Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

---

x

DANIEL ANDRADE,

- against -

M.A. ANGELIADES, INC.

x

Index Number 27540 2007

Motion Date September 22, 2010

Motion Cal. Number 1

Motion Seq. No. 2

The following papers numbered 1 to 15 read on this motion by M.A. Angeliades, Inc. (MAA) for summary judgment in its favor on its cause of action against Prestige Decorating & Wall Covering, Inc. (Prestige), for contractual indemnification, to dismiss plaintiff's claims in their entirety and for summary judgment on its claims for attorneys' fee; and cross motion by Prestige for summary judgment in its favor.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-6
Notice of Cross Motion - Affidavits - Exhibits	7-10
Answering Affidavits - Exhibits.....	11-12
Reply Affidavits.....	13-15

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

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained when he fell while working as a painter at the Richard J. Daronco Courthouse in White Plains, New York. At the time, plaintiff was employed by Prestige Decorating & Wallcovering, Inc. (Prestige), which had been hired by MAA to paint sections of the said courthouse. The complaint alleges that plaintiff was injured when he fell from a radiator while painting part of a ceiling. Plaintiff had not been provided with a ladder to perform the work. MAA moves for summary judgment in its favor on its claims for contractual indemnification based upon a provision in its contract with Prestige. Upon its cross motion for summary judgment and opposition to the motion, Prestige counters that the subcontract was not executed by Prestige until January 24, 2006, and by MAA on January 30, 2006, which was subsequent to the date of the accident. Therefore, according to Prestige, it never intended to indemnify and never agreed to indemnify MAA at all. MAA also moves to dismiss the underlying claims of plaintiff.

Contractual Indemnification

On August 8, 2005, MAA and Prestige entered into a written Trade Agreement, whereby Prestige was hired as subcontractor to MAA to perform all of the painting work on a project known as the "Rehabilitation of the Richard J. Daronco Courthouse" located at 111 Dr. Martin Luther King Boulevard, White Plains, New York (Project). MAA contends that pursuant to Article 9 of the Trade Agreement, MAA is entitled to recover from Prestige its litigation costs incurred in connection with plaintiff's claims, including reasonable attorney's fees.

Article 9, the "Hold Harmless" clause of the Trade Agreement, provides, as herein relevant, as follows:

> The Subcontractor hereby assumes the entire responsibility and liability for any and all injury to or death of any and all persons, including the subcontractor's employees and for any and all damage to property caused by, or resulting from or arising out of any act, or omission on the part of the subcontractor, its subcontractors, suppliers, material men and or consultants, in connection with this subcontract, or of the prosecution of the work hereunder. This provision shall be made part of all contracts with subcontractors suppliers, material men or consultants and the subcontractor shall save and hold harmless the owner, general contractor and project architect from and against any and all loss and/or expense which they may suffer or pay as a result of the claims or suits due to, because of, or arising out of any and all such injuries, deaths, and or damage. Further, the subcontractor, if requested, shall assume and defend, at no cost to the owner, general contractor or project architect, any suit,

action or other proceeding arising therefrom.

Prestige assumed an indemnity obligation for the benefit of MAA under the Trade Agreement. Specifically, as set forth in Article 9 of the Trade Agreement, Prestige, as subcontractor to MAA, assumed the entire responsibility and liability for claims brought against MAA that arise (1) out of or in connection with the prosecution of Prestige's work or (2) out of the acts or omissions of Prestige. MAA contends that Prestige's indemnity obligation applies to plaintiff's claims because plaintiff's claims arose out of his work as an employee of Prestige, MAA's subcontractor; and while plaintiff was performing work under the "scope of work" set forth by the Trade Agreement between MAA and Prestige.

Article 1 of the Trade Agreement, entitled "Scope of Work" provides as follows:

> The Scope of work shall include all labor, material, equipment, trucking, hoisting, transportations, delivery, off loading, handling, erection, cranes, supervision, scaffolding layout, clean-up, shop drawings, insurance, inspections and approvals, coordination and cooperation required to deliver a complete performance of the Painting work and all related and associated sections in its entirety as indicated on the contract documents.

It is well settled that contractual indemnity depends upon the language of the contract at issue and a party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" *(Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also, Hogeland v Sibley, Lindsay & Curr Co.,* 42 NY2d 153, 159 [1977]; *Rodriguez v Baker,* 91 AD2d 143, 146 [1983], *affd for reasons stated below* 61 NY2d 804 [1984]). Here, the language in the "Hold Harmless" provision of the Trade Agreement is explicit and clear. Plaintiff's claims arose out of or in connection with the prosecution of Prestige's work and, therefore, as provided for in the "Hold Harmless" provision, the liability and responsibility of plaintiff's claims shift to Prestige.

In August, 2005, Prestige commenced work on the Project pursuant to the Trade Agreement. In opposition to the instant motion, Prestige argues that the effective date of the Trade Agreement was not until January 30, 2006 - - the date when MAA executed the Trade Agreement - - yet Prestige does not provide any evidence demonstrating that January 30, 2006, was the date the parties intended for the Trade Agreement to take effect. Prestige does not explain why it was then performing work on the Project and receiving payment for its work prior to January 30, 2006. Moreover, the Certificate of Insurance demonstrates that the types of insurance that Prestige procured in connection with its work on the Project were in effect six (6) months prior to January 30, 2006.

The Trade Agreement provided that time was of the essence concerning Prestige's work on the project. The Trade Agreement also provides that Prestige shall furnish to MAA a Certificate of Insurance. Article 10, Section E states, in relevant part, that "Certificates of Insurance in triplicate shall be furnished . . . by the Subcontractor prior to commencement of work detailing all insurance required of the Subcontractor." In subcontractor agreements, this condition precedent - - procuring insurance prior to starting work - - is very common. Indeed in most cases, MAA submits, a subcontractor would not be allowed to commence work on a project before it procured the contractually-required insurance.

Furthermore, Article 10, Section F of the Trade Agreement, states that the County of Westchester and MAA were to be additional insureds and MAA was to be the Certificate Holder with respect to the insurance policy. MAA submits that Prestige procured insurance from Westchester Fire Insurance Company and provided a copy of the Certificate of Insurance to MAA prior to commencing its work on the Project. The effective dates of the policy were April 7, 2005 through April 7, 2006. The Certificate of Insurance lists both the County of Westchester and MAA as an "additional insured" and lists MAA as the Certificate Holder, which were both required under the Trade Agreement. MAA submits that the foregoing provides objective manifestations that Prestige acted in conformity with the requirements set forth in the Trade Agreement.

Prestige commenced work on the Project in August 2005. A copy of Prestige's payroll records indicate that Prestige was working on the Project prior to plaintiff's accident. Prestige received a benefit under the Trade Agreement (i.e. compensation for its painting work) prior to the date of plaintiff's accident and prior to Prestige's claimed effective date of the Trade Agreement. Prestige cannot now avoid its responsibilities under the Trade Agreement by alleging that the Trade Agreement was not in effect at the time of plaintiff's accident. Accordingly, MAA is entitled to summary judgment on its claim of contractual indemnification against Prestige.

Attorney's Fees

The branch of the motion which seeks reasonable attorney's fees in connection with MAA's defense against Prestige, is granted. The Trade Agreement further provides that Prestige "shall save and hold harmless [MAA] from and against any and all loss and or expense which [MAA] may suffer or pay as a result of the claims or suits due to, because of, or arising out of any and all such injuries, deaths, and or damage. The broad language of the indemnification provision spells out the intention of the parties that MAA would be entitled to an award of counsel fees reasonably incurred in defense of the action brought by plaintiff (*see Hooper Associates, Ltd. v AGS Computers, Inc.,* 74 NY2d 487 [1989]*; see also Milani v Broadway Mall Props., Inc.,* 261 AD2d 370 [1999]).

Labor Law § 240(1)

To prevail on a cause of action under Labor Law § 240(1), plaintiff must show that defendants violated the statute and the violation was a proximate cause of his accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280 [2003]; *Cody v State of New York,* 52 AD3d 930 [2008]). As no safety devices were provided to assist plaintiff in reaching the ceiling or prevent plaintiff from falling from a height, and such devices could have prevented plaintiff's accident, defendants violated the statute and that violation constituted a proximate cause of the accident. Thus, plaintiff is entitled to summary judgment on the issue of liability under Labor Law § 240(1).

The court rejects defendants' argument that plaintiff's actions were the sole proximate cause of the accident. The assertion that plaintiff knew that there were ladders on the premises as he had observed others using them does establish that plaintiff was the sole proximate cause of the accident. There is no evidence in the record that plaintiff knew where to find the safety devices that Prestige argues were readily available or that he was expected to use them. Although Prestige's witness testified that appropriate safety devices were available at the project site on the date of the accident, nowhere in his testimony did he state that plaintiff had been told to use such safety devices. When viewed in the light most favorable to plaintiff (as it must be when considering defendants' motion for summary judgment), the evidence does not raise a question of fact that plaintiff knew of the availability of the safety devices and unreasonably chose not to use them (*see Gallagher v The New York Post, et al.*, 14 NY3d 83 [2010]). Accordingly, the branch of the motion which seeks summary judgment dismissing plaintiff's claims pursuant to Labor Law § 240(1), is denied.

Labor Law § 200

To establish liability against an owner or general contractor pursuant to Labor Law § 200, it must be established that the owner or general contractor exercised supervision and control over the work performed at the site, or had actual or constructive notice of the allegedly unsafe condition (*Dennis v City of New York*, 304 AD2d 611 [2003], (internal citations omitted); *see also Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]). Ortiz (Prestige's witness) testified that MAA could throw Prestige off the site if it saw someone on the convector (radiator); and that the general contractor dictated the schedule, the type of paint and the safety equipment to be used. Further, the subcontract itself provides that MAA can terminate the work. The retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200 (*Dennis v*

City of New York, supra). Therefore, the branch of the motion which seeks to dismiss plaintiff's claims pursuant to Labor Law § 200, is granted.

Labor Law § 241(6)

"New York Labor Law §241 (6) imposes a non-delegable duty of reasonable care on owners and their agents to provide reasonable and adequate protection and safety to persons working in areas of construction" (*Worrell v One York Prop. LLC*, 2010 NY Slip Op 50842U). To establish a claim under this section, plaintiff is required to allege a violation of a provision of the Industrial Code which sets forth a specific standard of conduct, as opposed to a general reiteration of common law principles (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

Here, plaintiff alleges that MAA violated 12 NYCRR §23-1.7(f). This provision states, as herein relevant, as follows:

> "Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Plaintiff testified that at the time of his accident, he was painting in an open area of the courthouse, i.e. a room that was about fourteen (14) feet wide. Thus, plaintiff was not working in a vertical passage or any passage or passageway at the time of his alleged fall. Thus, plaintiff's reliance on 12 NYCRR § 23-1.7(f), is unavailing since the regulation does not apply to an open area (*see Enriquez v B&D Development, Inc.*, 63 AD3d 780 [2009]. Accordingly, the branch of the motion which seeks to dismiss plaintiff's claim under Labor Law § 241(6), is granted.

Cross Motion

The cross motion by Prestige for summary judgment is denied as untimely. CPLR 3212(a) provides that summary judgment motions are to be filed within one hundred and twenty (120) days of the filing of the Note of Issue. Here, the Note of Issue was filed on or about February 26, 2010, and Prestige's cross motion is dated August 23, 2010, well after the 120-days deadline. Inasmuch as Prestige's cross motion for summary judgment was made more than 120 days after the note of issue was filed, it was untimely (*see* CPLR 3212 [a]; *Miceli v State Farm Mut. Auto. Ins. Co.,* 3 NY3d 725 [2004];*Brill v City of New York,* 2 NY3d 648 [2004]). Since no good cause was articulated by Prestige for its late filing, its cross motion for summary judgment is denied as untimely (*id.; see Lofstad v S & R Fisheries, Inc.,* 45 AD3d 739 [2007]; *Jones v Ricciardelli*, 40 AD3d 936 [2007]). Moreover,

since the grounds upon which Prestige premised its cross motion were not nearly identical to those upon which MAA relied in connection with its motion (*see Bickelman v Herrill Bowling Corp.,* 49 AD3d 578 [2008]; *cf. Grande v Peteroy,* 39 AD3d 590 [2007]), there is no basis upon which the court may impute good cause for Prestige's delay in submitting its cross motion.

Conclusion

The branch of the motion by MAA which is for summary judgment on its claims for contractual indemnification and legal fees is granted. The branches of the motion by MAA which is to dismiss plaintiff's Labor Law §§ 200 and § 241(6) claims are granted. The branch of the motion which is to dismiss plaintiff's claim pursuant to Labor Law § 240(1) is denied.

The cross motion by Prestige is denied as untimely.

Dated: December 2, 2010

J.S.C.