

<b>Lezcano v Hotel on Rivington</b>
2010 NY Slip Op 32151(U)
July 2, 2010
Supreme Court, Queens County
Docket Number: 8749/2006
Judge: Lawrence Vincent Cullen
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 22  
Justice

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PEDRO LEZCANO,		Number <u>8749</u> 2006
Plaintiff,		Motion
- against -		Date <u>April 13,</u> 2010
HOTEL ON RIVINGTON, THE DOWNTOWN, LLC, 105 RIVINGTON, LLC, PAPER CLIP INTERNATIONAL, PAUL W. STALLINGS, Individually, PAUL W. STALLINGS d/b/a RENAM DEVELOPMENT, LLC. and RENAM DEVELOPMENT, LLC,		Motion Cal. Numbers <u>15, 16, 17</u>
Defendants.		Motion Seq. Nos. <u>7, 8, 9</u>
	X	

The following papers numbered 1 to 42 read on this motion by defendants 105 Rivington, LLC (105 Rivington) and Paper Clip International, LLC s/h/a Paper Clip International (Paper Clip International) for summary judgment dismissing all claims and cross claims against them, and for summary judgment on their cross claims for common-law indemnification, contractual indemnification, breach of contract and attorney's fees against defendants Hotel on Rivington (Hotel on Rivington) and The Downtown, LLC (The Downtown); on the motion by defendant Renam Development, LLC (Renam Development) for summary judgment dismissing all claims and cross claims against it; on the motion by defendant Paul W. Stallings (Stallings) for summary judgment dismissing all claims and cross claims against him; on the cross motion by the plaintiff Pedro Lezcano (plaintiff) for partial summary judgment on the issue of liability on his claim brought under Labor Law § 240 (1); and on the cross motion by Hotel on Rivington and The Downtown for summary judgment dismissing all claims and cross claims against them.

	Papers <u>Numbered</u>
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Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

This is an action to recover for personal injuries plaintiff allegedly sustained due to violations of Labor Law § 200, 240 (1), 241 (6), and common-law negligence. Paper Clip International owned the premises at 105 Rivington Street (the subject premises) and leased a portion of it to The Downtown, which was in the process of renovating the premises at the time of the incident. Renam Development was the general contractor for the construction and it subcontracted the drywall portion of the work to non-party Nino Drywall. Plaintiff was an employee of Nino Drywall and was working on stilts when he fell at the premises.

105 Rivington, Paper Clip International, Renam Development, Hotel on Rivington, The Downtown and Stallings, in his individual capacity, have moved and cross-moved for summary judgment dismissing all claims and cross claims against them. Plaintiff has cross-moved for partial summary judgment on the issue of liability on his claim brought under Labor Law § 240 (1) and opposed the motions and cross motions. 105 Rivington, Paper Clip International, Renam Development, Stallings and plaintiff have all relied upon, among other things, plaintiff's deposition testimony and the deposition testimony of Stallings. 105 Rivington and Paper Clip International have further relied upon the deposition testimony of Jerry Atkins (Atkins), a managing member of Paper Clip International.

Atkins' deposition testimony has demonstrated that Paper Clip International was the owner of the subject premises at the time of the incident. His testimony has also demonstrated that 105 Rivington was not an owner, contractor or an agent of the owner or contractor under the provisions of Labor Law and that it was not involved in the construction at the time of incident (*see, Musselman v Gaetano Constr. Corp.*, 285 AD2d 868, 869-870 [2001]; *Ogden v City of Hudson Indus. Dev. Agency*, 277 AD2d 794, 795-796 [2000]; *Decotes v Merritt Meridian Corp.*, 245 AD2d 864, 866 [1997]). In opposition to 105 Rivington's motion for summary judgment, plaintiff has not raised an issue of fact as to 105 Rivington's lack of status as an owner, contractor or as an agent of the owner or contractor under the Labor Law (*see, Ficano v Franklin Stucco Supply, Inc.*, 72 AD3d 1018, 1019

[2010]). Therefore, 105 Rivington has demonstrated its entitlement to summary judgment dismissing all claims and cross claims against it.

Although Stallings' motion is untimely and he has failed to show "good cause" for his delay (CPLR 3212 [a]), the Court will consider his motion since it has been made on nearly identical issues as those that are already before the court upon timely motions and cross motions (*see, Grande v Peteroy*, 39 AD3d 590, 591 [2007]). The record has demonstrated that Stallings was not an owner or general contractor and that he did not act as an agent of the owner or general contractor in his individual capacity for purposes of Labor Law (*see, Musselman v Gaetano Constr. Corp.*, 285 AD2d at 869-870; *Ogden v City of Hudson Indus. Dev. Agency*, 277 AD2d at 795-796; *Decotes v Merritt Meridian Corp.*, 245 AD2d at 866). In opposition, plaintiff has failed to raise a triable issue of fact on this issue. Therefore, Stallings is entitled to the relief sought on his motion.

In support of their cross motion, Hotel on Rivington and The Downtown have adopted Paper Clip International's arguments and evidence with regard to plaintiff's claims brought under Labor Law § 200, 240 (1), and 241 (6) and for common-law negligence. Stallings' deposition testimony reflected that Stallings was the owner of The Downtown, and that, while The Downtown leased a portion of the subject premises, it owned the premises located at 107 Rivington Street, next door to the subject premises. Stallings also testified that he developed 107 Rivington Street as the Hotel on Rivington. His testimony has established that the Hotel on Rivington was not an actual company, not the owner or lessee of the premises, and that The Downtown was the legal entity which owned the Hotel on Rivington (*see, Ogden v City of Hudson Indus. Dev. Agency*, 277 AD2d at 795-796). Therefore, Hotel on Rivington has demonstrated its entitlement to summary judgment as a matter of law dismissing all claims and cross claims against it. In opposition, plaintiff has failed to raise a triable issue of fact on this issue.

Despite the fact that the record reflects that Renam Development was the general contractor of the construction at the subject premises at the time of the incident and that The Downtown was neither the owner or general contractor, Stallings testified that The Downtown hired non-parties Amador Pons (Pons) and Mike Turner as construction managers at the subject premises to oversee the work. He further testified that Pons entered into contracts with the subcontractors, was at the worksite almost every day, and that he did not know whether Pons was actually an employee of The Downtown or another one of his companies.

Under certain circumstances, a construction manager may be found to be liable under Labor Law (*see, Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 520 [2008]). The Downtown has failed to demonstrate

whether it did or did not employ Pons, one of the construction managers of the construction, whether Pons acted with the authority of a general contractor or whether he did or did not have the ability to control the work which brought about the injury (*see, Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 1131 [2007]). Therefore, The Downtown has failed to satisfy its initial burden of demonstrating that there are no material issues of fact as to its liability under Labor Law (*see, Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, the burden on this cross motion never shifted and the opposition papers need not be considered (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Paper Clip International and Renam Development have argued that plaintiff's claim under Labor Law § 240 (1) should be dismissed because the instant case does not fall within the protections of Labor Law § 240 (1). Labor Law § 240 (1) provides that contractors, owners and their agents "shall furnish or erect, or cause to be furnished or erected . . . scaffolding . . . ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection" to workers employed on the premises. In order to recover under Labor Law § 240 (1), a plaintiff's injury must have been proximately caused by a violation of the statute (*see, Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Camlica v Hansson*, 40 AD3d 796, 797 [2007]).

Plaintiff testified that he was working as a drywall taping worker on stilts at the time of the incident and that, prior to his fall, he had observed plywood on the floor in the area he was working. He further testified that the plywood had been placed on the floor by other workers at the worksite, that he had no trouble using the stilts in the days prior to the incident and that he was provided with no other safety devices. He also testified that, while he was working, he was caused to fall when his right stilt came into contact with a piece of plywood on the floor.

Based upon plaintiff's deposition testimony, plaintiff has satisfied his initial burden on his cross motion with regard to Paper Clip International and Renam Development. His testimony has demonstrated that he was working without a safety device that would afford him proper protection under Labor Law § 240 (1) (*see, Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Losurdo v Skyline Assoc., L.P.*, 24 AD3d 1235, 1236-1237 [2005]). Paper Clip International, as the owner of the subject premises where plaintiff fell, and Renam Development, as the general contractor of the construction at the worksite, are statutorily liable to plaintiff under Labor Law § 240 (1) (*see, Ogden v City of Hudson Indus. Dev. Agency*, 277 AD2d at 795-796; *Decotes v Merritt Meridian Corp.*, 245 AD2d at 866).

In opposition to plaintiff's showing of *prima facie* entitlement to summary judgment as a matter of law and in support of their own motions, Paper Clip International, Renam Development and The Downtown have failed to demonstrate whether plaintiff's own actions were the sole proximate cause of his injuries and have failed to raise a triable issue of fact on that issue (*see, Argueta v Pomona Panorama Estates, Ltd.*, 39 AD3d 785, 786 [2007]). Therefore, plaintiff is entitled to partial summary judgment on his cross motion. In light of the above decision, defendants Paper Clip International and Renam Development are not entitled to the relief sought on the branches of their motion for summary judgment dismissing plaintiff's claim brought under Labor Law § 240 (1).

With regard to the branch of plaintiff's cross motion for partial summary judgment against The Downtown, as discussed above, issues of fact remain with regard to whether The Downtown is liable pursuant to Labor Law (*see, Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *Pino v Irvington Union Free School Dist.*, 43 AD3d at 1131). Furthermore, plaintiff has failed to eliminate all triable issues of fact as to whether The Downtown was liable to him under Labor Law § 240 (1). Therefore, plaintiff has failed to satisfy his initial burden on the branch of his cross motion against The Downtown and the opposition to plaintiff's cross motion need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Zuckerman v City of New York*, 49 NY2d at 562).

Paper Clip International, Renam Development and The Downtown have also moved for summary judgment dismissing plaintiff's claims brought under Labor Law § 200 and for common-law negligence and have argued that they did not exercise any control or supervision over the plaintiff or any of the work he was performing. In support of these branches of their respective motions, Paper Clip International, Renam Development and The Downtown have relied upon, among other things, plaintiff's deposition testimony, while Paper Clip International has further relied upon Atkins' deposition testimony and Renam Development and The Downtown, which adopted the arguments and evidence of Paper Clip International, have relied upon Stalling's deposition testimony.

Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury (*see, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Claims brought under § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]). Where a claim arises out of the methods or materials of the

work, an owner or general contractor may be liable if it is shown that he or she had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63). Whereas, where a claim is brought as a result of a dangerous condition, an owner or general contractor may be liable if it is demonstrated that he or she created the dangerous condition or failed to remedy a dangerous condition of which he or she had actual or constructive notice (*see, LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Chowdhury v Rodriguez*, 57 AD3d at 128). In the instant action, plaintiff's Labor Law § 200 claim has been based on both categories.

Plaintiff testified that no one other than Ramon Diaz, the owner of Nino Drywall, his employer, directed his work or instructed him when and where to perform his work. Atkins testified that he never directed or controlled any of the work during the construction. Through plaintiff's and Atkins' deposition testimony, Paper Clip International, Renam Development and The Downtown have established that they did not control or supervise plaintiff's work at the time of the incident (*see, Capolino v Judlau Contr., Inc.*, 46 AD3d 733, 735 [2007]). In opposition, plaintiff has failed to raise a triable issue of fact on this issue.

Atkins testified that he never personally visited the construction site, that no employees of Paper Clip International managed the site or were present during the construction, and that he was not notified about any workers putting plywood down on the floor of any portion of the worksite. Through Atkins' testimony, Paper Clip International has also demonstrated that it did not create the alleged condition or have actual or constructive notice of it (*see, Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2007]). In opposition to this branch of Paper Clip International's motion, plaintiff has failed to point to anything in the record which has raised a triable issue of fact as to whether Paper Clip International or its employees created the alleged condition or had actual or constructive notice of it (*see id.*). Therefore, Paper Clip International is entitled to the relief sought on the branch of its motion for summary judgment dismissing plaintiff's claim brought under Labor Law § 200.

Renam Development has conceded in its motion papers that it was the general contractor of the construction at the subject premises at the time of the incident. However, Renam Development has failed to submit evidence to demonstrate that its employees did not create the alleged condition which caused plaintiff's fall, or that it did not have actual or constructive notice of the condition (*see, Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940 [2009]). Renam Development must do more than point to the gaps in plaintiff's case in order to satisfy its initial burden on this branch of its motion (*see, Falah v Stop & Shop Cos., Inc.*, 41 AD3d 638, 639 [2007]). Therefore, inasmuch as Renam Development has failed to demonstrate its prima facie entitlement to summary judgment as

a matter of law on the branch of its motion for dismissal of plaintiff's claim brought under Labor Law § 200, the opposition papers need not be considered.

The Downtown has failed to demonstrate whether it employed Pons, the construction manager at the worksite, and whether Pons or any of its employees created or had actual or constructive notice of the alleged condition (*see, Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d at 940). Therefore, the opposition papers to this branch of the cross motion by The Downtown need not be considered and The Downtown is not entitled to the relief sought.

Paper Clip International, Renam Development and The Downtown have moved for summary judgment dismissing plaintiff's claims brought under Labor Law § 241 (6) and have argued that the sections of the Industrial Code which plaintiff has relied upon to support this claim are not applicable in the instant case or are insufficient to support a claim under this section. As mentioned previously, in support of this branch of its cross motion, The Downtown has adopted the arguments and evidence of Paper Clip International.

Under Labor Law § 241 (6) all contractors and owners must provide workers engaged in "construction, excavation or demolition work" with "reasonable and adequate protection and safety" in areas where such work is being performed. "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2007]; *see, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502).

Plaintiff has predicated his claim under Labor Law § 241 (6) upon various sections of the Industrial Code, including 12 NYCRR 23-1.7, 23-1.22, 23-2.1, and 23-5.22. Inasmuch as plaintiff has failed to oppose the branches of the motion by Paper Clip International, Renam Development and The Downtown to dismiss his claims regarding the alleged violations of 12 NYCRR 23-1.7 (a), (b), (c), (d), (f), (g), (h), 23-1.22, 23-2.1, and 23-5.22 (a), (b), (c), and (d), Paper Clip International, Renam Development and The Downtown are entitled to the dismissal of these claims (*see Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2010]).

12 NYCRR 23-1.7 (e) applies to tripping and other hazards in passageways and tripping hazards in work areas created by "accumulations of dirt and debris and from scattered tools and materials and from sharp projections." Plaintiff has alleged that he fell in the area in which he was working because one of the stilts he was wearing came into contact with plywood which had been placed on the floor. He has not alleged that he was caused to fall by an "accumulation" of anything (12 NYCRR 23-1.7 [e]). Therefore, based

upon plaintiff's testimony, Paper Clip International, Renam Development and The Downtown have demonstrated that 12 NYCRR 23-1.7 (e) is inapplicable in the instant case (*see, e.g. Farrell v Triangle Equities Dev. Co., LLC*, 26 Misc3d 1201[A] [2009]). In opposition, plaintiff has failed to raise a triable issue of fact as to whether this section is applicable.

12 NYCRR 23-5.22 (e) provides that “[s]tilts shall not elevate the feet of any person more than 24 inches above the floor” while section (f) provides that “[s]tilts shall be used only on even floor surfaces kept free from obstructions [and other] materials.” Since plaintiff's undisputed testimony reflected that the stilts he was using were approximately three and a half to four feet in height and that plywood had been placed on portions of the floor in the area in which he was working, Paper Clip International, Renam Development and The Downtown have failed to satisfy their initial burden by demonstrating that 12 NYCRR 23-5.2 (e) and (f) are inapplicable to the facts of the instant case (*see, Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619-620 [2008]). Therefore, the opposition to these branches of the motions by Paper Clip International, Renam Development and The Downtown need not be considered. Thus, Paper Clip International, Renam Development and The Downtown are not entitled to the relief sought on the branches of their respective motions and cross motions for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

105 Rivington and Paper Clip International have moved for summary judgment on their cross claims for common-law indemnification, contractual indemnification, breach of contract and for attorney's fees against Hotel on Rivington and The Downtown. In support of these branches of their motion, 105 Rivington and Paper Clip International have relied upon, among other things, a copy of the lease agreement and the rider to said agreement between Paper Clip International and The Downtown.

As to the branch of the motion by 105 Rivington for summary judgment on its cross claims against Hotel on Rivington and The Downtown, inasmuch as all claims and cross claims against 105 Rivington have been dismissed and since it is not a party to the lease agreement for the subject premises, it is not entitled to common-law indemnification, contractual indemnification, breach of contract or attorney's fees.

In light of the above decision which dismissed all claims and cross claims against Hotel on Rivington, 105 Rivington and Paper Clip International are not entitled to summary judgment on their cross claims for common-law indemnification, contractual indemnification, breach of contract and for attorney's fees against Hotel on Rivington.

“Pursuant to General Obligations Law § 5-321, a lease provision which purports to exempt a lessor from liability for its own acts of negligence is void and unenforceable” (*Rego v 55 Leone Lane, LLC*, 56 AD3d 748, 749 [2008]; *see, Ben Lee Distribs., Inc. v Halstead Harrison Partnership*, 72 AD3d 715, 716 [2010]). The rider to the agreement provides that “[t]he Tenant shall indemnify and hold Landlord harmless from and against all claims, liens costs (including attorney’s fees) and other liabilities which the Landlord may incur, arising out of or due to” alterations of the premises by the tenant. Since this indemnification clause in the rider exempts Paper Clip International from liability for damages that may be due to its own negligence, the clause, which contains the provision for attorney’s fees, is void as a matter of public policy and unenforceable (*see, Ben Lee Distribs., Inc. v Halstead Harrison Partnership*, 72 AD3d at 716; *Mendieta v 333 Fifth Ave. Assn.*, 65 AD3d 1097, 1100 [2009]). Therefore, Paper Clip International is not entitled to the relief sought on these branches of its motion for summary judgment on its cross claims for contractual indemnification and for attorney’s fees.

“Where, as here, an owner . . . is only held vicariously liable for violating the provisions of the Labor Law, that owner . . . is entitled to full common-law indemnification from the party actually responsible for the incident” (*Cunha v City of New York*, 45 AD3d 624, 626 [2007], *affd* 12 NY3d 504 [2009]; *see, Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc.*, 54 AD3d 394, 395 [2008], *lv denied* 12 NY3d 881 [2009]). However, in order to demonstrate its entitlement to common-law indemnification against The Downtown, Paper Clip International “must also prove that the proposed indemnitor was guilty of some negligence that caused or contributed to the accident or, in the absence of any negligence, that the proposed indemnitor had the authority to direct, supervise, and control the work giving rise to the injury” (*Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc.*, 54 AD3d at 395; *see, Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2005]). Inasmuch as Paper Clip International has failed to make such a showing, it is not entitled to summary judgment on this branch of its motion (*see, Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d at 684-685), and the opposition papers need not be considered.

With regard to the branch of the motion by Paper Clip International for summary judgment on its cross claim for breach of contract, its submission of a copy of the agreement between Paper Clip International and The Downtown has demonstrated that an agreement existed in which The Downtown agreed to procure insurance on behalf of Paper Clip International. However, the affirmation by counsel submitted in support of this branch of the motion by Paper Clip International, which has alleged a breach of this provision of the agreement, is insufficient because it has not been made by a party with personal knowledge of the facts (CPLR 3212 [b]; *see, Mattera v Capric*, 54 AD3d 827, 828 [2008]). Nor has Paper Clip International submitted any other evidence in admissible form that has demonstrated that there was a breach of the agreement to procure insurance. Therefore,

Paper Clip International has failed to demonstrate its prima facie entitlement to judgment as a matter of law on its cause of action alleging breach of contract and the opposition papers need not be considered (*see, McMahan v McMahan*, 66 AD3d 970, 970971 [2009]).

Accordingly, the motions by 105 Rivington and Stallings and the cross motion by Hotel on Rivington for summary judgment dismissing all claims and cross claims against them are granted. The branch of the cross motion by The Downtown for summary judgment dismissing all claims and cross claims against it is denied. Plaintiff's cross motion for partial summary judgment on the issue of liability on his claim brought under Labor Law § 240 (1) is granted as against Paper Clip International and Renam Development, while the branches of the motions by Paper Clip International and Renam Development for summary judgment dismissing plaintiff's claim brought under Labor Law § 240 (1) against them are denied. The branch of the motion by Paper Clip International for summary judgment dismissing plaintiff's claims brought under Labor Law § 200 and for common-law negligence against it is granted while the branch of the motion by Renam Development for summary judgment dismissing plaintiff's claims under Labor Law § 200 and for common-law negligence is denied. The branches of the motions by Paper Clip International and Renam Development for summary judgment dismissing plaintiff's claim brought under Labor Law § 241 (6) against them are denied. The branch of the motion by 105 Rivington and Paper Clip International for summary judgment on their cross claims against Hotel on Rivington is denied. The branches of the motion by 105 Rivington and Paper Clip International for summary judgment against The Downtown on their cross claims for common-law indemnification, contractual indemnification, breach of contract and attorney's fees are denied.

Dated: July 2, 2010

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LAWRENCE V. CULLEN, J.S.C.