Kola v Queen of Greene, Inc.
2008 NY Slip Op 32339(U)
August 16, 2008
Supreme Court, New York County
Docket Number: 0100050/2006
Judge: Michael D. Stallman
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SCANNED ON 8/21/2008

[* 1]

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

SHKLEQUIM KOLA,
Plaintiff,

- v -

QUEEN OF GREENE, INC., MORGANE GREENE, INC. and URBAN D.C., INC.,

Defendants.

(And a third-party action).

INDEX NO. 100050/06

MOTION DATE 2/19/08

MOTION SEQ. NO. 003

MOTION CAL. NO. 48

	PAPERS NUMBERED
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Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
AUG 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/18/08
New York, New York

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE J.S.C.
DATED:

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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SHKELQUIM KOLA,

Plaintiff,

- against -

QUEEN OF GREENE INC., MORGANE GREENE, INC. and URBAN D.C. INC.,

Defendants.

---------------------------------------X

Index No. 100050/06

FILED
AUG 21 2008
COUNTY CLERK'S OFFICE NEW YORK

QUEEN OF GREENE INC., MORGANE GREENE, INC. and URBAN D.C. INC.,

Third-Party Plaintiffs,

- against -

T&T ELECTRICAL CORP.,

Third-Party Defendant.

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Third-Party Index No. 590949/06

DECISION AND ORDER

HON. MICHAEL D. STALLMAN, J.:

This action arises out of a construction site accident. Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), and for an immediate assessment of damages. Defendants cross-move, pursuant to CPLR 3212, for summary judgment (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and (2) granting them contractual indemnification against plaintiff's employer, third-party T&T Electrical Corp. (T&T), and attorney's fees.

BACKGROUND

On September 22, 2005, plaintiff, a junior mechanic electrician working for T&T, was pulling on wires within a conduit pipe attached to the ceiling of the sixth floor of the building at 28-30 Greene Street, New York, New York. Plaintiff was standing on a 10-foot, A-frame ladder, two rungs from the top, as he was pulling on the wires and trying to dislodge the conduit. Apparently, part of his job that afternoon involved relocating 10-foot pieces of two-inch electrical conduit pipe, by loosening the couplings that joined the pieces of conduit together, loosening the circular clamps on metal brackets around the conduit which held the conduit to the ceiling, sliding the conduit out, and handing it to helpers on the ground. Plaintiff alleges that while he was working, dust and debris fell on him from the wooden ceiling beams above him, and the pipe began falling in his direction. Plaintiff allegedly moved to avoid the pipe, lost his balance as the ladder moved, and fell. According to plaintiff, he fell in one direction, and the ladder fell in the other. The pipe did not hit plaintiff.

Defendant Queen of Greene Inc. (Queen)[1] was the owner of the premises. Queen contracted with defendant Urban D.C. Inc. (Urban) to be the general contractor for the renovation work being performed at the location. Urban hired

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[1] Queen was formerly known as Morgane Greene, Inc. Thus, in this decision, defendant Morgane will be included in the designation "Queen."

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subcontractors, including T&T, to do the actual renovation work, T&T was hired to eliminate live wires, relocate electrical panels, and to provide temporary lighting and some new outlets. Two laborers, employees of Morris Mechanical, a company which supplied laborers to T&T, were helping plaintiff on the sixth floor the day of the accident: Louis Crosdale, called Ian (Ian), and Staling Sierra, called Benny (Benny). Plaintiff's nickname on the job was Jimmy.

Djalma Phillips, called Nick or Nicholas on the job (Nick), was plaintiff's foreman. Nick supervised plaintiff, and told him what to do. According to Nick, the laborers' duties included holding the ladder when plaintiff asked them to, handling conduit when it was removed from the ceiling and had to be placed on the ground, preparing conduit and electrical wires for plaintiff's use in their relocation, and supplying plaintiff with hand tools when asked. Inconclusive testimony has been offered concerning whether Ian was holding plaintiff's ladder at the time of the accident.

THE PLEADINGS/PRIOR DETERMINATIONS

Plaintiff's complaint consists of two causes of action: (1) for negligence, and (2) for violation of Labor Law § 240(1).

Defendants/third-party plaintiffs' third-party complaint includes three causes of action: (1) for common-law indemnification or contribution, (2) for contractual indemnification, and (3) for breach of contract to procure insurance.

In its March 10, 2008 Order (motion sequence number 004) (the March Order), this Court dismissed third-party plaintiffs' first and third causes of action, and Queen's contractual indemnification claim against T&T. The first cause of action was dismissed as barred by Workers' Compensation Law § 11, because plaintiff did not suffer a grave injury. Dismissal of the third cause of action was warranted because there was no evidence that T&T had agreed to obtain insurance on defendants/third-party plaintiffs' behalf. The second cause of action was dismissed with respect to Queen because Queen had no agreement with T&T for contractual indemnification.

By Order dated April 29, 2008 (motion sequence number 006), this Court granted reargument of the March Order, and adhered to its prior decision.

Thus, the only claim remaining in the third-party complaint is Urban's cause of action against T&T for contractual indemnification.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'"

Santiago v Filstein, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff's Motion

"Labor Law § 240(1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 880 [2003]).

> Labor Law § 240(1) requires that safety devices such as ladders be so "constructed, placed and operated as to give proper protection" to a worker. "[T]he legislative history of the Labor Law, particularly sections 240 and 241, makes clear the Legislature's intent to achieve the purpose of protecting workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner

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and general contractor'" [citation omitted]

(*Klein v City of New York*, 89 NY2d 833, 834 [1996]). The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards, such 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.*, 81 NY2d 494, 501 [1993]). "In order to establish prima facie entitlement to judgment as a matter of law on a cause of action pursuant to Labor Law § 240(1), a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of his or her injuries" (*Woszczyna v BJW Associates*, 31 AD3d 754, 755 [2d Dept 2006]; *see also Vergara v SS 133 West 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]).

This case involves a falling object.

> Labor Law § 240(1) applies to both "falling worker" and "falling object" cases. With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to "a significant risk inherent in ... the relative elevation ... at which materials or loads must be positioned or secured" [citation omitted]. Thus, for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute

(*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267-268 [2001]).

Plaintiff posits three reasons which he feels should entitle him to summary judgment on his section 240(1) claim: (1) defendants' alleged failure to secure the ladder; (2) defendants' alleged failure to provide safety devices to prevent his fall; and (3) defendants' alleged failure to secure the falling object. Because there are questions of fact with respect to each alleged violation of the statute, plaintiff's motion must be denied.

As mentioned above, inconclusive evidence precludes any finding that the ladder was secured or unsecured. Benny, one of the helpers assisting plaintiff that day, attested that Ian held the ladder for plaintiff, and that plaintiff moved the ladder from place to place to access different sections of the conduit (Sierra 1/18/08 Aff., ¶¶ 6, 7). At one point, Benny walked part way across the room, heard a noise, and turned to see plaintiff falling (*id.*, ¶ 8). However, he did not testify that he saw Ian holding the ladder at the time of the accident. Ian himself described the accident, but did not say anything about whether or not he held the ladder at all. Rather, he attested that he heard a crack and saw the pipe that plaintiff was working on falling from the ceiling, with dust and some ceiling debris. According to Ian, it looked like the entire pipe was going to fall. He saw the pipe swing, and when plaintiff tried to get out of its way, the ladder moved in one direction and plaintiff in the other (Crosdale 11/16/07 Aff., ¶¶ 4, 5). After the accident, he picked up the ladder and stood it

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upright (*id.*, ¶ 6). Because plaintiff has not established that the ladder was not secured, summary judgment on this theory must be denied.

Plaintiff also has not met his burden on the issue of whether defendants failed to provide adequate safety devices to prevent his fall. He has made no showing that a lack of safety devices was a proximate cause of his fall. Moreover, Darin Kochie, T&T's superintendent on the day of plaintiff's accident, testified that there was no feasible way to tie off the A-frame ladder due to the need to work at various locations away from the side walls, and that a fall arrest or harness also could not have been used in the circumstances (Kochie 1/18/08 Aff., ¶¶ 4, 5). The ceiling had already been demolished. Even if additional devices had been provided, there is no evidence that there would have been anything to hook them on to. There is also a question concerning whether additional devices would have prevented the work from being done.

Lastly, plaintiff contends that defendants failed to adequately secure the falling pipe. Darin Kochie, T&T's superintendent that day, averred:

> There also was no practical reason to try to provide additional support to the pieces of conduit being removed by Mr. Kola and no feasible way to tie or secure the lengths of conduit when they are being removed. Once an individual length of conduit has been uncoupled from the piece to which it is connected, it is still supported by the bracket which encircles it and which is connected to the ceiling. The length of pipe

> is then simply slid through the bracket to a point where it can be handed to a worker standing on the ground. As this process is ongoing, the conduit has the de-energized wires passing through it which further support it from falling. The bracket system also supports the conduit during the removal process

(Kochie 1/18/08 Aff., ¶ 8). Plaintiff's response was that the wires were not safety devices to keep the pipe from falling (Roura 2/8/08 Reply Affirm., ¶ 45). As such, plaintiff has not met his burden in seeking summary judgment on his section 240(1) cause of action, and his motion is denied.

Defendants' Cross Motion

Labor Law § 200 and Common-Law Negligence

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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]). In cases, like this one, where the injury results from the contractor's method of doing the work, liability under section 200 "may not be assigned absent proof that the defendant exercised some supervisory control over the work in the course of which the plaintiff was injured" (*DeSimone v Structure Tone*, 306 AD2d 90, 90 [1st Dept 2003]). "[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman*

Construction Corp., 40 AD3d 305, 311 [1st Dept 2007]).

Here, there is no evidence that Queen supervised plaintiff's work. The evidence also makes clear that Urban had only the general supervision of a general contractor. Thus, the part of defendants' cross motion which seeks summary judgment dismissing the Labor Law § 200 and common-law negligence claims against Queen and Urban is granted.

Contractual Indemnification Against T&T

"A party is entitled to full contractal indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances [interior quotation marks and citations omitted]" (*Torres v Morse Diesel International*, 14 AD3d 401, 403 [1st Dept 2005]; *Masciotta v Morse-Diesel International*, 303 AD2d 309, 310 [1st Dept 2003]). When dealing with an indemnification contract, "the intention to indemnify must be 'unmistakably clear from the language of the promise' [citation omitted]" (*Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 40 AD3d 415, 418 [1st Dept 2007]). Moreover, "[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; *see also De La Rosa v Philip Morris Management Corp.*, 303 AD2d 190, 193 [1st Dept 2003],

quoting *Correia; Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002], quoting *Correia*).

In this case, there are only two causes of action in the complaint: Labor Law § 200/common-law negligence, and Labor Law § 240 (1). This court has already determined that no claim sounding in Labor Law § 200 or common-law negligence lies against Urban. The "statutory liability" mentioned in *Correia*, in this case, refers to the absolute liability that could be imposed under Labor Law § 240 (1) on Urban because it was the general contractor at the worksite. However, "[a] violation of [Labor Law § 240 (1)] is not the equivalent of negligence and does not give rise to an inference of negligence" (*Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990]). Thus, even if plaintiff were to prevail against Urban on his Labor Law § 240 (1) claim, Urban would still not be found negligent in this matter, and, depending on the wording of the contract, could be entitled to contractual indemnification.

The September 20, 2005 Indemnity Agreement provides, in pertinent part, as follows:

> T&T Electrical Corp. ("T&T") ... covenants and agrees, at its sole cost and expense, to indemnify and hold Urban D.C. Inc. ... harmless from and against any and all claims made by or on behalf of any person, firm or corporation with the scope of the work to be performed by T&T for the project located at 28-30 Greene Street, New York, but only to the extent caused in whole or in part by the negligent acts or omissions of T&T, their contractors, employees and/or assigns.

Although Urban seeks a conditional summary judgment in its favor on its claim for contractual indemnification against T&T, this part of its cross motion is denied. No finding that T&T was negligent has been made, and Urban has not met its prima facie burden of demonstrating that T&T was negligent.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross motion is granted only to the extent that the Labor Law § 200 and common-law negligence claims are dismissed against defendants, and the motion is otherwise denied.

Dated: August 18, 2008
New York, New York

ENTER:

J.S.C.

FILED
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