

<b>Lopez v 550 Adler Realty RL, LLC</b>
2014 NY Slip Op 31650(U)
May 29, 2014
Supreme Court, Bronx County
Docket Number: 305635/2010
Judge: Norma Ruiz
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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index No. 305635/2010

LUIS EDUARDO LOPEZ

Plaintiff,

Decision and Order  
HON. NORMA RUIZ

-against-

550 ADLER REALTY RL, LLC, 530 ADLER REALTY  
RL, LLC., ADLER HOLDINGS II, LLC, FIVE STAR  
CARTING, INC., FIVE STAR CARTING LLC. and  
THE ADLER GROUP, INCORPORATED,

Defendants

FIVE STAR CARTING, LLC.,

Third Party Plaintiff

-against-

TAH CLEANING SERVICE CORPORATION,

Third Party Defendant

550 ADLER REALTY RL, LLC, 530 ADLER REALTY  
RL, LLC., ADLER HOLDING II, LLC, and THE ADLER  
GROUP, INCORPORATED

Second Third Party Plaintiff

-against-

TAH CLEANING SERVICE CORPORATION,

Second Third Party Defendant

The following papers numbered 1 to 15 Read on this motion SUMMARY JUDGMENT  
Noticed on \_\_\_ and duly submitted as No. \_\_\_ on the Motion Calendar of 12/9/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

	Numbered	Papers
Notice of Motions and Affidavits Annexed.....		1-6
Notice of Cross Motion and Answering Affidavits.....		7-13
Replying Affidavits .....		14-15
Memorandum of Law .....		
Other:		

*Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:*

Plaintiff Luis Eduardo Lopez (“Lopez”) moves for partial summary judgment pursuant to Labor Law 240(1) on the issue of liability. Defendant Five Star Carting, LLC (“Five Star”) moves for summary judgment. Defendant Five Star Carting, Inc. moves to dismiss pursuant to CPLR 3211(7). Defendants 550 Adler Realty RL, LLC, 530 Adler Realty RL, LLC, Adler Holding II, LLC and The Alder Group, Inc. (collectively referred to as “Adler”) cross moves for contractual indemnification.

In this Labor Law action, the plaintiff seeks damages for injuries he sustained in a work related accident on March 16, 2010 when he fell from an unsecured 6-foot ladder that moved and suddenly tipped over while he was removing air conditioning ducts located in the building owned by the Alder defendants. Defendants Five Star and Five Star Carting, Inc. were the alleged general contractors.

On the day of the accident, the plaintiff was employed by third-party defendant/second third party defendant Tah Cleaning Service Corp. (“Tah”) and he received his instructions from Tah’s foreman Pablo Hidalgo (“Hidalgo”). The court notes that there was conflicting testimony regarding who actually employed Hidalgo, Tah or Five Star Carting, Inc.

Hidalgo instructed the plaintiff to take down some walls and air conditioning ducts that were attached to the ceiling. Plaintiff was working on a 6 foot A frame aluminum ladder taking out an air conditioning duct with a crow bar. He used this ladder which he described as old and wobbly, for about three hours before the accident. Plaintiff alleges that he complained to

Hidalgo that the ladder was moving as he used it. Plaintiff further alleges that Hidalgo instructed the plaintiff to use it anyway.

At the time of the accident, the plaintiff was standing with both feet on the fourth step from the bottom, four feet from the floor. No one was holding the ladder. Pursuant to Hidalgo's instructions, he was using a crowbar to remove a screw that was attached to a hanger holding a part of the air conditioning duct. The ladder moved from side to side as he slowly pulled out the screw. When the screw came out, the ladder tipped over causing the plaintiff to fall with it. Plaintiff alleges that he was not wearing a hard hat because none was provided to him.

#### Plaintiff's Motion

The court finds that the plaintiff established his prima facie entitlement to judgment as a matter of law by showing that adequate safety devices to prevent the ladder in question from falling or to protect the plaintiff were absent (*see McCarthy v. Turner Construction, Inc.*, 52 A.D.3d 333 [1st Dept 2008]).

Defendants' opposition failed to raise an issue of fact with respect to the recalcitrant worker defense (*see McCarthy, supra*) and the "sole proximate cause" defense.

The "sole proximate cause defense" requires the defendants to establish that the plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004], *Gallagher v New York Post*, 14 NY3d 83, 88[2010] *see also* (*Cruz v. Turner Constr. Co.*, 279 AD2d 322, 323 [1st Dept 2001]; *Harris v. City of New York*, 83 AD3d 104, 111 [1st Dept 2011][Section 240(1) inquiry cannot focus simply on whether the provided safety devices malfunctioned, but must also examine whether the safety devices that were provided operated so to give proper protection]).

Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability is granted.

Defendant Five Star Carting, Inc.'s Motion

Defendant Five Star Carting, Inc. moves pursuant to CPLR 3211(7) to dismiss the complaint on the grounds that the plaintiff's complaint fails to state a cause of action as against it. . Movant argues that the evidence establishes that Five Star Carting, Inc owned no duty to the plaintiff because it did not contract for any of the work at the job site where the plaintiff was injured.

The court finds the plaintiff's complaint states a cause of action against the moving defendant. The court further finds that this motion is actually an untimely summary judgment motion masked as a motion to dismiss. As such, it is denied in its entirety.

Adler Defendants' Cross Motion

The Adler defendants cross move for summary judgment on their cross claim for common law indemnification against defendants Five Star Carting, Inc. and Five Star.

Movant contends that it retained Five Star to be its general contractor. In addition, it contends that there are questions of fact regarding whether Hidalgo was employed by Five Star Carting, Inc. In light of the questions of fact regarding the active tort feisor, the court grants the motion to the extent that it is granted a conditional award of common law indemnification upon a finding of negligence attributable to the defendants Five Star and Five Star Carting Inc. (see *McCarthy v. Turner Construction*, 17 NY3d 369 [2011]).

Defendant Five Star's Motion

Defendant Five Star timely moves for summary judgment for an order dismissing the plaintiff's claims against it for common law negligence, Labor Law 200 and Labor Law 241(6), as well as, an order dismissing all cross claims for common law and contractual indemnification.

In granting plaintiff's motion for partial summary judgment based upon Labor Law 240(1), the Court declines to consider defendant's argument that they are entitled to summary judgment dismissing the claims based upon the violation of Labor Law § 241(6). The plaintiff's damages are the same regardless of the theory of liability and plaintiff can only recover these damages once. As such, defendants argument concerning the lack of merit of the other theories

of liability contained in the complaint are academic (*see, Jallow v. Kew Gardens Hills Apartments Owners*, 803 N.Y.S.2d 18 (Sup. Ct. Bronx Cty. 2005) *citing Torino v. KLM Construction Co. Inc.*, 257 AD2d 541 (1st Dept 1999)).

That branch of the motion which seeks to dismiss the Adler defendants' cross claim for contractual indemnification is granted since there is no evidence of a contractual agreement to indemnify. However, the relief to dismiss the Adler defendants' claim for common law indemnification is denied

This constitutes the decision and order of the Court.

Dated: 5/29/14  
Bronx, New York

  
\_\_\_\_\_  
HON. NORMA RUIZ, J.S.C.