

**Gonzalez v Constructomics, LLC**

2009 NY Slip Op 31608(U)

July 8, 2009

Supreme Court, New York County

Docket Number: 108681/07

Judge: Doris Ling-Cohan

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SCANNED ON 7/20/2009  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 108681/2007  
GONZALEZ, ANGEL  
VS.  
CONSTRUCTOMICS  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3, 4  
5

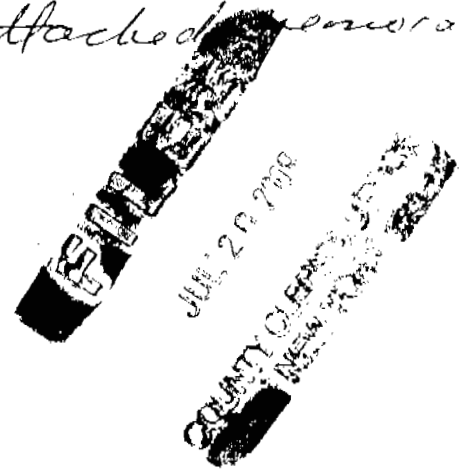
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

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

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

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion *by defendants for*  
*inter alia summary judgment is decided*  
*in accordance with the attached memorandum*  
*decision.*



HON. DORIS LING-COHAN

Dated: 7/20/09

[Signature]  
J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 36**

-----x

ANGEL GONZALEZ and TORRES GONZALEZ,

Index No.: 108681/07

Plaintiffs,

Motion Seq. No.: 003

-against-

CONSTRUCTOMICS, LLC, MH RESIDENTIAL 1,  
LLC, MH RESIDENTIAL 2, LLC and MH  
COMMERCIAL, LLC,

Defendants.

-----x

CONSTRUCTOMICS, LLC,

Index No.: 591131/07

Third-Party Plaintiff,

-against-

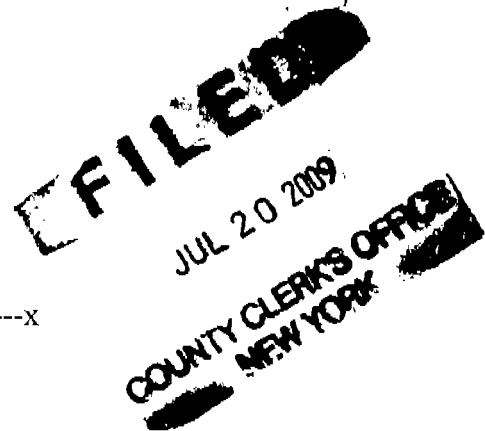
PRECISION INTERIOR CONSTRUCTION CO.,

Third-Party Defendant.

-----x

**Ling-Cohan, J.:**

This is an action to recover damages sustained by a carpenter when he allegedly fell from a scaffold while working at a construction site located at 200 East 66<sup>th</sup> Street, New York, New York (the premises) on June 5, 2007. Defendants Constructomics, LLC (Constructomics), MH Residential 1, LLC, MH Residential 2, LLC and MH Commercial, LLC (together, MH) (together, defendants) move, pursuant to CPLR 3212: (1) for summary judgment dismissing plaintiffs Angel Gonzalez (plaintiff) and Torres Gonzalez's common-law negligence and Labor Law § 200 claims; (2) for contractual indemnification against third-party defendant Precision



Interior Construction Co. (Precision); and (3) for leave to amend the third-party complaint to add defendant MH as a third-party plaintiff.

### **BACKGROUND**

On the date of the accident, defendant MH was the owner of the premises where the accident occurred. Defendant and third-party plaintiff Constructomics served as general contractor at the premises. Plaintiff was employed as a carpenter by third-party defendant Precision. Constructomics hired Precision to perform certain renovations on the roof garden library at the premises.

Plaintiff testified that, on the day of his accident, he was installing sheet rock on a ceiling located in the rooftop area of the premises. Plaintiff explained that, in order to perform his work, it was necessary for him to utilize a scaffold. Plaintiff explained that, while he was busy working on the scaffold, which was provided and assembled by Precision, the wood planking, which comprised the platform of the scaffold, “just caved in,” causing him to fall and impale his arm on one of the metal posts of the scaffold (Defendant’s Notice of Motion, Exhibit I, Plaintiff’s Deposition, at 79). Plaintiff testified that, on the day following the accident, Precision’s driver took photographs of the scaffold at issue, at which time he observed, for the first time, that the wood planking was too short to fit the frame of the platform.

Thomas Lohrer (Lohrer), Precision’s vice president, testified that the scaffolds used by its workers were owned and assembled by Precision carpenters. He explained that the scaffolds were prefabricated and that when the platforms became worn, Precision carpenters replaced them with pieces of plywood that they cut to fit with a power saw.

## 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 [1<sup>st</sup> Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. 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.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor’s methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Electric & Gas Corporation*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff’s injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]). Moreover, “general 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 Corporation*, 40 AD3d 305, 311 [1<sup>st</sup> Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1<sup>st</sup> Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor’s work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (*see Murphy v Columbia University*, 4 AD3d 200, 202 [1<sup>st</sup> Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over plaintiff’s work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

Here, it appears that the accident may have resulted from the means and methods of the work (since plaintiff’s employer allegedly replaced the scaffold’s platform with planking that was too short to properly fit the platform’s frame), and/or due to allegedly dangerous condition (that the scaffold’s platform was dangerously defective).

However, there is no indication in the record to support a finding that defendants controlled or supervised the injury-producing work. Plaintiff and Lohrer testified that the scaffold, which was used by the plaintiff, was owned, assembled and maintained by Precision. Lohrer maintained that Precision personnel did not typically communicate with any safety

inspectors. Colin Hyland (Hyland), Constructomic's supervisor, testified that his duties at the premises included touring the work areas to check on the progress and quality of the work being done. Hyland maintained that his duties did not include being responsible for safety on the job. Hyland noted that it was not Constructomic's custom and practice to inspect the subcontractor's scaffolds for safety. Paul Caras (Caras), Constructomic's assistant superintendent at the premises, testified that his duties at the site had to do with quality control, and that it was not his function to inspect the equipment of the subcontractors.

Further, there is no evidence that Constructomic's safety consultant had the authority to control the injury-producing work at issue (*see O'Sullivan v IDI Construction Company*, 7 NY3d 805, 806 [2006]; *Hughes v Tishman Construction Corporation*, 40 AD3d at 309 [no Labor Law § 200 liability where the site safety manager's role on the site was limited to performing safety-related tasks, and it did not have authority to control the manner in which the trades did their work]). Hyland stated that an outside safety consultant named Jackie Price (Price), from Environmental Health Investigators (EMI), would tour the site once a week or once every two weeks, but that her role was limited to safety-related tasks. Caras explained that one of his functions as assistant superintendent included walking Price through the site, because she was not familiar with the building. Caras maintained that Price's inspections did not involve any review of the subcontractors' equipment or materials, as she only observed the workers and pointed out unsafe practices. Plaintiff and Lehrer testified that, about a day or two before the accident, a female safety worker advised plaintiff to lock the wheels of his scaffold.

Further, there is also no indication in the record to support a finding that defendants created the unsafe condition at issue or that defendants had actual or constructive notice of the

unsafe condition of the scaffold (*see Geonie v OD & P NY Limited*, 50 AD3d 444, 445 [1<sup>st</sup> Dept 2008]). As noted previously, Precision employees were responsible for assembling and maintaining the scaffolds utilized by their workers, and thus, defendants did not create the unsafe condition at issue. In addition, there is no indication in the record to demonstrate that defendants had actual or constructive notice of the unsafe condition. In fact, prior to the accident, not even plaintiff noticed anything wrong with the scaffold. To that effect, plaintiff testified that he did not notice the scaffold shaking or moving prior to the accident. In addition, Lehrer testified that he never observed the cutting of the wood that was used on the subject scaffold. Lehrer also maintained that he never received any complaints regarding the scaffold's safety.

Defendants argue that plaintiffs inappropriately assert a *res ipsa loquitor* theory for the first time in his opposition to defendants' motion. "Although '[a] court may properly look beyond the allegations in the complaint and deny summary judgment where a party's papers in opposition to the motion raise triable issues of fact'" (*Pesantes v Komatsu Forklift USA, Inc.*, 58 AD3d 823, 823 [2d Dept 2009], quoting *Gold Connection Discount Jewelers v American District Telegraph Company*, 212 AD2d 577, 578 [2d Dept 1995]); plaintiff in this case failed to raise a triable issue of fact regarding the *res ipsa loquitor* theory.

In order to rely on the doctrine of *res ipsa loquitor*, plaintiff must show that "the event was of a kind that ordinarily does not occur in the absence of someone's negligence; that it was caused by an agency or instrumentality within the exclusive control of the defendant; and that it was not due to any voluntary action or contribution on the part of plaintiff" (*Bonura v KWK Associates, Inc.*, 2 AD3d 207, 208 [1<sup>st</sup> Dept 2003]; *Coku v Millar Elevator Industries, Inc.*, 12 AD3d 340, 340 [2d Dept 2004]). "As recently clarified by the Court of Appeals, the only

instance when summary judgment must be granted to a plaintiff on a res ipsa theory is ‘when the plaintiff’s circumstantial proof is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable’” (*Tora v GVP AG*, 31 AD3d 341, 342 [1<sup>st</sup> Dept 2006], quoting *Morejon v Rais Construction Company*, 7 NY3d 203, 209 [2006]).

Here, plaintiff has not established that the scaffold was within defendants’ exclusive control (*see Long v Battery Park City Authority*, 295 AD2d 204, 204 [1<sup>st</sup> Dept 2002]; *Reyes v Active Fire Sprinkler Corporation*, 267 AD2d 70, 71 [1<sup>st</sup> Dept 1999]); thus, plaintiff’s reliance on the doctrine of res ipsa loquitur to sustain his common law negligence claim is unavailing.

It should also be noted that, although plaintiff argues that defendants’ testimonial evidence does not constitute evidentiary proof in admissible form and should be given no consideration by this court because the depositions are unsigned, it is not “dispositive that the deposition transcripts were unsigned, since they were certified by the court reporter as accurate” (*White Knight Ltd. v Shea*, 10 AD3d 567, 567 [1<sup>st</sup> Dept 2004]; *Zabari v City of New York*, 242 AD2d 15, 17 [1<sup>st</sup> Dept 1998] [the deposition transcript, even though unsigned, was an adequate affidavit of merit, since it set forth the details of the incident, supporting the merits of the claim]). CPLR 3116 (a) allows a deposition transcript to be admitted as though it were signed especially where, as here, the transcript was certified as accurate (*id.*).

In any event, plaintiff annexed a signed copy of his transcript to his opposition papers. In addition, copies of the depositions of Lohrer, Hyland and Caras were sent to plaintiff’s counsel. “In efforts to avoid attacks on the competency of a transcript, CPLR 3116 (a) provides, in pertinent part, that ‘[i]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed’” (*Chisholm v Mahoney*, 302 AD2d 792, 793 (3d Dept

2003]).

Thus, as defendants have established, as a matter of law, that they did not control or supervise the injury-producing work, nor did they have notice of the alleged defective condition, they are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims (*Gallelo v MARJ Distributors, Inc.*, 50 AD3d 734, 736 [2d Dept 2008]).

### **CONSTRUCTOMICS' CLAIM FOR CONTRACTUAL INDEMNIFICATION AGAINST PRECISION**

Defendant/third-party plaintiff Constructomics moves for summary judgment in its favor on its third-party claim for contractual indemnification against third-party defendant Precision. "A party is entitled to full contractual 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'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 402 [1<sup>st</sup> Dept 2005]). It is well settled that with respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability (*De La Rosa v Philip Morris Management Corporation*, 303 AD2d 190, 193 [1<sup>st</sup> Dept 2003]; *Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82 [1<sup>st</sup> Dept 2002]).

The indemnification provision set forth in the contract between defendant/third-party plaintiff Constructomics and third-party defendant Precision, dated April 25, 2007 (the contract), sets forth, in pertinent part, as follows:

## INDEMNIFICATION

- a. To the fullest extent permitted by law ... subcontractor shall indemnify and defend Constructomics, the Owner, the architect ... and any other company required by the prime contract ... and save them harmless from and against any and all claims, damages, losses, liabilities ... arising out of the work of the subcontractor or any of its subcontractors ... provided that nothing herein shall require the subcontractor to indemnify or hold harmless the “Indemnitees” to the extent such claim is caused by the negligence of the “Indemnitees”. In the event that any “Indemnitee” is found to be negligent, the subcontractor shall not be required to indemnify that Indemnitee for any portion of the claim, damage, loss, liability ... that arises out of that portion of the “Indemnitees” negligence

(Defendants’ Notice of Motion, Constructomics/Precision Contract, Exhibit E, Rider to the Contract, at 1).

Here, it has been established that plaintiff’s accident arose as a result of Precision’s negligence in not properly maintaining its scaffold. Thus, since there has been no showing of negligence on the part of Constructomics, Constructomics is entitled to summary judgment on its third-party claim for contractual indemnification against third-party defendant Precision (*see Murphy v WFP 245 Park Company, L.P.*, 8 AD3d 161, 162 [1<sup>st</sup> Dept 2004]).

### **CONSTRUCTOMIC’S MOTION FOR LEAVE TO AMEND THE THIRD-PARTY COMPLAINT TO ADD DEFENDANT MH AS THIRD-PARTY PLAINTIFF**

Defendant/third-party plaintiff Constructomics moves for leave to amend the third-party complaint to add defendant MH as a third-party plaintiff. Pursuant to CPLR 3025 (b), “[l]eave to amend a pleading should be ‘freely given’ ... ‘as a matter of discretion in the absence of prejudice or surprise [internal citation omitted]’” (*Zaid Theatre Corporation v Sona Realty Company*, 18 AD3d 352, 354-355 [1<sup>st</sup> Dept 2005], quoting *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1<sup>st</sup> Dept 1990]). “Therefore, a motion for leave to amend a pleading ‘must be

supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment” ( *id.*, quoting *Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572 [1st Dept 1986]).

Here, third-party defendant Precision cannot demonstrate any prejudice by this amendment, as a review of the submissions in this case reveals that Precision was aware of the relationship between Constructomics and MH and that MH was the owner of the premises. In addition, as the indemnification provision in this case clearly obligates Precision to indemnify Constructomics, as well as the owners of the premises, the amendment adds parties that could have asserted claims against Precision in the first instance ( *see Cornhusker Farms, Inc. v Hunts Point Cooperative Market, Inc.*, 34 AD3d 309, 309-310 [1<sup>st</sup> Dept 2006] [leave to amend complaint to add a new plaintiff was properly granted where the record established that defendant was aware of the relationship between the plaintiff and the new plaintiff, and that the new plaintiff was an intended beneficiary of the agreement between the plaintiff and the defendant]).

Thus, defendant/third-party plaintiff Constructomics is entitled to leave to amend the third-party complaint to include defendant MH as a third-party plaintiff.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

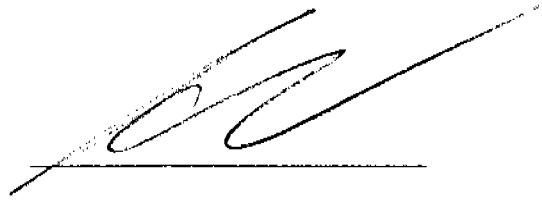
**ORDERED** that the part of defendants Constructomics, LLC, MH Residential 1, LLC, MH Residential 2, LLC and MH Commercial, LLC’s motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Angel Gonzalez and Torres Gonzalez’s common-law negligence and Labor Law § 200 claims is granted, and these claims are severed and dismissed; and it is further



sides within 30 days; it is further

ORDERED that within 45 days, or as soon as practicable, defendants shall serve a copy of this order with notice of entry upon the County Clerk (Basement of 60 Centre) and the Clerk of the Trial Support Office (Room 158 or 60 Centre) , who shall mark their records to reflect the amendment to the caption.

DATED: 7/18/09



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Gonzalez v Constructomics.labor law.wpd

**FILED**  
JUL 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK