

**Iavarone v New York Brush, LLC**

2010 NY Slip Op 32566(U)

May 24, 2010

Supreme Court, Queens County

Docket Number: 27630/2009

Judge: Robert J. McDonald

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT J. McDONALD  
Justice

IA Part 34

\_\_\_\_\_  
PASQUALE IAVARONE, et al. x

Index  
Number 27630 2009

- against -

Motion  
Date May 24, 2010

NEW YORK BRUSH, LLC, et al.  
\_\_\_\_\_ x

Motion  
Cal. Number \_\_\_\_\_

Motion Seq. No. 3

The following papers numbered 1 to 25 read on this motion by plaintiffs for summary judgment in their favor on the issue of liability; cross motion by NY Brush, LLC (Brush) to dismiss the complaint or alternatively, for summary judgment in its favor on its cross claims against Holt Construction Corp. (Holt) and Job Opportunities for Women Inc. (JOFW), for common-law indemnity, contractual indemnity and breach of contract; and cross motion by Holt to dismiss the complaint or, alternatively, for summary judgment in its favor on its claims for contractual and common-law indemnity against JOFW.

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Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiffs in this negligence action seeks damages for personal injuries sustained by Pasquale Iavarone on September 2, 2008, in a scaffolding collapse accident while Iavarone was working as a mason tender for JOFW. The action by Filomena Iavarone is derivative.

The accident occurred inside premises known as 650 Brush Avenue next to the Bronx toll plaza of the Bronx-Whitestone Bridge. On the date in question, plaintiff was working on a scaffold over ten (10) feet above the ground when the scaffold plank, upon which plaintiff stood, broke in two causing plaintiff to fall to the ground below. Pursuant to the Verified Bill of Particulars, plaintiff sustained a traumatic brain injury, neuropsychological impairment secondary to cerebral dysfunction, severe post traumatic hydrocephalus requiring shunt, and numerous other brain-related injury. Plaintiff also alleges neck, back and right knee injury. Brush was the owner of the project. Holt was the general contractor hired by Brush. JOFW was plaintiff's employer, hired by HOLT to perform masonry work. Plaintiffs move for summary judgment in their favor on the issue of liability pursuant to Labor Law §§ 240 (1) and 241 (6). Brush cross-moves to dismiss the complaint or, alternatively, for summary judgment in its favor on its cross claims against Holt and JOFW. Holt cross-moves to dismiss the complaint or, alternatively, for summary judgment on its claims for contractual and common-law indemnity against JOFW. The motion is opposed by Holt and Brush. The cross motions are opposed by the respective parties.

#### Motion by Plaintiffs

On a claim pursuant to Labor Law § 240 (1), a claimant must prove both that the statute was violated and that the violation was a proximate cause of his injuries (*see Bland v Manocherian*, 66 NY2d 452 [1985]; *Lightfoot v State of New York*, 245 AD2d 488 [1997]; *Skalko v Marshall's Inc.*, 229 AD2d 569 [1996]). Here, the undisputed record indicates that the scaffold, upon which plaintiff was standing, broke and collapsed causing plaintiff to fall. "Proof of a collapse of a safety device constitutes a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker's injuries" (*Dos Santos v State of New York*, 300 AD2d 434 [2002]; *see also Panek v County of Albany*, 99 NY2d 452, 458 [2003]; *Saeed v NY/Enterprise City Home Hous. Dev. Fund Corp.*, 303 AD2d 484 [2003]), thereby establishing the claimant's entitlement to judgment as a matter of law on the issue of liability (*see Pineda v Kechek Realty Corp.*, 285 AD2d 496 [2001]; *Smith v Yonkers Contr. Co.*, 238 AD2d 501 [1997]; *Cosban v New York City Tr. Auth.*, 227 AD2d 160 [1996]). No evidence was submitted which rebuts this prima facie showing.

Contrary to the contention of defendants, they failed to raise a triable issue of fact as to whether plaintiff's conduct was the sole proximate cause of the accident. Defendants are required to present "some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of . . . his injuries" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [2007]; *see e.g. Canino v Electronic Tech. Co.*, 28 AD3d 932, 933-934 [2006]; *Costello v Hapco Realty*, 305 AD2d 445, 447 [2003]). Defendant's contention that plaintiff fell because he did not

properly place his feet on the scaffold is based upon mere conjecture and thus is insufficient to defeat plaintiff's motion (see *Nicholas v EPO-Harvey Apts., Ltd. Partnership*, 31 AD3d 1174 [2006]). Because plaintiff established that a statutory violation was a proximate cause of his injury, he "cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Furthermore, the court is also not persuaded by defendant's contention that had the plaintiff used a second plank, it would have blocked the area where plaintiff fell. The record reveals that the plank broke in half, or collapsed and thus the presence of a second plank to block the area where plaintiff fell is irrelevant under the instant circumstances. Accordingly, plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1), is granted.

### Cross Motion by Brush

For reasons noted above, the branch of Brush's motion which seeks to dismiss the complaint on the ground that plaintiff was the sole proximate cause of the accident is denied.

In order to establish its entitlement to judgment as a matter of law on its cross claims, Brush is required to refer to evidence in the record, demonstrating not only that it was not negligent, but also that the proposed indemnitors were responsible for the negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the plaintiff's injury (see *Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2006]). Where a defendant's alleged liability is purely statutory and vicarious, conditional summary judgment in that defendant's favor on the basis of common-law indemnification "is premature absent proof, as a matter of law, that [the party from whom indemnification is sought] was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury" (*Benedetto v Carrera Realty Corp.*, *supra* at 875; see *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [2004]; *Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557-558 [2003]; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]). While the court make no express finding in this regard as to the nature of Brush's liability, Brush is not entitled to conditional summary judgment on its cross claim for common-law indemnification at this time, as Brush failed to make the requisite showings with regard to Holt (see *Benedetto v Carrera Realty Corp.*, *supra*; *Perri v Gilbert Johnson Enters. Ltd.*, *supra*; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, *supra*).

The branch of the motion which seeks common law indemnification against JOFW is granted. The owner or general contractor is entitled to common law indemnification where there is no evidence that they were actively negligent and exercised no direction or control over the work performed (see *Felker v Corning, Inc., et al*, 90 NY2d 219 [1997]; *Aragon v 233 West 21<sup>st</sup> Street, Inc.*, 201 AD2d 353 [1994]). It is uncontroverted that plaintiff's

accident occurred when he was working on a scaffold which was owned and assembled by his employer JOFW.

The branch of the cross motion which seeks summary judgment on its claim for breach of contract is denied as there is no evidence in the record that Holt and JOFW breached the subject contract between them and Brush by failing to procure insurance. The record reveals that Brush is an additional insured under Holt's policy with Harleysville, and that JOFW also named Brush as an additional insured under its policy with Zurich. In any event, even if such a breach had occurred, the measurement of damages to Brush would be limited to its actual damages for out-of-pocket expenses actually incurred by it, such as premiums, deductibles, etc. (*Inchaustegui v 666 5<sup>th</sup> Avenue Ltd. Partnership*, 96 NY2d 111 [2001]).

### Cross Motion by Holt

Holt moves to dismiss the complaint or alternatively, for summary judgment on its claims for contractual and common law indemnity from JOFW. The complaint contain five causes of action: (1) negligence generally including violations of Labor Law §§ 200, 240 (1) and 241 (6); (2) violation of Labor Law § 200; (3) violation of Labor Law § 240 (1); (4) violation of Labor Law § 241 (6). The fifth cause of action is for loss of services on behalf of plaintiff's wife. In the complaint, plaintiffs allege that Holt was negligent in failing to provide adequate protective devices; in failing to inspect the job site regarding the need for safety equipment; and in failing to insure the presence of proper, safe and stable scaffold planks. It is further alleged that defendant violated Labor Law §§ 200, 240 (1) and 241 (6), and Industrial Code Rule 23. Pursuant to an Amended Bill of Particulars, plaintiffs are alleging violations of NYS Industrial Code §§ 23-1.11; 23-1.15; 23-1.16; 2305.1; 23-5.3; 23-5.4 and 23-5.5.

### Labor Law § 200/Common-Law Negligence

To establish liability under a theory of common-law negligence and for a violation of Labor Law § 200, an injured worker must establish that the party charged with the duty to maintain a reasonably safe construction site had the authority to control the activity bringing about the injury, to enable it to avoid or correct an unsafe condition (*see Locicero v Princeton Restoration, Inc.*, 25 AD3d 664 [2006]; *Aranda v Park E. Constr.*, 4 AD3d 315, 316 [2004]). The defendant Holt established its prima facie entitlement to judgment as a matter of law by producing evidence that it did not have supervisory control over the activity that brought about the plaintiff's injury (*see Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329 [2005]; *Amaxes v Newmark & Co. Real Estate, Inc.*, 15 AD3d 321 [2005]).

Furthermore, when the claim arises out of alleged defects or dangers arising from the subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it can be shown that the party charged exercised some supervisory control over the operation or had actual or constructive notice of the unsafe condition (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). An owner or contractor's mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability (*Brown v New York City Economic Development Corp.*, 234 AD2d 33 [1996]). General supervisory authority at the work site, for purposes of overseeing the progress of the work and inspecting the work product, has been found to be insufficient to establish a cause of action under either Labor Law § 200 or the common law (*Riccio v Shaker Pine, Inc.*, 262 AD2d 746 [1999]). Further, the mere retention of inspection privileges and the fact that a defendant inspects the work site and was authorized to stop the work in the event that it observed any unsafe condition is insufficient to establish liability (see *Carpolino v Judlau Contr., Inc.*, 46 AD3d 733 [2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [2007]).

In the instant case, Holt did not exercise control or supervision over the work of JOFW nor did it have the authority to control the activity which brought about plaintiff's injuries. As per the testimony of Mr. Bryan of Holt, the general nature of the duties and responsibilities of the Holt employees at the site was to walk the site and review the progress of the job as well as to attend meetings relative to the project. As per the testimony of Mr. Caso of JOFW, employees of Holt never directed employees of JOFW in the performance of their work and never provided the employees of JOFW with instructions on how they should perform their work at the site. Significantly, plaintiff's accident occurred while he was working on a scaffold, which was owned and assembled by JOFW. There is no evidence to show that Holt created or had knowledge, actual or constructive, of the alleged defective condition that caused plaintiff's accident.

Holt met its burden of proving its entitlement to judgment as a matter of law on the common-law negligence and Labor Law § 200 claims by producing evidence that it did not exercise supervision or control over the activity which brought about plaintiff's injury or that it created or had actual or constructive notice of the alleged dangerous condition. In opposition, the plaintiff failed to produce any evidence to contradict Holt's submissions and, thus, failed to raise a triable issue of fact (see *Locicero v Princeton Restoration, Inc.*, *supra*; *Saleh v Saratoga Condominium*, 10 AD3d 645 [2004]).

#### Labor Law § 240 (1)

The branch of the cross motion which seeks to dismiss plaintiff's claims pursuant to Labor Law § 240 (1), is denied, for reasons noted above.

The court notes, briefly, that defendants cite the case of *Plass v Solotoff* (5 AD3d 365 [2004]), as authority for the proposition that plaintiff's claim under Labor Law § 240 (1), should be dismissed on the ground that plaintiff was the sole proximate cause of the accident. Under this court's view, the facts in *Plass* are distinguishable and, therefore, the holding therein is not controlling herein. The plaintiff in *Plass* fell from a scaffold while standing on one plank at the top level. In that case, the scaffold required three planks that would have covered the entire platform area of the scaffold. By using only one plank that plaintiff left "an unprotected three and one-half foot gap on the platform" which that plaintiff fell through. In the instant case, the plaintiff used only one plank which collapsed and broke in half. Plaintiff did not fall through an unguarded opening which should have been filled with the other planks as in *Plass*. The plank used collapsed and under the law in New York, "[p]roof of a collapse of a safety device constitutes a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker's injuries" (*Dos Santos v State of New York, supra*).

#### Labor Law § 241 (6)

Labor Law § 241 (6) imposes a "nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Dickson v Fantis Foods*, 235 AD2d 452 [1997]). To recover on a cause of action alleging a violation Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra* at 503-505). Here, plaintiff is alleging violations of NYS Industrial Code §§ 23-1.11; 23-1.15; 23-1.16; 23-5.1; 23-5.3; 23-5.4; and 23-5.5.

12 NYCRR 23-5.1 has been held insufficiently concrete or specific to support a Labor Law § 241 (6) claim (see *Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247 [1999]). 12 NYCRR 23-1.15, which sets forth standards for safety railings, does not apply here because plaintiffs do not allege that plaintiff Pasquale Iavarone's accident was the result of an inadequate safety railing on the scaffold. 12 NYCRR 23-1.16 applies only where a worker was provided with safety belts, harnesses, tail lines and lifelines in the first instance (see *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336 [2006]). Here, there is no allegation that plaintiff was provided with such devices, therefore, 12 NYCRR 23-1.16 does not apply herein.

Holt concedes that the remaining codes cited by plaintiff may be applicable and are sufficiently specific to sustain plaintiff's claim under Labor Law § 241 (6). However, Holt argues that since plaintiff was the sole proximate cause of his injuries, it is irrelevant whether

those sections apply to the facts at hand. The court has addressed and found unpersuasive the argument that plaintiff was the sole proximate cause of the accident. Therefore, the branches of the cross motion which seek to dismiss plaintiff's claims under Labor Law § 241 (6), are denied.

### Indemnification

The branch of the cross motion which seeks contractual indemnification from JOFW is granted. Pursuant to the contract between Holt and JOFW, there is an indemnification clause which reads as follows:

12.1 Subcontractor's Performance: To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Architect and General Contractor . . . from and against all claims, damages, losses and expenses including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's work provided that:

(a) any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Subcontractor's work itself) including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable . . .

Pursuant to the operations and duties in the contract, JOFW performed masonry work at the project. At the time of the accident, plaintiff was working on a scaffold that had been erected by his employer/third-party defendant JOFW. The scaffold on which plaintiff was working was under the direction, control and supervision of JOFW. At no time before the plaintiff's accident did anyone from Holt direct, supervise or control the means or method of JOFW's work at the site. Thus, plaintiff's injury is as a result of the performance of the work of JOFW at the site.

A party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]; *see also, Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153 [1977]; *Rodriguez v Baker*, 91 AD2d 143 [1983], *affd for reasons stated below* 61 NY2d 804 [1984]). The facts surrounding plaintiff's accident coupled with the language of the indemnification clause in

the contract between the parties indicate that Holt is entitled to conditional contractual indemnification as against JOFW.

Holt, the general contractor at the subject work-site, is also entitled to a conditional judgment on its third-party claim for common-law indemnification against subcontractor JOFW, plaintiff's employer, since Holt, in support of its cross motion, established that it had neither supervision nor control of the work plaintiff was performing at the time of his injury (*see Buccini v 1568 Broadway Assocs.*, 250 AD2d 466 [1998]; *Aragon v 233 W. 21st St., Inc.*, 201 AD2d 353 [1994]).

### Conclusion

The motion by plaintiffs for summary judgment in their favor on their claims pursuant to Labor Law § 240 (1), is granted.

The branch of Brush's cross motion which seeks to dismiss the complaint on the ground that plaintiff was the sole proximate cause of the accident is denied. The branch of Brush's cross motion which seeks conditional summary judgment on its cross claim for common-law indemnification is denied. The branch of the motion which seeks common-law indemnification against JOFW is granted. The branch of the cross motion which seeks summary judgment on its claim for breach of contract is denied.

The branch of the cross motion by Holt which seeks summary judgment in its favor dismissing plaintiff's claims against it pursuant to Labor Law § 200 and common-law negligence, is granted. The branch of the cross motion which seeks to dismiss plaintiff's claims pursuant to Labor Law § 240 (1), is denied. The branches of the cross motion which seek to dismiss plaintiff's claims under Labor Law § 241 (6), are denied, except as noted above. The branch of the cross motion by Holt which seeks contractual indemnification from JOFW is granted. The branch of the cross motion which seeks conditional summary judgment on its claims for common-law indemnification is also granted.

Dated:

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J.S.C.