

**Martinez v Greenwich St. Prods., Inc.**

2010 NY Slip Op 33477(U)

December 16, 2010

Sup Ct, NY County

Docket Number: 150125/08

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 150125/2008

MARTINEZ, MIGUEL

vs

GREENWICH STREET PRODUCTIONS,

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

**FILED**

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 \_\_\_\_\_

DEPT. OF COURTS  
PAPERS NUMBERED \_\_\_\_\_  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

Motion sequence 006, 007 and 008 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that, in motion sequence 006, the cross motion for summary judgment of third-party plaintiff Greenwich Street Productions, Inc. is denied; and it is further

ORDERED that, in motion sequence no. 006, the motion for summary judgment of third-party defendant Nations Roof of New York, LLC is granted and the third-party complaint is dismissed with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that, in motion sequence no. 007, the motion for summary judgment of defendant Greenwich Street Productions, Inc. is denied; and it is further

ORDERED that, in motion sequence no. 008, plaintiff's motion is granted to the extent that a negative inference instruction will be given for his benefit at trial; and it is further

ORDERED that counsel for third-party defendant Nations Roof of New York LLC shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: 12.16.10

  
HON. CAROL EDMEAD J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
MIGUEL MARTINEZ,

Plaintiff,

-against-

GREENWICH STREET PRODUCTIONS, INC.  
and M&M HOLDING CORP.

Defendants.

-----X  
\_\_\_\_\_X

Index No. 150125/08

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

GREENWICH STREET PRODUCTIONS, INC.,

Third-Party  
Plaintiff,

-against-

Third-Party Index No.  
590352/09

NATIONS ROOF OF NEW YORK, LLC,

Third-Party  
Defendant.

\_\_\_\_\_X

**CAROL R. EDMEAD, J.S.C.:**

Motion sequence nos. 006, 007, and 008 are consolidated for disposition. In motion sequence no. 006, third-party defendant Nations Roof of New York LLC (Nations) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the third-party complaint, and, pursuant to CPLR 3803-a and 22 NYCRR 130-1.1, for costs and attorney's fees. Defendant/third-party plaintiff Greenwich Street Productions, Inc. (Greenwich) cross-moves for summary judgment on its third-party complaint. In motion sequence no. 007, Greenwich moves for summary judgment dismissing the complaint and all cross

claims and counterclaims asserted against it. In motion sequence no. 008, plaintiff Miguel Martinez moves, pursuant to CPLR 3126, for an order striking Greenwich's answer, or in the alternative, precluding Greenwich from producing evidence, or in the alternative, striking Greenwich's first, fourth, and sixth affirmative defenses, and granting plaintiff partial summary judgment on liability in regard to his cause of action alleging negligence. Plaintiff's motion is based upon a claim of spoliation.

The complaint alleges common-law negligence, as well as violations of Labor Law §§ 200, 240, and 241, and violation of §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, and 23-1.21 of the Industrial Code of the State of New York.

Plaintiff, a roofer, was injured on January 22, 2008, when he fell approximately 11 feet from a 16-foot stationary fixed ladder while attempting to enter onto the roof of the commercial building (Building) located at 285 Tuckahoe Road in Yonkers. At that time, plaintiff was employed by Nations. Greenwich, the lessee of the Building, had engaged Nations to perform certain repairs on the roof.

Plaintiff testified at his deposition that he had ascended the ladder, which was on the second floor of the Building, carrying a poly bag with small tools, weighing approximately five pounds, as well as a two-pound pail of weather membrane cleaner, in his left hand, and that, when he was on the fourth, or fifth, rung from the top of the ladder, he unlocked the roof hatch by turning the lock

with his right hand while holding the ladder with his left hand on the second rung from the top, pulled down and then raised the lever that controlled the hatch, thereby raising the hatch by approximately one inch, and then lost his balance and fell when the hatch came down striking his right hand, while it was still on the lever but no longer pushing it up. Plaintiff testified that the distance between the lever and the hatch, when the latter is shut, is two to three inches. He also testified that, in every other roofing job that he had performed in a commercial building, the roof hatch has contained a mechanism that raises the hatch to its fully open position, once the hatch is manually made to begin to rise, and that, in instances where that mechanism is not working properly, workers are notified, and thus know to open the hatch all the way with their hands and then to make sure that it stays open.

Motion Sequence No. 006.

The third-party complaint alleges seven causes of action, the first four for contribution and common-law indemnification, and the last three for breach of Nations's contractual obligation to provide insurance coverage to Greenwich.

Workers' Compensation Law (WCL) § 11 provides, in relevant part, that

[a]n 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" . . . .

It is undisputed that, at the time of his accident, plaintiff was acting within the scope of his employment by Nations, and that

plaintiff did not sustain a "grave injury," within the meaning of WCL § 11. Accordingly, the first four causes of action alleged in the third-party complaint must be dismissed. See *Fleming v Graham*, 10 NY3d 296 (2008). Greenwich does not argue to the contrary.

Paragraph 9 of the Terms and Conditions part of the contract between Nations and Greenwich provides, in relevant part:

INSURANCE: [Nations] agrees to purchase and maintain, as required by law, workers compensation and general commercial liability insurance to protect [Greenwich] from injuries and/or damages which may arise out of or result from [Nations's] operations under this work order for which [Nations] may be legally liable, whether such operations be by [Nations] or by anyone directly or indirectly employe[d] by [Nations], or by anyone for whose acts [Nations] may be liable.

Pero Affirm., Exh. C, at 3. It is undisputed that Nations purchased worker's compensation insurance, and that plaintiff has been receiving benefits thereunder. It is also undisputed that Nations maintained commercial general liability insurance with Admiral Insurance Company during the time relevant to this lawsuit. That policy, however, excludes coverage for bodily injury to "an 'employee' of the insured arising out of and in the course of[] [e]mployment by the insured." Summers Affirm., Exh. J, at 2 of 14. Greenwich argues that Nations agreed to purchase insurance that would "protect" Greenwich, and that any limitation on that promise is necessarily ambiguous and must be construed against Nations, because Nations drafted the contract. There is nothing ambiguous or contradictory about the limitation on Nations's promise to furnish protection to Greenwich, which appears in the very same sentence that the promise appears. The promise to provide

\* 6]

insurance protection is limited to "injuries and/or damages which may arise out of or result from [Nations's] operations under this work order for which [Nations] may be legally liable." Because Nations is not legally liable for damages arising out of plaintiff's injuries, by virtue of WCL § 11, it is not in breach of its promise to furnish insurance protection to Greenwich. That protection pertains to damage to property and personal injuries sustained by persons, other than Nations's employees, as the result of Nations's performance of its contract.

Moreover, ¶ 9 of the Terms and Conditions also provides that Greenwich "expressly waives all claims excluded under [Nations's] insurance policies . . . ." Thus, Greenwich has waived all claims based upon plaintiff's injury.

Accordingly, this court grants that branch of Nations's motion that seeks dismissal of the third-party complaint, and denying the cross motion.

While Greenwich acknowledges sub silentio that the first four causes of action in its third-party complaint lack merit, and while its reading of ¶ 9 of the Terms and Conditions is strained, the third-party action is not frivolous. Accordingly, this court denies that branch of Nations's motion that seeks costs and attorney's fees.

Motion Sequence no. 007.

Greenwich's motion to dismiss the complaint relies exclusively upon the expert opinion of Irving Ojalvo, Sc.D.P.E., and on the deposition testimony of persons who testified that there was

nothing wrong with the hatch. That deposition testimony is contradicted by the testimony of two of plaintiff's co-workers, which is discussed below, and it therefore does not entitle Greenwich to summary judgment. Dr. Ojalvo states in his two affidavits that the carrying by plaintiff of the poly bag and the pail, while plaintiff was trying to open the hatch, and indeed, while ascending the ladder, constitutes a violation of ANSI A14.3, and was, in Dr. Ojalvo's professional opinion, the sole proximate cause of plaintiff's fall, inasmuch as it made it impossible for plaintiff to hold on to the ladder properly with his left hand. Where a plaintiff's actions are the sole proximate cause of his or her accident, the plaintiff has no claim even under Labor Law § 240 (1), which, generally, imposes strict liability with regard to elevation-related injuries. *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003). Dr. Ojalvo further states that the force of the descending hatch could not possibly have been great enough to cause plaintiff to fall, because that force was necessarily no more than "on the order of" that which plaintiff must have exerted in order to raise the hatch to the degree that he did.

Plaintiff points out that Dr. Ojalvo cannot even estimate the force that was required for the hatch to begin to be raised, or the force with which the hatch fell back, because the hatch has been replaced, and the subject hatch has been disposed of, a disposal that is the basis of plaintiff's motion with regard to spoliation. The court notes that Ruben Alvarez, one of plaintiff's co-workers

on the day of plaintiff's accident, testified at his deposition that, almost always, when one opens a roof hatch, it "opens like halfway, then one pushes it the rest of the way," but that, on the day of the accident, "there was a problem with the door," and it was difficult to open because of its weight. Gardy Affirm. (11/9/10), Exh. B, at 20. Another co-worker, Xavier Chacon, testified that he heard other workers complaining about the absence of shocks on the hatch.

In addition to Dr. Ojalvo's inability to estimate the force with which the hatch struck plaintiff's hand, Dr. Ojalvo's opinion does not address plaintiff's central allegation. Plaintiff does not contend that the fall of the hatch pushed him from the ladder, a contention that, in other circumstances, might raise the question of whether the force of that fall could have been great enough to have that effect. Rather, plaintiff contends that the fall of the hatch onto his hand caused him to lose his balance. Dr. Ojalvo does not opine that the force exerted by the falling hatch could not have had that effect. Clearly, the exertion of a force that will have a certain effect upon a person whom it surprises may not have that effect upon a person who is expecting it. Accordingly, Dr. Ojalvo's opinion, that, had plaintiff not been carrying materials in his left hand, he would not have been made to fall by the hatch closing onto his right hand, is no more than speculative. Because Dr. Ojalvo cannot exclude the conclusion that the fall of the hatch was a proximate cause of plaintiff's fall, his opinion, that plaintiff's carrying of those materials was the sole proximate

cause of plaintiff's fall, is untenable. That plaintiff had a rope in his van, that he had sometime earlier been given by another worker and that he might have been able to use to hoist the materials that he carried up the ladder by hand, does not change this conclusion.

Dr. Ojalvo also opines that had plaintiff been standing lower on the ladder than he was while trying to open the hatch, he would have been better able to hold onto the ladder with his left hand. It is undisputed that the rungs on the subject ladder are 11 3/4 inches apart. It is possible, therefore, that, had plaintiff, who testified that he is 5'6" tall, been standing on the sixth, or seventh rung from the top, as Dr. Ojalvo believes that he should have been, he would have been unable, or barely able, to reach and work the hatch lever.

It is established that where the proponent of a motion for summary judgment fails to "tender sufficient evidence to eliminate any issues of fact from the case[, the motion must be denied] regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); see also *Cox v Kingsboro Med. Group*, 88 NY2d 904 (1996). Dr. Ojalvo's opinions do not entitle Greenwich to judgment, as a matter of law.

Motion Sequence No. 008.

Plaintiff's motion for sanctions is based upon the fact that, on October 2, 2008, approximately eight months after plaintiff's accident, Greenwich replaced the subject hatch and failed to preserve it. Roger Paradiso, a co-chairman of Greenwich, testified

at his deposition that the hatch was replaced because film makers, to whom Greenwich rented the space, were complaining that light was leaking in through the opening below the hatch. Prior to that time, plaintiff had not requested Greenwich either to preserve the subject hatch, or any other physical evidence, or to allow him, or an expert of his choosing, to inspect the premises. Rather, by letter dated February 29, 2008, plaintiff's counsel only requested Greenwich to preserve "all documents, accident reports, records, photographs, videotapes and/or surveillance tapes which may bear relevance to the accident." Pero, Affirm. (10/28/10), Exh. C. However, plaintiff points out that, approximately one month after the accident, Mr. Paradiso was told by Ivan Areizaga, operations manager of Nations, that a worker had been injured and had bent the hatch somewhat. Mr. Paradiso also acknowledged at his deposition that, shortly thereafter, he had notified Greenwich's insurance company that there had been an accident, and that Greenwich was served with plaintiff's summons and complaint at some time before the hatch was replaced. Plaintiff argues, accordingly, that Greenwich was on notice that plaintiff was claiming that his injury resulted from a defect in the hatch, and that Greenwich was able to investigate the hatch and the immediate area in which it was located, but that plaintiff is unable to do so because the hatch is unavailable.

Sanctions for the destruction of evidence are appropriate, even where the evidence was lost by negligence. *Ortega v City of New York*, 9 NY3d 69 (2007); *Kirkland v New York City Hous. Auth.*,

236 AD2d 170 (1st Dept 1997). Here, it is not that the hatch was inadvertently lost, but that Greenwich appears to have failed to appreciate that its retention would be germane to the litigation of plaintiff's claim. It would be inappropriate, however, to strike Greenwich's answer, because the absence of the subject hatch does not deprive plaintiff of the means for making a prima facie case of negligence. *Hannah v Chorney*, \_ AD3d \_\_, 2010 WL 4941710 (1st Dept 2010); *Hall v Elrac, Inc.*, \_ AD3d \_\_, 2010 WL 4880521 (1st Dept 2010). Plaintiff can testify about his accident, and he can present testimony from Messrs. Alvarez and Chacon. Accordingly, it appears that the proper sanction is to give plaintiff the benefit of a negative inference instruction at trial. See *Seda v Epstein*, 72 AD3d 455 (1st Dept 2010); *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 (1st Dept 2009).

Accordingly, it is hereby

ORDERED that, in motion sequence 006, the cross motion for summary judgment of third-party plaintiff Greenwich Street Productions, Inc. is denied; and it is further

ORDERED that, in motion sequence no. 006, the motion for summary judgment of third-party defendant Nations Roof of New York, LLC is granted and the third-party complaint is dismissed with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

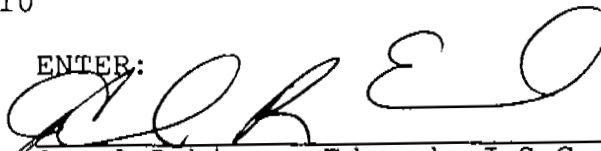
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that, in motion sequence no. 007, the motion for summary judgment of defendant Greenwich Street Productions, Inc. is denied; and it is further

ORDERED that, in motion sequence no. 008, plaintiff's motion is granted to the extent that a negative inference instruction will be given for his benefit at trial; and it is further

ORDERED that counsel for third-party defendant Nations Roof of New York LLC shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: December 16, 2010

ENTER:  
  
\_\_\_\_\_  
Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

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