Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

ANTONIO SILVA

- against -

FC BEEKMAN ASSOCIATES, LLC, et al.

Index Number 28984 2007

Motion Date August 4, 2010

Motion Cal. Number 36

Motion Seq. No. 3

The following papers numbered 1 to 28 read on this motion by plaintiff for partial summary judgment in his favor and against defendants/third-party plaintiffs FC Beekman Associates, LLC (Beekman) and Kreisler Borg Florman General Construction Company (Kreisler) pursuant to Labor Law § 240(1) and CPLR 3212, and on these cross motions by third-party defendant Gotham Safety Services Corp. (Gotham) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and for an award of sanctions against defendants/third-party plaintiffs Beekman and Kreisler for asserting frivolous third-party claims and by defendants/third-party plaintiffs Beekman and Kreisler pursuant to CPLR 3126 to strike third-party defendant Gotham's answer due to its failure to provide outstanding discovery as required by the binding stipulations entered into on March 24, 2010, and June 11, 2010, or to compel third-party defendant Gotham to provide all outstanding documentary discovery and to adjourn the trial date until such time as Gotham's outstanding discovery is provided.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Notices of Cross Motion - Affidavits - Exhibits.....	5-13
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiff alleges that he was injured on October 22, 2007, when he fell from a scaffold while working on a construction project, the Beekman Tower, a residential high-rise, at 8 Spruce Street, Manhattan, New York (the premises) while employed as a laborer by nonparty Urban Foundation Engineering LLC (Urban). Defendant/third-party plaintiff Beekman was the owner of the premises, defendant/third-party plaintiff Kreisler was the general contractor on the project and third-party defendant Gotham was the construction site safety manager on the project. Plaintiff, in his complaint, interposes claims for negligence and violations of Labor Law §§ 200, 240(1) and §241(6).

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law. (*See Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact. (*See Giuffrida v Citibank Corp.*, *supra*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, *supra.*)

Labor Law § 240 (1) imposes a nondelegable duty upon owners, contractors and their agents to furnish proper safety devices and protection, so as to ensure the safety of workers exposed to elevation-related hazards during the construction, repair, demolition, painting, and alteration of a building or structure. (*See Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995]; see also *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].) To prevail on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries sustained by plaintiff. (*See Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333 [2008]; *see also Singh v City of New York*, 68 AD3d 1095 [2009]; *Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849 [2009].) Plaintiff may not rely on this section if either (1) plaintiff's negligence was the "sole proximate cause" of the accident (*see e.g. Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]); or (2) plaintiff was a "recalcitrant worker" who refused to use available safety devices. (*See e.g. Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004].)

Plaintiff, here, has submitted sufficient evidence to establish his entitlement to summary judgment as a matter of law on the issue of liability pursuant to Labor Law § 240 (1). Plaintiff's testimony is clear that while pushing a steel lintel into position over a vault (pit), he fell into a two-foot gap between the scaffold he was standing on and the

vault wall down to the ground 14 feet below, and that he was not provided a harness or safety line prior to the accident. Plaintiff also asserts that the scaffold lacked guardrails or other safeguards. This testimony is sufficient to demonstrate that defendants/third-party plaintiffs Beekman and Kreisler failed to provide plaintiff with adequate safety devices to provide protection against an elevation-related hazard. (*See Madalinski v Structure-Tone, Inc.*, 47 AD3d 687 [2008]; *see also Vergera v SS 133 West 21, LLC*, 21 AD3d 279 [2005]; *Podbielski v KMO-361 Realty Assocs.*, 294 AD2d 552 [2002].) Thus, the burden shifts to defendants/third-party plaintiffs Beekman and Kreisler to present competent evidence demonstrating a triable issue of fact. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.)

Defendants/third-party plaintiffs Beekman and Kreisler have failed to meet this burden. Defendant/third-party plaintiffs Beekman and Kreisler contend that a triable issue of fact exists concerning whether plaintiff was the sole proximate cause of the accident. They base this contention on the affidavit of James Kern, plaintiff's co-employee and foreman, who averred that plaintiff must have climbed over or between the railings of the scaffold since a site safety representative of third-party defendant Gotham told him that plaintiff was working outside of the perimeter of the scaffold, resting one foot on the vault box and the other foot on the cross-brace of the scaffolding frame, at the time of the accident. The sworn statements of James Kern are based on inadmissible hearsay and are of no probative value. (*See Madalinski v Structure-Tone, Inc.*, *supra*; *see also Gelesko v Levy*, 37 AD3d 528 [2007]; *Bellafiore v L & K Holding Corp.*, 244 AD2d 443 [1997].) Moreover, it is undisputed that there was a gap of approximately two feet between the scaffold and the vault wall and no safety lines or other safety devices were provided plaintiff.

Accordingly, plaintiff's motion for partial summary judgment in his favor and against defendants/third-party plaintiffs Beekman and Kreisler on the issue of liability on his Labor Law § 240(1) cause of action is granted.

The assessment of damages shall be made at the time of trial, or after any other disposition of the action.

The cross motion of defendants/third-party plaintiffs Beekman and Kreisler to strike third-party defendant Gotham's answer pursuant to CPLR 3126 for failure to provide outstanding discovery as required by the so-ordered stipulations of the parties dated March 24, 2010, and June 11, 2010, or to compel third-party defendant Gotham to provide all outstanding discovery is denied as it appears to the satisfaction of the court that third-party defendant Gotham has responded to all discovery demands of defendants/third-party plaintiffs Beekman and Kreisler. Third-party defendant Gotham is reminded of its continuing obligation to amend or to supplement its responses promptly if it obtains information that the responses were incorrect or incomplete when made, or that the

responses, though correct and complete when made, no longer are correct and complete, and the circumstances are such that a failure to amend or to supplement the responses would be materially misleading. (*See* CPLR 3101 [h].)

The branch of third-party defendant Gotham's cross motion for summary judgment dismissing the third-party claims for contractual indemnification and breach of contract for failure to procure insurance is granted without opposition.

In support of this branch of its cross motion, third-party defendant Gotham submits its agreement for site safety management of the project, a proposal dated March 21, 2006, and signed by its principal, Owen Peterson. This proposal contains neither an express indemnification provision, nor an obligation to procure insurance.

The branch of third-party defendant Gotham's cross motion for summary judgment dismissing the third-party claims for common-law indemnification and contribution is denied as a triable issue of fact exists concerning whether third-party defendant Gotham acted negligently or otherwise unreasonably as site safety consultant. (*See Goodleaf v Tzivos Hashem, Inc.*,19 Misc 3d 1104A [2008]; *cf. Doherty v City of New York*, 16 AD3d 124 [2005].) This issue of fact is based on the examination before trial testimony of third-party defendant Gotham's principal, Owen Peterson, who was the site safety manager on the project, and the affidavit of James Kern, plaintiff's foreman. Owen Peterson testified that he prepared the project's site safety program, the terms of which provide, *inter alia*, that third-party defendant Gotham is a member of the project team and, as such, has the authority to stop work when either site conditions and/or work practices present an imminent danger, until those conditions and/or practices are corrected. Owen Peterson also testified that if there was a safety concern on the project, he would inform the superintendent in charge of the trade involved that corrections needed to be performed and if they ignored his observations, he could tell them to stop the work and would notify the construction general superintendent, Boris Faiguenbaum, an employee of defendant/third-party plaintiff Kreisler, the entity responsible for overall safety at the job site. Owen Peterson further testified that he was not present at the job site on the date of the accident and learned of the accident from third-party defendant Gotham's alternate site safety manager, Edward Garrett. James Kern avers that at the time of the accident, he and a laborer, who was also employed by nonparty Urban, were assisting plaintiff in maneuvering the metal frame (steel lintel) into place over the vault box. James Kern also avers that while he did not witness plaintiff fall from the scaffold, a site safety representative from third-party defendant Gotham was watching them at that time from the east side of the vault box.

The branch of third-party defendant Gotham's cross motion seeking sanctions is denied as the conduct of defendants/third-party plaintiffs Beekman and Kreisler in bringing

the third-party action against Gotham was not "frivolous" within the meaning of 22 NYCRR § 130-1.1.

Dated: December 10. 2010

J.S.C.