

Royce v Dig EH Hotels, LLC

2014 NY Slip Op 30830(U)

March 31, 2014

Supreme Court, New York County

Docket Number: 116959/09

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JEFFREY K. OING
J.S.C.

PRESENT: _____
Justice _____

PART 48

Index Number : 116959/2009
ROYCE, ZACHARY
vs
DIG EH HOTELS LLC
Sequence Number : 005
AMEND CAPTION/PARTIES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

"This motion is decided in accordance with the annexed decision and order of the Court."

FILED

APR 03 2014

NEW YORK
COUNTY CLERKS OFFICE

Dated: 3/31/14

JEFFREY K. OING
J.S.C., J.S.C.

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

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: IAS PART 48

-----x

ZACHARY ROYCE and ELIZABETH ROYCE,

Plaintiffs,

Index No.: 116959/09

-against-

Mtn Seq. Nos. 005,
006, 007, 008

DIG EH HOTELS, LLC d/b/a THE ESSEX HOUSE
and IMAGINATION (USA) INC.,

DECISION AND ORDER

Defendants.

-----x

DIG EH HOTELS, LLC d/b/a THE ESSEX HOUSE,

Third-Party
Plaintiff,

Third-Party Action

-against-

Index No.: 591083/10

IMAGINATION GROUP, LTD.,

Third-Party
Defendant.

FILED

APR 03 2014

NEW YORK

COUNTY CLERKS OFFICE

-----x

DIG EH HOTELS, LLC d/b/a THE ESSEX HOUSE,

Second Third-Party
Plaintiff,

Second Third-Party
Action

-against-

Index No.: 591083/10

IMAGINATION,

Second Third-Party
Defendant.

-----x

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Mtn Seq. Nos. 005, 006, 007, 008

-----x

THE IMAGINATION GROUP, LTD. s/h/a
IMAGINATION GROUP INC.,

Fourth-Party
Plaintiff,

**Fourth-Party
Action**

-against-

Index No.: 590924/11

PLS STAGING,

Fourth-Party
Defendant.

-----x

JEFFREY K. OING, J.:

Procedural Posture

Plaintiffs Zachary and Elizabeth Royce commenced this action against defendants Dig EH Hotels LLC d/b/a The Essex House ("DIG") and Imagination (USA) Inc. Plaintiffs voluntarily discontinued this action against Imagination (USA), then known as Imagination the Americas, in 2011 (Stipulation of Voluntary Discontinuance, Affirmation in Opposition of Raymond D'Erasmio [Seq. 005], 9/27/13, Ex. A).

On November 30, 2010, DIG served a third-party summons and complaint on third-party defendant Imagination Group, Ltd. ("Imagination Group"). On February 7, 2011, DIG served a second third-party complaint on second third-party defendant Imagination ("Imagination"). On November 9, 2011, the Imagination Group served a fourth-party summons and complaint on fourth-party defendant PLS Staging ("PLS").

Reliefs

Motion Seq. No. 005

Plaintiffs move for an order adding the Imagination Group as a direct defendant, and amending the caption accordingly.

Plaintiff Zachary Royce also moves, pursuant to CPLR 3212, for an order granting him summary judgment on liability as to his Labor Law § 240[1] (the second cause of action).

Motion Seq. No. 006

PLS moves for an order granting it summary judgment dismissing the complaint against DIG, or, alternatively, for summary judgment dismissing the Imagination Group's fourth-party complaint against it for indemnification and contribution.

Motion Seq. No. 007

DIG moves for summary judgment dismissing the complaint against it, or, alternatively, for summary judgment on its third-party claims for contractual and common-law indemnification.

Motion Seq. No. 008

The Imagination Group moves for summary judgment dismissing the complaint against DIG, or, alternatively, for summary judgment against PLS on its fourth-party claim for contractual indemnification.

The Project

Mizhuo, a Japanese company organizing a global tour in support of their Initial Public Offering, hired the Imagination

Group to locate and secure venues for each of the stops on the Mizhuo tour. On July 2, 2009, DIG and the Imagination Group entered into a contract regarding a Mizhuo road show event called "Project Solaris". The Imagination Group leased event space at the Essex House for the project for July 6th and 7th, and agreed to indemnify DIG against claims resulting from the "gross negligence or intentional misconduct" of the Imagination Group or its officers, employees, etc.

Mark Hadley, Imagination Europe's Head of Production, designed the floor plan for the event, which called for a temporary stage, a projector, two lighting stands, and tables and chairs for the attendees. The Imagination Group then hired Mark Bannister, an independent contractor, to oversee the project in New York (Hadley 12/12/12 EBT at pg. 26). Specifically, Bannister was to make sure that all the equipment had been properly installed, that the audio and lighting equipment was functional, and stage manage the actual event (Id. at pg. 33-34). Hadley testified at his EBT that Bannister had the authority to stop work in the event of any unsafe practices, but did not know whether Bannister had been in the room during the entire setup (Id. at pg. 34-35).

The Imagination Group retained PLS to set-up and stage the event. According to James Koziol's, PLS' principal, testimony, the two companies have a business relationship stretching back

more than twenty years (Koziol 12/20/12 EBT at pg. 14). The Imagination Group would first provide show specifications to PLS, who would in turn provide a price quote (Id. at pp. 24-25). The Imagination Group would then provide a purchase order, followed by an invoice from PLS for the final price (Id. at pp. 25-26). Neither party signed these documents, but that was the normal course of business between them (Id. at pp. 27-28). For this particular job, the Imagination Group and PLS exchanged at least two quotes in the days leading up to the project (Id. at pp. 39-40). Several PLS employees provided on site job supervision (Id. at pg. 49), but Koziol testified that Bannister was "the gentleman in charge of the entire crew" (Id. at pg. 112). PLS's responsibilities for the job included "lighting, sound, video, [and] scenic" setup and takedown (Id. at pp. 124-25).

Hadley testified that the final purchase order for the project was mailed to PLS on July 7th, the day after the accident (Hadley 12/12/12 EBT at pp. 73-74). He also testified that sending the final purchase order after the project was finished was in keeping with the parties' business relationship (Id. at pp. 75-76). The purchase order provided that PLS would indemnify the Imagination Group for tort claims "arising out of ... any error in design or drawings or any defect in or failure of the Goods or part thereof or work performed by [PLS] or occasioned by reason of any act or omission by [PLS]" (Purchase Order,

Affirmation of Raymond D'Erasmus [Seq. 008], 6/21/13, Ex. L, ¶ 12[3]). While the purchase order is only signed by Hadley, Koziol testified that PLS agreed to the terms and conditions set forth therein (Koziol 12/20/12 EBT at pg. 33).

The Accident

Plaintiff worked as a lead lighting technician for PLS at the time of the accident (Koziol 12/20/12 EBT at pg. 43). On the day of his accident, plaintiff worked many hours constructing the set, erecting the lighting stands, and powering the entire set (Royce 7/17/12 EBT at pp. 26, 29-30). Scott Mack, Brian Martinez, and Mark (whose last name Royce could not recall) acted as PLS supervisors that day (Id. at pg. 32). The lighting stands themselves consisted of one or two t-bars attached to a tripod frame, holding between four and eight lights (Event Setup Photo, Ryan Aff. [Seq. 006], 6/20/13, Ex. 10; Martinez 2/14/13 EBT at pp. 44-45). After the lights were placed on the t-bars, plaintiff and his co-workers would use a crank to raise the lights into position (Koziol 12/20/12 EBT at pp. 139-141). At the time of the accident, plaintiff had finished erecting the lighting stand he was working on, and was swapping a gel out of one of the lights on the stand (Id. at pp. 95-96). The lighting stands were held down by sandbags, were not bolted or otherwise secured to any part of the floor or walls of the room, and were meant to be removed the following day (Id. at pp. 208-09).

Plaintiff utilized an eight or ten foot stepladder to reach the lights (Royce 7/17/12 EBT at pp. 46-47). Both he and Koziol testified that the ladder belonged to PLS and not to DIG or the Imagination Group (Id. at pg. 37; Koziol 12/20/12 EBT at pg. 59). Prior to the accident, plaintiff did not know of any problems with the ladder (Royce 7/17/12 EBT at pg. 90). He made no complaints to anyone about the ladder, but did not know if anyone else had complained about it (Id. at pp. 92-93). In fact, he had set up and moved the ladder several times earlier that day (Id. at pg. 47).

Before climbing the ladder, plaintiff leveled the ladder and determined that the surface was safe to set up on (Royce 7/17/12 EBT at pp. 90-91). He then climbed up to somewhere between the third and fifth rungs to swap out the gel (Id. at pp. 46-47). He would do so by pressing a clip on top of the light, ejecting the old gel, and replacing it with the new gel (Id. at 95-96). As he was reaching out to swap the gel, he felt the ladder jerk (Id. at pg. 45). He looked down and noticed that the clip that kept the A-frame extended was bent, at which point he testified that "next thing I know I'm flying in the air" (Id.). He later testified that he felt like the right side of the ladder was giving way, causing him to lose his balance and fall (Id. at pp. 102-104). He could not recall whether the ladder moved or fell over (Id.).

Discussion

I. Labor Law § 240[1] (Mtn. Seq. Nos. 005, 006, 007, 008)

Section 240[1] requires building owners and contractors to provide adequate "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" to protect construction workers from injury. Specifically, "the statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" either because of a falling object or because the worker falls (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011]). "[T]he task in which an injured employee was engaged must have been performed during the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Martinez v City of New York, 93 NY2d 322, 326 [1999]). "[A]ny production or piece of work artificially built up or composed of parts joined together in some definite manner" qualifies as a building or structure (Lombardi v Stout, 80 NY2d 290, 295 [1992]).

DIG, the Imagination Group, and PLS all argue that plaintiff's work does not fall within the scope of section 240[1]. Specifically, they point to the undisputed fact that plaintiff had finished erecting the lighting stand, and was merely making a cosmetic change to it when he fell. This

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undisputed fact, they contend, is not alteration or construction as contemplated by the statute.

A worker alters a building or structure under the statute when he makes "a significant physical change to the configuration or composition of the building or structure" (Jablon v Solow, 91 NY2d 457, 465 [1998]). Here, plaintiff simply popped out a frame, replaced a lighting gel, and then replaced the frame. This function can only be deemed a minor cosmetic change -- plaintiff did not physically change the configuration of the lighting stand or the lights mounted on it. In fact, he testified that the stand was fully set up and the lights on it fully focused at the time of the accident (Royce 7/17/12 EBT at pg. 95).

Nonetheless, plaintiff argues that work on even temporary structures is sufficient to trigger statutory liability. The argument is unavailing. The cases he relies on involve temporary structures that were being erected or dismantled at the time the worker involved was injured (see, e.g., McCoy v Abigail Kirsh at Tappan Hill, Inc., 99 AD3d 13 [2nd Dept 2012] [worker fell while disassembling a large wedding canopy]; Sinzieri v Expositions, Inc., 270 AD2d 332 [2nd Dept 2000] [worker injured while dismantling an expo exhibit]; Panico v General Electric, et al., 2011 WL 675561, 2011 N.Y. Slip Op. 30379(U) [Sup Ct NY County 2011] [worker injured while setting up expo exhibit]). By

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contrast, where a worker was injured while making insignificant, temporary, or cosmetic changes to an existing structure, as here, courts have routinely dismissed section 240[1] claims (see, e.g., Munoz v DJZ Realty, 5 NY3d 747, 748 [2005] ["Plaintiff's activities may have changed the outward appearance of the billboard, but did not change the billboard's structure, and thus were more akin to cosmetic maintenance or decorative modification than to "altering" for purposes of Labor Law § 240(1)"]; Allen v City of New York, 89 AD3d 406 [1st Dept 2011] [court held that a worker installing scenery panels as a backdrop to a carnival ride was not engaged in an activity covered by Labor Law § 240[1]]; Adair v Bestek Lighting and Staging Corp., 298 AD2d 153 [1st Dept 2002])).

Adair is particularly instructive. Adair was a stagehand who fell off of a "man lift" while focusing the lights above an already completed temporary stage (Adair, 298 AD2d at 153). The Appellate Division, First Department, held that this was not work covered by section 240[1] because the lights and the stage were already fully set up (Id.). In particular, the majority went to great lengths to reject the dissent's claims, claims which are very similar to those made by plaintiff, namely, that the statute should apply because by focusing the lights Adair was "completing the construction of the stage" or "completing the installation of the lighting system" (Id. at 154). The majority held that the

statute is not triggered simply because "(1) plaintiff engaged in the activity shortly after the structure was erected, and (2) the activity was in preparation for the sole intended use of the structure" (Id.).

Plaintiff attempts to distinguish Adair by submitting an affidavit explaining the amount of work remaining to be done on the project. He claims that he still had to focus the lights on the second lighting stand, secure lighting cables, and create the lighting cues for the show (Affidavit of Zachary Royce, 9/30/13, ¶¶ 8-9). The Adair Court, however, expressly stated that a given activity "cannot be brought within the scope of the statute by deeming it integral, necessary or incidental" to work that is covered (Adair, 298 AD2d at 153). Here, the work plaintiff claims still needed to be done is merely incidental and necessary for the intended operation of the lighting system, and cannot be covered by the statute simply because the system had to be utilized during the event the next day.

Nonetheless, plaintiff continues to argue that his section 240[1] claim should survive. In that regard, he asserts that the proper inquiry is whether the full scope of the work would trigger the statute. The full scope of Project Solaris, he claims, was a renovation of the ballroom at the hotel for the event, and therefore his injuries should be covered. Plaintiff

relies primarily on Prats v Port Authority of New York and New Jersey, 100 NY2d 878 (2003). His reliance is misplaced.

In Prats, the Court of Appeals held that a plaintiff engaged in a covered alteration of a building is protected by section 240[1] even if at the time the plaintiff was not engaged in a covered activity. Specifically, Prats was working on a construction contract, including "level[ing] floors, lay[ing] concrete and rebuild[ing] walls to replace large air filtering systems" (Prats, 100 NY2d at 880). He was climbing a ladder to inspect an air conditioning unit when the ladder slipped out from underneath him, causing him to fall (Id. at 881). The Court held that he was engaged in altering the building even though at that exact moment he was only inspecting a unit to see if it needed to be altered (Id. at 881-882). In other words, said the Court, "the work here did not fall into a separate phase easily distinguishable from other parts of the larger construction project ... [t]he inspections were ongoing and contemporaneous with the other work that formed part of a single contract" (Id. at 881).

Even considering the full scope of the project, plaintiff's cannot maintain his section 240[1] claim. Here, unlike in Prats, plaintiff was not conducting work on the lighting system on an ongoing and contemporaneous manner with other work so that his work formed a part of a single contract. He was simply making a

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minor cosmetic change. Further, plaintiff's work was not part of a larger construction or alteration project. Project Solaris involved the temporary set up of a stage, lighting, and sound equipment for an event, with the equipment to be removed immediately after the event (Royce 7/17/12 EBT at pg. 208). The lighting stands themselves were held down by sandbags, and were not in any way bolted or affixed to the floor, ceiling or walls of the hotel (Id. at pp. 209, 227). In sum, Project Solaris did not "significant[ly] physical[ly] change" the hotel to the point where it could be considered a construction or alteration project (Jablon, 91 NY2d at 465; Tanzer v Terzi Productions, 244 AD2d 224 [1st Dept 1997][worker who fell from a ladder while attaching temporary scenery and other objects to a building to be used as a television set was not protected by section 240[1] because he was not altering the structural integrity of the building]).

Plaintiff also relies on Augustyn v City of New York, 95 AD3d 683 (1st Dept 2012). In Augustyn, the plaintiff was removing lead paint from a building, a covered activity under the statute. At the time he fell, however, he was walking across a sidewalk bridge to setup a tent in preparation for his work (Augustyn, 95 AD3d at 684). The Court held that setting up the tent was part of the overall project and awarded the plaintiff summary judgment (Id.). Again, in this case, plaintiff's

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activity was not in preparation for work on a larger scale so as to have the activity fall within the reach of section 240[1].

Accordingly, that branch of plaintiff's motion for summary judgment on liability on his second cause of action under Labor Law § 240[1] is denied. Those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the second cause of action under Labor Law § 240[1] against DIG are granted, and that claim is dismissed against DIG.

II. Labor Law § 241[6] (Mtn. Seq. Nos. 006, 007, 008)

Labor Law § 241(6) provides that "all areas in which construction, excavation or 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 the persons employed therein or lawfully frequenting such places." A plaintiff must allege "a violation of a specific rule or regulation promulgated pursuant to [the statute]" (Wilinski, 18 NY3d at 11-12, supra). Further, the violation must be the proximate cause of the plaintiff's injury (Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 351 [1998]).

Plaintiff alleges violations of several sections of Rule 23 of the Industrial Code of the State of New York (12 NYCRR § 23-1, et seq.) in his verified bill of particulars (Verified Bill of Particulars, Ryan Aff. [Seq. 006], 6/20/13, Ex. 3, ¶ 7). In his

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papers, plaintiff advanced support of 12 NYCRR 23-1.21(e)(2) and 23-1.21(e)(3). As such, he is deemed to have abandoned reliance on the other sections of the Industrial Code alleged in the bill of particulars (Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 [1st Dept 2012] ["it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Section 23-1.21(e)(2) provides that "such bracing as may be necessary for rigidity shall be provided for every stepladder ... [w]hen in use every stepladder shall be opened to its full position and the spreader shall be locked." The Appellate Division, First Department, has held that section 23-1.21(e)(2) is insufficiently specific to support a Labor Law § 241[6] claim, and, as such, it cannot be the basis for plaintiff's claim (Croussett v Chen, 102 AD3d 448 [1st Dept 2013]).

Section 23-1.21(e)(3) provides that "[s]tanding stepladders shall be used only on firm, level footings" and that "[w]hen work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means." Unlike section 23-1.21(e)(2), section 23-1.21(e)(3) may serve as the basis for a

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Labor Law § 241[6] claim (Hart v Turner Const. Co., 30 AD3d 213, 214 [1st Dept 2006]).

The record, however, does not demonstrate that any party violated section 23-1.21(e)(3). Plaintiff testified that he leveled the ladder and it was level enough to safely work on (Royce 7/17/12 EBT at pp. 90-91). Further, section 23-1.21(e)(3) applies only to work done from a ladder more than ten feet in the air. Plaintiff testified that he was between three and five rungs up on an eight to ten foot ladder when he fell (Royce 7/17/12 EBT at pp. 46-47).

Accordingly, those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the third cause of action pursuant to Labor Law § 241[6] against DIG are granted, and that claim is dismissed against DIG.

III. Labor Law § 200 and Common Law Negligence (Mtn. Seq. Nos. 006, 007, 008)

"Section 200 of the Labor Law is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (Lombardi v Stout, 80 NY2d 290, 294 [1992]). Accordingly, to prove a negligence claim or a violation of Labor Law § 200, a plaintiff must show that the owner either supervised the work or had actual or constructive notice of a dangerous condition on the premises that caused the plaintiff's injuries (Dalton v New Water St. Corp., 284 AD2d 213 [1st Dept 2001]).

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Here, the record demonstrates that DIG, the owner of the property, did not supervise plaintiff's work. Instead, the record reflects that Bannister, the Imagination Group's representative, had ultimate control over the project (Hadley 12/12/12 EBT at pp. 33-35; Koziol 12/20/12 EBT at pg. 112). In addition, both Koziol and plaintiff named several PLS employees that supervised the job (Koziol 12/20/12 EBT at pg. 14; Royce 7/17/12 EBT at pg. 32). Plaintiff testified that the only contact he had with any DIG employees before the accident was to make small talk (Royce 7/17/12 EBT at pg. 38), and that there were no DIG employees in the room at the time of the accident (Id. at pg. 57).

Further, the record is devoid of any evidence of a dangerous condition, or DIG's notice of it. Plaintiff testified that the ladder buckled underneath him, causing him to fall. He also testified that the floor around the ladder was level enough to safely perform his work (Royce 7/17/12 EBT at 90-91). He had not had prior problems with the ladder, and had not made any complaints about the ladder (Id. at pp. 90-93). Both plaintiff and Koziol confirmed that the ladder was PLS's property (Id. at pg. 37; Koziol 12/20/12 EBT at pg. 59).

Accordingly, those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the first cause of action for common law negligence and the fourth

cause of action pursuant to Labor Law § 200 against DIG are granted, and those claims are dismissed against DIG.

IV. Joinder of The Imagination Group (Mtn. Seq. No. 005)

CPLR 3025(b) provides that leave to amend shall be freely granted "upon such terms as may be just." If the statute of limitations has run, as here, a party may only assert claims against a nonparty sought to be joined if such claims relate back to the original claims filed prior to the statutory deadline. A claim relates back when

(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for [a mistake] by plaintiff as to the identity of the proper parties, the action would have been brought against him as well

(Buran v Coupal, 87 NY2d 173, 178 [1995]).

There is no dispute that the potential direct claims against the Imagination Group arise out of the same occurrence, specifically plaintiff's accident. As noted, supra, plaintiff has no direct claim under Labor Law §§ 240[1] or 241[6] against DIG. For the same reasons stated therein, these direct claims against the Imagination Group would also fail.

Assuming arguendo that the Labor Law § 200 or common law negligence claims exist, the question then is whether plaintiff has demonstrated a unity of interest. Parties are united in

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interest "where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (Vanderburg v Brodman, 231 AD2d 146, 147 [1st Dept 1997]). In other words, the parties must "stand or fall together and judgment against one will similarly affect the other" (Id. at 148).

Plaintiff, however, fails to establish the "unity of interest" necessary between DIG and the Imagination Group. Section 200 and common law claims require actual supervision or notice (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 505 [1993]). Here, DIG and the Imagination Group would have separate defenses to those claims, and, as such, would not "stand and fall" together. They are, therefore, not united in interest.

Further, plaintiff cannot satisfy the third prong of the test because he knew from the beginning of his lawsuit of the Imagination Group's existence, but was unable to obtain jurisdiction over it (Reply Affirmation of Matthew Fein, 10/10/13, ¶ 34). Such a jurisdictional claim is self-serving without evidence of plaintiff's efforts to obtain personal jurisdiction over the Imagination Group. In fact, and contrary to plaintiff's contention, when the Imagination Group was brought into the case as a third-party defendant and filed an answer on October 17, 2011 (Third-Party Answer, D'Erasmus Aff., 6/21/13, Ex. K), plaintiff had twenty days to amend the complaint as of right

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and assert direct claims against the Imagination Group (CPLR 1009). Instead, plaintiff waited almost twenty months, eleven months after the statute of limitations had run, to join the Imagination Group. As such, there can be no bona fide mistake for failing to add the Imagination Group as a direct defendant.

Accordingly, that branch of plaintiff's motion to join third-party defendant the Imagination Group as a defendant is denied.

V. Loss of Consortium (Mtn. Seq. Nos. 006, 007, 008)

DIG, the Imagination Group, and PLS move for summary judgment dismissing the entire complaint, including the claim for loss of consortium. Loss of consortium is a derivative claim which cannot be maintained without a substantive cause of action (see, e.g., Carmona v Mathisson, 54 AD3d 633, 634 [1st Dept 2008] ["[a]ll other substantive claims having been rejected, the derivative claim for loss of consortium as against appellants must also fall"]).

Here, all claims against DIG have been dismissed, and therefore plaintiff Elizabeth Royce's derivative claim for loss of consortium must also be dismissed.

Accordingly, those branches of DIG's, the Imagination Group's, and PLS' motions for summary judgment dismissing the fifth cause of action for loss of consortium against DIG are granted, and that claim is dismissed against DIG.

Assuming arguendo, that the claims against DIG remain in tact or that the Imagination Group is added as a party defendant, the remainder of the motions concerning indemnification and contribution are decided as follows.

VI. Contribution and Indemnification against PLS (Mtn. Seq. Nos. 006, 008)

PLS seeks summary judgment dismissing the Imagination Group's claims for common law indemnification, contribution, and contractual indemnification, while the Imagination Group seeks summary judgment on its claim for contractual indemnification. With respect to the Imagination Group's common law claims against PLS, Workers' Compensation Law § 11 bars claims for indemnification or contribution against an injured plaintiff's employer unless plaintiff suffers "a grave injury" as specifically enumerated in the statute.

According to plaintiff's verified Bill of Particulars, he fractured his lower leg, requiring surgery, screws, and a metal plate to set (Verified Bill of Particulars, Ryan Aff. [Seq. 006], 6/20/13, Ex. 3, ¶ 10). Following the surgery, plaintiff claims he suffers from reflex sympathetic dystrophy/complex regional pain syndrome, leading to chronic pain, muscle spasms, swelling, stiffness, and restricted ranges of motion (Id.). Plaintiff was also examined by DIG's experts, neurologist Dr. Elizabeth Ortof and orthopedic surgeon Dr. George Unis, on September 5, 2012 and September 4, 2012, respectively (Notice of Expert Disclosure,

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Ryan Aff. [Seq. 006], 6/20/13, Ex. 4). Both doctors confirmed plaintiff's RSD/CPRS and other symptoms (Ortof Report, Ryan Aff. [Seq. 006], 6/20/13, Ex. 4, pg. 4; Unis Report, Ryan Aff. [Seq. 006], 6/20/13, Ex. 4, pp. 2-3). Dr. Unis noted that though plaintiff continued to suffer pain and loss of motion in his left leg he was not disabled (Unis Report, Ryan Aff. [Seq. 006], 6/20/13, Ex. 4, pg. 3).

The record reflects that plaintiff has not sustained a "permanent or total loss of use" of his leg, and his injuries are not "grave" within the meaning of Workers' Compensation Law § 11. Therefore, the Imagination Group cannot assert against PLS, plaintiff's employer, claims based on common law contribution or indemnification.

Accordingly, that branch of PLS's motion for summary judgment dismissing the fourth-party claims for common-law indemnification and contribution is granted and those claims are dismissed.

With respect to the claim for contractual indemnification, Workers' Compensation Law § 11 exempts claims for indemnification or contribution where the plaintiff's employer had contracted to indemnify or contribute to the primary defendant. Here, while the final invoice containing the indemnification clause was only signed by the Imagination Group, Koziol, PLS's principal, testified that PLS agreed to the terms and conditions set forth

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therein (Koziol 12/20/12 EBT at pg. 33). PLS contends that the claim is still barred for two reasons.

PLS claims the indemnification clause violates General Obligations Law § 5-322.1 because it requires PLS to indemnify the Imagination Group for the Imagination Group's own negligence. The clause, however, clearly states that it covers claims based on PLS's acts or omissions (Purchase Order, D'Erasmus Aff. [Seq. 008], 6/21/13, Ex. L, ¶ 12[3]). As such, the indemnification clause does not violate General Obligations Law § 5-322.1 (Brooks v Judlau Contr., Inc., 11 NY3d 204, 207 [2008]).

PLS next argues that the clause does not apply because the invoice is dated July 7, 2009, the day after plaintiff's accident. Such a clause, however, may apply retroactively where as a matter of law "the agreement pertaining to the contractor's work was made as of a pre-accident date, and [] the parties intended that it apply as of that date" (Podhaskie v Seventh Chelsea Associates, 3 AD3d 361, 362 [1st Dept 2004]).

Here, Koziol testified that the parties exchanged price quotes and specifications before the job began (Koziol 12/20/12 EBT at pg. 39-40). He also testified that PLS would be bound by the provisions of the purchase order (Id. at pg. 33). Hadley, Imagination Europe's head of production, testified that the Imagination Group would send a final purchase order once the parties had agreed on a price, and it was not uncommon for the

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Imagination Group to send a purchase order after the work was completed (Hadley 12/12/12 EBT at pp. 74-76). The above course of conduct is sufficient to enforce the indemnification clause on PLS (see Flores v Lower East Side Service Center, Inc., 4 NY3d 363, 369-370 [2005] ["We therefore hold that the common-law rule -- which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract -- governs the validity of a written indemnification agreement under Workers' Compensation Law § 11"]).

Nonetheless, PLS continues to argue otherwise and relies on Temmel v 1515 Broadway Associates, L.P., 18 AD3d 364 [1st Dept 2005] and Beckford v City of New York, 261 AD2d 158 [1st Dept 1999] for the proposition that there must be explicit written language in the contract to support retroactivity. The reliance is misplaced. Neither case presents factually the same long history of business dealings that took place between PLS and the Imagination Group. Hadley testified that the two have been doing business for almost twenty years (Hadley 12/12/12 EBT at pp. 74-76). The Appellate Division, First Department, however, has also held that "[i]ndemnity contracts must be viewed with reference to the purpose of the entire agreement and the surrounding facts and circumstances" (Podhaskie, 3 AD3d at 362). Thus, at the very

least, there may be an issue of fact as to whether the parties intended the clause to have retroactive effect.

Given that this Court denied plaintiff's motion to join the Imagination Group as a defendant, there are no claims against the Imagination Group and PLS will not need to indemnify it.

Accordingly, that branch of PLS's motion for summary judgment dismissing the fourth-party claim for contractual indemnification is granted, and that claim is dismissed. That branch of the Imagination Group's motion for summary judgment on its fourth-party claim for contractual indemnification is denied as moot.

VII. Contractual and Common-Law Indemnification against The Imagination Group (Mtn. Seq. Nos. 007)

DIG seeks common-law indemnification and enforcement of its contractual indemnification clause against the Imagination Group. The contract between DIG and the Imagination Group provides that the Imagination Group would indemnify DIG for the "gross negligence or intentional misconduct" of the Imagination Group or its officers, employees, etc. (Letter of Agreement, Marquez Aff. (Seq. 007), 6/20/13, Ex. K, pg. 4). Absent from the record is any proof to compel a finding of gross negligence or intentional misconduct on the part of the Imagination Group. As such, DIG is not entitled to contractual indemnification. As for the common-law indemnification claim, given that the complaint has been

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dismissed against DIG, the common law indemnification claim is dismissed.

Accordingly, that branch of DIG's motion for summary judgment on its third-party claims for common-law and contractual indemnification is denied.

Accordingly, it is

ORDERED that branch of plaintiff's motion to join third-party defendant the Imagination Group as a first-party defendant, amend the caption, and deem the proposed amended complaint served on the defendants is denied; and it is further,

ORDERED that branch of plaintiff's motion for summary judgment on liability on his second cause of action pursuant to Labor Law § 240[1] is denied; and it is further,

ORDERED those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the second cause of action pursuant to Labor Law § 240[1] against DIG are granted, and that claim is dismissed against DIG; and it is further

ORDERED those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the first cause of action for negligence against DIG are granted, and that claim is dismissed against DIG; and it is further

ORDERED those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the fourth

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cause of action pursuant to Labor Law § 200 against DIG are granted, and that claim is dismissed against DIG; and it is further,

ORDERED those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the third cause of action pursuant to Labor Law § 241[6] against DIG are granted, and that claim is dismissed against DIG; and it is further

ORDERED those branches of DIG's, the Imagination Group's, and PLS's motions for summary judgment dismissing the fifth cause of action for loss of consortium against DIG are granted, and that claim is dismissed against DIG; and it is further

ORDERED that branch of PLS's motion for summary judgment dismissing the fourth-party complaint is granted, and the fourth-party complaint is dismissed; and it is further,

ORDERED that branch of the Imagination Group's motion for summary judgment on its fourth-party claim for contractual indemnification is denied; and it is further,

ORDERED that branch of DIG's motion for summary judgment on its third-party claims for common-law and contractual indemnification is denied.


This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/31/14

FILED

APR 03 2014

NEW YORK
COUNTY CLERK'S OFFICE


HON. JEFFREY K. OING, J.S.C.