Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ABDUL WAHAB,

Plaintiff,

-against-

AGRIS & BRENNER, LLC, et al.,
Defendants.

AGRIS & BRENNER, LLC, et al.,
Third-Party Plaintiffs,

-against-

ATLANTIC CONTRACTING, LLC,
Third-Party Defendant.

Index No. 27893/08

Motion
Date December 14, 2010

Motion
Cal. No. 19

Motion
Sequence No. 2

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

Plaintiff, Abdul Wahab sues for personal injuries suffered by him, a construction worker, on August 9, 2008 at 64-64 Dry Harbor Road,, Middle Village, New York, when a metal plank on a pipe scaffold collapsed causing him to fall ten (10) feet to the ground. On August 9, 2008, Pearl Brenner, Andrew Brenner, and Joann Brenner were the owners of 64-64 to 64-76 Dry Harbor Road, Middle Village, New York. Agris & Brenner, LLC was the landlord of 64-64 to 64-76 Dry Harbor Road, Middle Village, New York on August 9, 2008. Plaintiff commenced this action to recover for serious injuries. Plaintiff asserts liability against defendants

pursuant to Labor Law §§ 200, 240(1), and 241(6) and under common-law negligence theories. Defendants commenced a third-party action against plaintiff's employer, Atlantic Contracting, LLC, alleging causes of action sounding in common-law indemnification, contribution, and contractual indemnification. Plaintiff moves for summary judgment on liability pursuant to Labor Law § 240(1). Defendants/third-party plaintiffs cross-move for summary judgment dismissing plaintiff's Complaint pursuant to CPLR 3212, and/or striking third-party defendant, Atlantic Contracting LLC's affirmative defense as barred by section 11 of the Workers' Compensation Law, and granting summary judgment over and against the third-party defendant.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Plaintiff established a prima facie case that his claim under Labor Law § 240(1) must be granted. Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v. State of New York*, 59 AD3d 666 [2009]; *Rau v. Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see, Gordon v. Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v. Puccia*, 57 AD3d 54 [2008]; *Riccio v. NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries

(*see, Chlebowski v. Esber*, 58 AD3d 662 [2009]; *Rakowicz v. Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v. Brogor Realty Corp.*, 45 AD3d 828 [2007]). Plaintiff established that section 240(1) was violated by defendants in that plaintiff was provided with defective and improper equipment, the plaintiff was provided with defective and improper scaffolding, plaintiff was not provided with proper scaffolding, the subject scaffold was not properly secured, and plaintiff was not provided with proper safety equipment and protection from falls. In support of the motion, plaintiff presented, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testifies that as he was standing on the top metal plank of the pipe scaffold, the plank collapsed and he fell ten (10) feet to the ground; the examination before trial transcript testimony of Pearl Brenner, who testified that: on August 9, 2008, Agris & Brenner, LLC owned the subject premises, she had a membership interest in Agris & Brenner LLC of 64%, that Joann Brenner and Andrew Brenner each maintained a membership interest in Agris & Brenner LLC of 18%, Agris & Brenner hired Atlantic Contracting to perform roofing and construction work at 64-64 to 64-76 Dry Harbor Road, Middle Village, New York in August 2008, that she was present at the commercial property every summer for several years prior to the accident and including 2008 to visit her tenants and to check on the property, and that she had the authority to correct any unsafe condition on the property.

Defendants/third-party plaintiffs establish a prima facie case that there are no triable issues of fact pursuant to Labor Law § 240(1). Defendants/third-party plaintiffs submit, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testified that: the workers unloaded one metal scaffold and 3 pieces of wooden plank, both the metal plank and the wooden planks were new, there were no defects in the wooden planks, the metal scaffold platform, or the pipe scaffolding, that he is unable to state whether he "looked" or if he "looked carefully" to see if the metal scaffolding was properly supported by the scaffold pipes before stepping on the metal scaffolding, he knows that the first section of the scaffolding was done correctly because it was done in front of him, the moment he stepped onto the metal scaffold, it moved and "went down,", that when he climbed up the scaffold, he had no belt or harness, there was a safety harness in the vehicle, the harness had a connection or tail that could be affixed to the scaffolding, he did not put the harness on that day and does not recall if any of the workers told him to put it on, he reflected on whether he should put on the harness belt, but he decided not to put it on; the examination before trial transcript testimony of non-party witness, Mohammed Uddin, who testified, inter alia,

that: he used to work for Atlantic Contracting, LLC and was working at the location of the accident on the day it occurred, after the scaffold was erected, Mr. Uddin climbed up the scaffold and began working, that Mr. Islam and a laborer stood on the platform at some point to perform work, the workers went up and down the scaffold, while working on the scaffold that day, Mr. Uddin did not have any problems with the scaffold, at the time of the accident, there were 2 or 3 harnesses in the van, when he observed the plaintiff on the ground, he was not wearing a harness; and the sworn affidavit of Henry R. Naughton, a licensed professional engineer, who averred that: he inspected the scaffold at the plaintiff's home on April 23, 2010, that the sole proximate cause of plaintiff's accident was his own conduct, that had plaintiff taken the minute or two to put on the harness lanyard to the scaffold, he would not have contacted the sidewalk when he fell from the scaffold.

The Court finds that there are triable issues of fact as to whether defendants are liable under Labor Law § 240(1). It is undisputed that the accident is unwitnessed by anyone other than plaintiff. "[W]here the manner of the happening of the accident is within the exclusive knowledge of the plaintiff, an award of summary judgment on liability is inappropriate because the defendant should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact. On this record, there is, at the very least, a question of fact as to how the accident occurred" (*Manna v. New York City Housing Authority*, 215 AD2d 335 [1st Dept 1995][internal citations omitted]).

Defendants/third-party plaintiffs established a prima facie case that there are no triable issues of fact pursuant to Labor Law § 200 and common-law negligence, as the defendants did not have the requisite degree of supervision and control for liability to attach. Labor Law § 200 codifies the common-law duty of owners and general contractors to provide construction site workers with a safe working environment (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Damiani v. Federated Department Stores, Inc.*, 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (Id.) Defendants/third-party plaintiffs submit, inter alia, the examination before trial transcript testimony of Pearl Brenner, plaintiff himself, and non-party witness, Mohammed Uddin. Plaintiff fails to oppose

this branch of the motion. Accordingly, plaintiff's claims under Labor Law § 200 and common-law negligence are dismissed.

Defendants/third-party plaintiffs established a prima facie case that there are no triable issues of fact pursuant to Labor Law § 241(6), as plaintiff failed to prove that a specific industrial board regulation was violated and that the violation was a proximate cause of his injuries. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (*see, Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." *(Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards", but rather must establish "concrete specifications" (*see, Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996]). Defendants/third-party plaintiffs submit, inter alia, the examination before trial transcript testimony of Pearl Brenner, plaintiff himself and non-party witness, Mohammed Uddin. Plaintiff fails to oppose this branch of the motion. Accordingly, plaintiff's claims under Labor Law § 241(6) are dismissed.

That branch of defendants/third-party plaintiffs' cross motion for an order granting summary judgment against third-party defendant, Atlantic Contracting, LLC is hereby denied. As the issue of whether or not Agris & Brenner, LLC, Agris & Brenner, Pearl Brenner, Joann Brenner and Andrew Brenner were negligent has not been decided, the issues of common-law indemnification, contribution, and contractual indemnification are not yet ripe. Therefore, movant's request for summary judgment on its common-law indemnification, contribution, and contractual indemnification claims is denied. Dismissal of the third-party complaint is premature. As it has not yet been adjudged as to whether defendants are liable to plaintiff, the issues of whether third-party defendant is liable to third-party plaintiff is not yet ripe *(Marano v. Commander Electric, Inc.*, 12 AD3d 571 [2d Dept 2004; *Tulovic v. Chase Manhattan Bank, N.A.*, 309 AD2d 923 [2d Dept 2003]; *Prenderville v. International Service Systems*, 10

AD3d 334 [1st Dept 2004]; *Gomez v. National Center for Disability Services, Inc.*, 306 AD2d 103 [1st Dept 2003]; *Northland Associates v. Joseph Baldwin Construction Co., Inc.*, 6 AD3d 1214 [4th Dept 2004]).

That branch of defendants/third-party plaintiffs' cross motion for an order striking third-party defendant, Atlantic Contracting LLC's affirmative defense as barred by section 11 of the Workers' Compensation Law is hereby granted. Defendants/third-party plaintiffs established a prima facie case that the protections afforded by section 11 of the Workers' Compensation Law are only available to an employer who procures the requisite coverage (*Boles v. Dormer Giant, Inc.*, 4 NY3d 235 [2005]), and that third-party defendant did not procure any Workers' Compensation coverage for plaintiff. Atlantic Contracting, LLC has failed to establish a prima facie case that it did procure the requisite Workers' Compensation coverage for plaintiff.

Third-party defendant's motion for summary judgment dismissing the third-party Complaint is denied.

This constitutes the decision and order of the Court.

Dated: April 4, 2011

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Howard G. Lane, J.S.C.