

Giallanza v Commack Union Free School Dist.

2012 NY Slip Op 30172(U)

January 5, 2012

Supreme Court, Suffolk County

Docket Number: 06-26710

Judge: Daniel Martin

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Giallanza v Commack UFSD

Index No. 06-26710

Page No. 2

Upon the following papers numbered 1 to 62 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11; 12-36; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 37-42; 43-48; 49-57; Replying Affidavits and supporting papers 58-60; 61-62; Other the parties memoranda of law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiffs Thomas Giallanza and Karen Giallanza and the motion by defendant Park East Construction Corp. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiffs Thomas Giallanza and Karen Giallanza for partial summary judgment on the issue of liability is determined herein; and it is further

ORDERED that the motion by defendant Park East Construction Corp. for summary judgment dismissing the third-party complaint and cross claims against it is granted.

Plaintiff Thomas Giallanza commenced this action to recover damages for personal injuries allegedly sustained on August 25, 2004, when he fell from a ladder while performing renovations in the library of a school owned by defendant Commack Union Free School District. At the time of the alleged accident plaintiff was an employee of Gordon L. Seaman Inc. (hereinafter "Seaman"), which was hired as the prime electrical contractor at the construction site. Plaintiff allegedly fell when the ladder on which he was standing twisted and caused him to fall backward and hit his head on the concrete floor. Defendant Pav-Lak Industries (hereinafter "Pav-Lak") was hired as the prime contractor for general construction, and defendant Park East Construction Corp. (hereinafter "Park East") was retained as the construction manager for the project. By way of an amended complaint, plaintiff alleges causes of action against the School District, Pav-Lak and Park East for common law negligence and premises liability, and for violations of Labor Law §§ 200, 240 (1), and 241(6). The amended complaint also asserts a claim by plaintiff's wife, Karen Giallanza, for loss of consortium and reimbursement of medical expenses.

The School District joined issue on October 23, 2006. In its answer, it alleges, among other things, cross claims against Park East for common law and contractual indemnification, contribution, and breach of contract based upon Park East's alleged failure to obtain liability insurance naming the School District as an additional insured. Pav-Lak also asserts cross claims against Park East in its answer for common law indemnification, contribution, and failure to procure insurance. On April 27, 2010, the School District commenced a third-party action against Park East alleging causes of action identical to those asserted in its cross claim. Subsequently, Park East commenced a second third-party action against Seaman for contribution, common law indemnification, and breach of contract based upon Seaman's alleged failure to defend Park East and to obtain liability insurance naming it as an additional insured. Seaman's answer to the second third-party action asserts cross claims for common law indemnification and contribution against Park East. By order of this Court dated March 3, 2011, Park East's unopposed motion for summary judgment dismissing plaintiff's complaint against it was granted.

Plaintiffs now move for summary judgment on the issue of liability on the ground the School District and Pav-Lak violated Labor Law §240(1) by failing to ensure plaintiff was provided with a secured ladder and adequate safety equipment. The School District opposes the motion, arguing that triable issues exist as to how the accident occurred and whether plaintiff's own conduct was the sole proximate cause of his injuries. The School District submits, among other things, the affidavit of Philip Brabant, a former employee of Pav-Lak, who indicates that an unidentified individual told him plaintiff was "walking the

ladder” at the time of the accident. The School District also submits an affidavit by William Marletta, a safety consultant, which states that his inspection of the ladder after the accident revealed that it was in “near perfect condition,” and that he did not observe imperfections in the floor of the school’s library such as hazardous slopes, cracks or holes. The affidavit further states that it was Marletta’s professional opinion to reasonable degree of certainty, that no spotter was needed for use of the ladder; that there was no reason for the ladder to be unstable unless it was used in a dangerous manner; and that plaintiff’s alleged walking of the ladder could explain why an otherwise good ladder would fall. Park East opposes plaintiff’s motion on similar grounds. Pav-Lak did not oppose the motion.

During his examination before trial, plaintiff testified that he was in the process of wiring fluorescent lighting in the ceiling grid of the library at the time of the accident. He testified that both of his hands were above his head; that he was holding a cable in his left hand and a pliers in right hand; and that he was leaning into the ladder when it shifted left, turned counter-clockwise, and caused him to fall backward down to the concrete floor. Plaintiff testified that the ladder, which belonged to Seaman, was a “ten foot A-ladder” made of fiberglass, and that he was on the seventh step of the ladder, approximately seven feet in the air, when he fell to the ground. He testified that he tested the integrity of the ladder before using it, and that he shifted its four legs on the surface of the concrete floor to ensure the ladder was level before standing on it. Plaintiff testified that he was by himself at the time of the accident, and that he had been on the ladder for only a couple of minutes before he fell. He testified that the carpet of the library floor had been removed and that its surface consisted of unfinished concrete with pot-marks and imperfections. Plaintiff testified that while the area of the floor where the ladder was standing looked fairly even, he believed the ladder twisted because of the uneven surface of the floor. Plaintiff testified that his supervisor, Eric Jackson, was the only person who gave him instructions at the construction site, and that, unlike previous employers, no one from Seaman required him to use a spotter when utilizing a ladder. He also testified that he did not use any of the scaffolds Seaman provided at the construction site, because he knew from experience that it was unnecessary to use one for installing the fluorescent lights in the ceiling of the library.

Initially, the Court notes that the affidavit of plaintiff’s expert, Warner Laag, was not considered in the determination of this motion, as it was improperly submitted for the first time with plaintiff’s reply papers (*see* CPLR 2214; *Malanga v Chamberlin*, 71 AD3d 644, 896 NYS2d 385 [2d Dept 2010]; *Rengifo v City of New York*, 7 AD3d 773, 776 NYS2d 865 [2d Dept 2004]). The Court also did not consider the School District’s sur-reply (*see* CPLR 2214 [c]).

“Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure” (*Bland v Manocherian*, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; *see Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so “constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). Thus, a statutory violation is established where a ladder collapses, slips or otherwise fails to perform its safety function of supporting a worker (*see O’Connor v Enright Marble & Tile Corp.*, 22 AD3d 548, 802 NYS2d 506 [2d Dept 2005]; *Morin v Machnick Bldrs.*, 4 AD3d 668, 669-670, 772NYS2d 388 [3d Dept 2004]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 688 NYS2d 547 [1st Dept 1999]). Further, section 240(1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed,

that is to “protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513, 577 NYS2d 219 [1991], quoting *Koenig v Patrick Constr. Corp.*, 298 NY 313, 319, 83 N.E. 2d 133 [1948]). Moreover, an owner, contractor or agent who breaches this duty may be held liable in damages regardless of whether it had actually exercised any supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]).

Although plaintiffs failed to demonstrate that Pav-Lak either was in control of plaintiff’s work or was the School District’s statutory agent or general contractor, and, therefore, liable for his injuries (see generally *Rocovich v Consolidated Edison Co.*, *supra*), they established, prima facie, their entitlement to partial summary judgment on the issue of liability against the School District as owners of the subject construction site. In this regard, plaintiffs submitted evidence that the ladder on which plaintiff was standing failed to perform its safety function when it shifted for no apparent reason, turned counter-clockwise, and caused him to fall to the floor and injure himself (see *Gonzalez v AMCC Corp.*, __ AD3d __, 931 NYS2d 415 [2d Dept 2011]; *LaGiudice v Sleepy’s Inc.*, 67 AD3d 969, 890 NYS2d 564 [2d Dept 2009]; *Nudi v Schmidt*, 63 AD3d 1474, 882 NYS2d 731 [3d Dept 2009]; *Ricciardi v Bernard Janowitz Constr. Corp.*, 49 AD3d 624, 853 NYS2d 373 [2d Dept 2008]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 740 NYS2d 16 [1st Dept 2002]). “Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 771 NYS2d 484 [2003]; see *Morin v Machnick Bldrs.*, *supra*; *Squires v Robert Marini Bldrs.*, 293 AD2d 808, 809, 739 NYS2d 777 [3d Dept], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

Neither the School District nor Park East raised triable issues warranting denial of the motion against the School District. Both the School District and Park East assert that plaintiff provided an inconsistent account of his accident during a later deposition, at which he testified that he did not remember whether the ladder twisted or turned before he fell. However, contrary to such assertions, when read as a whole plaintiff’s deposition testimony consistently indicates that the ladder shifted to the left and fell for no apparent reason (see *Biovin v The Marrano/Marc Equity Corp.*, 79 AD3d 1750, 913 NYS2d 843 [4th Dept 2010]; *Morris v Mark IV Constr. Co.*, 203 AD2d 922, 923, 611 NYS2d 68 [4th Dept 1994]). Indeed, plaintiff indicated, during the same deposition hearing, that the ladder “felt like it twisted [and] moved to [the] left like counter-clockwise” before it fell. Moreover, the affidavit by Philip Brabant stating that an unknown individual told him that he believed plaintiff was “walking the ladder” at the time of the accident, constitutes hearsay and is insufficient to raise a triable issue challenging plaintiff’s version of the accident (see *Masiello v Belcastro*, 237 AD2d 235, 655 NYS2d 57 [2d Dept 1997]; *De Rocha v Old Spaghetti Warehouse*, 207 AD2d 978, 617 NYS2d 89 [4th Dept 1994]). In addition, evidence that the ladder was structurally sound and not defective, as asserted by the School District’s expert, is not relevant on the issue of whether the ladder was improperly placed (see *Woods v Design Ctr., LLC*, 42 AD3d 876, 877, 839 NYS2d 880 [4th Dept 2007]), and it does not avail the School District or Park East to speculate that plaintiff’s conduct was the sole proximate cause of his injuries when it is undisputed that the ladder was unsecured and no other safety devices were provided (see *Evan v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 862 NYS2d 425 [4th Dept 2008]). Where, as in this case, “a plaintiff alleges that a ladder

Giallanza v Commack UFSD

Index No. 06-26710

Page No. 5

tipped over for no apparent reason, the plaintiff does not have the burden of setting forth evidence that the ladder was defective” (*Mingo v Lebedowicz*, 57 AD3d 491, 493, 869 NYS2d 163 [2d Dept 2008]). Accordingly, plaintiffs’ motion is granted to the extent it seeks partial summary judgment on the issue of liability under Labor Law 240(1) as against the School District, and is otherwise denied.

Park East moves for summary judgment dismissing the School District’s third-party action, arguing that as it did not control or supervise plaintiff or the means, methods, or safety procedures of his employer at the time of the accident, it therefore is not contractually required to indemnify or defend the School District against the claim. Park East further asserts that its contract with the School District did not require that it purchase additional insurance on its behalf, and that even if such a requirement existed, the activities giving rise to plaintiff’s injuries were not covered by the agreement. Park East also seeks dismissal of the cross claims by Seaman and Pav-Lak for contractual and common law indemnification, contribution, and failure to procure insurance. Park East argues it shared no contractual relationship with either Seaman or Pav-Lak, and it cannot be held liable under the theories of contribution or common law indemnification as it played no role in causing or augmenting plaintiff’s injuries. The School District and Seaman both oppose Park East’s motion on the grounds that triable issues exist as to whether Park East was the School District’s statutory agent, whether its negligence contributed to plaintiff’s injuries, and whether Park East breached its contractual obligation to procure liability insurance naming the School District as an additional insured.

Article 9.7 of the Construction Manager Agreement states, in pertinent part, that:

With respect to each Contractor’s own Work, the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each the Contractors, since these are solely the Contractor’s responsibility under the contract for Construction. . . The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, their agents or employees, or any other persons performing portions of the Work not directly employed by the Construction Manager.

Article 17.1 of the Construction Manager Agreement between the parties further provides that:

Construction Manager shall indemnify and hold Owner harmless from and against all liability, claims, loss, damages, costs and expense, including attorney’s fees and expenses, and fees and expenses of experts, arising out of or resulting from any and all acts or omissions, or both, of Construction Manager, and its employees, agents, and consultants. In the event Owner is alleged to be liable to any person or entity on account of alleged acts or omissions, or both, of Construction Manager, its employees, agents and consultants of any of them, Construction Manager shall defend Owner against such allegations through counsel acceptable to Owner, and Construction Manager shall bear all the costs, fees and expenses of such defense.

It is well established that "a party seeking contractual indemnification must prove itself free from

Giallanza v Commack UFSD

Index No. 06-26710

Page No. 6

negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009]; see *McAllister v Constr. Consultants L.I., Inc.*, 83 AD3d 1013, 1014, 921 NYS2d 556 [2d Dept 2011]; *Reynolds v County of Westchester*, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]). Similarly, "a party cannot obtain common-law indemnification unless it has been held vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]). Here, inasmuch as the School District has been found liable for plaintiff's injuries pursuant to Labor Law §240 (1), the Court grants, as a matter of law, the branches of Park East's motion seeking dismissal of the School District's third-party claims for contractual and common law indemnification (see *McCarthy v Turner Constr., Inc.*, *supra*; *McAllister v Constr. Consultants L.I., Inc.*, *supra*; *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, *supra*).

As for the branch of Park East's motion seeking dismissal of the School District's claim for contribution, apportionment, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tortfeasors share responsibility for an injury (see *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 516 NYS2d 451 [1987]; *Rogers v Dorchester Assoc.*, 32 NY2d 553, 347 NYS2d 22 [1973]). 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 (see *DiMarco v New York City Health & Hosps. Corp.*, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]; see also *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]). Here, Park East has met its prima facie burden by submitting evidence that it did not owe plaintiff a common law duty of care with respect to any alleged defect with the ladder or the floor of the library. It is undisputed that Park East did not own or supply the ladder from which plaintiff fell, and was not supervising or directing his work at the time of the accident. Further, as it neither owned, occupied or controlled the subject premises, Park East did not owe plaintiff a common law duty of reasonable care with respect to any alleged defective condition therein (see *Seymour v David W. Mapes, Inc.*, 22 AD3d 1012, 803 NYS2d 250 [3d Dept 2005]; *Siracuse v Race Office Equip. Co.*, 278 AD2d 894, 718 NYS2d 921 [4th Dept 2000]).

Park East also did not owe plaintiff a duty of care as the School District's statutory agent. A prime contractor is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor "only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (*Nasuro v PI Assoc.*, 49 AD3d 829, 829, 858 NYS2d 175 [2d Dept 2008]; see *Coque v Wildflower Estates Dev. Inc.*, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; cf. *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]). Here, the adduced evidence, including the deposition testimony of plaintiff's supervisor, and Park East's employee, James Wojcik, indicates that Park East's role as construction manager was one of general supervision, which is insufficient to establish liability as the School District's statutory agent (see e.g. *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]; see also *Walls v Turner Constr. Co.*, 4 NY3d 861, 798 NYS2d 351 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]). Further, Park East lacked the contractual authority to exercise control over plaintiff's work or his safety procedures, and the mere general authority to coordinate different subcontractors, create work schedules, prepare progress reports and conduct walk-throughs did not rise to the level of control necessary for its

Giallanza v Commack UFSD

Index No. 06-26710

Page No. 7

classification as a statutory agent (*see Delahaye v Saint Ann's School*, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; *Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450, 817 NYS2d 132 [2d Dept 2006]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 704 NYS2d 658 [2d Dept 2000]). Park East, therefore, played no role in causing or augmenting plaintiff's injuries. The School District failed to raise any triable issues in opposition. Thus, the branch of Park East's motion seeking dismissal of the School District's claim for contribution is granted.

With respect to the branch of Park East's motion seeking dismissal of the School District's third-party claim for breach of contract based on its alleged failure to purchase insurance naming the School District as an additional insured, Article 18 of the parties' contract states, in relevant part, that "[t]he construction manager shall have and maintain insurance in accordance with the requirements of Exhibit C attached hereto and incorporated by reference herein." However, an examination of exhibit C of the contract, entitled "Insurance Required of Construction Manager," reveals that no such requirement was included, as that portion of the contract was left conspicuously blank. Even assuming, arguendo, that such a requirement existed, the School District would not have been covered for claims arising out of plaintiff's injuries, as such provisions have been interpreted to mean that the additional insured is only insured for activities covered by the agreement (*see Ceron v Rector, Church Wardens & Vestry Members of Trinity Church*, 224 AD2d 475, 638 NYS2d 476 [2d Dept 1996]; *see also Belcastro v Hewlett-Woodmere Union Free School Dis. No. 14*, 286 AD2d 744, 730 NYS2d 535 [2d Dept 2001]). Inasmuch as the contract specifically excludes Park East from control of plaintiff's activities or safety procedures, the School District would not have been covered by any purported additional insurance policy.

The portion of Park East's motion for summary judgment dismissing the cross claims by Seaman and Pav-Lak for common law and/or contractual indemnification is granted. "As a general rule, a separate prime contractor is not liable under Labor Law §240(1) . . . for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker" (*Berrios v City of New York*, 75 AD3d 517, 518, 905 NYS2d 255 [2d Dept 2010]; *see Russin v Louis N. Picciano & Son, supra*). Further, "[t]he obligation of common law indemnification runs against those parties who, by virtue of their direction and supervision over the injury-producing work were actively at fault in bringing about the injury" (*Colyer v K-Mart Corp.*, 273 AD2d 809, 810, 709 NYS2d 758 [4th Dept 2000]). Here, neither Seaman nor Pav-Lak entered any agreement entitling them the right to seek contractual indemnification from Park East (*see Araujo v City of New York*, 84 AD3d 993, 922 NYS2d 806 [2d Dept 2011]; *Jamindar v Uniondale Union Free Sch. Dist.*, __AD3d__, 2011 NY Slip Op 8909 [2d Dept, Dec. 6, 2011]). Moreover, as discussed above, Park East was not actively at fault in causing plaintiff's injuries and did not control or oversee his activities such that it could be regarded as the School District's general contractor or statutory agent. Accordingly, the branch of Park East's motion for summary judgment dismissing the cross claims by Seaman and Pav-Lak for common law and contractual indemnification is granted.

Based on the foregoing, the branch of Park East's motion seeking dismissal of the cross claims by Seaman and Pav-Lak for contribution also is granted. As mentioned above, Park East owed plaintiff no common law duty of care for any alleged defective condition, nor did it exercise sufficient control of plaintiff's work, performance or safety procedures to make it liable as the School District's statutory

Giallanza v Commack UFSD
Index No. 06-26710
Page No. 8

agent. Further, there is no evidence that Park East breached a duty of care to the School District or any other prime contractor such that it caused or augmented plaintiff's injuries. In addition, the branch of Park East's motion for summary judgment dismissing the cross claim by Pav-Lak for failure to procure insurance naming it as an additional insured is granted. Park East demonstrated that no contractual agreement existed requiring it to purchase insurance on behalf of Pav-Lak (*see generally Kinney v G.W. Lisk Co.*, 76 NY2d 215, 557 NYS2d 283 [1990]; *Rodriguez v Savoy Boro Park Assocs. Ltd. Partnership*, 304 AD2d 738, 759 NYS2d 107 [2d Dept 2003]), and the failure of Park East and the School District to include such a provision in their own agreement negates any argument by Pav-Lak that it is entitled to such coverage as a third-party beneficiary (*see State of California Public Employees' Retirement System v Sherman & Sterling*, 95 NY2d 427, 718 NYS2d 256 [2000]).

Dated: JANUARY 5, 2012



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION