Generoso v New York City Hous. Auth.
2008 NY Slip Op 33596(U)
November 25, 2008
Supreme Court, New York County
Docket Number: 102719/08
Judge: Louis B. York
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SCANNED ON 12/4/2009

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Generoso, Nicky

- v -

New York City Housing

INDEX NO. 102719/08

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for Pt. Summary Judg.

	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.

FILED

DEC 04 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/25/09

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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

NICKY GENEROSO,

Plaintiff,

-against-

Index No. 102719/08

NEW YORK CITY HOUSING AUTHORITY, BRI-DEN CONSTRUCTION CO., INC., PRO SAFETY SERVICES LLC, and POWERS BRIDGING AND SCAFFOLDING CO., INC.,

Defendants.

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

NEW YORK CITY HOUSING AUTHORITY and BRI-DEN CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 591017/08

COOPER PLASTERING CORPORATION,

Third-Party Defendant.

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FILED
DEC 04 2009
NEW YORK COUNTY CLERK'S OFFICE

Louis B. York, J.:

In this action arising from injuries suffered by plaintiff in a construction site accident, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) as against defendants New York City Housing Authority (the Housing Authority) and Bri-Den Construction Co., Inc. (Bri-Den). Defendant Pro Safety Services LLC (Pro Safety) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it.

Defendants the Housing Authority and Bri-Den cross-move for summary judgment dismissing the complaint and all cross claims asserted as against them, or, in the alternative, for summary judgment against Pro Safety on their cross claim for common-law indemnification.

Pursuant to stipulation filed November 17, 2008, the action has been discontinued as against defendant Powers Bridging and Scaffolding Co., Inc.

BACKGROUND

On September 27, 2007, plaintiff, then a laborer employed by third-party defendant Cooper Plastering Corporation (Cooper), was working on the exterior of one of the Fort Washington Houses located at 509 West 176th Street in Manhattan. The premises were owned by the Housing Authority, which had hired Bri-Den as its general contractor for renovations being undertaken at the site. In turn, Bri-Den hired Cooper to remove and replace the façade of the building, and Pro Safety to provide a site safety manager. On the morning of the accident, plaintiff had installed protection, consisting of wooden templates with a plastic sheet that fit into the window openings, on the third-floor windows in the area of the fire escape. After his coffee break, plaintiff ascended the fire escape to remove the protection from the windows. After he finished removing the protection, while he was descending the fire escape from the

third-floor landing to the second floor, one of the steps broke, causing him to fall down several steps, and to injure his back. Plaintiff did not fall off the fire escape.

THE PLEADINGS

In his complaint, plaintiff asserts three causes of action, sounding in common-law negligence and violations of Labor Law §§ 200 and 240 (1). Plaintiff concedes that the Labor Law § 241 (6) claim alleged in his bill of particulars should be dismissed (*see* Gorkin 4/8/09 Affirm. in Opp.).

In their answer, the Housing Authority and Bri-Den assert five cross claims against Pro Safety, all sounding in common-law indemnification and contribution. In its answer, Pro Safety alleges one cross claim against the Housing Authority and Bri-Den, for contribution.

The third-party action is not at issue on these motions, and will not be considered.

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]; *see also Smalls v AJI Industries*, 10 NY3d 733, 735 [2008] [proponent must tender "'sufficient evidence to demonstrate the

absence of any material issues of fact'"], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "'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; *see also Johnson v CAC Business Ventures*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez*, 68 NY2d at 324). 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*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "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 for Summary Judgment

Section 240 (1) of the Labor Law reads, in pertinent part:

> All contractors and owners and their agents

> ... in the ... altering ... of a building ... shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The statute "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for the protection of workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (*Ramos v Port Authority of New York & New Jersey*, 306 AD2d 147, 147-148 [1st Dept 2003]).

> The Court of Appeals has long and repeatedly observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers who are not in a position to protect themselves. Consistent with this objective, the Court of Appeals has stated that the statute is to be construed as liberally as necessary to accomplish the purpose for which it was framed, but has also cautioned that not every worker who falls at a construction site ... gives rise to an award of damages under Labor Law § 240 (1). ... [I]t is still necessary for a plaintiff to demonstrate that the statute was violated, and that the violation proximately caused his/her injuries [internal citations omitted]

(*Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]; *see also Miro v Plaza Construction Corp.*, 38 AD3d 454, 455 [1st Dept], *affd as mod* 9 NY3d 948 [2007] [proof of fall does not establish liability unless there is also evidence that fall was

[* 7]

proximately caused by violation of statute]).

Plaintiff asserts that his work in removing and replacing the façade of the building was an activity covered under the statute because it involved "altering" the structure. He further maintains that the fire escape was the functional equivalent of a scaffold, and that its failure establishes his entitlement to judgment on the issue of liability. Defendants the Housing Authority and Bri-Den, as owner and general contractor, respectively, may be absolutely liable under section 240 (1) if the statute applies, and if plaintiff can prove that his fall was proximately caused by defendants' failure to provide him with safety devices which would have afforded him "proper protection." However, the Housing Authority and Bri-Den contend that Labor Law § 240 (1) is not applicable in this matter because the accident did not involve an elevation-related risk, the collapse was caused by a non-elevation-related hazard, i.e., the latent (rust) defect in the step, and the fire escape was a permanent structure, the failure of which was not foreseeable.

It is uncontested that plaintiff's employer's work consisted of removing and replacing the building's façade. As such, plaintiff's work fell within the category of "altering" the structure.

Plaintiff's unrefuted testimony is that on the day of the accident, on the side of the building at which he was

[* 8]

working, there was a pipe scaffold on the left side of the fire escape, and a motorized hanging scaffold on its right (Plaintiff's Depo., at 59-60). As no other platform was provided upon which plaintiff could stand to do his work, in the circumstances of this case, the court finds that the fire escape was the functional equivalent of a scaffold (*see also De Jara v 44-14 Newtown Road Apartment Corp.*, 307 AD2d 948, 950 [2d Dept 2003] ["The fire escape was being used as the functional equivalent of a scaffold ... and therefore constituted a safety device within the meaning of Labor Law § 240 (1). The fact that the fire escape was a permanent rather than temporary structure does not preclude Labor Law § 240 (1) liability"]; *Bataraga v Burdick*, 261 AD2d 106, 107 [1st Dept 1999] [worker injured as he descended fire escape had section 240 (1) claim]).

The Housing Authority and Bri-Den's assertion that plaintiff was not exposed to an elevation-related hazard is unpersuasive. It is uncontested that plaintiff was working on the outside of a building, three stories above the ground on a fire escape with a rusty step. The rust which caused the step to fail made the fire escape, the functional equivalent of a scaffold, a defective safety device. Plaintiff's work three stories above the ground on a defective safety device, as a matter of law, subjected him to an elevation-related hazard.

Nor is the Housing Authority and Bri-Den's contention

that plaintiff may have been the sole proximate cause of his injuries because of his alleged failure to wear a harness and use a safety line tenable. It is well-settled that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 290 [2003]). Here, the Housing Authority and Bri-Den's failure to provide plaintiff with an adequate, non-defective safety device on which to perform his work at an elevated height was a proximate cause of his injuries. His alleged failure to wear a harness and to tie onto a safety line is of no moment. "Even 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]; *see also Spages v Gary Null Associates*, 14 AD3d 425, 426 [1st Dept 2005]; *Samuel v Simone Development Co.*, 13 AD3d 112, 113 [1st Dept 2004]).

Accordingly, plaintiff's motion, which seeks partial summary judgment on the issue of the Housing Authority and Bri-Den's liability under Labor Law § 240 (1), is granted.

The Housing Authority and Bri-Den's Cross Motion for Summary Judgment

As summary judgment has just been granted in plaintiff's favor on his Labor Law § 240 (1) claim, the part of

the Housing Authority and Bri-Den's cross motion which seeks summary judgment dismissing this cause of action is denied.

Labor Law § 200 (1) provides, in pertinent part:

> 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 ... equipment, and devices in such places shall be so placed [and] operated ... as to provide reasonable and adequate protection to all such persons.

"Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe work site" (*Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]; *see also Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007] [same]). Where, as here, the accident was caused by a dangerous condition, a plaintiff must show that the defendant "caused or created the dangerous condition, or had actual or constructive notice of the unsafe condition of which plaintiff complains" (*Arrasti v HRH Construction LLC*, 60 AD3d 582, 583 [1st Dept 2009]; *see also Baillargeon v Kings County Waterproofing Corp.*, 60 AD3d 881, 881 [2d Dept 2009]; *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 n [1st Dept 2008] ["It should be noted that, since the accident was caused by a dangerous condition of the premises, rather than by the work methods used, plaintiff need not establish that the defendant

owners exercised supervision and control over his work in order to prevail against those defendants on his claim under Labor Law § 200"]).

Although there is no evidence that either the Housing Authority or Bri-Den caused or created the dangerous condition of the rusted step, the evidence raises questions of fact concerning whether the Housing Authority and/or Bri-Den had constructive notice of the condition.

In order "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). In addition, "constructive notice of the allegedly unsafe condition that caused the accident ... must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York University*, 12 AD3d 200, 201 [1st Dept 2004]).

Pro Safety's site safety manager, Vicente Magistrado, testified that the inspection of fire escapes was not Pro Safety's responsibility. Rather, that duty fell within the Housing Authority's jurisdiction (Magistrado Depo., at 14-15). Thomas Reres, the Housing Authority's superintendent for the Fort Washington Houses from July to October 2007, attested that,

sometime before the accident, he personally made a visual inspection of the buildings, but that he was unable to inspect the fire escape at issue here because the ongoing construction hid the fire escape from his view (Reres Depo., at 46-47).

Approximately one month before the accident, Bri-Den's job superintendent, Kenneth Reilly, walked from the ground to the roof on the fire escape, and did not see any defects at the time, including rust on the step, but he was not "looking for anything specific with respect to the fire escapes, the steps" (Reilly Depo., at 13-14, 38, 53). Reilly further attested that he received no complaints concerning the condition of any of the fire escapes at the project prior to September 2007 (*id.* at 54).

The Housing Authority conducted regular inspections of the buildings, as evidenced by its inspection reports appended as Exhibit I to the Housing Authority/Bri-Den's cross motion. Its building inspection report for September 14, 2007, two weeks before the accident, indicated that the building's fire escape was in "good" condition, but that the third floor of it was "blocked." The September 14, 2007 inspection report also indicates that the inspection was performed by C. Lopez, but the signature lines for "Reviewed by" and "Superintendent" are blank.

In his description of the step that failed, plaintiff stated that the step "looked normal," but also averred that "the fire escapes were very very rusty" (Plaintiff's Depo., at 100).

The evidence presents questions of fact concerning whether the Housing Authority and Bri-Den had constructive notice of the rusted condition of the step. These questions of fact arise from the issue of whether the various "inspections" that were made were properly conducted. The testimony is replete with qualifiers with respect to the inspections, e.g., Reres made a visual inspection of the buildings, but was unable to see the fire escape at issue here; Reilly walked up the fire escape one month before the accident, but was not looking for anything specific (one wonders, since objects normally do not become "very, very rusted" in one month, how observant he was as he ascended the stairs); and the Housing Authority's inspection report of two weeks before the accident indicated that the third floor of the fire escape was "blocked," raising the question of whether the inspector was able to see the rusted step in question.

On a motion for summary judgment, the movant must present sufficient evidence to establish the absence of any material issues of fact (*see e.g. Alvarez v Prospect Hospital*, 68 NY2d at 324). This the Housing Authority and Bri-Den have failed to do. The portion of their cross motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Pro Safety asserts one cross claim against the Housing

Authority and Bri-Den, sounding in contribution. "Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). Because the Housing Authority and Bri-Den have failed to establish that their acts or omissions were not a cause of plaintiff's injury, dismissal of this cross claim must be denied.

Pro Safety's Cross Motion for Summary Judgment

Bri-Den hired Pro Safety to provide site safety consultant services during the renovations to the Fort Washington Houses. It is well-established that a subcontractor/safety consultant that does not control the work that brought about a plaintiff's injury is not liable under Labor Law §§ 200, 240 and 241 (*see e.g. Kelarakos v Massapequa Water District*, 38 AD3d 717, 718 [2d Dept 2007]; *Doherty v City of New York*, 16 AD3d 124, 125 [1st Dept 2005]; *but see Greaves v Obayashi Corp.*, 61 AD3d 570, 571 [1st Dept 2009] [safety consultant that was contractually required to "make certain" that scaffold was properly equipped was liable because it had authority to supervise and control plaintiff's use of scaffold]).

According to Magistrado, the site safety manager assigned to the project, Pro Safety's responsibility at the site was to monitor compliance with safety regulations and OSHA

requirements (Magistrado 4/29/09 Aff., ¶ 3). It had no authority to direct, supervise or control contractors' employees' work, and was not responsible for providing safety equipment to workers, or for inspecting fire escapes (*ibid.*; *see also* Plaintiff's Depo., at 196, 201-202 ["Vinny" Magistrado did not provide plaintiff with any safety equipment, did not direct plaintiff on how to do his work, and did not supervise plaintiff's work]). If Magistrado saw an unsafe practice, he would notify the worker, and if the worker did not listen, Magistrado would notify Bri-Den's project superintendent, Reilly (Magistrado 4/29/09 Aff., ¶ 5; Magistrado Depo., at 16-17, 31; Reilly Depo., at 11 [if safety conditions were "deficient," Pro Safety "would come to me. If it was an employee, (Pro Safety) would stop them and come to me and correct the problem and it would be addressed"]; Reilly Depo., at 19 ["if there is any unsafe conditions (Magistrado) was to come to me and make me aware of the conditions. If it was a life threatening matter and it needed to be addressed immediately, he would do so and he would stop the work if it needed"]; *id.* at 52 [if problem was minor, Magistrado would go to Reilly about it; if it was life-threatening, Magistrado "would stop them on the spot and he would call me and address it"]).

Magistrado was on site daily (*id.* at 53; Plaintiff's Depo., at 201), and ran weekly safety meetings, where he advised Cooper and Bri-Den employees that they were required to wear a

[* 16]

safety harness when they were working on fire escapes (Magistrado Depo., at 49-50). Each morning, "he would check all the life lines, the scaffolding, make sure everybody had their hard hats, their harness" and their goggles on (Plaintiff's Depo., at 196).

Plaintiff received his instructions concerning safety and what he had to do from Cooper's general foreman, "Moe" (*id.* at 53-54). While he was at the job site, he never received any instructions or materials from anyone other than Cooper (*id.* at 57-58).

The Bri-Den/Pro Safety Consultant Agreement (the contract) provides that Pro Safety would supply a licensed New York City Site Safety Manager on a full-time basis. Although plaintiff contends that Pro Safety was an agent of Bri-Den, the contract specifically establishes that "Nothing contained in this Agreement is intended to create, or does create, ... [an] agency relationship between the parties" (Contract, ¶ 20). Nothing in the contract grants any authority to Pro Safety to direct, supervise or control any employee of any subcontractor at the site, and there is no evidence that it did so.[1]

Based on this evidence, the court concludes that Pro

[1]When asked, "Did Vinny [Magistrado] ever give you direction on how to do your job?", plaintiff replied, "Like if I was hanging over the scaffold too much he would tell me to back it up, back off, you know" (Plaintiff's Depo., at 201). This falls far short of any direction, supervision or control of plaintiff's work.

Safety, the subcontractor/safety consultant, did not control the work that brought about plaintiff's injury, and therefore, is not liable under Labor Law §§ 200 and 240 (1), and common-law negligence. The portion of Pro Safety's cross motion which seeks summary judgment dismissing the complaint as against it is granted.

As a consequence of the complaint having been dismissed as against Pro Safety, the Housing Authority and Bri-Den's cross claims against it are dismissed (*see Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]).

Pro Safety's cross motion is granted in its entirety.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion which seeks partial summary judgment on the issue of the New York City Housing Authority and Bri-Den Construction Co., Inc.'s liability under Labor Law § 240 (1) is granted; and it is

ORDERED that the New York City Housing Authority and Bri-Den Construction Co., Inc.'s cross motion is denied; and it is further

ORDERED that Pro Safety Services LLC's cross motion for summary judgment is granted, and the complaint is severed and dismissed as against defendant Pro Safety Services LLC, and the Clerk is directed to enter judgment in favor of this defendant,

[* 18]

with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 11/25/09

ENTER:

J.S.C.

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