| **Guadagno v We're Developing, LLC** |
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| 2010 NY Slip Op 30877(U) |
| April 6, 2010 |
| Supreme Court, Queens County |
| Docket Number: 12481/2008 |
| Judge: Howard G. Lane |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

x

GIAMPIERO GUADAGNO

- against -

WE'RE DEVELOPING, LLC.

x

Index Number 12481 2008

Motion Date February 16, 2010

Motion Cal. Number 9

Motion Seq. No. 1

The following papers numbered 1 to 17 read on this motion by plaintiff for summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1); and on this cross motion by defendant/third-party plaintiff We're Developing, LLC (We're Developing), for summary judgment dismissing plaintiff's complaint and all cross-claims, or, in the alternative, for summary judgment against third-party defendant Pleasant View Plumbing (Pleasant View) in its favor on its third-party complaint; and on this cross motion by Pleasant View for summary judgment dismissing the third-party complaint.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits...................................... | 1-4 |
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on November 30, 2007 while he was performing plumbing work during the course of his employment with Pleasant View. The accident occurred on premises owned by We're Developing. We're Associates, Inc. (We're Associates), is the company that manages the subject building on behalf of We're Developing. At the time of the occurrence, plaintiff was using a six-foot A-frame ladder in order to solder pipes that ran just above the drop ceiling of a bathroom. Plaintiff testified that his right foot was on the top platform of the ladder and his left foot was one or two steps from the top, when he slipped and fell to the ground. When questioned about the cause of his fall, plaintiff attributed it to the messy conditions of his work area, which had been created by demolition work that was also being done in the building at the time. Plaintiff stated that: (1) the accumulated dust on his ladder caused his left foot to slip on the step; and (2) the rock debris from the demolition of the building walls – which was scattered on the floor – caused the ladder to become unstable.

In the case at bar, both plaintiff and We're Developing separately move for summary judgment on plaintiff's Labor Law § 240 (1) claim. Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

The court finds that plaintiff has established his entitlement to judgment as a matter of law, while We're Developing has not. By virtue of his deposition testimony, plaintiff has demonstrated that We're Developing failed to provide him with a secure ladder while he was working at an elevated height, and that this failure was a proximate cause of his injuries (*see Inga v EBS N. Hills, LLC*, 69 AD3d 568 [2010]; *Barr v 157 5 Ave., LLC*, 60 AD3d 796 [2009]; *Crooks v E. Peters, LLC*, 60 AD3d 717 [2009]).

The claim by We're Developing that "plaintiff has failed to produce evidence that the ladder he was using was unsecured" is unavailing in light of plaintiff's testimony, in which he identifies the unsafe, unsecured ladder as the cause of his fall. Moreover, on its cross motion, it was incumbent upon We're Developing to affirmatively demonstrate that it provided plaintiff with proper protection, rather than to merely point to gaps or deficiencies in plaintiff's case, which is insufficient to sustain its burden (*see e.g. Baines v G & D Ventures, Inc.*, 64 AD3d 528 [2009]; *Totten v Cumberland Farms, Inc.*, 57 AD3d 653 [2008]; *Stroppel v Wal-Mart Stores, Inc.*, 53 AD3d 651 [2008]). Finally, the fact that the accident was unwitnessed does not preclude summary judgment in plaintiff's favor (*see Inga*, 69 AD3d at 568; *Barr*, 60 AD3d at 798-799; *Rivera v Dafna Constr. Co.*, Ltd., 27 AD3d 545 [2006]).

We're Developing also cross moves for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. Since We're Developing relies upon the same reasons stated above to support its argument for dismissal, and since those reasons have been deemed insufficient, We're Developing has failed to meet its prima facie burden of establishing its entitlement to judgment as a matter of law with respect to this claim.

Turning now to Labor Law § 200 and common-law negligence, the general rule is that an owner or contractor has the duty to provide construction site workers with a reasonably safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 [2009]; *Radoncic v Independence Garden Owners Corp.*, 67 AD3d 981 [2009]). If a plaintiff's injuries stem from an alleged dangerous condition on the work site, rather than from the manner in which the work was performed, an owner may be liable if it had control over the work site and actual or constructive notice of the dangerous condition thereat (*see Astarita v Flintlock Constr. Servs., LLC*, 69 AD3d 888 [2010]; *Schultz v Hi-Tech Constr. & Mgt. Servs., Inc.*, 69 AD3d 701 [2010]; *Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938 [2009]).

Here, the alleged defect – dust on the steps of the ladder and debris on the floor – constitutes the complained-of dangerous condition on the premises. Despite plaintiff's claim, We're Developing focuses exclusively upon its lack of direction, supervision, or control over plaintiff's work. Since We're Developing fails to address in its cross motion the issue of whether it had control over the work site and whether it had actual or constructive notice of the dangerous condition, We're Developing has not met its prima facie burden of establishing its entitlement to judgment as a matter of law with respect to plaintiff's Labor Law § 200 and common-law negligence claims (*see Astarita*, 69 AD3d at 889; *Schultz*, 69 AD3d at 702; *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543 [2010]).

Finally, both We're Developing and Pleasant View cross move on the issue of indemnification. In support of its cross motion, We're Developing submits purchase orders along with the terms and conditions of said orders (Contract), one of which contains an indemnification clause. We're Developing contends that, although the Contract does not explicitly name it as an indemnitee, it should, nevertheless, be indemnified by Pleasant View, as We're Associates was authorized to enter into contracts on behalf of We're Developing. Pleasant View asserts that, since it did not contract with We're Developing to do the work, We're Developing is not entitled to indemnification.

The testimony of Robert Bloom (Bloom), assistant vice president of operations for We're Associates, is submitted by both parties. Bloom testified, in substance: that Pleasant View did not perform plumbing work for We're Developing, but rather for We're Associates, pursuant to the Contract; that the Contract provided for indemnification by Pleasant View; that the Contract was entered into by We're Associates on behalf of We're Developing, but that it was signed by representatives of We're Associates; that We're Developing does not appear anywhere on the Contract; and that the managing agreement between We're Associates and We're Developing allows the former to enter into contracts on behalf of the latter.

The deposition testimony of Joseph E. Oswald, Jr. (Oswald), president of Pleasant View, is also submitted on these cross motions. Oswald testified: that he is unfamiliar with We're Developing, but that he has done commercial plumbing work for We're Associates for 20 years; and that the work pursuant to the Contract was being done for We're Associates and not for We're Developing.

"[A] contractual promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Eldoh v Astoria Generating Co., LP*, 57 AD3d 603 [2008]; *see Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668 [2008]; *Sumba v Clermont Park Assoc., LLC*, 45 AD3d 671 [2007]). There is no evidence before this court that would suggest that Pleasant View and We're Developing had the mutual and explicit intent for the former to indemnify the latter (*see e.g. Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006] [courts will not construe a contract to provide indemnity without an "unmistakable intent" to indemnify]; *see also Baginski v Queen Grand Realty, LLC*, 68 AD3d 905 [2009]; *Mid-Valley Oil Co., Inc. v. Hughes Network Sys., Inc.*, 54 AD3d 394 [2008]; *Quality King Distribs., Inc. v E & M ESR, Inc.*, 36 AD3d 780 [2007]). On the contrary, the record reveals that there was no contract between We're Developing and Pleasant View. In fact, Oswald testified that he was unfamiliar with We're Developing and only performed plumbing work for We're Associates. The fact that Bloom testified that We're Associates had the authority to enter into contracts on behalf of We're Developing does

not by any means show an explicit intent on the part of Pleasant View to indemnity We're Developing. Based on these reasons, We're Developing is not entitled to contractual indemnification from Pleasant View.

In any event, even assuming that We're Developing was a beneficiary of the Contract, it still would not be entitled to summary judgment since it has failed to demonstrate its freedom from fault in the happening of plaintiff's accident (*see Astarita*, 69 AD3d at 889; *Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099 [2009]).

Finally, neither is common-law indemnification warranted in this case since Pleasant View – as plaintiff's employer – is immune from tort liability unless it can be shown that plaintiff sustained a "grave injury" (Workers' Compensation Law § 11; *see Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606 [2009]; *Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715 [2006]). No such showing has been made here.

Accordingly, plaintiff's motion for summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1) is granted. The cross motion by We're Developing is denied. Pleasant View's cross motion for summary judgment dismissing the third-party complaint is granted.

Dated: April 6, 2010

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HOWARD G. LANE, J.S.C.