

Carroll v 1156 APF LLC

2011 NY Slip Op 32455(U)

September 6, 2011

Sup Ct, NY County

Docket Number: 110725/2008

Judge: Emily Jane Goodman

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SCANNED ON 9/9/2011

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

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 110725/2008

CARROLL, SEAN

vs

1156 APF LLC

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

or _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

No(s). _____

Upon the foregoing papers, It is ordered that this motion is

Decided per

attached

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

FILED

SEP 09 2011

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

Dated: 9/6/11

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 17

-----X
Sean Carroll a/k/a Sean Carragher,
Plaintiff,

Index
Number
110725/2008

-against-

1156 APF LLC, APF Properties LLC
and B. Geller Restoration, Inc.,
Defendants.

-----X

1156 APF LLC and APF Properties LLC,
Third-Party Plaintiffs,

-against-

Rockledge Scaffolding Corporation,
Third-Party Defendant.

-----X

B. Geller Restoration, Inc.,
Second Third-Party Plaintiff,

-against-

Rockledge Scaffolding Corporation,
Second Third-Party Defendant.

-----X

Emily Jane Goodman, J.:

Plaintiff moves for summary judgment on liability on his claim under Labor Law § 240 (1) (the Scaffold Law) against 1156 APF LLC, APF Properties LLC (together, APF) and B. Geller Restoration, Inc. (Geller) (collectively, Defendants). APF moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it, for summary judgment on common-law and contractual indemnity against Geller and for

FILED

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summary judgment on common-law and contractual indemnity against Rockledge Scaffolding Corporation (Rockledge). Geller cross-moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it, dismissing plaintiff's Labor Law § 241 (6) claims under 12 NYCRR (the Code) §§ 23-1.5, 23-1.7, 23-1.7 (b) and 23-5.1 (f) and for summary judgment on contractual and common-law indemnity against Rockledge. Finally, Rockledge moves for summary judgment dismissing plaintiff's claims for past lost wages and future lost earnings. The motions and cross motion are consolidated for disposition and decided as noted below.

Parties

Plaintiff is a construction worker, employed by Rockledge, who was working on July 21, 2008, as part of a five-man demolition crew to dismantle a sidewalk bridge located at 1156 6th Avenue, New York, N.Y. (the Job Site) (bill of particulars, items 3, 8, 9). He was injured during the demolition of the sidewalk bridge, when he fell to the ground and suffered multiple fractures, resulting in total disability and paraplegia (*id.*, items 2, 3, 5, 10).

APF is the owner of the Job Site (Telleria EBT, at 6, 9-10) and, through its agent Newmark Knight Frank (Newmark), it entered into a contract for facade repairs to the building at the Job

Site, as well as at a nearby location, 25 West 45th Street, New York, N.Y. (the 45th Street Job Site) (*id.* at 15). Through its agent Newmark, it also entered into an agreement with Rockledge for erection and removal of a sidewalk bridge in connection with the facade work (*id.* at 67).

Geller is a company that performs facade restoration and repair work and it was the general contractor for the facade work at the Job Site, as well as for facade work at the 45th Street Job Site (Myles EBT, at 9-10).

Rockledge is a company that erects and dismantles sidewalk bridges and scaffolds and it was plaintiff's employer on July 21, 2008 (Harrington EBT, at 6, 19). It had previously erected and, on the day of the accident, was dismantling, the sidewalk bridge pursuant to a contract with Newmark, APF's agent (*id.* at 9-11).

Parties' Contentions

Plaintiff contends that he was hired by Rockledge in 2004 and, on July 21, 2008, that he was part of a five-man crew dismantling a sidewalk bridge at the Job Site (plaintiff EBT, at 9, 30, 33). He states that he was wearing a safety harness (*id.* at 76), but that there were no safety lines or ropes attached to the harness and that there was nothing onto which to attach safety lines (*id.* at 43, 105, 108; Deas affidavit).

Plaintiff asserts that he was assigned to go to the topmost

portion of the sidewalk bridge, 18 feet above the ground, and he was removing wooden planks, that had already had the nails securing them removed (plaintiff EBT, at 115), and passing the planks to DeLeon, the foreman, on a lower level, who would pass the planks to the other members of the work crew (*id.* at 34, 42-44). He further states that, after some time passing planks to DeLeon (*id.* at 48; DeLeon EBT, at 45), he felt the tin sheeting give way from underneath him and that he fell through it to the ground (plaintiff EBT, at 49-50, 54), resulting in his spinal injuries, subsequent surgery and ultimately, paraplegia (*id.* at 59, 61).

Plaintiff further asserts that he never heard of APF (*id.* at 45) and that only Rockledge employees gave him instructions as to how to perform his job (*id.*). He also states that he did not have a legitimate resident alien card (Green Card) or Social Security card, due to his lack of legal status (*id.* at 118-119). He contends that Rockledge obtained these documents for him, when he started working there (*id.* at 118-121).

APF contends that it needed facade work done at the Job Site and the 45th Street Job Site and that it, therefore, hired Geller under a contract dated October 17, 2007 (the Contract) (Telleria EBT, at 13-15, 27). The Contract contained an indemnification provision, section 8.13.1 (the Indemnification Clause).

APF states that, aside from the facade work, there was no other work being done at the Job Site that would require a sidewalk bridge (*id.* at 21), that Geller was the only contractor involved in the facade work and that APF did no work itself, supplied no tools or equipment or provided any instruction as to how to perform the dismantling of the sidewalk bridge and that, as general contractor, Geller was responsible for supervising Rockledge (*id.* at 44, 58-59, 68). It also states that, under a proposal from Rockledge dated August 23, 2007, and a purchase order from Rockledge dated September 14, 2007, for erection and dismantling of the sidewalk bridge (together, the Rockledge Contract), it is entitled to contractual indemnity under paragraph 11 (the Rockledge Indemnity Clause).

Geller asserts that it was the general contractor for the facade work at the Job Site, but that it contracted out the work to subcontractors including GNA Restoration (Myles EBT, at 11, 15). It states that the erection and demolition of the sidewalk bridge was done by Rockledge (*id.* at 20, 21, 25, 31).

Geller further states that it was instructed by Mr. Thompson from Newmark to have the sidewalk bridge removed and it passed on his instruction to Rockledge (*id.* at 38, 41). It further states that there was no contract between it and Rockledge and that, while it had the authority to stop work, it did not supervise the

erection or dismantling of the sidewalk bridge (*id.* at 65, 73-74), provide tools or equipment or instructions as to the manner of removing the sidewalk bridge (*id.* at 74-76).

Rockledge contends that its business is the erection and removal of sidewalk bridges and scaffolds (Harrington EBT, at 6), that it erected the sidewalk bridge pursuant to instructions from Geller (*id.* at 9, 19), that the foreman would tell its workers how to perform the job (*id.* at 27) and that it provided safety harnesses and other appropriate safety equipment to its workers (*id.* at 53). It further states that plaintiff provided Rockledge with his Green Card and Social Security card (*id.* at 36, 74).

Rockledge states that Geller did not supervise installation, or removal, of the sidewalk bridge (*id.* at 85-86). It also frivolously asserts that it was not necessary for workers to be tied off during the erection or removal of a sidewalk bridge (*id.* at 88, 113), and, therefore, that it did not provide safety lines to the foreman (*id.* at 60-61), because the sidewalk bridge was too close to the ground (*id.* at 104). It states that for the same reason, safety nets could not be used (*id.* at 101). It also states that it was not supervised by Geller and that the foreman DeLeon was the only person telling plaintiff and the other Rockledge workers how to do the job (DeLeon EBT, at 81, 83).

Defendants and Rockledge assert that the accident was caused

due to the manner in which plaintiff was removing planks by standing on the portion of the tin sheeting that was not supported by steel beams underneath it (*id.* at 60-61) and that, accordingly, his conduct was the sole proximate cause of the accident.

Labor Law § 200 and common-law negligence

Defendants seek dismissal of plaintiff's claims against them under Labor Law § 200 and common-law negligence.

Labor Law § 200 is a codification of common-law negligence and, to be held liable, a party must have the authority to control the activity that caused the plaintiff's injury (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). There is no liability for an owner that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

Neither APF (*Telleria EBT*, at 58-59) nor Geller (*Myles EBT*, at 73-74) supplied any tools or equipment or supervised the manner in which the dismantling of the sidewalk bridge occurred. Only Rockledge had supervisory authority over the manner in which the work was performed (plaintiff *EBT*, at 45; *DeLeon EBT*, at 83).

Plaintiff has not presented any opposition to the portion of APF's motion that seeks dismissal of his Labor Law § 200 and

common-law negligence claims against it (Gail Kelner affirmation dated April 14, 2011, ¶ 5), but has stated that, since Geller had the responsibility under the Contract to supervise subcontractors such as Rockledge (Gail Kelner affirmation dated April 15, 2011, ¶¶ 16-18), Geller had the authority to control Rockledge's activity.

However, both APF and Geller have proffered evidence that the manner and means of dismantling the sidewalk bridge was solely controlled by Rockledge (plaintiff EBT, at 45; DeLeon EBT, at 83). General supervisory authority is insufficient to constitute control over the manner in which the work was performed (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). Consequently, since neither APF nor Geller had supervisory authority over the manner in which plaintiff performed the work, plaintiff's Labor Law § 200 and common-law negligence claims against them are dismissed (*Lombardi*, 80 NY2d at 295; *Hughes v Tishman Constr. Corp.*, 40 AD3d at 306; *Haider v Davis*, 35 AD3d 363, 364 [2d Dept 2006]).

Labor Law § 241 (6)

Labor Law § 241 provides:

"All contractors and owners and their agents
... when ... demolishing ... buildings ...
shall comply with the following requirements:

(6) All areas in which ... demolition work is

being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] ... [in accordance with rules promulgated by the Commissioner of Labor]."

A cause of action under Labor Law § 214 (6) must allege violation of a specific, rather than a general, safety standard (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]).

Geller seeks dismissal of plaintiff's Labor Law § 241 (6) claim under Code sections 23-1.5, 23-1.7, 23-1.7 (b) and 23-5.1 (f) (Geller Memorandum of Law, at 7) and does not seek dismissal of the claims under Code sections 23-5.1 and 23-5.1 (k) (*id.* at 7, n 2). Plaintiff has withdrawn his claim for violation of Code section 23-1.5 (Gail Kelner affirmation dated April 15, 2011, ¶ 14) and has not presented any opposition to dismissal of his claims based upon Code sections 23-1.7 and 23-5.1 (f). Therefore, plaintiff's claims under Labor Law § 241 (6) as to Code sections 23-1.5, 23-1.7 and 23-5.1 (f) are dismissed. The remaining claim involves Code section 23-1.7 (b).

12 NYCRR 23-1.7 (b) (the Hazardous Opening Rule) provides:

"(b) Falling hazards
 (1) Hazardous openings
 (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing"

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

- (b) An approved life net installed not more than five feet beneath the opening; or
- (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Geller asserts that the Hazardous Opening Rule is inapplicable, since it is designed for "protections against falls from an elevated area to a lower area through openings large enough for a person to fit" (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]) and that plaintiff did not fall through the opening through which he handed the planks to the foreman.

Plaintiff asserts that the Hazardous Opening Rule is applicable, since the tin sheet covering an opening gave way, causing him to fall. This assertion raises the issue of the adequacy of the substantial covering of the tin sheeting over the steel beams on the sidewalk bridge. Where a covering gives way, the Hazardous Opening Rule has been held to be applicable (*Stephens v Triborough Bridge and Tunnel Authority*, 55 AD3d 410 [1st Dept 2008]; *Bell v Bengomo Realty, Inc.*, 36 AD2d 479 [1st Dept 2007]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 [1st Dept 1999]). Dismissal of plaintiff's claim under the Hazardous Opening Rule is, therefore, denied.

Labor Law § 240 (1)

Labor Law § 240 (1) provides that:

"All contractors and owners and their agents ... in the erection, demolition ... of a building or structure shall furnish or erect, or cause to be furnished or erected ... scaffolding, hoists, ... ladders, slings, ... braces, ... ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a [worker]."

The purpose of the Scaffold Law is to protect workers and to place responsibility for safety equipment and practices on owners and general contractors who are deemed to be best situated to bear that responsibility (*Ross*, 81 NY2d at 500). However, the Scaffold Law is aimed at the extraordinary risks of elevation-related hazards, rather than the ordinary risks of a construction site (*id.* at 500-501; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Plaintiff has presented evidence that, while he was working at the elevated level of 18 feet above the ground on the sidewalk bridge, the tin sheeting gave way underneath him (plaintiff EBT, at 49-50, 54, Deas affidavit) and that he fell to the ground. A scaffold that collapses (*Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 721-722 [2d Dept 2011]; *Tapia v Mario Genovesi & Sons, Inc.* 72 AD3d 800, 801 [2d Dept 2010]) fails to provide adequate protection to the worker for the work performed and,

therefore, constitutes a violation of the Scaffold Law. Even where, as in this case, the structure is being dismantled, if it is "inadequate ... to protect workers against the elevation-related hazards encountered while ... dismantling [the structure since it collapses]" (*Cody v State of New York*, 52 AD3d 930, 931 [3d Dept 2008]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012, 1013 [3d Dept 1990]), plaintiff is entitled summary judgment on liability.

However, Defendants contend that they have a defense based upon plaintiff's conduct being the sole proximate cause of the accident.

Sole Proximate Cause

A plaintiff who refuses to use an available safety device is considered to be a recalcitrant worker and is, therefore, held to be the sole proximate cause of the accident (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). This bars recovery under the Scaffold Law. Similarly, a plaintiff who fails to use a ladder available at the job site and who jumps off an inverted bucket elevated four feet is "the sole cause of his injury" (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]).

Defendants frivolously contend that plaintiff's conduct in stepping on the tin sheeting where it was unsupported by steel

beams makes his conduct the sole proximate cause of the accident.

"[A] plaintiff who knowingly chooses to use defective or inadequate equipment ... has no claim under [the Scaffold Law]" (*Miro v Plaza Constr. Corp.*, 38 AD3d 454, 455 [1st Dept], mod 9 NY3d 948 [2007]).

Over and over again, the Court has observed that the sole proximate cause argument is raised as an automatic defense, often without any merit. It is particularly egregious to do so where, as here, Defendants' argument is that plaintiff is the sole proximate cause of his injury, based on Defendants' assumption that plaintiff failed to walk on that portion of the sidewalk bridge's tin sheeting which had steel beams underneath. The argument, that plaintiff was expected to walk at a height, without any protection whatsoever, above beams covered with tin sheeting, as if on a balance beam, or risk a dangerous fall if he happened to veer off course, turns the Labor Law in its head. Further, although Defendants cite to testimony that plaintiff could have tied off on a header beam of the sidewalk bridge and point out that plaintiff was provided with a safety harness, Rockledge determined that no safety lines would be provided and no anchorage points provided to which to tether the safety lines (*Harrington EBT*, at 88, 113, 60-61, *Dias* affidavit). Therefore, Defendants did not provide plaintiff with appropriate safety

equipment as the safety harness, without any line, is worthless (see *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 509-510 [1st Dept 2009]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [1st Dep 2008]). There is also no evidence to raise an issue of fact that plaintiff was a recalcitrant worker, who knew that harness lines were available on site, which he was expected to use, but did not use, for no good cause (see *Pietrowski v Are-East River Science Park, LLC*, -AD3d-, 2011 WL 2899096 [1st Dept 2011] [holding that where safety cables were at the job site, plaintiff's failure to use them raised an issue of fact as to his conduct being the sole proximate cause]). Consequently, as Defendants have not shown that plaintiff's purportedly wrongful conduct was the sole proximate cause of the accident plaintiff's motion for summary judgment on liability against Defendants on his Scaffold Law claim is granted.

Common-Law and Contractual Indemnity

Common-law indemnification shifts responsibility from a party liable based upon its status to a party at fault (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]). In contractual indemnity, a party seeking indemnity must show that it is free from negligence, but need not show that the proposed indemnitor is negligent (*Uluturk v City of New York*, 298 AD2d

233, 234 [1st Dept 2002]).

The claims against APF and Geller based upon Labor Law § 200 and common-law negligence have been dismissed and the remaining claims against them are based upon their status as owner and general contractor, respectively. Consequently, the portion of APF's motion that seeks summary judgment based upon common-law indemnity against Geller must be denied. The only remaining claim for negligence based upon fault is against Rockledge, based upon its supervision and control of the dismantling of the sidewalk bridge.

An owner and a general contractor (*Leon v Peppe Realty Corp.*, 190 AD2d 400, 411 [1st Dept 1993]) are entitled to common-law indemnity from a subcontractor whose negligence is the cause of a worker's injury. Responsibility is thereby shifted to the party at fault.

The portion of APF's motion that seeks summary judgment on common-law indemnity against Rockledge and the portion of Geller's cross motion that seeks summary judgment on common-law indemnity against Rockledge are both granted, conditioned upon a finding at trial that Rockledge is negligent.

The Indemnification Clause provides:

"[t]o the fullest extent permitted by law ... the Contractor shall indemnify and hold harmless the Owner ... from and against

claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury ..., but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable."

The Rockledge Contract contains the Rockledge Indemnity Clause which states:

"[Rockledge] agrees to indemnify, defend and hold the Customer, ... its ... agents and employees harmless from and against all claims, damages, losses, suits, judgments, actions and expenses (including attorneys' fees and costs) caused directly and solely by [Rockledge], its employees or other persons under [its] direct and immediate control."

APF seeks summary judgment on contractual indemnity against Geller under the Indemnity Clause and against Rockledge under the Rockledge Indemnity Clause. Geller seeks summary judgment on contractual indemnity against Rockledge under the Rockledge Indemnity Clause.

The right to contractual indemnity depends upon the language of the contractual provision (*Smith v Broadway 110 Devs., LLC*, 80 AD3d 490, 491 [1st Dept 2011]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051-1052 [2d Dept 2007]). Additionally, a party seeking contractual indemnity must show that it is not negligent, but, in this case, both APF and Geller have already made this showing.

The Indemnity Clause requires Geller to indemnify APF for claims and damages arising out of the work to the extent caused by the negligent acts or omissions of the contractor (Geller) or a subcontractor. Since the sidewalk bridge was erected as part of the facade work, the accident arose out of the work and APF has, therefore, shown its entitlement to summary judgment on contractual indemnity against Geller, conditioned upon a finding at trial that the accident occurred due to the subcontractor's (Rockledge's) negligent actions or omissions.

APF has established its entitlement to summary judgment on contractual indemnity against Rockledge, pursuant to the Rockledge Indemnity Clause, which provides that Rockledge is responsible to indemnify the Customer (APF) for claims and actions caused solely by Rockledge, its employees or others under its control. There is no requirement under the Rockledge Indemnity Clause that APF show that Rockledge was negligent and the court will not rewrite the Rockledge Contract to insert such a requirement (*Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Similarly, Geller seeks summary judgment on contractual indemnity against Rockledge. Rockledge states that there was no contract between it and Geller, but the Rockledge Indemnity Clause provides that Rockledge must indemnify the customer (APF)

and its agents. Geller was the general contractor for the facade work and it forwarded APF's instruction to Rockledge to remove the sidewalk bridge. Geller is, therefore, entitled to contractual indemnity under the language of the Rockledge Indemnity Clause.

Plaintiff's Claim For Lost Wages

The final issue arises from Rockledge's motion for summary judgment dismissing plaintiff's claim for past lost earnings and future lost wages. It seeks dismissal of these claims based upon plaintiff's lack of legal resident alien status. Plaintiff does not deny that he lacks such status. However, he states that his Green Card and Social Security card were obtained for him by Rockledge when he began his employment with the company (plaintiff EBT, at 118-121). Rockledge contests this and asserts that plaintiff supplied it with false documentation (Harrington EBT, at 36, 74).

Lack of legal status, in and of itself, does not require dismissal of an injured undocumented alien's claim to lost wages, since "limiting [this claim ... would lessen an employer's incentive to comply with the Labor Law and supply all of its workers [with a] safe workplace" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 359 [2006]). The federal immigration laws do not make it a crime to work without documentation, but rather they

prohibit the tendering of false documents (*id.* at 360; *see also Angamarca v New York City Partnership Housing Development Fund, Inc.*, -AD3d-, 2011 WL 2448131 [1st Dept 2011]). Thus although 'an undocumented alien may be precluded from recovering damages for lost wages if he or she obtained employment by submitting false documentation to the employer'" (*Coque v Wildflower Estates Devs., Inc.*, 58 AD3d 44, 53 [2d Dept 2008] [internal citation omitted; italics in original] such preclusion is not automatic.

The motion must be denied. There is a disputed issue of fact as to whether plaintiff supplied a false Green Card and a false Social Security card to Rockledge, inducing it to hire him or whether Rockledge obtained false documentation for plaintiff. Further, Rockledge has not established that it took reasonable steps to verify the employee's eligibility. The Court in *Coque* held that "[i]f the employer hires the employee with the knowledge of the employee's undocumented status, or without verifying the employee's eligibility for employment, the employer has not been induced by the false document to hire the employee and, thus, the employee has not 'obtained employment by' submitting the false document (*id.* at 53; *see also Balbuena*, 6 NY3d at 359; *Janda v Michael Rienzi Trust*, 78 AD3d 899, 901 [2d Dept 2010]; *Macedo*, 68 AD3d at 511). Therefore, Rockledge's motion to dismiss plaintiff's claim for past lost earnings and

future lost wages is denied.¹

It is, therefore,

ORDERED that the portion of 1156 APF LLC's and APF Properties LLC's motion that seeks dismissal of plaintiff's claims under Labor Law § 200 and common-law negligence against them is granted; and it is further

ORDERED that the portion of said parties' motion for summary judgment on common-law indemnity against B. Geller Restoration, Inc. is denied; and it is further

ORDERED that the portion of said parties' motion for summary judgment on common-law indemnity against Rockledge Scaffolding Corporation is granted, conditioned upon a finding at trial that said party is negligent; and it is further

¹Although *Balbuena v IDR Realty LLC*, 6 NY3d 338, *supra* distinguished *Hoffman Plastic Compounds, Inc. v NLRB* (535 US 137 [2002]) on the grounds that in that case, it was established that the plaintiff had tendered false documentation, the Court of Appeals did not necessarily foreclose recovery by an injured worker who also tendered false documentation. As noted in *Balbuena*, the Immigration and Nationality Act does not contain an express statement by Congress that it was intended to preempt state laws regarding the scope of recovery in personal injury actions, and therefore, the Court found no express or field preemption (*Balbuena v IDR Realty LLC*, 6 NY3d at 357). Given the Court of Appeals' deep concern that limiting an undocumented worker's lost wages claim would lessen an employer's incentive to comply with the Labor Law (*id.* at 359), it is not clear whether that concern (which applies even where an injured worker tenders false documentation), would result in a determination that an worker who tenders false documentation is not preempted or otherwise foreclosed from making a lost wages claim.

ORDERED that the portion of said parties' motion for summary judgment on contractual indemnity against B. Geller Restoration, Inc. is granted, conditioned upon a finding at trial that Rockledge Scaffolding Corporation is negligent; and it is further

ORDERED that the portion of said parties' motion that seeks summary judgment on contractual indemnity against Rockledge Scaffolding Corporation is granted; and it is further

ORDERED that the portion of B. Geller Restoration, Inc.'s cross motion that seeks dismissal of plaintiff's claims under Labor Law § 200 and common-law negligence against it is granted; and it is further

ORDERED that the portion of said party's cross motion to dismiss plaintiff's claims under Labor Law § 241 (6), as to 12 NYCRR §§ 23-1.5, 23-1.7 and 23-5.1 (f), is granted and, as to 12 NYCRR § 23-1.7 (b), is denied; and it is further

ORDERED that the portion of said party's cross motion that seeks summary judgment on common-law indemnity against Rockledge Scaffolding Corporation is granted, conditioned upon a finding at trial that said party is negligent; and it is further

ORDERED that the portion of said party's cross motion that seeks summary judgment on contractual indemnity against Rockledge Scaffolding Corporation is granted; and it is further

ORDERED that plaintiff's motion for summary judgment on

liability against 1156 APF LLC, APF Properties LLC and B. Geller Restoration, Inc. on his claim under Labor Law § 240 (1) is granted; and it is further

ORDERED that Rockledge Scaffolding Corporation's motion for summary judgment dismissing plaintiff's claims for past lost earnings and future lost wages is denied; and it is further

ORDERED that the parties immediately email afield@courts.state.ny.us regarding scheduling a firm trial date.

This Constitutes the Decision and Order of the Court.

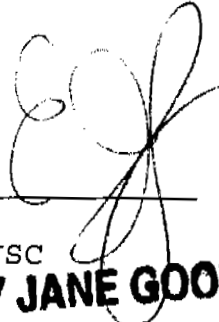
Dated: September 6, 2011

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