

Jin-Rong Yu v 2030 Embassy LLC

2010 NY Slip Op 32783(U)

October 1, 2010

Supreme Court, New York County

Docket Number: 111032-2006

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

SALIANN SCARPULLA

PRESENT: _____

PART 9

listing

Index Number : 111032/2006

YU, JIN-RONG

vs.

2030 EMBASSY LLC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This constitutes Decision and Order of the Court.

Dated: 10/1/10

Saliann Scarpulla
SALIANN SCARPULLA 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):

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
JIN-RONG YU,

Plaintiff,

--against--

2030 EMBASSY LLC, CARNEGIE HILL
MANAGEMENT CORPORATION, STARLIGHT E.R.,
INC., M.G. CONSULTING SERVICES, INC., PADMA
CONSTRUCTION. INC. AND MITCHELL IRON
WORKS, INC.,

Defendants.

-----X
2030 EMBASSY LLC., CARNEGIE HILL
MANAGEMENT CORPORATION AND STARLIGHT
E.R., INC.,

Third-Party Plaintiffs,

--against--

TAFT ELECTRIC COMPANY, INC., M.G.
CONSULTING SERVICES, INC., and PADMA
CONSTRUCTING, INC., MITCHELL IRON WORKS,
INC.,

Third-Party Defendants,
-----X

Index Number 111032-2006
Submission Date July 21, 2010
Mot. Seq. No. 002, 004 & 006

ORDER AND DECISION

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

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For Defendants 2030 Embassy/CHM:
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For Third-Party Defendant Taft:
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Papers considered in review of this motion and cross-motions for summary judgment:

Papers	Numbered
Affirm. in Supp. of Plaint. Motion for Summ. Judg with Att.....	<u>1</u>
Affirm. in Supp. of Def. Embassy/CHM's Motion for Summ and Opp...	<u>2</u>
Affirm. in Reply.....	<u>3</u>
Affirm. in Opp. By Taft.....	<u>4</u>
Affirm. in Further Supp. and Opp by Def. Embassy/CHM.....	<u>5</u>
Affirm. in Further Reply. by Plaint.....	<u>6</u>
Affirm. in Further Opp. by Taft.....	<u>7</u>
Numerous Sur-Replies.....	<u>8</u>

HON SALIANN SCARPULLA, J.:

This action arises out of an alleged construction accident on February 13, 2006, when plaintiff Jin-Rong Yu (“Yu”) fell from a scaffold while performing work at the building known as 154 W. 70th Street, New York, New York (“the premises”) in the course of his employment with the third-party defendant Taft Electrical Company, Inc. (“Taft”). The owner of the premises, defendant 2030 Embassy LLC (“Embassy”) and the property manager, defendant Carnegie Hill Management Corporation (“CHM”), hired Taft pursuant to a written estimate agreement to perform installation of electrical wiring and hardware for a new commercial tenant at the premises.

Yu alleges that as part of the work, he was responsible for running large, heavy electrical wiring through conduit piping along the wall of the basement. A heavy, mechanical wire pulling machine (“the wire puller”) was required to perform this task. The wire puller weighed, by witness estimations, anywhere between fifty-five and one hundred pounds and was placed on the scaffold on which Yu worked. There is a

disagreement as to the exact height of the scaffold, with witnesses approximating it anywhere from three-and-a-half to ten feet high. As Yu was pulling the heavy electrical conduit, the scaffold tipped to the side. Yu fell to the ground, and the wire puller landed on his back, causing him injury.

In motion sequence 002, Yu moves for partial summary judgment pursuant to CPLR 3212 on his Labor Law § 240 (1) cause of action. In motion sequence 004, Embassy and CHM move for summary judgment dismissing Yu's entire complaint, including Labor Law §§ 240(1), 241(6) and 200 claims, or in the alternative for summary judgment on their claim of contractual indemnification in the third-party action against Taft. In motion sequence 006, Taft moves to compel Embassy to produce the hard drive of its computer system, in which Taft believes an early draft of the alleged indemnification agreement may be preserved.

In support of the summary judgment motion dismissing Yu's Labor Law § 240(1) claim, Embassy and CHM argue that Yu was the sole proximate cause of the accident. Embassy and CHM point to Yu's testimony that he did not receive any scaffold or other appropriate device from Taft, but found the subject scaffold after searching the construction site. Yu then set up the wire puller on the scaffold so that he could use it. This, Embassy and CHM argue, proves that Yu was himself responsible for the accident.

Embassy and CHM also submit an affidavit by Werner E. Laag, self-described "Board Certified Safety Professional." Laag states that "[i]t was plaintiff's idea to secure

the wire pulling machine to the scaffold. Plaintiff positioned the scaffold and secured the wire pulling machine to the top of the scaffold with a chain and two screws. Utilizing a free standing scaffold in this manner created an unsafe condition when the force created by the powered wire cable pulling machine was applied to the scaffold.”

With respect to the branch of Embassy and CHM’s motion for summary judgment on the contractual indemnification claim against Taft, Embassy and CHM submit a copy of Taft’s work estimate, dated December 12, 2005. The last paragraph of the three-page document contains a broad indemnification clause, in which Taft agrees to indemnify 2030 Embassy LLC and non-party Ormonde LLC from any law suits related to Taft’s work at the premises.

In opposition, Taft submits a competing copy of the estimate that does not contain the signatures of Taft’s and Embassy’s principals or the indemnification clause. Taft argues that it submitted the estimate in December, 2005 without any indemnification provision. Taft’s principal, Joseph Tuzzolo, alleges that after Yu’s accident, in April, 2006, Embassy’s employee Marian Heschel asked Tuzzolo to convert the unsigned estimate into the contract. As Heschel presented the contract for signature, she covered with her hand the part of the page containing the indemnification clause. Tuzzolo signed the contract without realizing that the estimate had been amended without his knowledge. Tuzzolo discovered the change a short time later when he got a copy of the signed contract.

With respect to Taft's motion to compel Embassy to produce its computer hard drive, Taft hopes that an earlier draft of the estimate preserved on the hard drive will prove the unilateral alteration of the estimate. Embassy argues that it installed a new computer system sometime in April, 2007, during which process all of Embassy's prior electronic records were erased. Taft thus argues that Embassy and CHM should be denied summary judgment on their indemnification claim, because there is a genuine issue as to the authenticity of the relied-upon estimate agreement.

For the purposes of this decision, motion sequences 002, 004 and 006 are consolidated and resolved herein.

Discussion

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep't 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Labor Law § 240(1) Claim

New York Labor Law § 240(1), informally known as “the scaffold law,” provides that property fee owners, general contractors, and their respective agents are liable for those types of accidents in which a scaffold or other protective device proves inadequate to shield a worker from harm flowing directly from the application of the force of gravity to an object or person. *See John v Baherstani*, 281 A.D.2d 114 (1st Dep’t 2001). The purpose of the scaffold law is to provide exceptional protection for workers against special hazards that arise when the work site either is itself elevated or positioned below the level where materials or loads are hoisted, and includes events such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Zory v Consolidated Edison Co. of New York, Inc.*, 248 A.D.2d 708 (2nd Dep’t 1998); *see also Kyle v City of New York*, 268 A.D.2d 192 (1st Dep’t 2000), *lv denied* 97 N.Y.2d 608 (2002).

The statute is violated when plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute, and defendant fails to provide a safety device adequate to protect plaintiff against the elevation-related risk entailed in the activity. *See Broggy Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681 (2007). The most recent formulation of the applicability of Labor Law § 240(1) is “whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” *Runner v New York Stock Exchange, Inc.*, 13 N.Y.3d 599, 603 (2009) (finding a violation arising out of a cable

reel's insufficiently checked descent down a small set of stairs). If the "harm flows directly from the application of the force of gravity to the object" and the safety device is inadequate to protect the worker, Labor Law § 240(1) is violated. *Runner*, 13 N.Y.3d at 604.

The occurrence of an elevation-related accident does not conclusively establish a Labor Law § 240(1) violation or causation. See *Cahill v Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35, 39 (2004). As explained in *Blake v Neighborhood Housing Services of New York City Inc.*, 1 N.Y.3d 280, 288 (2003), and later reaffirmed in *Cahill*, once plaintiff makes a prima facie showing of the lack of a requisite safety device and that the lack of the safety device proximately caused a fall resulting in injury, plaintiff is entitled to partial summary judgment on liability, unless the defendant raises a factual issue as to whether there was a statutory violation and whether the plaintiff's own acts or omissions were the sole proximate cause of the accident. *Blake*, 1 N.Y.3d at 289.

In this case, plaintiff has made a prima facie showing of a Labor Law § 240(1) violation by establishing that his fall was proximately caused by lack of a safety device that would adequately protect him from falling as he worked the wire puller on the scaffold. See *Kosavick v Tishman*, 50 A.D.3d 287 (1st Dept 2008); see also *Campuzano v Board of Education of New York City*, 54 A.D.3d 268 (1st Dept 2008); *Thompson v St. Charles Condominiums*, 303 A.D.3d 152, 153-55 (1st Dep't 2003).

Here, the uncontroverted evidence shows that the unsecured scaffold tipped over as the heavy electrical conduit jammed the wire puller. Embassy's and CHM's argument that it was Yu who found the scaffold and used it does not establish the sole proximate cause defense. On the contrary, it establishes that Yu's employer, Taft, failed to provide him with the needed scaffold, and Yu did with what he had. Further, Taft's principal, Tuzzolo, testified at deposition that he saw Yu use the scaffold, and never instructed him to stop using it or to use another one. Taft did not have its own scaffold at the construction site and used instead whatever was available. Tuzzolo also testified that the wire puller had to be secured on top of the scaffold, because the basement floor upon which Yu was working was an uneven dirt floor. This uncontroverted testimony establishes that Yu did not ignore or disobey Taft's instructions.

Laag's expert affidavit only states in a conclusory manner that placing the wire puller on the scaffold was dangerous. Laag's affidavit does not raise an issue of fact that the accident happened solely as a result of Yu's willful or intentional acts. At most, Laag's affidavit creates an issue of Yu's negligence, which is irrelevant, because Labor Law § 240(1) claim is not amenable to comparative negligence under Article 16 of CPLR. *Kyle v City of New York*, 268 A.D.2d 192, 196 (1st Dep't 2000), *lv denied* 97 N.Y.2d 608 (2002). In *Runner*, the injured workers on their own came up with an unsafe way to lower the heavy cable reel down a flight of stairs. Nevertheless, the Court of Appeals found a violation of Labor Law § 240(1), because the workers resorted to an

unsafe procedure after the employer failed to provide a required hoist. *Runner v New York Stock Exchange, Inc.*, 13 N.Y.3d 599, 603 (2009). Similar to the workers in *Runner*, Yu used the unsecured scaffold he found after Taft failed to provide him with a safe alternative device. *See also Apel v The City of New York*, 73 A.D.3d 406, 407 (1st Dep't 2010).

Accordingly, the Court finds that Yu has established his entitlement to partial summary judgment against Embassy and CHM on his Labor Law § 240(1) cause of action.

Contractual Indemnification Claim

Indemnification is a right of one party to shift a loss to another and is either grounded in common law or based on a contractual obligation, or both may coexist. *See Bellevue South Associates v HRH Const. Corp.*, 78 N.Y.2d 282, 296 (1991); *see also Zurich Ins. Co. Lumbermen's Cas. Co.*, 233 A.D.2d 186 (1st Dep't 1996). A claim for contractual indemnification usually arises from an express agreement by which one party agrees to hold the other harmless for claims brought against it by a third party. 28 N.Y. Prac., Contract Law § 26:16.

The indemnification agreement between Embassy and Taft provides as follows:

Taft Electric Company, IHC (Hereby referred to as General Contractor) hereby agrees to indemnify, defend, and hold harmless, 2030 Embassy LLC and Ormonde LLC (hereby referred to as Owner) together with its employees, agent and authorized representatives, from and against any and all losses, suits actions, legal or administrative proceedings, claims, demands, liabilities, interest, legal fees, cost and expenses of whatsoever kind of nature whether arising before or

after completion of work hereunder and in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, be reason of any action, omission, fault or negligence whether active or passive of the general contractor, or of anyone acting under its direction or control or on its behalf in connection with or incidents to the performance of any contracts. General contractor's aforesaid indemnify and hold harmless obligations, or portions or applications thereof shall apply to the fullest extent permitted by law.

Taft's argument that it is relieved of its contractual obligation, because Tuzzolo did not see the indemnification clause is insufficient to raise any issue of fact. Under New York law, Taft is bound by the agreement that Tuzzolo chose to sign without reading. *See e.g., Collins v E-Magine, LLC*, 291 A.D.2d 350, 351 (1st Dep't 2002); *see also Blog v Battery Park City Authority*, 234 A.D.2d 99, 101 (1st Dep't 1996).

The weakness in Taft's emphasis on allegations of the alteration to the language of the estimate is that Tuzzolo admits that the alterations were done before he signed the agreement. That is, Tuzzolo admittedly signed the agreement when the alleged altered language was already present. There is no evidence to suggest that Tuzzolo signed the estimate contract under duress. Tuzzolo simply chose not to ask Heschel to take her hand off the page, so that he could read it. Tuzzolo negligently chose to sign the estimate without taking care to first it read carefully, but Taft is bound notwithstanding.

Nevertheless, there is a disputed issue of fact as to whether the indemnification agreement was effective on the date of Yu's accident. Embassy and CHM argue that the indemnification agreement was executed prior to Yu's accident, and in any event was

intended to apply retroactively. Taft argues that the agreement was executed after Yu's accident, and does not have retroactive effect.

Tuzzolo's testimony regarding the timing of his execution of the estimate agreement is ambivalent. While he testified at his deposition on September 24, 2009 that he signed a contract a few weeks before Yu's accident, Tuzzolo later submitted an affidavit, dated January 20, 2010, in which he affirmed that he signed the agreement in April, 2006.

The Court can not determine whether Tuzzolo, at his deposition and in the affidavit, was referring to the same contract, as Embassy submitted Tuzzolo's deposition transcript with no exhibits attached, and the parties have submitted several copies of the alleged estimate contract with slightly different hand markings, as well as one unsigned estimate. A copy of the contract included in Embassy's papers has a date "9/15/2006 03:20 PM" stamped in the top portion of the first page, but Embassy did not explain this marking. This date does not appear on other copies. As the papers submitted by the parties do not clearly show when Tuzzolo executed the estimate agreement, the Court can not determine whether the indemnification provision was in effect at the time of Yu's accident.

In addition, a term in a contract executed after plaintiff's accident may be applied retroactively only if "the evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made 'as of' [a pre-accident date], and that the

parties intended that it apply as of the date.” See *Pena v Chateau Woodmere Corp.*, 304 A.D.2d 442, 443 (1st Dep’t 2003) (citations omitted). Here, the language of the contract does not clarify the range of the effective dates.

The indemnification language in the estimate is ambiguous as to whether the parties intended to include pre-execution accidents. The estimate signed by Tuzzolo does not contain language explicitly applying the indemnification to accidents which occurred before the date of execution. Rather, the indemnification clause merely states that it applies to claims “whether arising before or after completion of work hereunder. . .” Here, too, there is a disputed issue of fact as to whether the parties intended the indemnification to be retroactive, and the parties’ intent is not ascertainable from the agreement as a matter of law. Therefore, the motion by Embassy and CHM for summary judgment on the issue of contractual indemnification is denied.

In accordance with the foregoing, it is

ORDERED that plaintiff Jin-Rong Yu’s motion for partial summary judgment on the third cause of action for liability pursuant to Labor Law § 240(1) is granted as against defendants 2030 Embassy LLC and Carnegie Hill Management Corp.; and it is further

ORDERED that the branch of the summary judgment motion by defendants 2030 Embassy LLC and Carnegie Hill Management Corp, seeking dismissal of plaintiff’s complaint is denied; and it is further

ORDERED that the branch of the summary judgment motion by third-party plaintiffs 2030 Embassy LLC and Carnegie Hill Management Corp. on their third-party action against third-party defendant Taft Electric Company, Inc. is denied; and it is further

ORDERED that the motion to compel production of defendant 2030 Embassy LLC's computer hard drives is denied; and it is further


ORDERED that counsel for plaintiff shall serve a copy of this decision and order upon all parties and third-parties and upon the Clerk of Trial Support (60 Centre St., Rm. 158) who shall schedule this matter forthwith for a date in Part 40 for jury selection and a trial.

This constitutes the decision and order of the court.

Dated: *October 1*, 2010

New York, New York

ENTER:



Hon. Saliann Scarpulla, J.S.C.

FILED
OCT 07 2010
NEW YORK
COUNTY CLERKS OFFICE