (6).

However, this Court has already determined, supra, that defendant Woodrow Construction was also not actively negligent with respect to plaintiff's accident.


Accordingly, that portion of defendant Woodrow Construction's motion seeking to dismiss the cross-claim for common law indemnification must be granted and that portion of the co-

defendants' cross-motion seeking summary judgment on said cross-claim must be denied.

A settlement conference shall be held in IA Part 12, 60 Centre Street, Room 341 on July 30, 2008 at 9:30 a.m. Plaintiffs' counsel is directed to relay a demand to defendants' counsel prior to the conference.

This constitutes the decision and Order of this Court.

Dated: June 25, 2008



BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

**FILED**  
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