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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

GUANG FU WANG x

- against -

COOPER SQUARE ASSOCIATES LIMITED PARTNERSHIP

x

Index Number 20773 2006

Motion Date October 13, 2009

Motions Cal. Numbers 27 - 30

Motion Seq. Nos. 4 - 7

The following papers numbered 1 to 48 read on this motion by plaintiff for summary judgment in his favor against Cooper Square Associates Limited Partnership (Cooper); motion by Reins International USA Co., Ltd., s/h/a Reins International New York, Inc., d/b/a Gyu Kaku (hereinafter "Reins"), for summary judgment in its favor dismissing all claims and cross claims against it; motion by Cooper for summary judgment in its favor on its claims for contractual indemnification as against Reins and to dismiss plaintiff's first and second cause of action which assert common-law negligence and a claim under Labor Law § 200; and motion by YT Resolution Services (YT), for summary judgment dismissing the second third-party complaint pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1-15
Answering Affidavits - Exhibits	16-36
Reply Affidavits	37-48

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained on October 23, 2004, while employed as a plumber's helper by The Plumbing Company, Inc. Plaintiff allegedly fell from a ladder while performing plumbing work at 34 Cooper Square, New York, NY (premises). The premises are owned by Cooper and pursuant to a contract, Reins, the tenant at the premises, hired YT to design and build the new Gyu Kaku restaurant at 34-36 Cooper Square. The proposed contract was for architectural work and the construction of new partitions, finishing floors, painting walls, installing tile, furnishing millwork counters and installing doors as well as modifications to plumbing. YT thereafter retained Collaborative Design Enterprises, Inc. (Collaborative), as its general contractor and Collaborative hired plaintiff's employer, The Plumbing Company, Inc., to perform plumbing work at Gyu Kaku.

Denashit Manefuangfoo, Vice-President of Reins, testified at his examination before trial that Reins occupies space in the basement and first floor of the premises, and that the basement space is locked and only the restaurant managers have access to the keys. Manefuangfoo further testified that the restaurant was operating pursuant to a lease with the owners of the building; that Reins hired YT to oversee the construction of the restaurant; and that the plumbing worked at issue was part of this construction.

Brian Chabrunn, Vice-President of Property Management for Hartz Mountain Industries, testified at his examination before trial that Reins occupied the portion of the basement at the subject location where plaintiff allegedly had his injury. Chabrunn testified that Cooper would not send any supervisory personnel to the tenant's work site or tenant space to check on the construction being done; that the landlord would not send anyone to check that the tenant's work was completed and that "all of the work of that nature is the tenant's responsibility within the tenant's space." Moreover, he testified that Cooper did not supply any labor, equipment or tools to be used.

Motion by Plaintiff

Plaintiff testified that he was employed by the Plumbing Company and that his direct boss was Boss Qian, who was also employed by the Plumbing Company. The tools were provided by the Plumbing Company, and the ladder at issue was provided by the Sheetrock contractor. Plaintiff had brought the ladder down to the basement himself the day before the accident and extended the ladder himself on the date of the subject accident. The foreman was the only person supervising plaintiff's work. Plaintiff never complained to anyone about the ladder prior to the accident.

The record reveals that there were no witnesses to plaintiff's alleged fall in the basement of the premises. The absence of an independent eyewitness to a fall does not

preclude summary judgment when it is uncontroverted that a device like a ladder collapsed (*LaJeunesse v Feinman*, 218 AD2d 827 [1995]; *Davis v Pizzagalli Const. Co.,* 186 AD2d 960 [1992]), and there is no evidence tendered which is inconsistent with plaintiff's account or which contradicts the claim of collapse (*Klein v City of New York*, 89 NY2d 833 [1996]). In this case, however, Cooper tenders evidence which casts doubt on plaintiff's version of events. Specifically, there is a hospital report which indicates that plaintiff reported falling from a ladder while changing a lightbulb at plaintiff's home. The inconsistent versions of the happening of the accident given by the plaintiff at his examination before trial and the hospital records raise an issue of fact as to his credibility and are thus insufficient to prove, as a matter of law, that the subject ladder failed to provide proper protection (*see, Doo Won Choi v B.H.N.V. Realty Corp.,* 240 AD2d 619 [1997]; *Xirakis v 1115 Fifth Ave. Corp.,* 226 AD2d 452 [1996]). Accordingly, plaintiff's motion for summary judgment is denied.

Motion by Reins

Reins was the lessee at the premises where the accident occurred, and admittedly hired YT Design to perform renovation work at the premises. Absolute liability under the Scaffold Act (Labor Law § 240[1]) applies to "contractors and owners" at a work site. A lessee, however, is also liable under the statute where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1999]; *Frierson v Concourse Plaza Assocs.*, 189 AD2d 609 [1993]). Here, Reins admittedly hired YT Designs as a general contractor to manage the renovation at the premises so that Reins could open a restaurant at the location, and plaintiff was injured while working on the renovation project at the premises. Reins also contracted as the "owner" for the renovation project.

Reins may also be liable under Labor Law § 241(6). It is well settled that under Labor Law § 241(6), "the term 'owner' encompasses a party with an interest in the property 'who fulfilled the role of owner by contracting to have work performed for his benefit' " (*Demartino v CBS Auto Body & Towing,* 208 AD2d 886, 887 [1994], quoting *Copertino v Ward,* 100 AD2d 565, 566 [1984]; *see, Grindley v Town of Eastchester,* 213 AD2d 448 [1995]; *Wendel v Pillsbury Corp.,* 205 AD2d 527 [1994]). Accordingly, triable issues of fact exist with respect to the question of whether Reins may be treated as an owner for purposes of the application of Labor Law § 241(6) (*see*, *e.g.*, *Cannino v Locust Val. Fire Dist.*, 241 AD2d 534 [1997]).

The branch of the motion by Reins' which is to dismiss Cooper's contractual indemnification claim is also denied. While a party "who is held liable in the absence of negligence, pursuant to Labor Law § 240(1), may be entitled to contractual indemnification,

'it is elementary that the right to contractual indemnification depends upon the specific language of the contract' " (*Kader v City of N.Y., Hous. Preserv. & Dev.,* 16 AD3d 461, 463 [2005], quoting *Gillmore v Duke/Fluor Daniel,* 221 AD2d 938, 939 [1995]). The indemnification provision herein is triggered by paragraph 8 of the lease agreement wherein Reins agreed to indemnify Cooper for injuries arising out of the work performed under the contract.

Accordingly, the motion by Reins for summary judgment in its favor dismissing all claims and cross claims against it is denied.

Motion by Cooper

For reasons noted in the preceding paragraphs, the branch of the motion by Cooper which is for summary judgment as against Reins for contractual indemnification is granted.

The branch of the motion which is for summary judgment dismissing plaintiff's first and second cause of action which assert common-law negligence and a claim under Labor Law § 200, is also granted. Labor Law § 200 is the codification of the common-law duty of an employer to provide his employees with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury (*id.*). Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (*id.*; *see also Lombardi v Stout*, 80 NY2d 290 [1992]; *Paciente v MBG Develop., Inc.*, 276 AD2d 761 [2000]; *Joachimsen v Perini Corporation*, 253 AD2d 737 [1998]). Here, there is no evidence that Cooper directed, controlled or supervised plaintiff's work. Nor is there evidence that Cooper provided tools or personnel to the construction site. Furthermore, the record is devoid of any evidence suggesting that Cooper had actual or constructive notice of the allegedly dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473 [2004]; *Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798 [2003]).

Motion by YT

YT moves for summary judgment in its favor dismissing the second third-party complaint against it. The second third-party action of *Reins v YT* contains seven causes of action. The first cause of action seeks common-law indemnification and contribution. The second cause of action alleges that YT violated Labor Law § 200. The third cause of action alleges that YT violated Labor Law § 240. The fourth cause of action alleges that YT

violated Labor Law § 241(6). The fifth cause of action alleged that YT agreed to obtain insurance naming Reins and Cooper as additional insureds on its policy. The sixth cause of action alleges that YT agreed that its subcontractors would obtain insurance naming Reins and Cooper and that plaintiff's employer did not get this insurance. The seventh cause of action seeks common-law contribution.

Regarding the branch of its motion which is for summary judgment on its claims for common-law indemnification and contribution, YT failed to establish its prima facie entitlement to judgment as a matter of law since it failed to demonstrate that it was not negligent, and that Reins was either negligent or exclusively supervised and controlled plaintiff's work site (*see Mendelsohn v Goodman*, 2009 WL 3766364; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2005]; *Reilly v. DiGiacomo & Son*, 261 AD2d 318 [1999]). Therefore, the branch of the motion which is for common-law indemnification is denied.

In support of the branch of the motion which is to dismiss the Labor Law §§ 200, 240(1) and 241(6), YT argues that it did not supervise, control or direct the work of any subcontractor such as plaintiff's employer, the plumbing subcontractor; nor did it provide any tools or equipment to them. Since no evidence was submitted to demonstrate that YT had any control or supervisory role over the work of the plaintiff, so as to enable it to prevent or correct any unsafe conditions, or that YT provided the allegedly defective ladder or had notice of any defects, there are no triable issues of fact as to YT's liability under the Labor Law § 200 or the common-law negligence causes of action (*see Linkowski v City of New York*, 33 AD3d 971 [2006]; *Singh v Black Diamonds LLC*, 24 AD3d 138 [2005]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 474 [2000]).

The record demonstrates that the role of YT was only one of general supervision, which is insufficient to impose liability under Labor Law §§ 240(1) and 241(6) (*see Linkowski v City of New York*, *supra*; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329 [2005]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464 [2000]).

YT admitted that it was the construction manager at the alleged loss location. YT further admitted that it had the authority to cease all work if it deemed the conditions unsafe; and YT provided a safety manual for the purposes of the construction/renovation of the restaurant at the alleged loss location. Also, Mr. Miyazono testified that a representative from Reins was not regularly present at the work site and that Reins never gave direction to any of the workers relative to the manner or safety measures to perform when doing the work. YT admitted that it was YT that entered into a contract with Collaborative to perform the actual work for the construction/renovation of the restaurant at the location, however, YT did not need or seek the approval of Reins before entering into the contract with

Collaborative. According to the contract between YT and Collaborative, YT was the general contractor and the entity that exerted control and authority at the subject work site.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738 [2003]; *see McGill v Polytechnic Univ.*, 235 AD2d 400, 402 [1997]). Here, Reins and Cooper submitted a copy of the contract wherein it was required that YT and its subcontractors obtain the said insurance naming the two as additional insureds, and the record reveals that YT breached the insurance procurement clause. Therefore, the branches of the motion which seek summary judgment dismissing Reins' fifth and sixth causes of action are denied.

Conclusion

Plaintiff's motion for summary judgment is denied. The motion by Reins for summary judgment in its favor dismissing all claims and cross claims against it is denied. The motion by Cooper for summary judgment as against Reins for contractual indemnification and to dismiss plaintiff's first and second causes of action is granted.

Finally, the motion by YT to dismiss the third-party complaint is denied.

Dated: January 4, 2010

AUGUSTUS C. AGATE, J.C.S.