

**Romanczuk v Metropolitan Ins. & Annuity
Co.**

2009 NY Slip Op 30636(U)

March 19, 2009

Supreme Court, New York County

Docket Number: 100565/05

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

ANDRZEJ ROMANCZUK,

Plaintiff,

- v -

INDEX NO. 100565/05

MOTION DATE

MOTION SEQ. NO. 006

METROPOLITAN INSURANCE and ANNUITY COMPANY et al.

Defendants.

And Third-Party Actions.

FILED L. NO.

MAR 23 2009

COUNTY CLERKS OFFICE NEW YORK

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 006, 008 and 009 are hereby consolidated herein for decision.

This is an action to recover damages for personal injuries sustained by a worker when he fell from a scaffold while working at Building 453 in the Peter Cooper Village Stuyvesant Town complex in Manhattan.

In motion sequence number 006, defendant and third-party plaintiff Arrow Restoration, Inc. moves for summary judgment dismissing plaintiff Andrzej Romanczuk's complaint and all cross claims against it, as well as awarding it reimbursement of the costs and attorney's fees it incurred in defense of this action.

In motion sequence number 008, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) against defendants and third-party plaintiffs Metropolitan Insurance and Annuity Company (Metropolitan), Rose Associates, Inc. and Rose Associates, LLC, as well as against defendant and second third-party plaintiff Titan Restoration, Inc. (Titan) and defendant and third-party plaintiff Arrow.

In motion sequence number 009, the Met/Rose defendants move for summary judgment (1) dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims against them, (2) dismissing plaintiff's claim for lost wages and (3) granting their cross claims against Titan for common-law and contractual indemnification, including reimbursement for all costs and attorney's fees incurred in defense of this action. They also seek an order conforming the third-party pleadings to the proof developed after a default order was entered on October 11, 2006 against third-party defendant Westchester Plaza Restoration, Inc. In addition, Titan cross-moves for summary judgment dismissing plaintiff's complaint and all cross claims against it.

Pursuant to stipulation, this action has been discontinued without prejudice as against defendants Rockledge Scaffold Corporation and Insignia Residential Group, Inc. (Insignia).

Background

At the time of the accident, Metropolitan owned the premises where plaintiff's accident took place. Insignia was Metropolitan's managing agent. It retained Titan to serve as the general contractor on a project to perform bulkhead masonry repair work on Building 453. Although Arrow was also retained to perform masonry repair work at the premises, it was not retained to do the work at Building 453. The Rose

defendants later replaced Insignia as the property manager at the premises. After Rose became the property manager, Titan hired plaintiff's employer, Westchester Plaza, to perform the actual bulkhead masonry repair work on Building 453.

Plaintiff testified that, on the day of his accident, he and three of his co-workers were renovating the bulkhead walls located on the roof of Building 453. Plaintiff explained that, in order to perform the requisite work, it was necessary for him to access the bulkhead from a scaffold, which was provided and erected by Westchester. Plaintiff further explained that the bulkhead could only be accessed by climbing up the inside rungs of the scaffold and then stepping from the scaffold to the small roof. Plaintiff maintained that his co-workers accessed the roof in this same way and that plaintiff's foreman was aware of this fact.

Plaintiff testified that, as he took a step down over an approximately one and a half to two-foot gap between the scaffold and the bulkhead, and as he was about to place his foot on the roof, the scaffold moved towards the wall and back, causing him to lose his balance and fall down three meters between the wall and the scaffold. According to the plaintiff, this type of scaffolding is normally attached to a wall by an arm in order to prevent it from moving. Plaintiff also stated that the scaffold did not possess proper planking or any guardrails, and that he was not given any safety equipment, such as a safety belt, to protect him while working at Building 453.

Discussion

A. Arrow's Motion to Dismiss the Complaint and All Cross Claims Against It -- The record before the court clearly shows that while Arrow may have performed work at various buildings at the premises, it never performed any work at Building 453. Indeed, the plaintiff has not opposed Arrow's application. Arrow is therefore entitled to summary judgment dismissing plaintiff's complaint, as well as all cross claims against it. Its motion for sanctions against Titan and Met/Rose, pursuant to 22 NYCRR 130-1.1, is denied.

B. Titan's Untimely Cross Motion for Summary Judgment -- Titan served its cross-motion for summary judgment on December 29, 2008, more than four months after the summary judgment deadline date of August 12, 2008 which this court fixed by order dated June 17, 2008. However, an untimely cross-motion may nevertheless be considered if it was made "in response to ... still pending, timely summary judgment motions" (*Osario v BRF Construction Corporation*, 23 AD3d 202, 203 [1st Dept 2005]) and "was largely based on the same arguments raised in [the] timely motion, and the same findings that mandated judgment for [the proponent of the motion] also require judgment for [the proponent of the cross motion]" (*Altschuler v Gramatan Management*, 27 AD3d 304, 304-305 [1st Dept 2006]; *Filannino v Triborough Bridge and Tunnel Authority*, 34 AD3d 280, 281 [1st Dept 2006]): Since this rule clearly applies herein, the court may properly consider Titan's cross-motion.

C. Plaintiff's Labor Law § 240(1) Claim -- Labor Law § 240(1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), requires that all contractors and owners engaged in the renovation of a building or other structure "furnish 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 statute "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]). The Scaffold Law does not apply merely because work is performed at elevated heights, but

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where the work itself involves risks related to differences in elevation (*Binetti v MK West Street Company*, 239 AD2d 214, 214-215 [1st Dept 1997]; see *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 500-501)).

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]). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Labor Law § 240 (1) requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (*Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999]). "[W]here the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240 (1), and the burden shifts to the defendant" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]). "[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Construction Corporation*, 44 AD3d 377, 381 [1st Dept 2007], *aff'd* 11 NY3d 757 [2008], quoting *Blake v Neighborhood Housing Services of New York City*, 1 NY3d at 289). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]).

Here, the evidence shows that scaffold at issue was inadequately secured and did not therefore provide the necessary protection to the plaintiff while he was subject to an elevation-related risk. Since there were no other safety devices provided to him, Met/Rose and Titan are all vicariously liable for his injuries under Labor Law § 240(1) (see *Peralta v American Telephone and Telegraph Company*, 29 AD3d 493, 494 [1st Dept 2006]; *Chlap v 43rd Street-Second Avenue Corporation*, 18 AD3d 598, 598 [2nd Dept 2005]).

Defendants, however, assert that they should not be liable because plaintiff's negligence constituted the sole proximate cause of his injuries. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d at 1188; *Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]).

In support of this contention, defendants suggest that plaintiff's recitation of the events leading up to his accident is contradicted by his foreman, Leszek Szumowski, an eyewitness standing within 10 feet of where the accident took place. Thus, they point out that Szumowski testified that plaintiff was negligent in that he was holding various materials in his hands as he climbed the scaffold to get to the roof. In addition, Szumowski testified that plaintiff fell backwards off the scaffold as a result of his shoelace getting caught in a clip on the scaffold as he was stepping from the scaffold onto the bulkhead and that this would not have occurred had plaintiff been wearing long pants instead of short pants, as the longer pants would have covered his shoelaces. Szumowski also maintained that the scaffold did not move prior to the accident and that it did not need guardrails since it had cross bars.

Even assuming that the plaintiff fell as the result of his shoelaces being caught on the scaffold due to his own negligence, any such negligence was merely contributory and not the sole cause of the accident since, as already noted, the plaintiff was not otherwise provided with safety devices which adequately protected him from falling off of the scaffold. (see *Figueiredo v New Palace Painters Supply Co. Inc.*, 39

AD3d 363, 364 [1st Dept 2007]; *Jamison v GSL Enterprises, Inc.*, 274 AD2d 356, 361 [1st Dept 2000]. 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]). Thus, plaintiff is entitled to partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1).

C. Plaintiff’s Labor Law § 241(6) Claim - - 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). To prevail on a claim brought under this statute, a plaintiff must show that the defendant violated a specific, applicable, provision of the Industrial Code. *Id.*

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, the only provisions he addresses in his motion papers are 12 NYCRR 23-5.1(c)(2); 5.1(j)(1); and 23-5.3(e). All other provisions must be deemed to have been abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

As to the first of the three provisions which have been addressed, 12 NYCRR 23-5.1(c)(2) has been found not sufficiently specific to sustain a claim under Labor Law § 241(6) (*see Greaves v Obayashi Corporation*, 55 AD3d 409, 410 [1st Dept 2008]; *Moutray v Baron*, 244 AD2d 618, 619 [3rd Dept 1997]).

As to 12 NYCRR 23-5.1(j)(1), this provision has been found sufficiently concrete in its specifications to support a Labor Law § 241(6) claim (*see Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]). It provides that “the open sides of all scaffold platforms ... shall be provided with safety railings constructed and installed in compliance with this Part (rule).....Exceptions: Any scaffold platform with an elevation of not more than seven feet.”

Here, testimonial and photographic evidence in the record indicates that the scaffold at issue, which was more than seven feet high, lacked guardrails. Since the scaffold did not have a safety railing, as required by 12 NYCRR 23-5.1(j)(1), defendants are not entitled to summary judgment with respect to this provision.

As to Industrial Code NYCRR 23-5.3(e), it has also been found sufficiently concrete in its specifications to support a Labor Law § 241(6) claim (*see Riccio v NHT Owners, LLC*, 13 Misc 3d 1209[A], 2006 NY Slip Op 51752[U] [Sup Ct, Kings County 2006], *affd*, 51 AD3d 897 [2d Dept 2008]). It applies to nonmobile metal scaffolds and provides that “Safety railings constructed and installed in compliance with this Part (rule) shall be provided for every metal scaffold.” Since plaintiff’s accident was caused, in part, because the scaffold he was using lacked safety railings which were constructed and installed in compliance with the requirements of the Industrial Code, defendants are not entitled to summary judgment on this provision.

D. Plaintiff’s 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]).

Where, as here, a claim arises out of defects or dangers in the methods or materials of the work, recovery under Labor Law § 200 requires that “it is shown that the party to be charged had the authority to supervise or control the performance of the work” (*Ortega v Puccia*, 57 AD3d 54, 61 [2nd Dept 2008]; *Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]). Thus, the duty under section 200 to provide a safe place to work “is not breached when the injury arises out of a defect in the subcontractor’s own plans, tools and methods, or through negligent acts of the subcontractor occurring as

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a detail of the work” (*Ortega v Puccia*, 57 AD3d at 62, quoting *Persichilli v Triborough Bridge & Tunnel Authority*, 16 NY2d 136, 145 [1965]).

Here, as plaintiff’s injury arose out of a defect in the scaffold provided and erected by plaintiff’s employer, Westchester, Labor Law § 200 imposes no liability absent evidence of defendants’ authority to supervise and control the work. In this respect, there is no evidence that defendants directed or supervised the means and methods by which plaintiff performed his work. Rather, plaintiff testified that he was given his instructions by either his boss or his supervisor, and that he either used his own tools or tools provided to him by his employer. Plaintiff also stated that he never received any instructions as to how he should perform his work from any of the defendants. Although Titan may have had a general duty to oversee the progress of the work and resolve safety concerns on the project, mere “[g]eneral supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200 [citations omitted]” (*Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]). Thus, defendants are entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 claims as against them.

E. Met/Rose’s Indemnification Claims Against Titan - - Met/Rose has moved for summary judgment in its favor on its cross claim for common-law and contractual indemnification against Titan. “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 [2nd 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 indemnification may be established upon a showing that the proposed indemnitor “had the authority to direct, supervise, and control the work giving rise to the injury” (*Hernandez v Two East End Avenue Apartment Corporation*, 303 AD2d 556, 557 [2d Dept 2003]). As already discussed, there is no evidence that Titan negligently caused the plaintiff’s accident or supervised the plaintiff’s work. Thus, Met/Rose’s motion for summary judgment on its claim against Titan for common-law indemnification must be denied.

As to its cross claim against Titan for contractual indemnification, the agreement between the parties does not require that Titan be negligent in order for it to be obligated to indemnify Met/Rose. Rather, the contract merely requires that the claim asserted against the owner and property agent result from or arise out of “the performance of the Work.” Under its contract, Titan was responsible for the supervision and coordination of the work, which included the bulkhead renovation at Building 453. Titan subcontracted this work to Westchester. In addition, the Titan contract provides that Titan “shall be responsible for the acts and omissions of its own employees and agents and of subcontractors.” Since Titan therefore remained responsible for the work that it delegated to its subcontractors, plaintiff’s claim clearly arises out of Titan’s work under the Titan contract. Met/Rose is therefore entitled to summary judgment in its favor on its cross claim against Titan for contractual indemnification, including the costs it has and will incur in its defense of this action.

As to the dismissal of the various cross claims which have been asserted against them, the Met/Rose defendants have not presented any evidence or argument in support of the dismissal of these claims. Indeed, they have not even identified these claims. As such, Met/Rose is not entitled to summary judgment dismissing the cross claims asserted against them.

F. Met/Rose's Request to Conform the Third-Party Pleadings to the Proof - - Met/Rose requests that the third-party pleadings be conformed to the proof developed after the default order was issued against Westchester on October 11, 2006. At the time the default order was entered, it was believed by the parties that Westchester was performing its bulkhead restoration work for defendant Arrow. However, as Met/Rose notes, discovery has since confirmed that, at the time of plaintiff's accident, Westchester was working for Titan and not for Arrow. Under the circumstances, the third-party pleadings should be conformed to this proof.

G. Plaintiff's Claim for Lost Earnings - - Included among the damages plaintiff seeks are lost wages. On Met/Rose's motion, it seeks partial summary judgment dismissing this claim, asserting that plaintiff is not entitled to recover lost wages because he is an undocumented alien who obtained employment through fraudulent means, to wit, the use of a falsified social security number.

During his deposition, plaintiff testified that he had been working without a work visa at the time of his accident. Plaintiff also testified that, in February, 2004, a secretary at his employer's office asked him to fill out a form that required a social security number and, as he did not have one, he "just made [the social security number] up." In addition, he testified that this "made up" social security number also appears on various other documents, such as his medical card and workers' compensation checks.

It is well settled that a worker is not barred from recovering lost wages solely because of his status as an illegal alien (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 358 [2006]; *Shi Pei Fang v Heng Sang Realty Corporation*, 38 AD3d 520, 521 [2nd Dept 2007]). However, a worker's submission of false documentation is sufficient to bar recovery of damages for lost wages when that conduct induces the employer to hire the worker (*Coque v Wildflower Estates Developers, Inc.*, 58 AD3d 44, 52 [2nd Dept 2008]). "If the employer hires the employee with knowledge of the employee's undocumented status, or without verifying the employee's eligibility for employment, the employer has not been induced by the false document to hire the employee" (*id.* at 53).

Here, although the plaintiff testified that he submitted a false social security number when he applied for employment, there is no evidence indicating that Westchester ever attempted to verify his eligibility for employment or that it was unaware that he was an undocumented alien. Since there is thus a question of fact as to whether plaintiff's conduct actually induced his employer to hire him, defendants are not entitled to summary judgment dismissing that part of plaintiff's complaint seeking lost wages as a result of his accident.

Accordingly, in motion sequence number 006, Arrow Restoration's motion for summary judgment is granted to the extent that the complaint, as well as all cross claims, are hereby dismissed as against this party. The motion is otherwise denied.

In motion sequence number 008, plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) against the Met/Rose defendants and Titan is hereby granted.

In motion sequence number 009, Met/Rose's motion is hereby granted to the extent that (1) plaintiff's common-law negligence and Labor Law § 200 claims, as well as plaintiff's Labor Law § 241(6) claim predicated on all alleged Industrial Code violations, with the exception of Industrial Code 23 NYCRR 23-5.1(j)(1) and 23-5.3 (e), are hereby dismissed as against these defendants, (2) they shall have summary judgment in their favor on their cross claim for contractual indemnification as against Titan and (3) the third-party pleadings are hereby conformed so as to reflect the fact that the plaintiff's employer, Westchester, was retained by, and entered into a subcontract with Titan and not with Arrow. The motion is otherwise denied.

Titan's cross-motion for summary judgment is granted to the extent that plaintiff's common-law negligence and Labor Law § 200 claims, as well as plaintiff's Labor Law § 241(6) claim predicated on all

alleged Industrial Code violations, with the exception of Industrial Code 23 NYCRR 23-5.1(j)(1) and 23-5.3 (e), are hereby dismissed as against this defendant. The cross-motion is otherwise denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on April 3, 2009 at 10:00 a.m. to pick a trial date.

ENTER ORDER

Dated: 3-9-09

MGD

MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
MAR 23 2009
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