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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

JIAN LIANG ZHONG and YU ZHOA HUANG,	INDEX NO. 9307/2008
Plaintiffs,	MOTION DATE April 13, 2010
- against -	
FATE REALTY, et al.,	MOTION CAL. NO. 23
Defendants.	MOT. SEQ. NUMBER

and two third-party actions.

The following papers numbered 1 to 42 read on this motion by the plaintiff for summary judgment on his claims under Labor Law §240[1] and §241[6]. The defendants Fate Realty and New York City Industrial Development agency cross-move for dismissal of the plaintiff's complaint and for summary judgment on their claims for indemnification from the defendant 88 Trading Corp. and third-party defendant New Trend Construction. The defendant 88 Trading Corp. cross-moves for summary judgment on its claims for indemnification from the second third-party defendant New Trend Construction. The third-party defendant New Trend Construction, Inc. cross-moves for, inter alia, summary judgment dismissing the plaintiff's Labor Law §241[6] claim and dismissal of all claims against it for indemnification.

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Upon the foregoing papers the motion and cross-motions are determined as follows:

These actions arise out of an accident that occurred on November 9, 2007 at a construction site located at 58-29 48th Street in Maspeth, New York. At the time of the accident, the plaintiff was an employee of the third-party defendant New Trend Construction, Inc. ("New Trend"). The defendant 88 Trading Corp. ("88 Trading") contracted with the defendant New Trend to perform extensive renovations at the premises it leased, including installing three loading bay entrances with rolling gates at the premises. It is undisputed that on the day of the accident, the defendant Fate Realty Corp. ("Fate Realty") was the owner of the premises where the accident occurred. As between New Trend and 88 Trading, two written agreements were executed and subscribed by these parties. The first agreement was a four page agreement dated September 26, 2007 and the second was a single page long dated October 13, 2007. Neither of these agreements has any express provision relating to indemnification. There was also an agreement executed between New Trend and Fate Realty on September 26, 2007. In that contract, New Trend agreed to "indemnify and hold [Fate Realty] harmless from any claims or liabilities arising from [New Trend's] work under [the] agreement".

Prior to the beginning of the above renovation, Fate, 88 Trading and the defendant New York City Industrial Development Agency ("NYCIDA") entered into three lease agreements, all dated August 1, 2007. In the first, Fate Realty leased the premises to NYCIDA which then re-leased the premises to Fate Realty in a second agreement. In the third agreement, Fate Realty subleased the premises to 88 Trading. The purpose of the leasing scheme, as stated in the first lease agreement from Fate Realty to NYCDIA, was to facilitate the financing of the renovation project so as to permit 88 Trading to expand its operations and remain within the City of New York.

The plaintiff testified at his 50-h hearing and deposition that on the day of the accident he had been an employee of New Trend for between two and four weeks and that he, co-employees of New Trend and a foreman were engaged in constructing a cinder block wall at the site. Just prior to the accident, the plaintiff stated that the employees of New Trend, who were the only workers on the site at the time, were in the process of raising the second of two approximately 19 foot long steel I-beams. The I-beams were intended to be placed on the top of the loading bay door opening to permit further cinder blocks to be placed above the opening. The plaintiff stated that one I-beam had already been installed, but it was not fixed in place.

The plaintiff's deposition revealed that a hoist was used to raise the steel beams into place. He averred that the hoist consisted to two metal frame scaffolds with wood planks on top of each. The plaintiff further described that the two scaffolds were parallel to one another

with one outside the structure and the other within the structure. The plaintiff claimed that he assisted in the construction of only the outside scaffold. The two scaffolds were connected by either two or three planks of wood that were placed across the wood hoist planks on the top of each scaffold. The plaintiff stated that the hoist planks measured two by ten and were twelve feet long and were installed by the foreman. Attached to the hoist planks was a chain pulley that had a hook on the end.

According to plaintiff, the foreman attached the chain and hook to the second I-beam that was intended to be hoisted and placed next to the one that had already been placed. At the time of the accident, the plaintiff stated that he was within the structure facing out of one of the bay doors that was being constructed. The plaintiff averred that the foreman asked him to hold one end of the I-beam while it was being hoisted. Moments prior to the accident, the plaintiff averred that the I-beam had traveled one-half the distance necessary and that the I-beam was at an angle to the ground with one end approximately ten feet off the ground and the other at end at his height. The last memory the plaintiff had prior to awaking at the hospital was that the I-beam being hoisted fell.

Shu Huan Huang ("Huang"), the foreman for New Trend who was present at the site on the day of the accident, testified at his deposition that on the day of the accident he was supervising the plaintiff and five other employees of New Trend. Huang confirmed much of the plaintiff's testimony concerning the design of the hoist used on the day of the accident. Huang averred that the hoist had been assembled three times on the job and had been used without incident prior to the accident to install four other I-beams over two other loading bay doors. Huang described the outside scaffold as being three sections high and between 40 to 50 feet in length comprised of five eight foot sections. The inside scaffold was one eight foot section long and only two sections high due to a height differential between the inside and outside of the structure. The ground where the outside scaffold was placed consisted of gravel and the interior scaffold stood on concrete.

Huang testified that he supervised the plaintiff and another employee, Gee, erect both the interior and exterior scaffolds. Huang also asserted that the plaintiff and other New Trend employees, again under his supervision, placed the hoist support beam between the inside and outside scaffolds. Although Huang was clear that he did not know whether the three hoist planks were fastened together in any manner, he offered conflicting testimony regarding whether the hoist plank was attached to the scaffolds. Huang initially testified that he did not know whether it was attached. Later in the deposition he specifically testified that no one attached the hoist plank to the exterior scaffold. Huang also offered conflicting testimony concerning whether he inspected the hoist plank prior to the accident. He first testified that he inspected the hoist beam after it was installed from the ground. Later he averred that he did not inspect the points where the hoist plank and scaffolds connected. Huang stated that the chain pulley was attached to the hoist plank with a ½ inch thick cable. When completed, the hoist plank was approximately 13 to 15 feet off the ground and the pulley

suspended below the plank was approximately ten inches above the height where the I-beams were to be placed.

Huang substantiated the plaintiff's testimony that the first I-beam was successfully placed nearer to the inside of the building and was not secured in any manner. Huang added that ends of the first I-beam had been placed on top of flat steel plates that had been recently cemented to the cinder blocks on both sides of the opening for the loading bay door. Huang acknowledged that prior to hoisting the second I-beam, he repositioned the pulley, that he attached the pulley chain to the middle of the second I-beam and he supervised the hoisting of that beam. While the second I-beam was being hoisted the chain attached to it was approximately nine inches from the previously placed I-beam. Huang stated that a New Trend employee named Hoi was standing on the exterior scaffold and was pulling the chain to hoist the second I-beam. As the second I-beam was hoisted, Huang averred that he and the plaintiff were the same distance from the opening and that he was five to ten feet to the right of the plaintiff. When the beam was approximately one foot above the ground, Huang testified that "something happened" and he saw that the first I-beam was falling. Huang also claimed that he saw the hoist plank falling. In response, Huang stated that he ran for his life and was struck by the interior scaffold when it fell. Huang claimed he did not know what caused the first beam to fall and did not see anything strike the plaintiff.

After the accident, Huang stated that both I-beams, the hoist support plank and the interior scaffold had fallen, intact, to the ground. While Huang observed that nothing was on top of the plaintiff, he saw the plaintiff was on the floor bleeding from his head, three feet from the loading bay opening and the two I-beams and a piece of wood were five feet from the plaintiff. Huang further stated that he did not see anything on the floor after the accident other than the plaintiff, the hoist support structure and the two I-beams.

Another employee of New Trend, Chao Wen Wu ("Wu"), testified at a deposition that he was standing on the exterior scaffold at the time of the accident. While he did not see the accident, Wu stated that he felt the scaffold he was standing on shake and heard loud sounds from within the building. After the accident, Wu averred he saw the plaintiff, the interior scaffold, the hoist plank and the two steel beams on the floor of the building. He further testified that the hoist planks were next to the plaintiff on the ground and the steel I-beams were two to three feet from the plaintiff. Wu also confirmed Huang's testimony that the hoist planks were not affixed to either scaffold.

In addition to the above deposition testimony, the plaintiff submitted affidavits from his experts including James Pugh, a biomedical engineer. This expert opined that the plaintiff's injuries were consistent with injuries caused by an object that fell in a vertical downward trajectory which made impact with the top of the plaintiff's head.

With respect to the plaintiff's claim under Labor Law §240[1], the plaintiff argues that the presented facts establish his entitlement to

judgment as a matter of law. The defendants Fate and NYCIDA argue that the plaintiff's Labor Law §240[1] claim should be dismissed since the plaintiff can not precisely identify, nor is there any proof in the record, as to what caused the plaintiff's accident. NYCIDA also argues that the claims against it under Labor Law §240[1] and §241[6] should be dismissed as it is not an "owner" or "agent" as defined by the Labor Law.

It has been established that a prima facie case for summary judgment on a claim under Labor Law §240[1] may be made by the submission of circumstantial evidence (See, Rios v 474431 Associates, 278 AD2d 399; Cosgriff v Manshul Construction Corp., 239 AD2d 312; see also, Haggerty v Zelnick, 68 AD3d 721). Here, the above evidence sufficiently demonstrates circumstantially that the plaintiff was struck by a qualifying "falling object" under Labor Law §240[1] (See, Keaney v City of New York, 24 AD3d 615). It is undisputed that the plaintiff was on the ground when several heavy objects that were above his head fell, that all the objects that fell were in close proximity to the plaintiff on the floor after the accident and that the plaintiff was rendered paralyzed as a result of the accident. Also uncontradicted is the opinion of the plaintiff's expert that the plaintiff's injuries were caused by a heavy object striking his head. Although no one testified that they witnessed what object specifically struck the plaintiff, all of the objects that fell on the day of the accident constituted violations of Labor Law §240[1]. The I-beam that was in the process of being hoisted was within the express terms of the statute (See, Labor Law §240[1]; Keaney v City of New York, supra). The I-beam that was in place, but unsecured, was a "falling object" under the statute since, given the nature of the work being performed at the time of the accident, there was a significant risk that the unsecured steel beam would fall (See, Portillo v Roby Anne Development, 32 AD3d 421; Costa v Piermont Plaza Realty, Inc., 10 AD3d 442; Bornschein v Schuman, 7 AD3d 476). Lastly, the hoist plank and interior scaffold were safety devices under Labor Law §240[1] that incontrovertibly failed on the day of the accident (See, Thompson v St. Charles Condominiums, 303 AD2d 152; Jiron v China Buddisht Association, 266 AD2d 347). Based on the foregoing, there is evidence that the plaintiff was stuck by a "falling object" sufficient to demonstrate prima facie entitlement to judgment as a matter of law under Labor Law §240[1].

In opposition, the defendants failed to proffer any evidence as to a cause of the accident that was not a qualifying "falling object" nor did they put forth any proof, expert or otherwise, that his injuries were not caused by the impact of a heavy object to his head.

Accordingly, the branch of the plaintiff's motion for summary judgment on his claims under Labor Law §240[1] are granted as against the defendants Fate Realty and 88 Trading. However, as to the defendant NYCIDA, the motion must be denied and the plaintiff's claims under Labor Law §240[1] and §241[6] must be dismissed since this defendant was not an applicable defendant under these section of the Labor Law.

Contrary to the plaintiff's assertions, it is clear from the submitted evidence that NYCIDA was merely a lessee of the premises who

did not contract for the work nor did it exercise any control over the work performed by New Trend or its employees (See, Gary v Flair Beverage Corp., 60 AD3d 413; Sumner v FCE Indus., 308 AD2d 440; Crespo v Triad, Inc., 294 AD2d 145).

The branch of the plaintiff's motion for summary judgment on his claim under Labor Law §241[6] must be denied. In support of the motion on this claim, the plaintiff relies on a single section of the Industrial Code, specifically, 12 NYCRR §23-2.3[a][1]. That section provides that "[d]uring the final placing of structural steel members, loads shall not be released from hoisting ropes until such members are securely fastened in place. Structural steel members shall not be forced into place by hoisting machines while any person is so located that he may be injured thereby". Unlike the branch of the plaintiff's motion under Labor Law §240[1] where a sufficient circumstantial case was made because all the object that fell on the day of the accident constituted "falling objects", here the plaintiff was required, but failed, to establish as a matter of law that the plaintiff was struck by the first steel I-beam that was placed on the wall and left unsecured. Even if the court were to consider the multiple hearsay statements proffered by the plaintiff, none of these established that the plaintiff was stuck by the first steel I-beam, as opposed to the beam that was being hoisted, the hoist support planks or the interior scaffold.

Nevertheless, the evidence is sufficient to raise an issue of fact on this claim such that the branches of the motions by the defendants Fate Realty and New Trend to dismiss this claim are denied (See, Keaney v City of New York, supra). The testimony does not, as asserted by New Trend, establish that the first I-beam was secured into place after it was released from the hoist. The plaintiff and Huang expressly testified that previously placed I-beam was not secured to the metal mounting plates on the wall in any manner.

The defendants Fate Realty and NYCIDA also move to dismiss the plaintiff's Labor Law §200 cause of action. Labor Law §200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Comes v New York State Elec & Gas Corp, 82 NY2d 876, 877). Where the accident is the result of a dangerous or defective condition in the workplace, liability is predicated upon the party at issue either creating the condition or having actual or constructive notice of the condition (See, Gambino v Mass. Mut. Life Ins. Co., 8 AD3d 337; DeBlase v Herbert Constr. Co., 5 AD3d 624; Paladino v Soc'y of the N.Y. Hosp., 307 AD2d 343, 345). When the theory of liability is based upon the manner in which the plaintiff's work was being performed, liability will attach only if the party to be charged exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe practice causing the accident (See, Comes v New York State Electric and Gas Corporation, supra).

In this case, since the plaintiff's claim of liability is premised upon the manner in which the work was performed, "recovery against the defendants under Labor Law § 200 cannot be had 'unless it is shown that the party to be charged had the authority to supervise or control the

performance of the work'" (McFadden v Lee, 62 AD3d 966, 967, quoting Ortega v Puccia, 57 AD3d 54, 61). On this point, the moving defendants established with the testimony of its employee Wing Pa Fong ("Fong") that no one from either Fate Realty nor NYCIDA directed or controlled the activities of the employees of New Trend. In addition, the plaintiff and Huang, New Trend's foreman, averred in their depositions that the plaintiff only took instructions on the site from the foreman and co-employees and that no one other than the foreman instructed New Trend's employees how to perform the tasks they were assigned. In opposition, the plaintiff failed to raise any proof that would constitute an issue of fact.

Accordingly, the plaintiff's cause of action under Labor Law §200 is dismissed as against the defendants Fate Realty and NYCIDA. Based upon the court's previous dismissal of the plaintiff's claims under Labor Law §240[1] and §241[6] as against NYCIDA, the plaintiff's entire complaint is dismissed as against NYCIDA only.

The defendants Fate Realty and NYCIDA seek summary judgment on their claims for common law indemnification against New Trend Construction. Fate Realty also seeks summary judgment on its claim for contractual indemnification against New Trend and 88 Trading. Additionally, NYCIDA moves for summary judgment on its claim for contractual indemnification against the defendant 88 Trading. The defendant 88 Trading moves for summary judgment on its claims for contractual and common law indemnification against New Trend. The defendant New Trend moves for summary judgment dismissing all the asserted claims of contractual and common law indemnification.

Generally, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident" (Correia v Professional Data Mgt., 259 AD2d 60, 65). In the context of an action brought pursuant to the Labor Law, even in the absence of any negligence on the part of the proposed indemnitor, common-law indemnification may be found if the indemnitor "had the authority to direct, supervise and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557; see also, Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 685, citing Reilly v. D. Giacomo & Son, 261 AD2d 318). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (Correia v Professional Data Mgmt., Inc., 259 AD2d 60, 65).

As concerns the branches of Fate and NYCIDA motion for summary judgment on their claims for common law indemnification against New Trend, the movants established, prima facie, entitlement to judgment as a matter of law. The movants established that they were not negligent, based upon the court's dismissal of the plaintiff's Labor Law §200 claims against these defendants, and that the unchallenged proof demonstrates the plaintiff sustained a grave injury. The movants also established, with the deposition testimony of Huang and the plaintiff, that New Trend's employees were solely responsible for the design and

assembly of the scaffold and that New Trend's employees only took direction from its foreman, Huang. In opposition, New Trend failed to raise any triable issues of fact concerning the movant's negligence, the extent of the plaintiff's injuries, that it was not negligent or not responsible for the erection and design of the scaffold.

Accordingly, the branch of the motion by the defendants Fate Realty and NYCIDA for summary judgment on their claims for common law indemnification against the defendant New Trend are granted (See, Canka v Coalition for the Homneless, Inc., 240 AD2d 355; Danaher v Notarfrancesco, 213 AD3d 444).

Similarly, the branch of the motion by the defendant 88 Trading for summary judgment on its claim for common law indemnification against the defendant New Trend is granted. The defendant 88 Trading demonstrated with deposition testimony and an affidavit that it did not control the work at the site nor did it direct New Trend's employees in the performance of their work. Again, in opposition, New Trend failed to raise any issue of fact concerning the existence of any negligent conduct on the part of 88 Trading or its lack of responsibility for the accident.

Fate Realty is also entitled to summary judgment on its claim for contractual indemnification as against New Trend. Based on the foregoing standards, the applicable language of the parties' contract, dated September 26, 2007, and the court's determination as a matter of law that Fate Realty was not negligent nor controlled the performance of the plaintiff's work, Fate Realty established its prima facie case on this issue.

New Trend's argument that the indemnification clause is limited to only the work expressly delineated in writing in the contract is an incorrect overly narrow interpretation of the agreement. Clearly, the work being performed at the time of the accident was "under" the parties' agreement, otherwise it would not have been performed.

In addition, the argument by New Trend that the indemnification clause in the September 26, 2007 agreement violates GOL §5-322.1 is without merit. The indemnification provision in that agreement clearly only indemnifies Fate Realty for negligence on the part of New Trend. Moreover, the finding that Fate Realty is liable to the plaintiff under Labor Law §240[1] "is not the equivalent of negligence and does not give rise to an inference of negligence" (See, Brown v Two Exchange Plaza Partners, 76 NY2d 172, 179).

The branch of Fate Realty and NYCIDA's motion for summary judgment on its claims for contractual indemnification against 88 Trading are denied. The sublease between Fate Realty and 88 Trading makes absolutely no mention of indemnification between these parties. With respect to NYCIDA, there is no written agreement at all executed as between it and 88 Trading. The argument that the incorporation clause contained in the sublease establishes that 88 Trading is required to contractually indemnify New Trend and NYCID is without merit. The indemnification provision in the agreement whereby NYCIDA leased the

property back to Fate Realty only provides that Fate Realty must indemnify NYCIDA and nothing in the incorporation clause modifies the terms of this indemnification provision.

The branch of New Trend's motion for summary judgment dismissing the claims for contractual indemnification by NYCIDA and 88 Trading is granted. NYCIDA was not in privity of contract with New Trend. Indeed, there is no written agreement of any kind between these parties. Concerning 88 Trading, while there were signed contracts between these parties, none of the agreements contained anything remotely constituting a provision for indemnification. The argument by 88 Trading that they were third-party beneficiaries of the indemnification provision contained in the agreement between New Trend and Fate Realty is meritless as is its argument that the above agreement is ambiguous.

Dated: November 12, 2010

Peter J. Kelly, J.S.C.