

**Simpson v O'Shea**

2010 NY Slip Op 32173(U)

July 8, 2010

Supreme Court, Suffolk County

Docket Number: 28651/2006

Judge: Paul J. Baisley

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXVI SUFFOLK COUNTY

COPY

**PRESENT:****HON. PAUL J. BAISLEY, JR., J.S.C.**-----X  
ROY T. SIMPSON and MARGARET SIMPSON,

Plaintiffs,

-against-

GERALD O'SHEA and BINDER &amp; BINDER, P.C.

Defendants.  
-----X

INDEX NO.: 28651/2006  
CALENDAR NO.: 200901296OT  
MOTION DATE: 10/29/2009  
MOTION NO.: 004 MOT D  
005 MOT D

**PLAINTIFFS' ATTORNEY:**

CHARLES G. EICHINGER & ASSO.  
1601 Veterans Memorial Hwy.  
Islandia, New York 11749

**DEFENDANTS' ATTORNEY:**

ANDREA G. SAWYERS, ESQ.  
3 Huntington Quad., Suite 102S  
Melville, New York 11747

PEREZ & VARVARO, ESQS.  
333 Earle Ovington Blvd.  
Uniondale, New York 11553-3644

Upon the following papers numbered 1 to 31 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers 14-25; Answering Affidavits and supporting papers 26-27; Replying Affidavits and supporting papers 28-29; 30-31; Other     ; (and after hearing counsel in support and opposed to the motion) it is:

**ORDERED** that this motion (004) by the defendant, Gerald O'Shea d/b/a O'Shea Properties, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and the cross claims asserted by Binder & Binder, P.C. is granted and the complaint and cross claims asserted against the defendant Gerald O'Shea are dismissed with prejudice; and that part of the motion which seeks summary judgment against Binder & Binder, P.C. for its alleged breach of the agreement premised upon the alleged failure of Binder & Binder to name Gerald O'Shea as an additional insured on its premises liability policy has been rendered academic by dismissal of the complaint and cross-claims asserted against him and is denied as moot; and it is further

**ORDERED** that this cross-motion (005) by the defendants, Binder & Binder, P.C., for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent that the causes of action premised upon Binder & Binder P.C.'s alleged violation of Labor Law sections 200, 240(1), and 241(6) and the cross claims asserted against it are dismissed with prejudice; and is denied as to that part of the motion which seeks dismissal of the cause of action premised upon its alleged negligence.

The complaint of this action sets forth that on November 13, 2005, during his employment with the Social Security Express, Ltd., the plaintiff, Roy T. Simpson, was working at the premises located at 2805 Veterans Memorial Hwy, Suite 20, Ronkonkoma, County of Suffolk, State of New York, when he was caused to be precipitated from the ladder he was working on while repairing a light ballast, causing him to sustain personal injury. It is claimed that the defendants, Gerald O'Shea (O'Shea) and Binder & Binder, P.C. (Binder & Binder) owned, managed and controlled the premises where the incident occurred. Causes of action are premised upon the

defendants' alleged negligence and violation of New York State Labor Law sections 200, 240, 241. A derivative claim has been asserted on behalf of Margaret Simpson, wife of the plaintiff. By way of the bill of particulars, the plaintiff has claimed, inter alia, that there was lack of lighting at the premises, that the ballasts were dangerous and defective, the defendants failed to provide ballasts, that the defendants caused or created the condition, and had actual and constructive notice of the condition complained of and failed to remedy the condition.

Binder & Binder has set forth "counterclaims" against Gerald O'Shea for contribution and common law indemnity. Gerald O'Shea has set forth cross claims against Binder & Binder for common law indemnification, contractual indemnification, contribution and breach of contract in failing to maintain a liability insurance policy as required by the terms of the written lease and/or agreement between the parties.

O'Shea, in motion (004) and Binder & Binder in motion (005) seek summary judgment dismissing the complaint and cross claims asserted against them.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Gerald O'Shea testified to the effect that he is self-employed and is the sole owner of O'Shea Properties which constructs buildings and develops land, and leases the buildings which are mostly multi-tenant buildings. He has owned the property located at 2805 Veterans Highway for about eight years and was the general contractor for a multi-tenant single story office building constructed on the property about seven years ago. He entered into a lease with Binder & Binder, P.C. for the rental of that building for the period commencing November 1, 2001 and ending October 31, 2006. The lease was in effect on November 13, 2005, the date of the plaintiff's accident. Ballasts were installed as original equipment in the building and were changed pursuant to work orders for Binder & Binder, if the ballasts were under a warranty period provided by the manufacturer, generally by the licensed electrician, Bridgeway Electric, who originally installed the ballasts. No warranty period was set forth in the lease agreement for the ballasts. Paragraph 13 of the lease provided that "The Landlord shall provide grounds and building maintenance commensurate with standards of other local first class office buildings." O'Shea described a

“first class office building” as a building that would be maintained in a higher standard than other buildings in the area. Maintenance of the ballasts was covered under another paragraph under ordinary wear and tear. Prior to November 13, 2005, he and Binder & Binder had a disagreement with respect to the responsibility to change the ballasts in 2005 when requested by Binder & Binder to do so. It was O’Shea’s position that Binder & Binder should make arrangements to have an electrician change the ballasts, and he would have recommended the original electrician to them; O’Shea was not going to assume responsibility for the costs but he never refused to change the ballasts. It was O’Shea’s understanding that Binder & Binder were responsible for changing the ballasts, and if O’Shea changed the ballasts they would charge Binder & Binder. In his letter of December 15, he advised Binder & Binder that the initial replacement of the ballasts was during the manufacturer’s fixture warranty period of about one year after installation which they granted as a courtesy at the beginning of the lease, and that the ballasts needed to be replaced as a result of normal wear and tear rather than a possible defect. He was not sure if he put this in writing to Binder & Binder. He believed the average life of a ballast was three years, depending upon use. He was not aware that Binder & Binder hired Mr. Simpson to perform electrical work at their premises. He did not provide any equipment for Mr. Simpson and did not provide instructions to Mr. Simpson with regard to any work that he performed at the premises Binder & Binder occupied.

Roy Simpson testified to the effect that he was employed by Social Security Express and was in charge of their construction and maintenance in the field. The accident occurred on November 13, 2005 at Binder & Binder’s office at 2805 Vets Highway while he was changing ballasts in the lights and changing fluorescent lights. About twenty lights were not working. He had been contacted by Eddie Gomez of Binder & Binder, his immediate supervisor, that the work needed to be done. He had previously changed light bulbs and fixed plumbing problems at Binder & Binder’s location. He arrived on Sunday at about 5:00 p.m. The accident occurred between 6:00 and 7:00. He brought ballasts (described as transformers) with him and Binder & Binder provided him with the ladder. He was reimbursed by his employer for the ballasts. The lights were turned on when he arrived and he testified it was not necessary to turn off the electrical power to do the work. He was working in the lunch room, with the lights on, on a recessed ceiling light fixture, took off the face, an inside cover over the ballast wires, and was about to replace the ballast when the accident occurred. He testified that Binder & Binder later represented him to obtain Social Security Disability benefits.

Harry Binder testified to the effect that Binder & Binder have only two employees, Harry and his brother. They have twenty nine offices in ten different states with different corporations for each state for the leases. Harry Binder stated that he is the owner of Social Security Express, an employee leasing corporation, which in November 2005 had about 260 employees consisting of caseworkers, accounting, receptionists, case managers, attorneys and call writers. The back office of the subject leased premises is the law firm. Mr. Simpson and Mr. Day were the only two maintenance employees. Mr. Gomez is the head of security. Social Security Express also operates and supplies about twenty factory worker employees for a jewelry factory. Mr. Simpson worked for Social Security Express at five locations, including New York City, the Bronx, Jericho, Huntington and Ronkonkoma. He testified that Mr. Simpson did not have a supervisor, set his own schedule, and was alerted to the problems and projects needed to be attended to. He stated he knew Roy Simpson for about thirty years prior to this incident and that Mr. Simpson probably changed ballasts prior to this accident and that he never assigned him to specifically change ballasts or lights at these locations prior to the accident. On the date of the accident he

met Roy Simpson at his office at 2805 Veterans Memorial Highway, Unit 20, Ronkonkoma, a Sunday, so the employees would not be there while Simpson was replacing ballasts and fluorescent light bulbs. It was light outside. He intended to remain at the office until Simpson was finished. He had been there about an hour and a half or two hours and was in the cafeteria area when the accident occurred. He stated that there is a ladder on the premises, which Mr. Simpson used, but he did not personally hand it to him. He described the ladder as being a six-foot ladder in fair shape, used, not newly bought, and he did not know if there was anything wrong with it. He never purchased the ladder as he had no use for one. He thought that O'Shea or one of his workers might have left the ladder but did not know when. He had no idea it was being used on the premises, and did not notify O'Shea it had been left behind. He was in his office when he heard a crash in the lunchroom about 100 feet away. When he arrived in the lunch room he smelled burning electric and the light Mr. Simpson was working on was not lit. There were no emergency lights on. He had no difficulty seeing in the room. He observed Mr. Simpson sprawled on the floor, a lot of blood, the ladder was down, the chair was knocked over, a table had been broken, and there was glass all around from the fluorescent light bulb. Mr. Simpson was moaning and did not recognize his name. He told him not to get up and ran to the phone and called 911. When the fire department came, he advised them he smelled smoke and they turned off the circuit breakers. He had no discussion with Simpson about what happened until about a week later, and Mr. Simpson told him he did not recall what happened or did not remember the smell of the burned wires. He testified that he gave Mr. Simpson no instructions concerning how to do the job.

Harry Binder also testified that he originally asked the landlord, Gerald O'Shea, by way of a letter and telephone, to fix the ballast and fluorescent lights as previously done in the past as he had been leasing the premises from about November 2001. He believed the lease required the landlord to fix the electrical and that O'Shea had hired electricians to do so in the past. He did not recall when he first had problems with the ballasts. Some of the lights were out. When the building was being built, he worked with O'Shea's architect to tell them what specifications he wanted, but had no knowledge concerning the electrical specifications. Mr. O'Shea prepared the lease and he did not recall any item having to do with electrical supply that he wanted amended or inserted into the lease. Harry Binder did not know when he first had complaints about the ballasts. At one point, O'Shea submitted a bill to his office for changing bulbs and ballasts, but he did not know when or who the electrician was who performed the work. He did not recollect a provision in the lease identifying Mr. O'Shea's responsibility to change the ballasts or light fixtures in his office. He personally made a decision to have the ballasts changed and to charge O'Shea for the service, but did not hire a licensed electrician and instead had Mr. Simpson do the work. He did not recall Mr. Simpson or anyone from Social Security Express changing any light fixtures or ballasts prior to the date of the incident.

Christopher McLoughlin testified as a non-party witness that he owns Bridgeway Electric, an electrical contracting company, since 1983, and is an electrician licensed in Nassau County, doing commercial and residential work. Gerald O'Shea has been his client since about 1987 or 1988 and provided an electrical proposal for the building at 2805 Veterans Memorial Highway for the installation of lighting fixtures, wall outlets, wall switches, light switches, circuit breaker panels and the units, wiring the electric hot water heaters, exist signs, power pole connections, GFI outlets, GFCI outlets, bathroom exhaust fans, and exterior light fixtures. That work was performed during the months of October and November 2001. There were 179 lighting fixtures, two by four foot fluorescent lights, installed in units 16 through 20, installed by all three people

working for him, one a mechanic and two apprentice electricians. He described the ballast as a device in a fluorescent fixture that increases the voltage from what the input voltage is to whatever the output voltage is supposed to be. To change a ballast, he testified, the electricity is to be turned off first and the lamp replaced prior to changing the ballast. He stated that written on most ballasts is a warning not to work on the ballast with live voltage applied. In addition to the original installation work performed at the location, he stated he last performed work at the building in 2003 when he changed one ballast. He has never received any complaints about power surges in the building, especially suites 16 to 20, and has never received a summons or violation from any municipal entity with regard to any of the work he completed at the location. The manufacturers guarantee the ballasts for about a year, but some last a long time and some don't last long at all. About five to ten percent of the ballasts installed fail, which he stated, is not an unusual rate. He has never had a ballast fail in the first year. Prior to 2005, other than changing the one ballast in units 16 to 20, he did no other work on the light fixtures after that initial installation was completed. His company maintained no equipment at the location and no one from Binder & Binder ever requested that he perform work at the location. He never received any complaints from anyone at the location in terms of inadequate illumination. He never assigned any of his employees that have no electrical background to change out a ballast and would not recommend that be done. The ballast comes with the fixture. The type of ballast is not specified and is limited to a number of ballast manufacturers, depending which is available.

The lease agreement provides at paragraph 13, that the Tenant shall supply its own utility service and garbage disposal and that the Landlord shall provide grounds and building maintenance commensurate with standards of other local first class office buildings.

In *Deoki v Abner Properties Co.*, 48 AD3d 510, 852 NYS2d 261 [2<sup>nd</sup> Dept 2008], wherein the plaintiff was injured while replacing a ballast in a fluorescent light in a building leased by the plaintiff's employer from the owner, it was held that the task of changing or replacing a ballast in a fluorescent light fixture falls within the category of routine maintenance as it did not constitute erection, demolition, repairing, altering, painting, cleaning or pointing of a building under Labor law §240(1) so as to bring him within the protective ambit of that statute. Dismissal of the Labor Law §241(6) was also upheld as there could be no recovery since the work constituted maintenance which was unrelated to construction, excavation or demolition.

In the instant action it has been established that the plaintiff was changing or replacing ballasts and fluorescent light bulbs at the premises leased by Harry Binder of Binder & Binder from the owner of the building, Gerald O'Shea. The building, completed in 2001 and moved into by Binder & Binder in 2001, was not under construction, demolition, or excavation at the time of the accident and was not being repaired, altered, painted, cleaned or pointed. Therefore, the work that the plaintiff was carrying out at the request of Harry Binder, replacing ballasts and fluorescent light bulbs, is routine maintenance does not fall within the protective ambit of Labor Law §200, §240(1), or §241(6) (see, *Gleason v Gottlieb et al*, 35 AD3d 355, 826 NYS2d 633 [2<sup>nd</sup> Dept 2006]; *Anderson v Olympia & York Tower B Company et al*, 14 AD3d 520, 789 NYS2d 190 [2<sup>nd</sup> Dept 2005]; *Sanacore et al v Solla et al*, 28- AD2d 321, 725 NYS2d 383 [2<sup>nd</sup> Dept 2001]; *Bermel v Board of Education of the City of New York*, 231 AD2d 663, 647 NYS2d 548 [2<sup>nd</sup> Dept 1996]). Therefore, those causes of action asserted in the complaint and premised upon Gerald O'Shea's and Binder & Binder's alleged violation of the New York State Labor Law §200, §240(1), or §241(6) fail as a matter of law.

The plaintiff has failed to raise a triable factual issue to preclude summary judgment concerning the alleged Labor Law violations. The cases cited by counsel for the plaintiff in opposing motions (004) and (005) are distinguishable from the facts in this action and inapplicable to the instant action.

Accordingly, those causes of action premised upon defendants Gerald O'Shea's and Binder & Binder's alleged violation of New York State Labor Law §200, §240(1), or §241(6) are dismissed with prejudice.

In New York, to establish a *prima facie* case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct., Nassau County 2006]).

With regard to any claim premised upon O'Shea's alleged negligence relating to the accident, O'Shea has demonstrated *prima facie* entitlement to summary judgment dismissing the negligence cause of action. The testimonies submitted have established that O'Shea did not supervise, direct, or control the plaintiff's activities, he owed no duty to the plaintiff, did not breach any duty to the plaintiff and did not proximately cause the plaintiff's injury. Harry Binder testified that he did not recollect a provision in the lease identifying Mr. O'Shea's responsibility to change the ballasts or light fixtures in his office. He personally made a decision to have the ballasts changed and to charge O'Shea for the service, and did not hire a licensed electrician but assigned the job to the plaintiff pursuant to the plaintiff's employment with Social Security Express. The plaintiff has failed to raise a factual to preclude summary judgment on the issue of negligence as to defendant O'Shea.

Accordingly, that part of motion (004) which seeks dismissal of the negligence cause of action as asserted against Gerald O'Shea is dismissed with prejudice.

With regard to any claim premised upon Binder & Binder's alleged negligence relating to the accident, it is determined that Binder and Binder has not established *prima facie* entitlement to summary judgment dismissing that cause of action as there are factual issues raised in the moving papers which preclude summary judgment on the issue of negligence by Binder & Binder.

It is undisputed that the plaintiff was an employee of Social Security Express, owned by Harry Binder, and that Social Security Express is a separate corporate entity from Binder & Binder. Harry Binder testified that he did not hire a licensed electrician to change the ballasts and fluorescent bulbs but assigned the job to the plaintiff pursuant to the plaintiff's employment with Social Security Express. There are factual issues concerning whether Binder & Binder paid the plaintiff directly or whether the plaintiff was paid by Social Security Express for this work and no testimony or admissible evidence has been presented on that issue.

It is undisputed that Binder & Binder leased the premises and supervised and controlled the premises in the cafeteria where the accident occurred. Harry Binder testified that he directed the plaintiff come in on a Sunday so the other workers would not be in the building while he was doing his work. He met Mr. Simpson at the office, turned off the alarms and intended to wait

there until Simpson finished his work. He was aware there was a ladder on the premises but thought that the ladder may have been left by O'Shea's workers but never notified O'Shea to let him know it was there. He did not direct the plaintiff not to use that ladder and did not provide another ladder for the plaintiff to use. Mr. Simpson testified that he was standing on the fiberglass, six-foot, A-frame ladder which he had placed himself and which he retrieved from the utility closet. He was not supervised by anyone and no one witnessed the accident. He was on the top part of the ladder below the top step. The ceilings were eight or nine feet high. He was trying to take the ballast out, disconnecting it from the light fixture, holding it, when, the next thing he remembered was waking up on the floor. Harry Binder was in the building and waited with him until the ambulance came. Simpson did not believe he made any complaints with regard to the condition of the ladder prior to the day of the accident. It was the only ladder at Binder & Binder, and he never asked for a different ladder prior to the date of the accident. He never had any kind of training or instructions provided to him concerning how to change a ballast and just gained experience in the general course of his employment. He was never advised by anyone to turn off the electricity when changing a ballast. Harry Binder testified that he did not hire an electrician to replace the ballasts and fluorescent bulbs. Based upon the foregoing, there are factual issues which preclude summary judgment, including but not limited to the issue of whether Binder & Binder was negligent in failing to require a licensed electrician to accomplish the job, whether it breached its duty to the plaintiff by permitting him to replace the ballasts and fluorescent lights without proper training, or requiring or ascertaining whether the electricity should be turned off to do the job.

Accordingly, that part of the motion (005) by Binder & Binder for an order dismissing that part of the complaint premised upon Binder & Binder's alleged negligence is denied.

In motion (004) O'Shea further seeks summary judgment on his cross claim asserted against the defendant Binder & Binder for breach of contract for failure to name O'Shea as an additional insured on its policy for liability insurance on the premises. The lease agreement at paragraph 11 provides in pertinent part that the Tenant agrees to carry Comprehensive public liability insurance with coverage for the landlord in minimum limit of \$100,000/\$300,000 personal injury and \$5,000 property damage naming Landlord as additional insured. In light of the dismissal of the complaint and the cross claims asserted against O'Shea, that part of motion (004) has been rendered academic.

Accordingly, that part of motion (004) wherein O'Shea seeks summary judgment for breach of the agreement relative to the alleged failure of Binder & Binder to name Gerald O'Shea on its premises liability insurance policy as an additional insured is denied as moot.

Dated: July 8, 2010

PAUL J. BAISLEY, JR.  
J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION