

Savillo v Greenpoint Landing Assoc., L.L.C.
2010 NY Slip Op 32470(U)
September 7, 2010
Supreme Court, New York County
Docket Number: 114418/07
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 114418/2007
SAVILLO, DANIEL J.
VS.
GREENPOINT LANDING
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Answering Affidavits — Exhibits _____
Repeating Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion's*
are denied per attached

FILED
SEP 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/7/10

[Signature]

EMILY JANE GOODMAN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
DANIEL J. SAVILLO,

Plaintiff,

-against-

Index No. 114418/07

GREENPOINT LANDING ASSOCIATES, L.L.C., and
GREENPOINT STORAGE TERMINAL, L.L.C.,

Defendants.

-----X

GREENPOINT LANDING ASSOCIATES, L.L.C., and
GREENPOINT STORAGE TERMINAL, L.L.C.,

Third-Party Plaintiffs,

Third-Party Index
No. 590014/08

-against-

ALL SAFE HEIGHTS CONTRACTING, CORP.,

Third-Party Defendant.

-----X

Emily Jane Goodman, J.S.C.:

The facts of this matter are set forth in a prior decision and order of this court dated September 8, 2009 (the Prior Decision), and will be repeated here only as necessary.

In this motion sequence number 004, plaintiff, now a paraplegic as a result of a 12-15 foot fall, moves pursuant to CPLR 3212, for summary judgment against both Greenpoint defendants on the issue of their liability under Labor Law § 240 (1), and for an order directing an immediate trial on the issue of damages.

Plaintiff's former employer, third-party defendant All-

[* 3]

Safe Height Contracting Corp., s/h/a All Safe Heights Contracting, Corp. (All-Safe)¹, cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against both Greenpoint defendants, and then dismissing both Greenpoint defendants' claims against All-Safe.

Defendants/third-party plaintiffs Greenpoint Landing Associates, L.L.C. (Greenpoint Landing) and Greenpoint Storage Terminal, L.L.C. (Greenpoint Storage) (together, Greenpoint) cross-move, pursuant to CPLR 3212, for summary judgment (1) dismissing the entire complaint as against Greenpoint Storage; (2) dismissing the negligence cause of action against Greenpoint; (3) dismissing the Labor Law §§ 200 and 241-a claims against Greenpoint; and (4) for summary judgment against All-Safe on Greenpoint's claim for common-law indemnification.

DISCUSSION

Plaintiff's Motion

In the Prior Decision, this Court denied the portion of All-Safe's motion which sought summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against Greenpoint Landing, the owner of the property (Prior Decision, at 16-17), because the court found that "a nexus existed between [Greenpoint Landing] and [All-Safe], and that [Greenpoint Landing] is an

¹Given All-Safe's complete disregard for safety (discussed *infra*), the name of this company strikes this Court as very ironic.

'owner' under the Labor Law" (*id.* at 15). Because Labor Law § 240 (1) "imposes absolute liability on owners who fail to provide adequate safety devices to workers laboring at elevated work sites, when that failure is a proximate cause of the workers' injuries" (*id.* at 16), and because Greenpoint Landing provided no safety devices and that failure was a proximate cause of plaintiff's injuries (*ibid.*), that part of plaintiff's motion which seeks summary judgment on the issue of Greenpoint Landing's liability under Labor Law § 240 (1) is granted, with the issue of damages to await trial.²

All-Safe maintains summary judgment cannot be granted under Labor Law § 240 (1) because plaintiff's consumption of alcohol the night before the incident, and his poor judgment, were the sole proximate causes of his accident. However, it is well-established that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake v Neighborhood Housing Services of New York*

²The parties argue at length concerning whether plaintiff was engaged in "steel erection" which is an activity, or whether the structure he was standing on was a "scaffold," all in an attempt to apply various OSHA standards in support of their positions that protection was or was not required from various heights. The Court will not address these arguments as they are irrelevant and unnecessary to the Court's determination that Labor Law § 240 (1) was clearly violated.

City, 1 NY3d 280, 290 [2003]). This Court previously found that Greenpoint Landing failed to provide proper protection for plaintiff when he was exposed to an elevation-related danger. All-Safe's principal purportedly in charge of safety testified that he never told anyone to use a lifeline, purportedly leaving it to the employee's discretion. No lifelines were provided. Accordingly, the harness plaintiff wore was completely useless. Therefore, plaintiff cannot be the sole proximate cause of his injuries (*Samuel v Simone Development Co.*, 13 AD3d 112, 113 (1st Dept 2004) (despite plaintiff's alleged drug use the IAS court erred in denying plaintiff summary judgment on his Labor Law § 240 (1) claim "since defendant's failure to provide a properly secured ladder or any safety devices was a proximate cause of plaintiff's fall"); *Podbielski v KMO-361 Realty Assoc.*, 294 AD2d 552, 553-54 (2d Dept 2002) ("Because the lack of safety devices was demonstrated to have been a proximate cause of decedent's accident, the decedent's intoxication was not the sole proximate cause of his death" summary judgment was granted under Labor Law § 240 [1]); *Sargeant v Murphy Family Trust*, 284 AD2d 991, 992 (4th Dept 2001) (despite plaintiff's blood alcohol level of 0.23% in the hospital shortly after his fall, liability was established under Labor Law § 240 (1) because "no safety devices were in place to prevent employees from falling through or off the roof").

All-Safe's contention that Greenpoint and All-Safe were not required to provide fall protection for plaintiff because of OSHA regulations is ludicrous, especially in light of decades of section 240 (1) case law that clearly indicates that fall protection is required whenever a plaintiff worker is exposed to an elevation-related hazard. With respect to OSHA, "Labor Law § 240 (1) 'contain[s] its own specific safety measures' [citation omitted]" (*Dalaba v City of Schenectady*, 61 AD3d 1151, 1153 [3d Dept 2009]), and "the stated purpose [of the absolute liability imposed by Labor Law § 240 (1)] is not the prevention of injury through administrative enforcement but rather the imposition of responsibility upon certain individuals for failure to provide adequate safety measures" (*Gain v Eastern Reinforcing Service*, 193 AD2d 255, 258 [3d Dept 1993]).

All-Safe also attempts to turn the Labor Law, and common sense, on its head and avoid liability based on the assertion that "there were no compliant, safe, feasible or practical alternatives for protecting plaintiff in the work he was performing" (Manarel 5/14/10 Affirm. in Opp. to Plaintiff's Motion and in Support of All-Safe's Cross Motion, ¶ 27). Here, All-Safe brazenly contends that work proceeded even though "the location of the equipment rack was such that there were no available, fixed available anchor points, due to the lack of adjacent walls or overhead structures" (Brief In Support of

Cross-Motion for Summary Judgment by All-Safe Height Contracting Corp. And In Opposition to Plaintiff's Motion for Summary Judgment at 14). The First Department has already rejected such an argument under strikingly similar facts, holding that even if a harness was provided, because an appropriate anchorage point to which the harness could be attached did not exist, defendant failed to provide proper safety devices and summary judgment was properly granted under Labor Law § 240 (1) (see *Miglionico v Bovis Lend Lease, Inc.*, 851 NYS2d 48 (1st Dept 2008)).

Thus,

"where an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). This Court recently cited *Zimmer* as authority for rejecting certain defendants' argument that "to provide an appropriate safety device was ... impracticable under the circumstances" (*Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008])

(*Salazar v Novalex Contracting Corp.*, 72 AD3d 418, 422 [1st Dept 2010]; see also *Hamilton v Kushnir Realty Co.*, 51 AD3d 864, 865 [2d Dept 2008] ["When an owner or contractor fails to provide any safety device, liability is mandated by the statute without regard to external considerations such as custom or usage"]). Specifically, the First Department in *Pichardo* found that "Defendants' argument that failure to provide an appropriate

safety device was either impracticable under the circumstances or would not have prevented the accident is unavailing" (*Pichardo*, 51 AD3d at 472-473, citing *Zimmer*).³

Moreover, a plaintiff need not prove what safety devices would have prevented the accident (see e.g. *Kindlon v Schoharie Central School District*, 66 AD3d 1200, 1202 [3d Dept 2009]; *Cody v State of New York*, 52 AD3d 930, 931 [3d Dept 2008]; *Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]). Accordingly, liability under Labor Law § 240 (1) has been clearly established.

With respect to plaintiff's claims as against Greenpoint Storage, in footnote 6 of plaintiff's counsel's reply affirmation, he states that "[i]t should be noted that plaintiff does not oppose the cross-motion by defendant [Greenpoint Storage] to dismiss all claims asserted against it nor does plaintiff oppose defendant [Greenpoint Landing's] motion to dismiss plaintiff's Labor Law § 200 claims" (Golomb 6/7/10 Reply

³All-Safe's reference to the poorly reasoned case *Gottstine v Dunlop Tire Corp.* (272 AD2d 863 [4th Dept 2000]) is unavailing. There the Court found that issues of fact precluded summary judgment on the Labor Law § 240 (1) claim because the plaintiff attested that "no safety devices were practical, none was customarily used for such work, and ... [he] did not know what caused him to fall" (*id.* at 864). However, the Fourth Department is not controlling precedent where the First Department has come to a contrary conclusion based upon determinations of the Court of Appeals, and where such a case is a clear departure from the well established principals of the Labor Law.

Affirm., at 7, n 6).⁴

Accordingly, plaintiff's claims sounding in violations of Labor Law §§ 240 (1) and 241 (6) as against Greenpoint Storage are dismissed, as well as the Labor Law § 200 claim against Greenpoint Landing. Plaintiff's motion for partial summary judgment against both Greenpoint defendants on the issue of their liability under Labor Law § 240 (1) is granted only as to Greenpoint Landing, and is otherwise denied.

All-Safe's Cross Motion

In the Prior Decision, the court determined that plaintiff's Labor Law § 240 (1) claim remained as against Greenpoint Landing, but that the Labor Law § 200 and common-law negligence causes of action as against Greenpoint Landing were dismissed. As plaintiff's Labor Law § 200 and common-law negligence claims as against Greenpoint Storage are dismissed for the reasons previously discussed, the part of All-Safe's cross motion which seeks summary judgment dismissing the complaint as

⁴Sections 240 (1) and 241 (6) of the Labor Law apply to owners, contractors, and their agents. No evidence has been proffered that Greenpoint Storage was an owner, contractor or agent of the owner or contractor, for purposes of these provisions. It is well-established that "unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls v Turner Construction Co.*, 4 NY3d 861, 864 [2005]). Greenpoint Storage's presence at the site consisted of a clerical worker and a handyman/watchman, neither of whom had anything at all to do with the work All-Safe was doing.

against Greenpoint Storage is granted.

Of the claims brought by plaintiff, only the Labor Law § 241 (6) claim as against Greenpoint Landing remains to be adjudicated.⁵

Labor Law § 241 (6) imposes a *nondelegable* duty . . . upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers]. To recover on a cause of action alleging a violation [of] Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards. The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case [internal quotation marks and citations omitted]

(*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]).

Although, in his bills of particulars, plaintiff alleges violations of no less than 16 Industrial Code (12 NYCRR Part 23) sections, including numerous subsections thereof, many of the provisions listed fail as either non-specific or inapplicable to this matter. In addition, as is well-established, the many cited OSHA standards "[do] not provide a basis for liability under Labor Law § 241 (6)" (*Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2d Dept 2005]).

The following sections of the Industrial Code are too general to support a section 241 (6) claim: 23-1.5 (a) ("General

⁵The court did not address plaintiff's Labor Law § 241 (6) action in the Prior Decision (see Prior Decision, at 18, n 4).

responsibility of employers") (see e.g. *Pereira v Quogue Field Club of Quogue, Long Island*, 71 AD3d 1104 [2d Dept 2010]); and 23-5.2 ("Approval required").

The following sections are inapplicable to the facts of this case: 23-1.7 (d) ("Slipping hazards"); 23-1.7 (e) (1) and (2) ("Tripping and other hazards" in "Passageways" and "Working areas"); 23-1.15, 23-1.16, and 23-1.17 ("Those sections, which set standards for safety railings, safety belts and life nets, respectively, do not apply because plaintiff was not provided with any such safety devices" [*Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 337 (1st Dept 2006)]); 23-1.21 ("Ladders and Ladderways"); 23-1.22 (c) (1) and (2) ("Structural runways, ramps and platforms" ["platforms contemplated by (section 23-1.22 [c]) are 'those used to transport vehicular and/or pedestrian traffic' (citation omitted)" (*Dzieran v 1800 Boston Road, LLC*, 25 AD3d at 337)]); and 23-2.4 ("Flooring requirements in building construction").

Subpart 23-5 of the Industrial Code pertains to scaffolding. A "scaffold" is "[a] temporary elevated working platform and its supporting structure including all components" (Industrial Code § 23-1.4 [b] [45]). The court, in the Prior Decision, stated that plaintiff fell "from the top of an equipment storage rack or structure that he was helping to erect" (Prior Decision, at 2; see also at 16, 17, 18 ["equipment storage

rack"])). It appears that at no time in the papers submitted on the prior motions was the structure ever denominated a "scaffold," although Martin O'Donovan attested that the equipment storage rack was a temporary installation and could be assembled and disassembled and removed without any impact to the property (O'Donovan 10/30/08 Aff., ¶ 9).

Although "structure" is not defined in the Industrial Code, the Court of Appeals has held that a "structure" is "any production or piece of work artificially built up or composed of parts joined together in some definite manner [interior quotation marks and citation omitted]" (*Joblon v Solow*, 91 NY2d 457, 464 [1998]; see also *Pino v Robert Martin Co.*, 22 AD3d 549, 552 [2d Dept 2005], citing *Joblon*).

The description of the composition and purpose of the "equipment storage rack" falls more accurately within the definition and purpose of a "structure" than of a "scaffold." In any event, the provisions of subpart 23-5 of the Industrial Code ("Scaffolding") are inapplicable in this matter "because the gravamen of [the] claim is that no safety device was provided, not that an inadequate scaffold provided...led to this accident (*Masullo v 1199 Housing Corp.*, 63 AD3d 430 (1st Dept 2009)).

The Court denies dismissal with respect to section 23-1.7 (b) (1) ("Falling hazards - Hazardous openings"). Plaintiff relies on the deposition testimony of plaintiff's co-worker,

Seamus Glackin, to establish that plaintiff fell through an opening caused by Q-decking that was too short (see Glackin Depo., at 59, 64-65). Although Section 23-1.7 (b) (1) applies to hazardous openings, not elevation hazards, and generally applies to existing holes (it speaks of covering an opening) the issue has not been sufficiently briefed. At least one First Department case has found that the provision can apply to a gap created as a result of the work being done (*Stevens v Triborough Bridge & Tunnel Authority*, 55 AD3d 410 (1st Dept 2008) (where plaintiff fell from a prefabricated temporary stairway through a gap created when he tried to attach the stairway to the bridge's anchorage, issues of fact existed as to whether Section 23-1.7 (b) (1) (iii) (c) was violated).

Accordingly, the part of All-Safe's cross motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claim as against Greenpoint Landing is granted, except as to Section 23-1.7 (b).

As noted in the Prior Decision, the complaint's reference to a violation of "Labor Law § 241 (a)" is a nullity. No such statute exists (see Prior Decision, at 2, n 2). If, however, plaintiff meant Labor Law § 241-a, summary judgment dismissing this claim must also be granted. Labor Law § 241-a pertains to the "Protection of workmen in or at elevator shaftways, hatchways and stairwells," and clearly is inapplicable

in this matter. Thus, the part of All-Safe's cross motion which seeks summary judgment dismissing this claim is granted, along with dismissal of the complaint as against Greenpoint, with the exception of the section 240 (1) claim and the section 241 (6) claim based on a violation of section 23-1.7 (b).⁶

In its third-party complaint, Greenpoint alleges four causes of action against All-Safe, sounding in contribution, common-law and contractual indemnification, and breach of contract to procure insurance. In the Prior Decision, this court granted the dismissal of Greenpoint's claim against All-Safe for contractual indemnification, but denied summary judgment on the claim for breach of contract to procure insurance. On these motions, no new arguments or evidence have been put forth on the breach of contract claim. Thus, for the reasons set forth in the Prior Decision, summary judgment dismissing this claim is denied (see Prior Decision, at 19-21).

"Workers' Compensation Law § 11 bars a third-party action for contribution or indemnification against an employer when its employee is injured in a work-related accident unless the employee has sustained a 'grave injury' ... [internal

⁶All-Safe's additional papers submitted via e-mail and letter were not considered on these motions. Counsel for All-Safe failed to make a timely request to make further submissions after the motions were marked submitted. In any event, nothing in the additional papers would have changed anything in this decision.

quotation marks and citations omitted]" (*Bovis v Crab Meadow Enterprises, Ltd.*, 67 AD3d 846, 847 [2d Dept 2009]). It is undisputed that plaintiff, who is now a paraplegic, suffered a "grave injury" in the accident. Thus, claims for contribution and common-law indemnification may be brought against All-Safe.

Greenpoint Landing has been held liable to plaintiff under Labor Law § 240 (1) solely on the basis of its status as owner of the property on which the accident occurred. As is well-established, liability under Labor Law § 240 (1) "is not predicated on fault: it is imputed to the owner ... by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990]). "It is well settled that an owner ... who is held strictly liable under Labor Law § 240 (1) is entitled to full indemnification from the party actually responsible for the incident [internal quotation marks and citations omitted]" (*Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 691 [2006]).

It is undisputed that All-Safe was solely and directly responsible for the supervision and control of the erection of the equipment storage rack, during which plaintiff was injured. Thus, Greenpoint Landing is entitled to summary judgment on its claim for common-law indemnity against All-Safe, and the part of All-Safe's cross motion which seeks summary judgment dismissing

this claim must be denied (see e.g. *Mejia v Levenbaum*, 57 AD3d 216, 216 [1st Dept 2008]; *Tighe v Hennegan Construction Co.*, 48 AD3d 201, 202 [1st Dept 2008]; *Bronzino v NYNEX*, 262 AD2d 236, 236 [1st Dept 1999]).

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; see also *Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]).

As the court has already found that Greenpoint Landing was held solely vicariously liable to plaintiff under Labor Law § 240 (1), without fault, no claim in contribution lies. Therefore, the part of All-Safe's cross motion which seeks summary judgment dismissing Greenpoint's contribution claim is granted.

Greenpoint's Cross Motion

In accordance with the Prior Decision and this decision, Greenpoint's cross motion is decided as follows: summary judgment dismissing the complaint, as against Greenpoint

Storage is granted; summary judgment dismissing the negligence cause of action against Greenpoint is granted; summary judgment dismissing the Labor Law §§ 200 and 241-a claims against Greenpoint is granted; and summary judgment on Greenpoint's claim for common-law indemnification against All-Safe is granted.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment against both Greenpoint defendants on the issue of their liability under Labor Law § 240 (1) is granted only as to Greenpoint Landing Associates, L.L.C., with the determination of damages to await trial, and is otherwise denied; and it is further

ORDERED that the part of All-Safe Height Contracting Corp.'s cross motion which seeks summary judgment dismissing the complaint against Greenpoint Landing Associates, L.L.C. and Greenpoint Storage Terminal, L.L.C. is granted, with the exception of the section 240 (1) claim and section 241 (6) as to Section 23-1.7 (b) as against Greenpoint Landing Associates, L.L.C., which is denied; and it is further

ORDERED that the part of All-Safe Height Contracting Corp.'s cross motion which seeks summary judgment dismissing the third-party complaint is granted only with respect to the claim for contribution, and is otherwise denied; and it is further

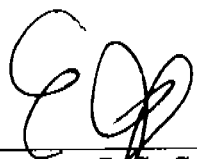
ORDERED that Greenpoint Landing Associates, L.L.C. and Greenpoint Storage Terminal, L.L.C.'s cross motion is granted; and it is further

ORDERED that the parties immediately contact the Court by email to schedule a trial date.

This Constitutes the Decision and Order of the Court.

Dated: September 7, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

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