

Ulloa-Narvaez v E & L Realty of Suffolk Inc.
2010 NY Slip Op 33299(U)
November 22, 2010
Supreme Court, New York County
Docket Number: 103401/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Middle

PART II

Index Number : 103401/2008
ULLOA-NARVAEZ, WALTHER
vs
E & L REALTY OF SUFFOLK
Sequence Number : 004
DISMISS

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

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed Memorandum Decision + Order.

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

FILED
DEC 01 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 22, 2016 _____
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
WALTHER ULLOA-NARVAEZ,

Plaintiff,

-against-

E & L REALTY OF SUFFOLK INC., E & L REALTY
INC. and CELTIC CONTRACTING, INC.,

Defendants.

-----X
E & L REALTY OF SUFFOLK INC.,

Third-Party Plaintiff,

-against-

CELTIC CONTRACTING, INC., HEIDIE
CONSTRUCTION CORP., LOVULLO
ASSOCIATES, INC., and ESSEX INSURANCE
COMPANY,

Third-Party Defendants.

-----X
JOAN A. MADDEN, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In this action to recover damages for injuries sustained by plaintiff Walther Ulloa Narvaez (plaintiff) as a result of a workplace accident, third-party defendant Heidie Construction Corp. (Heidie) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims and counterclaims asserted against it (motion seq. no. 004). Plaintiff moves, by order to show cause, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants E & L Realty of Suffolk Inc. (E & L) and Celtic Contracting Inc. (Celtic) (motion seq. no. 005). Defendant/third-party

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COUNTY CLERK'S OFFICE

Third-Party

Index No. 590579/08

plaintiff E & L cross-moves, pursuant to CPLR 3212, for summary judgment awarding it contractual and common-law indemnification against Celtic and dismissing the cross claims asserted against it.

BACKGROUND

Plaintiff was injured on February 20, 2008, when he fell from a ladder while performing carpentry work at the premises located at 332 West Montauk Highway, Hampton Bays, New York. The premises were owned by E & L. E & L hired Celtic, as a general contractor, to perform construction work on the premises. Celtic, in turn, retained Heidie as a subcontractor to perform certain carpentry work. Plaintiff was an employee of Heidie on the date of his accident.

Plaintiff testified at his deposition that he was employed as a helper by Heidie in February 2008 (Plaintiff EBT, at 13-14, 19). According to plaintiff, Heidie was constructing a new building on the property (*id.* at 17). Plaintiff testified that his boss, Willie, asked him to help him that morning (*id.* at 28, 29). Specifically, plaintiff's supervisor asked him to "nail wood on the roof of the building" (*id.* at 29). Plaintiff retrieved an aluminum A-frame ladder from a truck owned by Heidie, placed it against the side of the building, and pulled on a rope in order to extend the ladder and engage the clips of the ladder (*id.* at 22, 31, 36). According to plaintiff, the ladder was about 12 feet long when closed, but about 24 feet long when extended (*id.* at 22). Plaintiff testified that he was not given any ropes, safety harnesses, or other safety devices (*id.* at 33). He also stated that he was never told to use safety devices while working on a ladder (*id.* at 34). At around 8:00 or 9:00 in the morning, plaintiff was nailing a piece of wood that was two inches by 10 feet (*id.* at 85). Plaintiff was on the fourth or fifth rung from the top of the ladder, holding the wood with his left hand and using a nail gun with his right hand (*id.* at 39-40).

Plaintiff testified that the ladder “twisted” to his right, causing him to fall approximately 15 feet to the ground (*id.* at 37, 39). Plaintiff’s hands hit the ground first, followed by his head, jaw, and legs (*id.* at 40). After he fell, plaintiff was transported to Stony Brook Medical Center by helicopter (*id.* at 45). At the hospital, plaintiff’s doctors took X-rays, which showed that he had broken his hands (*id.* at 46). Plaintiff also broke five teeth in the accident (*id.* at 47). Plaintiff applied for and received workers’ compensation benefits (*id.* at 69).

Lynn Villano testified that she is the vice president, treasurer, and director of E & L (Villano EBT, at 10). Her husband, Dr. Eyad Ali, M.D., is the president, secretary, and director of E & L (*id.*). E & L owned the property on the date of the accident (*id.* at 11). E & L hired Celtic to build two buildings on the property (*id.* at 17). According to Villano, she stopped by the construction site about once a week during construction (*id.* at 34). Her husband visited the site monthly (*id.*). Villano testified that her visits generally lasted about five to 10 minutes, which consisted of Daniel Kelly (“Kelly”), the President of Celtic, giving her a quick update as to how construction was progressing (*id.* at 47).

Kelly testified at his deposition that E & L hired Celtic to construct two one-story office buildings at 332 West Montauk Highway (*id.* at 11, 12). Celtic subsequently hired subcontractors by job work order (*id.* at 14). Heidie was hired to do carpentry work on the frames, exterior trim, doors and windows (*id.* at 20). Kelly stated that Willie was Heidie’s lead carpenter for the trim work (*id.* at 14). Kelly testified that he was present on the job site on the date of plaintiff’s accident (*id.* at 17). There were only two employees from Heidie that day: plaintiff and Willie (*id.* at 20, 21). According to Kelly, Villano did not tell Celtic how to perform the construction work (*id.* at 22). He stated that, “[w]e gave her all the colors – you know,

sample colors. It was all picked out pre-construction, so basically there was no reason to tell me anymore about anything” (*id.*). Kelly did not observe plaintiff’s accident, but his employee, Edil Gutierrez, did see plaintiff fall from the ladder (*id.* at 23). Plaintiff’s accident took place near the south face of the south building (*id.* at 25). Kelly was inside the north building at the time (*id.* at 24). Kelly stated that he gave Heidie workers instructions as to what to do that morning: he told them to do exterior trim work on the south face of the building (*id.* at 27). Heidie provided its own equipment, including ladders (*id.* at 29). Heidie’s workers were not using any safety belts or lifelines while using the ladders (*id.* at 43). However, Kelly testified that “when you put a ladder up against the wall, you put the nails in the plywood and you bend them around the ladder so it won’t slide” (*id.* at 34). Kelly testified that a tradesman would know to do that (*id.* at 37). Kelly further testified that, as a general contractor, Celtic was required to supervise the subcontractors’ work on the project (*id.* at 61). Celtic was responsible for safety on the job (*id.* at 62). If Kelly saw that subcontractors were performing work in an unsafe manner, he would stop that work (*id.* at 61). According to Kelly, “[he] inspected everybody. [He] supervised everybody. [He] was on the job every day” (*id.* at 63).

Heinz Kopf testified that he is the president of Heidie (Kopf EBT, at 7). Heidie performs “finish carpentry” work (*id.*). On this job, Heidie performed frame work (*id.* at 14). Kopf learned that plaintiff and Willie were on the site on February 20, 2008 (*id.* at 30). Both men were required to be on ladders at the same time; “you need two people to hold up the wood so he can nail it” (*id.* at 31). In 2008, Heidie had safety meetings once per week, usually on Friday mornings (*id.* at 8). At the safety meetings, Kopf told his workers to make sure that ladders had a “safety base” so that they do not move or slide (*id.* at 9). According to Kopf, Celtic did not

provide any safety equipment to Heidie's workers (*id.* at 33). Kopf testified that the ladder that plaintiff was using was in good condition (*id.* at 41).

On May 14, 2008, plaintiff commenced the instant action against E & L and Celtic, seeking recovery for common-law negligence and violations of Labor Law §§ 200,¹ 240 (1) and 241 (6). Subsequently, E & L brought a third-party action against Celtic, Heidie, Lovullo Associates, Inc. (Lovullo), and Essex Insurance Company ("Essex"), asserting claims for, among other things, indemnification and contribution. On April 2, 2009, the court severed the third-party action against Lovullo and Essex and transferred the third-party action against them to be consolidated with a pending action in Suffolk County captioned *Essex Ins. Co. v E & L of Suffolk, Inc.*, Index No. 16157/08.

Heidie previously moved for summary judgment dismissing the third-party complaint as against it. On October 1, 2009, the court denied the motion as premature, without prejudice to restoration or renewal after relevant discovery was complete.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its evidentiary proof and establish the existence of a genuine, triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d

¹Plaintiff agreed to withdraw his Labor Law § 200 and common-law negligence claims as against E & L (Edwards Affirm. in Opposition, ¶ 10).

320, 324 [1986]).

Plaintiff’s Motion for Summary Judgment under Labor Law § 240 (1)

In moving for summary judgment, plaintiff contends that he is entitled to judgment under Labor Law § 240 (1),² because he fell from an unsecured ladder that suddenly twisted, moved, and slid. In support of his position, plaintiff submits an affidavit, in which he avers that “the ladder suddenly twisted and forcefully moved to the right[,] causing [him] to fall down to the ground” (Plaintiff Aff., ¶ 9). Plaintiff states that he was not given any safety equipment or fall protection, such as safety harnesses, lifelines, or safety nets (*id.*, ¶ 12). Plaintiff also states that “[n]obody ever told [him] to nail a ladder to the wall and nobody told [him] to do that on this job site. [He] never saw anybody nail a ladder to the wall on this job site” (*id.*, ¶ 10). Furthermore, plaintiff contends that, although it was windy on the day of the accident, the wind speed was only that of a “breeze.”³

In response to plaintiff’s motion, defendants argue that there is a plausible view of the evidence that there was no statutory violation and that plaintiff was the sole proximate cause of his accident. According to defendants, plaintiff erected the ladder, and then used it to perform his work. Defendants take the position that plaintiff could have asked another member of the crew to stabilize the ladder, or could have requested another means of gaining access to the roof.

²In his memorandum of law, plaintiff also discusses his Labor Law § 241 (6) cause of action. However, plaintiff’s notice of motion and moving papers make clear that he is only moving for summary judgment under Labor Law § 240 (1).

³Plaintiff submits weather records for Westhampton Beach for February 20, 2008, which indicate that at 8:53 A.M., the wind speed was 20.7 miles per hour, with a gust speed of 31.1 miles per hour (Edwards Affirm., Exh. 12). Plaintiff cites the definition of a “breeze” as a wind “from 4 to 31 miles (6 to 50 kilometers) per hour, according to the Beaufort scale” (American Heritage Dictionary 229 [4th ed 2000]).

As argued by Celtic, a jury could conclude that the ladder “twisted” as the result of an “act of God” (a sudden, violent gust of wind), in light of the weather records for that day (Trimarco Affirm. in Opposition to Cross Motion, Exh. A, at 2).

Known as the Scaffold Law, Labor Law § 240 (1) provides in pertinent part:

“All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure *shall furnish or erect, or cause to be furnished or erected* for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices *which shall be so constructed, placed and operated as to give proper protection to a person so employed*” [emphases supplied].

The Scaffold Law imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). The duty imposed is “nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The purpose of the statute is to “protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). As a result, the statute “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed” (*Panek v County of Albany*, 99 NY2d 452, 457 [2003] [internal quotation marks and citation omitted]; *see also Felkner v Corning Inc.*, 90 NY2d 219, 224

[1997]).

In order to recover under the statute, the plaintiff must establish a violation of the statute, and that the statutory violation was a proximate cause of the injuries sustained (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Proximate cause is established where a “defendant’s act or failure to act as the statute requires was a substantial cause of the events which produced the injury” (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993] [internal quotation marks and citation omitted]). However, where the plaintiff’s actions are the sole proximate cause of the injuries, liability under Labor Law § 240 (1) does not attach under the statute (*see Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875 [1998]; *see also Robinson*, 6 NY3d at 554). Nevertheless, the plaintiff’s comparative negligence does not “exonerate a defendant who has violated the statute and proximately caused a plaintiff’s injury” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]).

The statute requires that ladders and other safety devices be “so constructed, placed and operated as to give proper protection” to construction workers (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). “In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason,” there is a presumption that the ladder or scaffolding device was “not good enough to afford proper protection” (*Blake*, 1 NY3d at 289 n 8). “Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [internal quotation marks and citations omitted]). As noted by the First Department, “[i]t is sufficient for

purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [1st Dept 2008], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show that the ladder was somehow defective (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008]).

The court finds that plaintiff has made a prima facie case for recovery under Labor Law § 240 (1). Plaintiff testified that the ladder on which he was standing “twisted” to his right, which caused him to fall about 15 feet to the ground (Plaintiff EBT, at 37, 39). Plaintiff also testified that he was not given any ropes or safety harnesses, and that no one was at the base of the ladder (*id.* at 29, 33). Additionally, plaintiff submits an affidavit, in which he avers that “the ladder suddenly twisted and forcefully moved to the right[,] causing [him] to fall down to the ground” (Plaintiff Aff., ¶ 9). Plaintiff states that the ladder was not secured by any ropes or any other means, and that no one was holding the ladder (*id.*, ¶ 11). Thus, plaintiff has shown that the ladder was not an adequate safety device, and that he was not given any other safety devices to prevent him from falling (*see Picano v Rockefeller Ctr. N., Inc.*, 68 AD3d 425 [1st Dept 2009] [owner failed to provide adequate safety devices to plaintiff, where there was no dispute that no one was holding the ladder, and that no safety devices were provided to prevent the ladder from slipping or the worker from falling if it did]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [worker met his prima facie burden, through his testimony that eight-foot ladder on which he was standing shifted, causing him to fall to the ground]).

The burden thus shifts to defendants to raise an issue of fact as to whether plaintiff is

entitled to prevail on liability on his Labor Law § 240 (1) claim (*see Alvarez*, 68 NY2d at 324).

“Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident” (*Blake*, 1 NY3d at 289 n 8).

To defeat summary judgment on this basis, the defendant must establish that plaintiff “‘had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured’” (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412 [1st Dept 2008]). Mere “generic statements of the availability of safety devices” are insufficient (*Kosavick*, 50 AD3d at 289).

Defendants have failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident. Although defendants argue that plaintiff was negligent in erecting the ladder, and in performing his work unassisted while holding a 10-foot piece of wood near the top of the ladder, defendants have presented no evidence that plaintiff knew that adequate safety devices were available, that he was expected to use them, or that he chose not to use them for no good reason (*see Cahill*, 4 NY3d at 40). In opposing plaintiff’s motion, defendants have pointed to Celtic’s president’s testimony that it was a common practice to nail a ladder to plywood to prevent it from sliding (Kelly EBT, at 34-37). However, plaintiff testified that he was not given any other safety devices, and was never instructed to use any safety devices

while working on ladders (Plaintiff EBT, at 29, 33, 34). In his affidavit, plaintiff states that he was never directed to nail a ladder to a wall, and was never given any safety devices to prevent or break a fall (Plaintiff Aff., ¶¶ 10, 12). Therefore, defendants' arguments are without merit (*see Gallagher*, 14 NY3d at 88 [ironworker was not the sole proximate cause of his injuries where nothing indicated that he knew where to find safety devices or that he was told to use them]; *Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] [worker was not the sole proximate cause of his injuries for failing to test electrical panel prior to applying force to the panel; defendant presented no evidence remotely suggesting that plaintiff had adequate safety devices available, that he knew that they were available and that he was expected to use them, that he chose for no good reason not to do so, or that had he not made that choice he would not have been injured]; *cf. Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009] [where defendant's store manager testified "that he saw plaintiff lean a closed ladder against the wall, unsecured, that he warned plaintiff that this was not safe, and that plaintiff replied that he knew what he was doing," such testimony raised "the factual issue of whether plaintiff misused an otherwise adequate ladder by leaning it, unsecured, against the wall, after which the ladder slipped as he was moving on top of it"]).

Defendants' remaining arguments are also unavailing. While defendants argue that there is an issue of fact as to whether the ladder was properly secured, it cannot be disputed that plaintiff fell from an unsecured ladder. Thus, the ladder "failed in its core objective of preventing him from falling" (*Roman v Hudson Tel. Assoc.*, 11 AD3d 346 [1st Dept 2004] [internal quotation marks and citation omitted]). "This failure is sufficient to establish liability under section 240 (1)" (*id.*). Moreover, Celtic has failed to raise an issue of fact by pointing to

climatological data for Westhampton Beach, which shows that at 8:53 A.M. on the date of the accident, there were wind speeds of 20.7 miles per hour, with gust speeds of 31.1 miles per hour (Trimarco Affirm. in Opposition to E & L's Cross Motion for Summary Judgment, Exh. A).

"For a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree" (*Moore v Gottlieb*, 46 AD3d 775 [2d Dept 2007]; see also *Cangialosi v Hallen Constr. Corp.*, 282 AD2d 565, 566 [2d Dept 2001]). Here, defendants violated the statute by failing to provide plaintiff with adequate safety devices to prevent him from falling off the ladder.

Accordingly, plaintiff's motion for partial summary judgment is granted on the issue of liability under Labor Law § 240 (1) against E & L, the owner of the premises, and Celtic, the general contractor.

Heidie's Motion for Summary Judgment Dismissing the Third-Party Complaint and All Cross Claims and Counterclaims Against it

Heidie moves for summary judgment dismissing the third-party complaint, contending that the evidence shows that plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11. To support its position, Heidie submits plaintiff's verified bill of particulars, which states that his injuries are the following:

"right wrist intra-articular fracture with persistent loss of motion and pain;
comminuted intra-articular fracture of the right radial styloid and ulna;
fracture of the left ulna styloid with displacement;
comminuted intra-articular fracture of the left distal radius involving the distal radial ulna and radial carpal joint;
left wrist intra-articular fracture with ligamentous disruption, suspected;
bilateral intra-articular distal radial and ulna styloid fractures;
laceration to forehead;
chipped tooth at #5 due to trauma;
head trauma;

nasal fracture with persistent breathing problems;
internal derangement of right shoulder, clinical evidence for a labral tear;
lumbar post traumatic myofascial pain”

(Verified Bill of Particulars, ¶ 9).

In addition, Heidie provides a copy of a narrative report dated November 18, 2009, from plaintiff’s treating orthopedist, Dr. Jeffrey S. Kaplan, M.D., who examined plaintiff on November 18, 2009 and reviewed plaintiff’s medical records (Persky Affirm., Exh. G [Kaplan Report]). Dr. Kaplan states that plaintiff sustained the following permanent injuries as a result of his accident: a “[c]omminuted intra-articular fracture of the left wrist involving the distal radius and ulna,” “[i]ntra-articular fracture of the right wrist including the distal radius and ulna,” “[p]ost-traumatic shoulder pain with clinical symptoms of labral tear,” “[p]ost traumatic low back pain,” and a “[f]acial fracture with deviated septum” (*id.* at 5). Upon examining plaintiff, Dr. Kaplan found that “[r]ight wrist flexion is to 30 degrees, versus 45 degrees on the left (normal 75-90),” “[e]xtension is to 45 degrees bilaterally (normal 75-90),” “[r]adial deviation is to 25 degrees on the right versus 30 degrees on the left (normal 30-40),” and “[u]lnar deviation is to 10 degrees on the right versus 15 degrees on the left (normal 30-40)” (*id.*). Dr. Kaplan measured plaintiff’s grip strength using a standard Jamar dynamometer (*id.*). Over multiple trials, Dr. Kaplan found that plaintiff’s right and left hands registered at 18 units (*id.*). Dr. Kaplan also measured plaintiff’s cervical motion and lateral rotation; he noted that plaintiff’s extension is to 30 degrees with pain (normal extension is to 45 to 60 degrees), and that his lateral rotation is limited to 30 degrees bilaterally (normal is to 70 to 90 degrees) (*id.*). Additionally, Dr. Kaplan notes that:

“Currently, he has persistent right hand and wrist pain. He has numbness over the

dorsal hand and forearm. He has numbness and weakness in the thumb, index and long finger. He has symptom exacerbations with attempts using a computer mouse. He has diminished writing tolerance with his right dominant hand. He has diminished lifting and carrying capacity. He cannot carry anything greater than 5-8 pounds. He has difficulty with shopping and lifting groceries. He has pain exacerbations with weather changes and cold weather. At the left wrist he has persistent pain with impact loading and diminished lifting and carrying tolerance. He has persistent lumbar pain. He is requesting a new lumbar orthosis today as he has gotten some relief with this in the past. He has not had adequate relief with ESIs in the past. He has limited sitting, standing, and walking tolerance. He has persistent cervical pain and stiffness as well as limited motion. He has persistent right shoulder pain. He is taking Vicodin twice daily in addition to other oral medications, the name of which he cannot recall, from Dr. Thomas' [sic] office"

(*id.* at 4).

Heidie also submits an affirmed report from Dr. William J. Kulak, M.D., an orthopedist who reviewed plaintiff's medical records and examined plaintiff on November 9, 2009 (*id.*, Exh. H [Kulak Report]). During his examination of plaintiff, Dr. Kulak measured plaintiff's radial and ulnar motion and flexion (*id.* at 3). He noted that plaintiff has a loss of 3 to 4 degrees of radial motion with his right hand; plaintiff's ulnar motion was to the normal 35 degrees (*id.*). Compared with normal dorsiflexion of 70 degrees, Dr. Kulak measured plaintiff's dorsiflexion as 50 degrees with his left hand, and 55 degrees with his right hand (*id.*). Where normal volar flexion is 75 degrees, plaintiff was found to have flexion to 65 degrees with both the left and right hands (*id.*). In his report, Dr. Kulak states that "[o]verall [plaintiff] is certainly not totally disabled and the extent of heavy work that can be performed in the future will depend upon the [plaintiff's] desire and aggressiveness to perform that work" (*id.* at 8). Dr. Kulak notes that "[m]ost probably there will be permanency in regard to decreased motion of the left and right wrists" (*id.*). According to Dr. Kulak, "[d]ue to the intra-articular nature of the fractures," he will be at an increased risk of developing arthritis (*id.*). He further states that "[i]f the left ulnar

styloid remains ununited, he may experience mild symptoms with prolonged stress to that area, which would not be expected to be overall restricting or disabling and the radial symptoms on the right should further improve simply with fracture maturation” (*id.*).

E & L contends, in opposition to Heide’s motion, that discovery has not yet been completed, and that independent medical examinations of plaintiff have not yet taken place. E & L argues that plaintiff testified at his deposition that he is unable to work as a result of his injuries, but notes that it does not have his exact testimony because it has not yet received the transcript of his deposition. Thus, as argued by E & L, it is for the jury to determine whether plaintiff has suffered a “grave injury.”

Workers’ Compensation Law § 11 provides that:

“An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer *unless such third person proves through competent medical evidence* that such employee has sustained a “grave injury” which shall mean one or more of the following: death, permanent and *total loss of use or amputation of an arm, leg, hand or foot*, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability” [emphases added].

The statute was intended to give “relief in the form of immunization from tort liability to employers . . . who provide workers’ compensation coverage,” except in extremely limited, defined circumstances (*Castro v United Container Mach. Group*, 96 NY2d 398, 401 [2001]). In *Castro*, the Court of Appeals held that “[t]he grave injuries listed are deliberately both *narrowly and completely described*. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action” (*id.* at 402 [internal quotation marks and citation

omitted]). “The term ‘grave injury’ has been defined as a ‘statutorily defined threshold for catastrophic injuries,’ and includes only those injuries which are listed in the statute and determined to be permanent” (*Ibarra v Equipment Control*, 268 AD2d 13, 17-18 [2d Dept 2000], quoting *Kerr v Black Clawson Co.*, 241 AD2d 686 [3d Dept], *lv dismissed* 91 NY2d 867 [1997] [citation omitted]).

In *Meis v ELO Org.* (97 NY2d 714, 716 [2002]), the Court of Appeals considered whether the loss of a thumb constituted a “permanent and total loss of use” of a hand. The Court held that “Workers’ Compensation Law § 11 does not list the loss of a thumb as a ‘grave injury,’ and plaintiff failed to demonstrate that due to the amputation of his thumb he suffers a ‘permanent and total loss of use’ of the hand. Plaintiff’s argument that the loss of his thumb automatically renders his hand totally useless is unavailing” (*id.* [citation omitted]).

Subsequent cases have held that anything less than a “total” loss of use of an arm or hand does not qualify as a “grave injury” (*Aguirre v Castle Am. Constr.*, 307 AD2d 901 [2d Dept], *lv denied* 1 NY3d 501 [2003] [“some movement” in arm did not qualify as “permanent and total loss of use” of an arm]; *Trimble v Hawker Dayton Corp.*, 307 AD2d 452, 453 [3d Dept 2003] [plaintiff did not sustain “total loss of use” of his arm, given that he was “able to extend and close his right thumb and fingers sufficiently to grasp, hold and carry objects in his right hand”]).

However, where the plaintiff retains only “passive movement” of the hand or arm, that may be sufficient to qualify as a “total loss of use” of a hand or arm (*Balaskonis v HRH Constr. Corp.*, 1 AD3d 120 [1st Dept 2003]; *see also Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242 [1st Dept], *lv denied* 13 NY3d 711 [2009], citing *Mustafa v Halkin Tool, Ltd.*, 2004 WL 2011384, *5, 6, 2004 US Dist LEXIS 16128, *23 [ED NY 2004] [adopting “loss of functional

use” definition of “total loss of use,” i.e., the inability to accomplish a task with the hand]). For instance, in *Millard v Alliance Laundry Sys., LLC* (28 AD3d 1145, 1147 [4th Dept 2006]), the plaintiff was injured while operating a clothes dryer. The Fourth Department determined that the third-party plaintiff raised an issue of fact as to whether plaintiff retained only “passive movement” in her left arm and hand, in view of evidence that she could use her left arm only “as a gross assist by laying it on top of an object to hold it still,” that plaintiff could not use her left arm or hand “for any grooming, bathing, toileting, feeding, dressing or other activities,” and that she retained only a “flicker” of flexion and extension in her fingers and less than 10 degrees of extension in her wrist (*id.*). In *Sexton v Cincinnati Inc.* (2 AD3d 1408, 1410 [4th Dept 2003]), the plaintiff sustained a traumatic crush injury to his hands. The Court held that the third-party plaintiff created an issue of fact as to whether the plaintiff sustained a “permanent and total loss of use” of his hands, by submitting evidence that plaintiff “has not retained even minimal use of his hands,” and that plaintiff performed certain activities with his arms, “using the adaptive techniques of an amputee” (*id.*). In *Mustafa* (2004 WL 2011384, at *9, 2004 US Dist LEXIS 16128, at *28), the third-party plaintiff’s expert, after measuring the plaintiff’s grip strength and pinch capabilities, concluded that he was “unable to use his left hand functionally for any type of grasp, prehension, dexterity, or bimanual tasks.” The court held that the parties’ conflicting expert opinions as to whether the plaintiff suffered a permanent and total loss of use of his left hand rendered “grave injury” a question of fact for the jury to decide (2004 WL 2011384, at *10, 2004 US Dist LEXIS 16128, *31).

Here, although the evidence reveals that plaintiff indeed suffered a serious injury, there is no evidence that plaintiff suffered a “total loss of use” of a hand or arm or any other “grave

injury.” There is no evidence to suggest that plaintiff has only retained “passive movement” in either his left or right hand. While plaintiff’s treating orthopedist, Dr. Kaplan, states that plaintiff has “persistent right hand and wrist pain,” “diminished writing tolerance,” and “diminished lifting and carrying capacity” (Kaplan Report, at 4), he does not state that he is unable to use his hands for daily activities such as bathing, feeding, or dressing. Accordingly, summary judgment dismissing the third-party complaint and all cross claims and counterclaims as against Heidie is warranted, without prejudice to renewal after completion of discovery.

E & L’s Cross Motion for Summary Judgment Awarding Contractual and Common-law Indemnification Against Celtic and Dismissal of Celtic’s Cross Claim

E & L’s Cross Claim for Contractual Indemnification

E & L, the owner, moves for indemnification against Celtic, the general contractor, pursuant to section 3.18.1 of the General Conditions of the Contract of Construction (AIA A201-1997),⁴ which provides as follows:

“To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Section 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, *arising out of or resulting from performance of the Work*, provided that 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 Work itself), *but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*, regardless of whether or not such claim, damage, loss or expense is caused in part by a party to be indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to

⁴This provision was made applicable to the contract pursuant to section 8.1.2 of the agreement between E & L and Celtic (McLoughlin Affirm., Exh. D [AIA Document A101-1997], at 5).

a party or person described in this Section 3.18”

(McLoughlin Affirm., Exh. E, at 17 [emphases added]).

E & L contends that it is entitled to indemnification pursuant to this provision, since plaintiff’s accident arose out of Heidie’s performance of the work, and was caused in whole or in part by Celtic or Heidie.

In response, Celtic points out that the indemnification provision at issue only provides for indemnification “to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable.” Celtic contends that indemnification is premature because there has been no finding that plaintiff’s accident was the result of any negligence by Celtic or any of its agents, servants and/or employees.

“Where an entity is held strictly liable based solely on its status as owner of the premises pursuant to Labor Law § 240 (1) . . . , the owner is entitled to contractual indemnification where such has been agreed to between the parties” (*Crimi v Neves Assoc.*, 306 AD2d 152, 153 [1st Dept 2003] [internal quotation marks and citation omitted]).

While not specifically argued by E & L in support of its motion, the court notes that the indemnification provision at issue provides indemnification “[t]o the fullest extent permitted by law” (McLoughlin Affirm., Exh. E, at 17). An agreement that purports to indemnify a party for its own negligence is void and unenforceable under General Obligations Law § 5-322.1 (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008 [1997]). However, such an agreement does not violate the General Obligations Law if it authorizes indemnification “to the fullest extent permitted by law,” as here (*see Brooks v Judlau*

Contr., Inc., 11 NY3d 204, 210 [2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Moreover, an indemnification provision is enforceable where the party to be indemnified is found free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). Here, E & L has shown that it was not negligent – E & L’s two principals, Lynn Villano and Dr. Eyad Ali, only stopped by the site during construction for short updates as to how construction was progressing (Villano EBT, at 47).

In the instant case, the indemnification provision at issue is broad. It allows indemnification where a claim “arise[s] out of or result[s] from performance of the Work,” “but only to the extent caused by the negligent acts of [Celtic] [or] [Heidie]” (McLoughlin Affirm., Exh. E, at 17). Although E & L has been found liable under Labor Law § 240 (1) based upon its nondelegable duty as owner of the premises, there has been no finding that either Celtic or Heidie was negligent or that such negligence proximately caused plaintiff’s injuries. It must be noted that liability under Labor Law § 240 (1) is “imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence” (*Brown*, 76 NY2d at 179). Therefore, E & L’s motion for contractual indemnification against Celtic is premature at this juncture (*see Gomez v Sharon Baptist Bd. of Directors, Inc.*, 55 AD3d 446 [1st Dept 2008] [court properly denied summary judgment against third-party defendant on contractual indemnification claim; the contract provided that third-party defendant is obligated to “indemnify [third-party defendant] for losses only to the extent that they were caused in whole or in part by the negligent acts or omissions of [third-party defendant], its agent, or anyone else for whom [third-party defendant] was responsible,” and there was no

finding that third-party defendant or its agents were negligent or that such negligence proximately caused the plaintiff's injuries]; *Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2d Dept 2005] [contract provided that contractor shall indemnify and hold harmless City "against the risk of loss, damage or liability caused by personal injuries, bodily injuries, wrongful death and/or property damages arising out of or in connection with the performance of the Work, as a result of the negligence, carelessness, or willful tort of the Contractor, its agents, employees, contractors, or subcontractors"]; since City failed to establish that accident was the "result of negligence, carelessness, or willful tort of [Contractor], its agents, employees, contractors, or subcontractors," it was error to grant summary judgment on cross claim for contractual indemnification).

E & L's Cross Claim for Common-law Indemnification

E & L also moves for common-law indemnification against Celtic, asserting that Celtic, as the general contractor, controlled the job site. E & L maintains that, if there was any negligence, Celtic would be the actual tortfeasor and bearer of responsibility for plaintiff's accident. Further, E & L argues that Celtic had the authority to direct, supervise, and control plaintiff's carpentry work.

Celtic opposes this portion of E & L's motion, noting that there has been no finding that it was negligent.

"Common-law indemnification is predicated on vicarious liability without actual fault, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept], *lv dismissed* 7 NY3d 864 [2006] [internal quotation marks and

citation omitted]). To establish a claim for common-law indemnification, “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 causation of the accident” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]), or, in the absence of negligence, that the proposed indemnitor “had direct control over the work giving rise to the injury” (*Mejia v Levenbaum*, 57 AD3d 216 [1st Dept 2008]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]; *see also Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875-876 [2d Dept 2006]; *Bronzino v NYNEX*, 262 AD2d 236 [1st Dept 1999]; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1st Dept 1999]).

Here, as previously noted, E & L has been found liable under Labor Law § 240 (1) based upon its nondelegable duty as an owner and was not negligent. Next, as indicated above, there are triable issues of fact as to whether Celtic was negligent and whether any negligence by Celtic was a proximate cause of plaintiff’s injuries. The remaining issue, then, is whether E & L has established that Celtic, the general contractor, directly controlled the work giving rise to plaintiff’s injuries.

Celtic’s president, Daniel Kelly, testified that he gave Heidie’s worker instructions as to what to do on the morning of plaintiff’s accident (Kelly EBT, at 27). According to Kelly, Celtic, as the general contractor, was required to supervise the work on the project, and was responsible for site safety (*id.* at 61, 62). Kelly stated that “[he] inspected everybody. [He] supervised everybody. [He] was on the job every day” (*id.* at 63). Plaintiff testified, however, that on the morning of the accident, he received his instructions from “Willie” an employee of Heidie, and the record shows that the ladder was provided by Heidie. Under these circumstances, there are

triable issues of fact as to whether Celtic directly controlled and supervised plaintiff's work so that summary judgment on E & L's common-law indemnification claim against Celtic must be denied as premature (*see Delaney v. Spiegel Assocs.* 225 AD2d 1102 [4th Dept 1996])[summary judgment on cross-claim for common law indemnification against owner's agent and manager for owner was properly denied when record raised triable issue of fact as to whether these entities supervised plaintiff's work at the time of his injuries]; *Saft v. 111 Chelsea LLC*, 2009 WL 2984785 [Sup Ct. NY Co. 2009][denying summary judgment with respect to common law indemnity claim against defendant construction manager when issues of fact existed as to whether that defendant actually supervised or had direct control over injured the plaintiff's work]; *compare Bronzino v NYNEX*, 262 AD2d 236 [common-law indemnification correctly awarded where indemnitee was free from active negligence and employer had direct supervisory authority over plaintiff's work]; *Rodriguez v Metropolitan Life Ins. Co.*, 234 AD2d 156, 157 [1st Dept 1996] [subcontractor was obligated to indemnify defendants under common law, where subcontractor supervised and controlled reinsulation work giving rise to plaintiff's injury, even though there was no showing of negligence on its part]).

Celtic's Cross Claim for Indemnification and Contribution

Finally, the court notes that Celtic has not opposed dismissal of its cross claim for indemnification and contribution against E & L (Celtic's Answer, ¶ 28). In any event, E & L has established that it was not negligent. Accordingly, this cross claim is dismissed.

CONCLUSION

In view of the above, it is hereby

ORDERED that the motion (sequence number 004) by third-party defendant Heidie

Construction Corp. for summary judgment dismissing the third-party complaint and all cross claims and counterclaims asserted against it is granted, without prejudice to renewal upon completion of discovery, and the third-party complaint and all cross claims and counterclaims asserted against it are dismissed with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

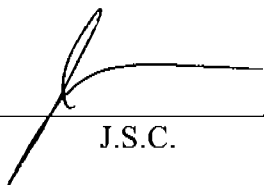
ORDERED that the motion (sequence number 005) by plaintiff Walther Ulloa Narvaez for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted against defendants E & L Realty of Suffolk, Inc. and Celtic Contracting, Inc.; and it is further

ORDERED that the cross motion by defendant/third-party plaintiff E & L Realty of Suffolk, Inc. for summary judgment is granted to the extent of dismissing the cross claim by Celtic Contracting, Inc. for indemnification and contribution as against it, and is otherwise denied; and it is further

ORDERED that the parties shall appear in Part 11, room 351 on December 2, 2010 at 9:30 am.

Dated: November 22, 2010

ENTER:



J.S.C.

FILED

DEC 01 2010

NEW YORK
COUNTY CLERK'S OFFICE