

Hernandez v St. Francis Xavier Church

2011 NY Slip Op 30215(U)

January 19, 2011

Sup Ct, New York County

Docket Number: 404861/06

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 404861/2006
HERNANDEZ, JUAN RAMON MEDINA
vs.
ST. FRANCIS ZAVIER CHURCH
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8-19-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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

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

FILED

JAN 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 19, 2011

[Signature]
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
JUAN RAMON MEDINA HERNANDEZ,

Plaintiff,

-against-

Index No. 404861/06

ST. FRANCIS XAVIER CHURCH, SPRING
SCAFFOLDING INC., and YATES RESTORATION
GROUP, LTD.,

FILED

Defendants.

JAN 31 2011

-----X
ST. FRANCIS XAVIER CHURCH,

NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590419/07

CALISTRO CONSTRUCTION CORP.,

Third-Party Defendant.

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

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

In this action arising out of a construction site accident, plaintiff Juan Ramon Medina Hernandez (plaintiff) claims injuries as a result of falling off scaffolding, and moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendant St. Francis Xavier Church (St. Francis) (motion seq. no. 004). Defendant Spring Scaffolding Inc. (Spring) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it (motion seq. no. 003). Defendant/third-party plaintiff St. Francis moves, pursuant to CPLR 3212, for an order: (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it; and (2)

granting it contractual defense and indemnification and common-law indemnification from third-party defendant Calistro Construction Corp. (Calistro) (motion seq. no. 005). Third-party defendant Calistro cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint, and all cross claims against it.

BACKGROUND

Plaintiff was injured on August 6, 2004, when he fell at a construction site located at 46 West 16th Street, New York, New York. St. Francis is a Catholic church and the owner of the premises. Pursuant to a written agreement dated March 14, 2003, St. Francis hired Yates Reconstruction Group, Ltd. (Yates) as a general contractor to furnish all labor, materials, and scaffolding to remove and replace the roof of the church (Edwards Affirm. in Support, Exh. 8). On May 1, 2003, Calistro was retained as a subcontractor to perform masonry work on the job (*id.*, Exh. 12). On June 9, 2003, Yates hired Spring to install and remove a sidewalk bridge at the church (Kovner Affirm. in Support, Exh. J). There is a dispute as to what entity employed plaintiff, and whether he was employed at all.

Plaintiff testified that he was employed as a laborer by Yates in August 2004 (Plaintiff 1/23/06 EBT, at 41; Plaintiff 7/22/09 EBT, at 15, 16). According to plaintiff, he was hired four months earlier, in April 2004, to perform demolition at a church located between 15th and 16th Streets in Manhattan; he “broke walls” and picked up debris at the job site (Plaintiff 1/23/06 EBT, at 13, 42; Plaintiff 7/22/09 EBT, at 12). Plaintiff stated that he spoke with “Jose’s brother,” the head of the company, who gave him the job, and that he did not fill out any paperwork (Plaintiff 1/23/06 EBT, at 39, 40). Plaintiff knew that he was an employee of Yates based upon conversations with his co-workers and because his hard hat said “Yates” on it

(Plaintiff 1/23/06 EBT, at 49, 54, 55, 56). Plaintiff was paid \$100 per day, and was paid in cash (*id.* at 41, 43). Plaintiff stated that he was given instructions on a daily basis by his supervisor, Dominick (*id.* at 48).

Plaintiff testified at his first deposition that, on the date of the accident, he was working on the second level of the scaffold, picking up debris that had fallen and putting it into a sack (Plaintiff 1/23/06 EBT, at 72, 75, 79, 80), but later testified at subsequent depositions that he was "breaking some bricks" and removing bricks with a chisel and hammer (Plaintiff 2/25/09 EBT, at 48, 69; Plaintiff 7/22/09 EBT, at 19-21). At his first deposition, plaintiff stated that, at about 4:40 or 4:45 P.M., the scaffold boards that he was standing on somehow dislodged and fell to the ground, causing him to fall (Plaintiff 1/23/06 EBT, at 82, 83). However, plaintiff subsequently testified that his accident occurred at "about 4:00" (Plaintiff 2/25/09 EBT, at 44). He did not notice that the boards were loose prior to falling (Plaintiff 1/23/06 EBT, at 83). Plaintiff fell on top of debris (*id.* at 86). Plaintiff testified that he lost consciousness after he fell (*id.* at 90). Plaintiff has received workers' compensation benefits as a result of the accident (Plaintiff 7/22/09 EBT, at 53). He further testified that no one from the church ever gave him any instructions (Plaintiff 2/25/09 EBT, at 25). According to plaintiff, there were three or four wood planks that formed the floor of the scaffold, and the planks were not tied to the scaffold in any way (*id.* at 40).

Jacqueline Falco testified that she is currently the parish manager for St. Francis, but was an administrative assistant in August 2004 (Falco EBT, at 10, 12). According to Falco, St. Francis hired Yates to replace the roof of the church (*id.* at 21).

Virgil Lupu testified that he is employed as a chief estimator by Outdoor Installation, Inc.

d/b/a Spring Scaffolding (Lupu EBT, at 10, 11). According to Lupu, Yates hired Spring to erect scaffolding at the church (*id.* at 15). Lupu testified that the planks for scaffolds are typically reused (*id.* at 57). The planks are visually inspected, and if they do not have any cracks or bends, they are reused (*id.*). On occasion, Spring performs a tension test to determine if the planks resist 25 pounds per square foot (*id.* at 58). Lupu testified that, when installing scaffolding, Spring runs #9 wire across the planks, and nails the planks to the wires (*id.* at 64). Lupu stated that this is required by the New York City Department of Buildings (*id.*). After the scaffold is installed, a field inspector does not visit the construction site (*id.* at 99). Lupu testified that, after the scaffold is installed, Spring ordinarily gives a sign-off sheet to the contractor, indicating that the contractor inspected the scaffold and is fully responsible for the condition of the scaffold (*id.*). However, there was no sign-off sheet for this site (*id.* at 99, 100, 102). Lupu stated that there was an indication that \$300 in sign-off costs were paid, which would indicate that an inspection was performed; nonetheless, he later stated that he was unsure (*id.* at 102; Kovner Affirm. in Support, Exh. J). According to Lupu's testimony, the terms of the rental contract state that "[i]f planking is removed from the scaffolding during the rental period of this contract, it must be properly reinstalled by the customer" and that "[t]he customer will be responsible for the continued safe use of the installation" (Lupu EBT, at 104; Kovner Affirm., Exh. J, at 3). Spring is responsible for general wear and tear to the scaffold (Lupu EBT, at 103). The scaffold was partially dismantled on June 8, 2004, and the rest of the scaffold was taken down on December 20, 2004 (*id.* at 61-63; Kovner Affirm. in Support, Exh. J, at 2). Lupu did not know which parts were dismantled in June 2004, and there are no records which would indicate which parts were removed (*id.* at 63, 124).

Valeriano Sendon testified at his deposition that he owns Calistro, a masonry restoration company (Sendon EBT, at 7). Sendon testified that Calistro does not supply its own tools and equipment on construction jobs (*id.* at 17). According to Sendon, Calistro was hired to replace the roof of the church and to perform copper work, granite repairs, and masonry repairs (*id.* at 21). Sendon testified that Yates and other subcontractors were present on the site, in addition to Calistro (*id.* at 22). In August 2004, Calistro was performing punch list work, which included a final clean-up of the site (*id.* at 57). During this time, Calistro used power washers to clean the exterior of the building (*id.* at 60). Sendon never heard of plaintiff (*id.* at 75). He testified that he signed an equipment release, and read it before he signed it (*id.*). The site closed fairly promptly at 4:30 P.M. every day (*id.* at 76). Sendon testified that, during 2003 and 2004, there were homeless people sleeping on the pipe scaffolding (*id.* at 78-79).

Daniel Callahan testified that he was employed by Yates as a senior project manager (Callahan EBT, at 8). Yates was hired to perform exterior facade restoration of the church (*id.* at 20). Dominick Volpe was Callahan's assistant (*id.* at 22). Callahan visited the site a couple of times per week, while Volpe visited the site three or four times per week (*id.*). According to Callahan, Dominick Silva was a foreman employed by Calistro (*id.* at 24, 78). There were no Yates employees on the job on a daily basis; Calistro was responsible for performing all of the work except for construction of the pipe scaffolding and steel restoration (*id.* at 26). Yates supplied materials and equipment on the job, including hard hats (*id.* at 44). Callahan stated that he never saw plaintiff, and that Yates did not employ any "workers" (*id.* at 45, 47). Work typically stopped at 4:30 P.M. (*id.* at 43). At that time, the storage area and equipment would have been locked up, and the lights would have been turned off (*id.* at 81). Callahan stated that,

during the course of the project, vagrants climbed on the sidewalk bridge (*id.* at 45). Yates did not employ workers off the books; all Yates employees received a payroll check (*id.* at 49). Callahan testified that the church hired Cauldwell Wingate as a construction manager for the job (*id.* at 68). According to Callahan, “the maintenance . . . the safe operation typically falls to the subcontractor on the site” and “typically [a subcontractor], whoever was on-site, would have to move [its] own planks and deal with [its] own adjustment to the pipe scaffold” (*id.* at 26, 27). Callahan believed that, if a scaffold plank was moved after installation, it would have been moved by Calistro (*id.* at 72). Calistro would be responsible for tying down the planks, once they were moved (*id.* at 39).

An ambulance call report states that plaintiff was found lying “supine on the ground under construction scaffolding. [B]ystanders stated that [plaintiff] fell approx. 10 feet off the scaffolding, landing on his back and falling asleep” (Edwards Affirm. in Support, Exh. 15). Hospital records reflect that plaintiff fell 10 feet off a scaffold while working at a construction site (*id.*).

On January 24, 2006, a Workers’ Compensation Law Judge (WCLJ) found that plaintiff was employed by Yates, based upon his testimony and ambulance and hospital records (Edwards Affirm. in Support, Exh. 18). Subsequently, on July 7, 2006, a Workers’ Compensation Board panel affirmed the WCLJ’s decision (*id.*). Specifically, the panel stated that:

“[t]he claimant’s credible testimony that he was employed by Yates for four months prior to the date of the accident, and was paid \$500.00 a week in cash, as well as the ambulance and hospital records which indicate that the claimant fell from a scaffolding on the work site in question, constitute sufficient credible evidence in support of the WCLJ’s decision. The Board Panel, therefore, adopts the findings of fact and the opinion of the WCLJ as the findings of fact and the opinion of the Board panel” (*id.*).

On October 18, 2004, plaintiff commenced the instant action against St. Francis, Spring, and Yates in Supreme Court, Bronx County, asserting claims for common-law negligence and violations of Labor Law §§ 200, 240, 241, and 242. Plaintiff's verified bill of particulars alleges that defendants violated the Occupational Safety and Health Administration rules as they pertain to construction, and the following sections of the New York State Industrial Code (12 NYCRR Part 23): 23-1.5; 23-1.7; 23-1.15; 23-1.16; 23-1.17; 23-1.21; 23-1.24; 23-5.1; 23-5.2; 23-5.3; 23-5.4; and 23-5.8 (Verified Bill of Particulars, ¶ 16).

St. Francis and Yates moved for summary judgment dismissing Yates from the action and to change venue to Supreme Court, New York County. On August 18, 2006, the court (Billings, J.) granted the motion without opposition (Edwards Affirm. in Support, Exh. 19). Subsequently, on May 8, 2007, St. Francis impleaded Calistro, asserting claims for indemnification, contribution, and failure to procure insurance. Calistro asserted a cross claim for indemnification and contribution against Spring. In its answer, St. Francis also asserted cross claims for indemnification, contribution, and failure to procure insurance against Spring.

DISCUSSION

On a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to demonstrate the existence of a genuine, triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff's Motion for Summary Judgment Under Labor Law § 240 (1)

Plaintiff moves for summary judgment under Labor Law § 240 (1) against St. Francis, the building owner.¹ Plaintiff contends that he is entitled to judgment because the scaffold planks on which he was standing moved, causing him to fall, and because he was not given any other safety devices to prevent him from falling. In addition, plaintiff notes that the violation of the statute was a proximate cause of his injuries, and that there is no evidence that he was the sole proximate cause of his accident.

To support his position, plaintiff submits an affidavit, in which he states that he was injured while performing demolition work for Yates (Plaintiff Aff., ¶ 2). According to plaintiff, his supervisor from Yates was a man named Dominick, who told him what to do and provided necessary tools, and paid him \$100 per day (*id.*). When plaintiff started working for Yates in April 2004, he was given a hard hat that said “Yates” on it (*id.*, ¶ 3). Plaintiff states that, after lunch on the date of the accident, Dominick told him to remove an area of bricks from the building facade; he “was removing a brick from the wall with a hammer and chisel at the time of [his] accident” (*id.*, ¶ 6). While working on the second level of the scaffolding, “two boards dislodged and moved from under [him] and fell down to the ground,” causing him to fall through the scaffold (*id.*, ¶¶ 6, 8).

In opposition to plaintiff’s motion, St. Francis contends that there are issues of fact as to plaintiff’s credibility and the manner in which the accident occurred. First, St. Francis argues that there are inconsistencies as to the work plaintiff was performing at the time of his accident – plaintiff testified in January 2006 that he “was picking up the debris that had fallen” (Plaintiff

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

1/23/06 EBT, at 79), while he testified in February 2009 that he was removing bricks with a chisel and hammer (Plaintiff 2/25/09 EBT, at 69, 72). Second, St. Francis argues there is an issue of fact as to whether plaintiff was employed by Yates, given that employees of Yates and Calistro testified that Yates did not employ any laborers, that they never saw or heard of plaintiff, and that they did not remember any accidents happening at the site (Callahan EBT, at 45, 46, 47; Sendon EBT, at 75). Additionally, St. Francis submits the payroll records for Yates and Calistro for the relevant period, which indicate that plaintiff was not employed by either entity (Taustine Affirm. in Opposition, Exh. F), and notes that Yates did not pay employees in cash or off the books (Callahan EBT, at 48, 49). In this regard, St. Francis argues that it is not collaterally estopped by the Workers' Compensation Board determination from relitigating plaintiff's employment with Yates because it was not a party to that determination. Third, St. Francis maintains that plaintiff's testimony reveals an issue of fact as to the time of the accident – plaintiff testified in 2006 that his accident occurred at “[a]bout 4:40, 4:45” in the afternoon (Plaintiff 1/23/06 EBT, at 79), but later testified in 2009 that his accident occurred at “4:00” (Plaintiff 2/25/09 EBT, at 44).² According to the testimony of two witnesses, the job site was closed at 4:30 P.M. (Sendon EBT, at 75; Callahan EBT, at 42). St. Francis also argues that the ambulance report reflects a false address and social security number for plaintiff, and that there is no indication that either a contractor or the church advised the ambulance as to how the accident occurred (Edwards Affirm. in Support, Exh. 15). Fourth, St. Francis contends that the evidence demonstrates that the work site had problems with vagrants sleeping on the pipe scaffolding

²The court notes that plaintiff actually testified in 2009 that his accident happened at “[a]bout 4:00 P.M.” (Plaintiff 2/25/09 EBT, at 44).

(Callahan EBT, at 46; Sendon EBT, at 77).

Calistro similarly contends, in opposition to plaintiff's motion, that plaintiff has failed to meet his prima facie burden, since he failed to show the exact manner in which his accident occurred. According to Calistro, given plaintiff's testimony that his accident occurred between 4:40 and 4:45 P.M., and the testimony that the job site was closed at 4:30 P.M., it is questionable whether plaintiff's accident occurred in the manner that he claims, or whether he was injured while performing construction work. Calistro further argues that, although plaintiff testified that the wooden planks were unsecured and dislodged, all other parties testified that the wooden planks were secured by nails and were tied down to the scaffolding with wire.

In reply, plaintiff notes that: (1) the Workers' Compensation Board confirmed that plaintiff was an employee of Yates; (2) plaintiff has received workers' compensation benefits; and (3) counsel for Calistro has admitted that plaintiff was an employee of Yates. Plaintiff also points out that counsel for St. Francis previously represented Yates, but not before the Workers' Compensation Board.

Labor Law § 240 (1), entitled "Scaffolding and other devices for use of employees," provides in relevant part, that:

"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].

Labor Law § 240 (1) "imposes absolute liability on owners, contractors and agents for their failure to provide *workers* with safety devices that properly protect against elevation-related

special hazards” (*Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 977 [2003] [emphasis supplied]). “The purpose of this statute is to protect *workers* and to impose the responsibility for safety practices on those best situated to bear that responsibility” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993] [emphasis added]; *see also Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985]).

The protections of the Labor Law apply to an “employee,” defined as “a mechanic, workingman or laborer working for another for hire” (Labor Law § 2 [5]). An “employed” person is defined as one who is “permitted or suffered to work” (Labor Law § 2 [7]), and encompasses “all workers on the job” (*Kirkpatrick v Diversified Sports*, 216 AD2d 891, 892 [4th Dept 1995]). “[T]o come within the special class for whose benefit liability is imposed upon contractors, owners, and their agents, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent” (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990], quoting *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979] [citations omitted]; *see also Agli v Turner Constr. Co.*, 246 AD2d 16, 21 [1st Dept 1998]; *Brown v Christopher St. Owners Corp.*, 211 AD2d 441, 442 [1st Dept 1995], *affd* 87 NY2d 938, *rearg denied* 88 NY2d 875 [1996]). Thus, section 240 does not apply to a person serving as a volunteer and without pay (*Stringer v Musacchia*, 11 NY3d 212, 215 [2008]).

“[C]ollateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). A party invoking the collateral estoppel doctrine must

show that: (1) the identical issue was necessarily decided in the prior proceeding and is decisive in the present action; and (2) the party to be precluded had a full and fair opportunity to contest the prior determination (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665-666 [1990]). Collateral estoppel applies to quasi-judicial determinations of the Workers' Compensation Board (see *Ryan*, 62 NY2d at 499; *Rigopolous v American Museum of Natural History*, 297 AD2d 728, 729 [2d Dept 2002]).

The collateral estoppel doctrine applies to parties to the prior action or proceeding and those in privity with those parties (*Buechel*, 97 NY2d at 304). "Generally, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" (*Chambers v City of New York*, 309 AD2d 81, 86 [2d Dept 2003], quoting *D'Arata*, 76 NY2d at 664). "[T]o establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding" (*Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]; see also *Russell v New York Cent. Mut. Fire Ins. Co.*, 11 AD3d 668 [2d Dept 2004]).

Here, plaintiff has failed to show that the issue of plaintiff's employment was necessarily decided in the workers' compensation proceeding and that the issue is decisive in this action. First, plaintiff has not established that the identical issue was decided by the Workers' Compensation Board (see *Baker v Muraski*, 61 AD3d 1373, 1374 [4th Dept 2009] [defendants failed to establish that Workers' Compensation Board's determination that plaintiff was not

employed by them was entitled to collateral estoppel effect, in view of differing definitions of “employee,” “employer,” and “employed” in Labor Law § 2 (5) through (7) and those of “employer,” “employee,” and “employment” in Workers’ Compensation Law § 201 (4) through (6); *see also Matter of Bartenders Unlimited [Commissioner of Labor]*, 289 AD2d 785, 787 [3d Dept 2001], *lv denied* 98 NY2d 601 [2002] [although Industrial Board of Appeals had determined that workers were independent contractors, rather than workers, Unemployment Insurance Appeal Board was not collaterally estopped from determining whether workers were independent contractors; employment was not defined identically under the statutes relevant to each agency]). Second, St. Francis was not a party to the Workers’ Compensation Board proceeding, and plaintiff has not shown that St. Francis is in privity with Yates (*see Tounkara v Fernicola*, 63 AD3d 648, 650 [1st Dept 2009] [owner and contractor did not have full and fair opportunity to litigate issue of purported employer’s status in workers’ compensation proceeding, where owner and contractor were not parties to the proceeding and did not have a direct stake in its outcome other than potential collateral estoppel effect]; *Talcove v Buckeye Pipe Line Co.*, 247 AD2d 464, 465 [2d Dept 1998] [plaintiff’s co-worker, who was not a party to workers’ compensation proceeding, was not barred under doctrine of collateral estoppel from asserting cross claim against employer]).

Thus, the court turns to whether plaintiff is entitled to prevail under Labor Law § 240 (1). Although, as noted by plaintiff in his moving papers, the collapse of a scaffold is prima facie evidence of a statutory violation (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept], *lv dismissed* 100 NY2d 556 [2003]), there are issues of fact as to whether plaintiff was an “employee” or “employed” within the meaning of the Labor Law. Plaintiff

testified that he was employed by Yates, the general contractor, based upon his conversations with his co-workers and the fact that his hard hat said "Yates" on it (Plaintiff 1/23/06 EBT, at 49, 54, 55, 56). Plaintiff submits an affidavit in which he avers that he was employed by Yates, and that he was only given instructions by a man named Dominick from Yates (Plaintiff Aff., ¶¶ 2, 6). However, a senior project manager employed by Yates, who visited the site a couple of times per week, testified at his deposition that he never saw plaintiff, and that Yates did not employ laborers to perform the actual demolition work (Callahan EBT, at 45, 46, 47). Additionally, Valeriano Sendon, the owner of Calistro, the subcontractor, testified that he never heard of plaintiff, and did not recall that a worker had fallen at the site (Sendon EBT, at 75, 77). Thus, summary judgment is unwarranted in view of the conflicting evidence as to whether plaintiff was "permitted or suffered to work" on the scaffold, and was a "a mechanic, workingman or laborer working for another for hire" (*see e.g. Baker*, 61 AD3d at 1374 [summary judgment was incorrectly awarded given issue of fact as to whether the plaintiff was "permitted or suffered to work" on roof and received monetary compensation therefor]; *Haque v Crown Hgts. NRP Assoc., LP*, 33 AD3d 864 [2d Dept 2006] [defendant's motion for summary judgment dismissing plaintiff's Labor Law §§ 240 and 241 causes of action was correctly denied, in view of issues of fact as to whether plaintiff was given permission to perform work on the date in question]; *Morra v White*, 276 AD2d 536, 537 [2d Dept 2000] [since plaintiff was not engaged in the construction project, he was not within class of persons entitled to protection under Labor Law § 241 (6)]).

Accordingly, plaintiff's motion for partial summary judgment under Labor Law § 240 (1) is denied.

Spring's Motion for Summary Judgment Dismissing the Complaint and All Cross Claims

Asserted As Against it

Plaintiff has withdrawn all of his claims against Spring (Edwards Affirm. in Opposition, ¶ 4). Accordingly, this portion of Spring's motion for summary judgment is moot. Therefore, the court turns to Spring's motion for summary judgment dismissing the cross claims brought as against it.

In moving for summary judgment, Spring argues that it was not negligent because it properly erected the scaffold at the job site on July 22, 2003, and later dismantled the scaffold on December 20, 2004. Spring contends that, after the scaffold was erected, it was not present at the construction site, and did not control the work of either Yates or Calistro. Spring also maintains that, if the wooden planks were moved after installation, they were moved by either Yates or Calistro.

In opposing Spring's motion, St. Francis argues that there is a jury question as to the adequacy of the scaffolding provided at the site. As argued by St. Francis, there is an issue of fact as to whether Spring should have placed boards on the first level of the scaffolding; had there been boards on the first level, plaintiff would not have fallen all the way through the scaffolding.

Calistro contends, in opposition to Spring's motion, that Spring has failed to meet its prima facie burden, asserting that there is an issue of fact as to whether the planks supplied by Spring were proper and safe. Calistro points out that the scaffold planks were only visually inspected before being reused, and that there is no indication as to how many times the planks were reused or how long the planks were used. Calistro also argues that there is an issue of fact as to whether Spring properly secured the planks, in light of plaintiff's testimony that the planks

were unsecured, and the lack of evidence that the planks had been moved prior to plaintiff's accident.

In this case, St. Francis and Calistro have asserted cross claims for common-law indemnification and contribution against Spring (Kovner Affirm. in Support of Motion for Summary Judgment, Exhs. B, C).³ "Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1st Dept 1985]). Common-law indemnification is predicated on vicarious liability without actual fault on the part of the indemnitee (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept], *lv dismissed* 7 NY3d 864 [2006]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]). 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 supervision and control over plaintiff's work (*McCarthy v Turner Constr., Inc.*, 72 AD3d 539 [1st Dept 2010]; *Mejia v Levenbaum*, 57 AD3d 216 [1st Dept 2008]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]; *Reilly v*

³Contrary to Spring's assertion, St. Francis did, in fact, assert cross claims for indemnification and contribution against Spring (Spring's Answer, First, Second, Third, and Fourth Cross Claims). The parties have not addressed St. Francis's cross claims for failure to procure insurance and contractual indemnification against Spring.

DiGiacomo & Son, 261 AD2d 318 [1st Dept 1999]).

“Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). “The ‘critical requirement’ for apportionment by contribution under CPLR article 14 is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought’” (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Although Spring asserts that it was not responsible for the condition of the scaffold at the time of plaintiff’s accident, there are issues of fact as to whether Spring was negligent and whether its negligence caused or contributed to plaintiff’s accident. Spring has failed to show that it was not negligent when it dismantled part of the scaffold prior to plaintiff’s accident on August 6, 2004. Virgil Lupu, a chief estimator employed by Spring, testified that the scaffold was partially dismantled on June 8, 2004 (Lupu EBT, at 61-63; Kovner Affirm. in Support, Exh. J, at 2). Lupu did not know which parts of the scaffold were dismantled at that time (Lupu EBT, at 63). Lupu further testified that there are no records which would indicate which parts were removed (*id.* at 124). Therefore, summary judgment is not appropriate (*see Williams v 7-31 Ltd. Partnership*, 54 AD3d 586 [1st Dept 2008] [issues of fact as to whether defendant supplied defective or unsafe scissor lift]; *Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225, 226 [1st Dept 2004] [where scaffold on which plaintiff was standing collapsed, there were material issues of fact as to whether scaffold erected by scaffold construction company was defective and whether

company was otherwise negligent in providing defective equipment]).

Therefore, the part of Spring's motion for summary judgment seeking dismissal of St. Francis and Calistro's cross claims for indemnification and contribution is denied.

St. Francis's Motion for Summary Judgment Dismissing Plaintiff's Labor Law § 200 and Common-Law Negligence Claims and for Contractual Defense and Indemnification and Common-law Indemnification from Calistro

Initially, the court notes that plaintiff has withdrawn his Labor Law § 200 and common-law negligence claims as against St. Francis (Edwards Affirm. in Opposition, ¶ 2). Therefore, that part of St. Francis's motion is also moot.

St. Francis's Third-Party Claim for Contractual Indemnification

St. Francis, the owner, moves for contractual defense and indemnification from Calistro, the subcontractor, pursuant to the subcontract between Yates and Calistro, which states as follows:

"Contractor⁴ . . . (a) shall provide all tools, scaffolds, equipment and supplies,"

"(d) To the fullest extent permitted by law, the Contractor will indemnify, defend and hold harmless YATES and Owner, their officers, directors, partners, representatives, agents and employees from and against any and all claims (including all claims for consequential damages, loss of profits and damage to property), suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability (including statutory liability) *arising in whole or in part and in any manner from injury and/or death of any person or damage to or loss of any property of any kind resulting from the acts, omissions, breach or default of Contractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by or for Contractor pursuant to any contract, Purchase Order, and/or related Proceed Order, except those claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of YATES.* Contractor will defend and bear all costs of defending any actions or proceedings brought against YATES and/or Owner, their officers, directors, agents and employees arising in whole or in part out

⁴"Contractor" is defined as Calistro in the subcontract (Taustine Affirm. in Support, Exh. S, at 1).

of any such acts, omissions, breach of default. . . .”

(Taustine Affirm. in Support, Exh. S, at 2 [emphasis supplied]).

St. Francis argues that it is entitled to a defense and indemnification because plaintiff allegedly fell off scaffolding, which was supplied by Spring, pursuant to a contract with Yates. St. Francis contends that Calistro was solely responsible for the use of the scaffolding, relying upon the equipment release in the subcontract between Yates and Calistro, which states:

“To: Yates Restoration Group, Ltd. (Yates)

We have requested permission *to use and operate ladders, scaffolding equipment, hoists, and/or other equipment owned, leased, or rented by Yates Restoration Group, Ltd. (Yates)*, and all other affiliates, all of which we have inspected and examined and determined to be in good operating order. We agree to advise you immediately if this equipment is not in good operating order, or in need of repair. We will assume and pay the cost of any such repairs to said equipment which may be made necessary by our use thereof, or for any loss or damage due to theft, vandalism or other cause.

Job Address:

We hereby assume entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether our employees or others, and to all property caused by, resulting from, arising out of, or occurring in connection with the use or operation of said equipment while in our use or under our control at the job site. . . .”

(*id.* [emphasis added]). St. Francis argues that Calistro was responsible for the scaffolding, in view of the testimony by Yates’s senior project manager that, if scaffold planks were moved, they would have been moved by Calistro (Callahan EBT, at 27, 39, 72).

In opposition to St. Francis’s motion, Calistro argues that it is the law of the case that plaintiff was employed by Yates at the time of his accident, and that St. Francis is collaterally estopped from relitigating the issue of plaintiff’s employment with Yates. Calistro points out that the contract states that Yates and “Owner” are not entitled to a defense or indemnification

where the claim or loss is “caused by the negligence of YATES.” Calistro argues that plaintiff’s accident did not arise from the work that was being performed pursuant to its subcontract, and that it did not supervise, direct or control plaintiff or his work. Calistro maintains that the equipment release does not entitle St. Francis to a defense or indemnification, since St. Francis was not a party to or beneficiary of that agreement. Finally, Calistro takes the position that there is no evidence that it was using or controlling the scaffolding in question at the time of the accident.

Although Calistro argues that it is the law of the case that plaintiff was an employee of Yates, this contention is without merit. “Pursuant to the doctrine of law of the case, judicial determinations made during the course of litigation before final judgment is entered may have preclusive effect provided that the parties had a full and fair opportunity to litigate the initial determination” (*Ruffino v Green*, 72 AD3d 785, 786 [2d Dept 2010] [internal quotation marks omitted]). The workers’ compensation determination was not made within the course of this litigation.⁵ And, as previously noted, given that St. Francis was not a party to the workers’ compensation proceeding, it is not barred from relitigating the issue of plaintiff’s employment with Yates.

“A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] 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” (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003] [internal quotation marks and citation

⁵Although the court dismissed Yates from the action, the court did not make any finding that plaintiff was employed by Yates.

omitted)). It is well established that “[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [internal quotation marks and citation omitted]).

In the instant case, the indemnification provision provides for indemnification “[t]o the fullest extent permitted by law” for any claims “arising in whole or in part . . . resulting from the acts, omissions, breach or default of [Calistro] . . . in connection with the performance of any work by or for [Calistro] pursuant to any contract, Purchase Order, and/or related Proceed Order, except those claims . . . caused by the negligence of YATES” (Taustine Affirm. in Support, Exh. S, at 2). Since the indemnification provision expressly provides for partial indemnification by incorporating the language “to the fullest extent permitted by law,” the provision does not violate General Obligations Law § 5-322.1 (*see Williams v City of New York*, 74 AD3d 479, 480 [1st Dept 2010]; *Kamin v James G. Kennedy & Co., Inc.*, 52 AD3d 263, 264 [1st Dept 2008]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]).

While St. Francis points to the language of the equipment release to show that Calistro controlled the scaffolding, the release only states that Calistro “assume[s] . . . liability for any and all damage or injury of any kind or nature whatever . . . resulting from, arising out of, or occurring in connection with [Calistro’s] use or operation of [the scaffolding] while in [its] use or under [its] control at the job site” (Taustine Affirm. in Support, Exh. S). However, there are issues of fact as to whether indemnification is triggered, i.e., whether plaintiff’s accident arose from any acts or omissions by Calistro, and whether the accident was caused by the negligence of

Yates. Although Yates's senior project manager testified that if a scaffold plank was moved, it would have been moved by Calistro, and that subcontractors would typically tie down planks after making adjustments to the scaffold (Callahan EBT, at 27, 72), this testimony does not establish that Calistro moved the planks. Therefore, St. Francis's motion for contractual indemnification against Calistro is premature at this time (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808-809 [2d Dept 2009] [where there are triable issues of fact as to which parties caused plaintiff's accident, it is premature to award summary judgment to third-party plaintiffs on cause of action for contractual indemnification]; *D'Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept 2007] [since it had not been determined whether plaintiff's injury had been caused by an act or omission by the subcontractor, an award of summary judgment on contractual indemnification was premature]; *Iurato v City of New York*, 18 AD3d 247, 248 [1st Dept 2005], *lv dismissed* 6 NY3d 806 [2006] [motion for contractual indemnification was premature, given that there was no determination as to the proximate cause of the injury or who was liable for the accident]).

St. Francis's Third-Party Claim for Common-law Indemnification

St. Francis also moves for summary judgment on its third-party claim for common-law indemnification against Calistro. St. Francis argues that it was not responsible for the work in question, and that Calistro was solely responsible for the maintenance of the scaffolding pursuant to the equipment release.

Calistro counters that there is no evidence that it was negligent or that any of its acts or omissions caused or contributed to plaintiff's accident. Calistro further argues that it did not have direct control over plaintiff or his work.

As noted above, common-law indemnification requires proof not only that “[the proposed indemnitee] 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*, 259 AD2d at 65), or, in the absence of negligence, that the proposed indemnitor had direct supervision and control over plaintiff’s work (*McCarthy*, 72 AD3d at 539).

In the present case, there are issues of fact as to whether Calistro was negligent and whether its negligence contributed to plaintiff’s accident. Indeed, the record is unclear as to whether Calistro created or had notice of loose scaffold planks. In August 2004, Calistro was still on the site, was performing a final clean-up of the site, and used the scaffolding (Sendon EBT, at 57, 60). Moreover, in view of the issues of fact as to the identity of plaintiff’s employer, there are further questions of fact as to whether Calistro had control over the work giving rise to plaintiff’s injury. Therefore, summary judgment on St. Francis’s third-party claim for common-law indemnification is not appropriate (*see Mendelsohn v Goodman*, 67 AD3d 753, 754 [2d Dept 2009] [“an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties”]; *Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004] [common-law indemnification was not ripe for adjudication, in view of factual issues as to extent to which tenant could be liable]).

Calistro’s Cross Motion for Summary Judgment Dismissing the Complaint, the Third-Party Complaint, and All Cross Claims Asserted Against it

Calistro moves for summary judgment dismissing the complaint, the third-party complaint, and all cross claims asserted against it. Although Calistro argues that it cannot be

liable under the Labor Law, as noted by plaintiff, he has not asserted any direct claims against Calistro (Edwards Affirm. in Opposition, ¶ 5). Therefore, Calistro may only be liable for indemnification and contribution.

As for its negligence, Calistro maintains that it did not have the authority to supervise, direct or control plaintiff or his work, and did not create or have notice of any defective condition.⁶ In support, Calistro submits an affidavit from Valeriano Sendon, its president, who states that he did not witness any accidents on August 6, 2004, and that he is unaware that any employees of Calistro were involved in any accidents (Sendon Aff., ¶ 8). Additionally, Calistro puts forth an affidavit from Domingo Silva, an employee of Yates who worked at the site on August 6, 2004 (Silva Aff., ¶ 6). Silva is unaware that plaintiff was an employee of Calistro or had an accident on that date (*id.*, ¶¶ 5, 6). Calistro also submits its payroll records, which show that “Dominick” Silva, “Dominick” Volpe, and Daniel Callahan were never employees of Calistro on the church renovation project (Heffernan Affirm. in Support, Exh. E).

In response, St. Francis argues that, pursuant to the equipment release, Calistro assumed responsibility for the condition of the scaffolding. St. Francis again asserts that there is an issue of fact as to whether Calistro was negligent in maintaining the scaffolding in question.

Plaintiff also opposes Calistro’s motion, arguing that Calistro has failed to eliminate issues of fact as to its liability in common-law negligence by failing to secure the scaffold planks.

Calistro has failed to establish that it did not create or have notice of the loose planks on the scaffold. Indeed, Calistro has not submitted any evidence to show that it did not remove the

⁶Although Calistro asserts that it never received any complaints regarding its work, it has not submitted any evidence to support this contention.

nails on the scaffold planks or otherwise make the scaffold planks unsafe. In August 2004, Calistro was still on the job site, and was performing a final clean-up of the work site (Sendon EBT, at 57). Calistro used the scaffolding (*id.* at 60). Therefore, Calistro's cross motion for summary judgment must be denied (*see Lyons v Schenectady Intl.*, 299 AD2d 906, 906-907 [4th Dept 2002] [summary judgment was properly denied on common-law indemnification claim, where there were issues of fact as to whether subcontractor created or had notice of a dangerous condition at the work site]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 003) of defendant Spring Scaffolding Inc. for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 004) of plaintiff Juan Ramon Medina Hernandez for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendant St. Francis Xavier Church is denied; and it is further

ORDERED that the motion (sequence number 005) of defendant/third-party plaintiff St. Francis Xavier Church for summary judgment is denied; and it is further

ORDERED that the cross motion of third-party defendant Calistro Construction Corp. for summary judgment is denied; and it is further

ORDERED that the parties shall appear on January 27, 2011 at 2:30 pm for a pre-trial conference in Part 11, room 351, 60 Centre Street, New York, NY .

Dated: January 19, 2011

FILED



J.S.C.

JAN 31 2011

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