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

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THOMAS McGLINCHEY and HELEN McGLINCHEY,

Plaintiffs,

-against-

Index No.: 7089/05

VASSAR COLLEGE,

Defendant.

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VASSAR COLLEGE,

Third-Party Plaintiff,

-against-

KIRCHHOFF CONSTRUCTION MANAGEMENT, INC.,

Third-Party Defendant.

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HON. DIANE A. LEBEDEFF:

Two motions are consolidated for disposition. First, plaintiffs move for summary judgment on the issue of liability on their Labor Law §§ 240(1) and 241(6) claims against defendant Vassar College ("Vassar"). Vassar cross-moves for summary judgment and dismissal of the complaint and for summary judgment on its third-party claims against Kirchhoff Construction Management, Inc. ("Kirchhoff") for contractual and/or common law indemnification. Kirchoff cross-moves for summary judgment and dismissal of the third-party complaint. Second, Kirchoff moves for summary judgment and dismissal of plaintiffs'

complaint.

In this personal injury action, plaintiffs seek to recover for injuries sustained by plaintiff, Thomas McGlinchey, at a construction site accident, on August 12, 2003. The accident occurred on a construction project in a building known as the New England Building owned by and on the campus of defendant Vassar. Plaintiff, an employee of the general contractor, third-party defendant Kirchhoff, was performing work in connection with this construction project, pursuant to a contract between his employer and Vassar at the time of the accident. His tasks included repairing damage and plastering the walls and ceiling of a portion of the New England Building (Thomas McGlinchey deposition, dated September 2, 2009, pp. 72, 76-78).

Plaintiff testified that at the time of his accident he was standing on a Bakers scaffold plastering the ceiling when a piece of plaster fell and struck him causing him to fall from the scaffold and sustain serious injuries (Thomas McGlinchey deposition, dated September 2, 2009, pp. 134-35). The scaffold was in two sections, which made it approximately 14 feet high (Cannizzaro deposition, dated December 3, 2009, p. 23). There were no guardrails on the scaffold (Cannizzaro deposition, dated December 3, 2009, p. 24), and it is not known whether the wheels of the scaffold were locked (Cannizzaro deposition, dated December 3, 2009, p. 76).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Uni. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the moving party has established

its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*see Zuckerman v City of New York, supra*, 49 NY2d at 562). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion (*see Makaj v Metro. Trans. Auth.*, 18 AD3d 625, 626 [2d Dept 2005]).

I

Plaintiff argues that the failure to properly place, erect and safeguard the movable scaffold in absence of all necessary safety devices was a blatant violation of Labor Law §§ 240(1) and 241(6) by defendant Vassar (*see Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68 68-69 [1st Dept 1996]). He further argues that partial summary judgment on the issue of liability be granted as defendant's breach was the proximate cause of the accident and plaintiff's injuries.

Vassar and Kirchhoff argue that plaintiff's act of illegally entering onto the worksite prior to being authorized to work, and thereafter working unsupervised, demonstrates that he was not lawfully on the work site at the time of the accident and thus not entitled to the protections afforded by the Labor Laws.

According to plaintiff, the accident occurred at approximately 6:45 AM. However, plaintiff's supervisor, John Cannizzaro testified that access to the subject building with key cards, provided by Vassar, was restricted until 7 AM (Cannizzaro deposition, dated December 3, 2009, pp. 48, 92). Overtime was permitted but only at the end of the work day (Cannizzaro deposition, dated December 3, 2009, p. 52). Furthermore, Richard Burns, Kirchhoff's project manager, testified that Kirchhoff had rules and regulations in place which prohibited workers from working without the presence of a supervisor and/or foreman (Burns deposition, dated

September 19, 2007, p. 62).

Labor Law § 240(1) provides in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

This section is applicable when the proximate cause of injuries is a fall from a ladder, scaffolding or other elevated work place in the absence of the requisite safety devices.

Plaintiff's argument that defendants' failure to furnish and erect the safety devices necessary to provide him with sufficient protection while he was working at an elevation was a violation of the statute and a proximate cause of the injuries he sustained. Thus, plaintiff has met his burden of establishing entitlement to partial summary judgment against defendants.

The burden then shifts to defendants to demonstrate the existence of a triable issue of fact (*Zuckerman v City of New York, supra*, 49 NY2d at 562). Defendants have not met this burden.

As discussed above, plaintiff was an employee of Kirchhoff and was performing plastering work in the course of his employment at the time of the accident. He customarily commenced his work day at the Vassar site at 6 AM. His supervisors initialed time cards on a daily basis, which showed his customary 6 AM start time.

Defendants argue that plaintiff was not permitted to be working at the site during the time of the accident and, thus, should not be permitted to recover under a negligence theory or under the Labor Laws. This argument is unpersuasive.

Plaintiff regularly worked at the site prior to the 7 AM allowable start time and his supervisors were presumably aware of same, given that they signed off on his time cards. Courts have held that the Labor Law protects persons who at the time of the injury were engaged for hire and not merely volunteers (*see Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979], "To come within the special class for whose benefit absolute liability is imposed upon contractors, owners and their agents to furnish safe equipment for employees under section 240 of the Labor Law, 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").

It is undisputed that plaintiff was doing what he was authorized to do. Plaintiff was neither a volunteer nor was he performing work outside the scope of his employment.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability is granted, and the cross-motion and motion for summary judgment and dismissal of the complaint by Vassar and Kirchhoff, respectively, are denied as moot.

II

With respect to Vassar's request for an order for summary judgment on the issue of indemnification against Kirchhoff, the relevant contractual language provides:

> "[Kirchhoff] shall indemnify and hold harmless Vassar College and its representatives against any and all liabilities, claims and costs of whatsoever kind and nature for injury or death of any persons and for loss or damages to property occurring in connection with the performance of this contract." (Bernstock affirmation, dated May 6, 2010, Exhibit E).

The unambiguous terms of the indemnification provision above provide that Kirchhoff agreed to indemnify and hold harmless Vassar under the circumstances presented in the instant action.

Kirchhoff argues that Vassar is not entitled to summary judgment on the issue of common

law indemnification, however, because an issue of fact remains as to the extent of Vassar's control over plaintiff in the course of his work. Specifically, it argues that because Vassar set guidelines for the start time for commencement of work in the New England Building, this amounts to Vassar exerting significant and essential control over the construction project. This argument is without merit. Indeed, it has been held that general instructions such as the act of outlining the daily start time does not rise to the level of necessary control (*O'Sullivan v ODI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006]; *Dunlap v United Health Servs.*, 189 AD2d 1072 (3d Dept 1993]).

Kirchhoff further argues, citing General Obligations Law Section 5-322.1, that the indemnification provision is voidable by because it purports to indemnify Vassar against its own negligence. However, there is no evidence in the record showing Vassar's negligence. Therefore, this argument also fails (*see McGuinness v Hertz Corp.*, 15 AD3d 160, 161-62 [1st Dept 2005]).

* * *

Accordingly, Vassar's cross-motion for summary judgment on its third-party claims against Kirchhoff is granted, and Kirchhoff's cross-motion to dismiss the third-party complaint is denied as moot.

This decision constitutes the order of the Court.

Dated: February 8, 2011

Diane A. Lebedeff, J.S.C.