SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

FRANCISZEK KACPRZYK,	INDEX NO. 27028/2006
Plaintiff,	MOTION DATE December 15, 2010
- against -	
804 EQUITIES CORPORATION, et al.,	MOTION CAL. NO. 11, 12 & 13
Defendants.	MOT. SEQ. NUMBER 4, 6 & 7
804 EQUITIES CORPORATION, et al.,	
Third-party Plaintiffs,	
- against -	
PHOENIX CONSTRUCTION, INC.,	
Third-party Defendants.	

The following papers numbered 1 to 27 read on this motion by the plaintiff for summary judgment on his cause of action under Labor Law §240[1]. The defendant Spring Scaffolding, Inc. moves for summary judgment dismissing the complaint and all cross-claims. The defendants 804 Equities Corporation and JRD Management move for summary judgment on their third-party claims for indemnification.

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Upon the foregoing papers the motions are determined as follows:

This action arises out of an accident that occurred on December 3, 2004 outside a building located at 804 West 180th Street, New York, New

York. The premises was owned by the defendant 804 Equities Corporation ("804 Equities") and managed by the defendant JRD Management ("JRD"). 804 Equities and JRD hired the defendant Phoenix Construction, Inc. ("Phoneix") to perform certain renovations at the premises which included exterior masonry work. Phoenix subcontracted with Citak, Inc., the plaintiff's employer, to perform some of the work it agreed to complete.

On the day of the accident, the plaintiff was working on the 180th Street side of the premises with a "co-worker" whom he identified as "Stasiek". The plaintiff testified at his deposition that he and Stasiek, whose directions he claimed to be following, assembled a two point suspended scaffold on the sidewalk adjacent to the premises which was to be used to vertically ascend and descend the exterior facade of the building. It is undisputed that Phoenix supplied the scaffolding at issue.

The plaintiff described the scaffold as twelve feet long and three feet wide. At the rear of the scaffold, where the workers' backs would be, was a three to four foot high horizontal railing. The rear and sides of the scaffold were covered by a wire mesh. The plaintiff stated that front of the scaffold, that faced the facade of the building, had neither a railing nor the wire mesh covering.

After completing assembly of the scaffold, the plaintiff and Stasiek set about moving the scaffold up the outside of the building. The plaintiff averred that the sidewalk where the scaffold was located was separated from the building by a four foot high fence composed of masonry and metal. Photographs annexed to the moving papers reveal that the distance between the building and the outside edge of the fence was approximately four and one-half feet. The plaintiff testified that he and Stasiek were positioned at opposite ends of the scaffold, with the plaintiff on the left side, and were manually operating motors used to raise the and lower the scaffold. The plaintiff averred that when the scaffold was being raised, he and Stasiek each kept one leg on the scaffold and pushed the other against the fence to create space while the scaffold was being raised. When the scaffold was raised above the level of the fence, the plaintiff and Stasiek intended to allow the scaffold to evenly swing into the facade of the building. However, the plaintiff stated that when the scaffold was over the level of the fence, the scaffold twisted and the right side struck the building and bounced off the surface. The plaintiff claimed this motion caused him to fall from the from the front of the scaffold.

At the time of the accident, two safety lines were available for the plaintiff and Stasiek to use. The plaintiff acknowledged that on all other occasions when he was on the scaffold he used the safety line. However, in this instance, the plaintiff was not wearing his safety line because he claimed it would not reach the sidewalk where he was standing when he mounted the scaffold. The plaintiff also asserted that Stasiek told him they would attach their safety lines after the scaffold was raised over the fence. Miroslaw Buko ("Buko"), a project manager with Phoenix who was assigned to the project at issue, and Michael Siweic ("Siweic"), the president of Phoenix, both contradicted the plaintiff testimony and averred that the safety lines at issue could reach the

sidewalk where the scaffold was located.

In support of his motion for summary judgment on his claim under Labor Law §240[1], the plaintiff submitted, in addition to his own deposition testimony, an affidavit from his expert in construction site safety, Kathleen Hopkins. The expert opined that the scaffold used by the plaintiff did not provide proper protection since it lacked "fall prevention", in the form of safety railings and wire mesh, on the side of the scaffold facing the building. In addition, the expert asserted that a sidewalk bridge should have been erected between the sidewalk and the and the building's facade. The expert noted that the shed would have prevented the accident since the plaintiff and Stasiek could have mounted the scaffold on top of the shed, directly adjacent to the building's facade, and would have negated the need to maneuver the scaffold over the fence.

Contrary to the defendants' arguments, the expert's affidavit along with the plaintiff's deposition testimony established prima facie that the scaffold did not provide proper protection to the plaintiff under the circumstances and, consequently, was a violation of Labor Law §240[1] (See, Tama v Gargiulo Bros., Inc., supra; Miglionico v Bovis Lend Lease, Inc., 47 AD3d 561; cf., Golaszewski v Cadman Plaza North, Inc., 136 AD2d 596).

In opposition, the defendants failed to raise an issue of fact. The defendants' assertion that the plaintiff was not engaged in an activity covered by Labor Law §240[1] is incorrect. "[I]t is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (Prats v Port Auth., 100 NY2d 878, 882). Here, although the plaintiff had not yet begun the particular work he was tasked to perform, which undoubtably was a covered activity, he was still, under the above principle, engaged in a covered activity.

The defendants also argue that the plaintiff was either a recalcitrant worker and/or the sole proximate cause[1] of his fall based upon his misuse of the scaffold and his failure to use the available safety line.

Concerning the plaintiff's purported misuse of the scaffold, the defendants failed to establish that the manner in which the plaintiff and Stasiek operated the scaffold was improper and, more importantly, that the plaintiff was either instructed on the proper use of the scaffold or admonished not to raise the scaffold in the manner at issue

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[1] While the defendants argue that the plaintiff was a "recalcitrant worker" as opposed to casting his actions as the "sole proximate cause" of his fall, under the present state of the law, these two defenses are indistinguishable (Compare, Gallagher v New York Post, ____ NY3d ____, 2010 NY Slip Op 1014, with Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35).

(See, Gallagher v New York Post, ____ NY3d ____, 2010 NY Slip Op 1014).

The affidavit of the defendants' expert, Herbert Heller, Jr., failed to raise an issue of fact on this point. First, the court is precluded from considering the opinions set forth in the affidavit since it emanates from a previously undisclosed expert (See, Construction by Singletree, Inc. v Lowe, 55 AD3d 861). However, even if the court were to deal with the substance of the affidavit, it still would fail to raise an issue of fact. Specifically, the expert offered no opinion as to the sufficiency of the scaffold and the conclusions drawn by the plaintiff's expert. The opinions of the defendants' expert are confined exclusively to the safety line.

Moreover, the expert's statement that Citak workers were "told that to access the scaffold they should either use a ladder or step onto to it from a sidewalk bridge" is totally unsupported by the record. Buko expressly testified at his deposition that while he was responsible for safety at the site he never instructed workers at the site how they were supposed to raise the scaffold from the sidewalk to the building wall while clearing the fence. Buko also averred that there was no sidewalk bridge in place at the location of the plaintiff's accident and that Citak workers were never instructed by anyone from Phoenix to use the sidewalk bridge to access the scaffold.

Siweic offered contradictory testimony from that of the plaintiff and Buko as to the existence of a sidewalk bridge at the accident location. Siweic insisted that a sidewalk bridge was in place at the accident location. When Siweic was asked whether photographs of the building at issue which clearly showed a sidewalk bridge was not in place refreshed his recollection he responded "no". This testimony does not, as the defendants assert, raise an issue of fact. Siweic was admittedly not at the premises on the day of the accident and he affirmatively testified that he did not know whether the sidewalk bridge covered the fenced in area between the sidewalk and the building's facade. Although Siweic averred that workers could use a ladder or the purported sidewalk bridge to access the scaffold, he admitted that his knowledge that Citak workers were trained and instructed as to safety at the site was, in actuality, just an assumption.

With respect to the plaintiff's failure to use the safety line, the defendants are correct in their assertion that an affirmative failure of a worker to utilize a readily available safety line that he or she was instructed to use can render that worker the sole proximate cause of a fall (See, Cahill v Triborough Bridge & Tunnel Auth., supra; Leniar v Metro. Tr. Auth., 37 AD3d 425; Yedynak v Citnalta Constr. Corp., 22 AD3d 840; Negron v City of New York, 22 AD3d 546). However, unlike the above cases, and those cited by the defendants, the case at bar includes a claim that an additional safety device, i.e.: the suspended scaffold, did not provide proper protection. This factual distinction is salient. It is established that where "a violation of Labor Law § 240(1) is a proximate cause of an accident, the worker's conduct, of necessity, cannot be deemed the sole proximate cause" (Triola v City of New York,

62 AD3d 984). When this principle has been applied to cases where there is an established failure of one safety device and it is also claimed that the injured worker neglected to use an available safety line, the plaintiff has still been found entitled to judgment as a matter of law under Labor Law §240[1] (See, Tama v Gargiulo Bros., Inc., 19 Misc3d 1141A, aff'd 61 AD3d 958; Moniuszko v Chatham Green, Inc., 24 AD3d 638).

Accordingly, as the defendants failed to adduce any proof to raise a triable issue of fact or defense that would deny the relief demanded by plaintiff as a matter of law, the plaintiff's motion for summary judgment on his claim under Labor Law §240[1] is granted.

The motion by the defendant Spring Scaffolding, Inc. for summary judgment is granted without opposition and the plaintiff's complaint and all cross-claims are dismissed as against this defendant only.

The motion by 804 Equities Corporation and JRD Management for summary judgment on the claims for contractual and common law indemnification against the third-party defendant is granted. Generally, "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 cause of the accident" (Correia v Professional Data Mgt., 259 AD2d 60, 65). In the context of an action brought pursuant to the Labor Law, even in the absence of any negligence on the part of the proposed indemnitor, common-law indemnification may be found if the indemnitor "had the authority to direct, supervise and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557; see also, Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 685, citing Reilly v. D. Giacomo & Son, 261 AD2d 318). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (Correia v Professional Data Mgmt., Inc., 259 AD2d 60, 65).

Here, the movants established, prima facie, entitlement to conditional summary judgment with submission of the deposition testimony from Buko and Siweic which demonstrated that 804 Equities and JRD did not control the work of Citak's employees and that Phoenix was responsible for safety at the work site. In opposition, Phoenix failed to raise an issue of fact that either 804 Equities and JRD had "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317). At best, the deposition testimony of Richard Miller of 804 Equities and Claudia Sampson of JRD established only an authority for "general supervision, which is insufficient to impose liability under the Labor Law" (Damiani v Federated Dept. Stores, Inc., 23 AD3d 329).

Accordingly, the motion is granted to the extent that 804 Equities and JRD are granted summary judgment on their claims for contractual and common-law indemnification against Phoenix.

Dated: April 19, 2010

Peter J. Kelly, J.S.C.