

Balzano v BTM Dev. Partners, LLC
2014 NY Slip Op 32674(U)
September 18, 2014
Sup Ct, Bronx County
Docket Number: 0306469\09
Judge: Jr., Kenneth L. Thompson
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X

GENTRONICS USA, INC.,

Index No. **83981/11**

Fourth Third Party Plaintiff,

-against-

CERTIFIED MULTI-MEDIA SOLUTIONS, INC.,

Fourth Third Party Defendant.

X

The following papers numbered **1 to 32a** Read on Motions and Cross-Motions for **SUMMARY JUDGMENT** Noticed on **November 18, 2013** and duly submitted on the Motion Calendar of **August 7, 2014**

	<u>Papers</u>	<u>Numbered</u>
Notice of Motion- Order to Show Cause-Exhibits and Affidavits Annexed	1,9,13,21,	27, 30, 32a
Answering Affidavit and Exhibits	3,5,6 7,8,8a, 24, 25, 28,	10,11,15,23, 31
Replying Affidavit and Exhibits	12, 12a, 14, 20, 26, 29,	17, 18, 19, 32
Memoranda of Law	2,4,16, 22	

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on liability as against defendants, BTM Development partners, LLC, (BTM), Target Corporation, (Target), and Plaza Construction Corp., (Plaza), on grounds of violation of Labor Law 240(1). Defendant/third-party plaintiff, Plaza moves pursuant to CPLR 3212 for summary judgment, dismissing the complaint and all cross-claims as against it. Defendant, BTM cross-moves pursuant to CPLR 3212 for summary judgment against Plaza and dismissing any and all cross-claims asserted against BTM. Third third-party defendant/fourth third-party plaintiff, Getronics, USA, Inc., (Getronics), moves pursuant to CPLR 3212 for summary judgment, dismissing the third third-party complaint and cross-claims, and granting contractual indemnity with fees and expenses over against fourth third

party defendant, Certified Multi-media Solutions, LTD., (Certified).

Defendant/third-party plaintiff/second third-party plaintiff, Target, cross-moves pursuant to CPLR 3212 for summary judgment for contractual indemnification against third third-party defendant, Getronics, USA, Inc. Second third-party defendant, United Rentals, Inc., moves pursuant to CPLR 3212 to dismiss all claims as against United.

The aforementioned motions and cross-motions are hereby consolidated for decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff in an alleged fall from a hi low lift, (lift). Plaintiff testified that the lift trembled and jerked which caused him to fall out of the lift. At the time of his accident plaintiff was dressing electrical cables that had previously been installed. The work involved banding electrical cables and making the cables look neat. It is undisputed that plaintiff was not wearing a safety harness or lifeline nor was a safety harness or lifeline provided. It is undisputed that a post-accident inspection of the lift revealed a leak of hydraulic fluid in the lift's hose. Defendants question whether plaintiff fell from the lift, arguing that plaintiff may have jumped from the lift or did not fall from the lift at all. While defendants' attorneys argue that there is evidence from the testimony of Certified's mechanics that the lift would not tremble or jerk with a hydraulic fluid leak, no such testimony exists.

PLAINTIFF'S LABOR LAW 240(1) MOTION

"All contractors and owners and their agents ... 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.” Labor Law 240(1).

Target argues that it is not a contractor, owner or agent and therefore Labor Law 240(1) does not apply to it. However, a “lessee of property under construction is deemed to be an “owner” for purposes of liability under article 10 of New York's Labor Law (see, e.g., *Glielmi v Toys “R” Us*, 62 NY2d 664; *Bart v Universal Pictures*, 277 AD2d 4, 5; *Tate v Clancy-Cullen Stor. Co.*, 171 AD2d 292, 295; *Copertino v Ward*, 100 AD2d 565, 566). As the Court in *Copertino* explained, the term “owners” within the meaning of section 241 of the Labor Law is not “limited to the titleholder ... [It] encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner by contracting to have work performed for his benefit.” (Id.)” (*Kane v Coundorous*, 293 A.D.2d 309, 311 [1st Dept 2002]). It is undisputed that the lease agreement from BTM, as lessor, to Target, as lessee, was in full force and effect on the date of plaintiff’s injuries. It is further undisputed that Target contracted to have worked performed for its benefit. Clearly, Target’s liability falls within the ambit of Labor law 240(1).

Plaza argues that it not liable under Labor Law 240(1) to plaintiff as the on-site general contractor, because Plaza did not hire Certified, plaintiff’s employer. “Defendants unpersuasively argue that [contractor] was not a general contractor for purposes of liability under Labor Law § 240 (1) and § 241 (6). The record shows that [contractor] was delegated plenary authority over the construction work at the site, which included the authority to supervise and control the work performed by its subcontractors, and was therefore a statutory agent of the owner or general

contractor of the work site liable under the Labor Law (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981])... Whether [contractor] actually supervised plaintiff is irrelevant (see *Burke v Hilton Resorts Corp.*, 85 AD3d 419, 420 [2011]).” (*Naughton v City of New York*, 94 A.D.3d 1, 10 [1st Dept 2012]). Under the contract between Target and Plaza, Plaza contracted to be responsible for the safety of all workers on the job, and to be responsible for failure to maintain adequate safety precautions. Certified attended job meetings run by Plaza and Plaza ran safety meetings. Therefore, Labor Law 240(1) applies to Plaza, the General Contractor.

Plaza cites to *Kwoksze Wong v New York Times Co.*, 297 A.D.2d 544 [1st Dept 2002] for the proposition that a general contractor in name is not always held liable under Labor Law 240(1) when a worker falls from an elevated height. In distinction from the case at bar, in *Wong* the general contractor was responsible for the building, while an entirely different prime contractor was responsible for the installation of large printing presses that were located in specific locations and those locations and printing presses were not integrated into the building, as the low voltage electrical work was integrated in the build out of the building in this action.

With respect to the testimony of plaintiff’s supervisor that plaintiff at first said he jumped from the lift and then said he fell due to the trembling and jerking of the lift, “[w]hether plaintiff was hit by the swinging bundle or jumped to get out of its way, it cannot be said that plaintiff was the sole proximate cause of his injuries (see e.g. *Sherman v Piotrowski Bldrs.*, 229 AD2d 959 [1996]; *Cosban v New York City Tr. Auth.*, 227 AD2d 160, 161 [1996]; *Lockwood v National Valve Mfg. Co.*, 143 AD2d 509 [1988]).” *Naughton v City of New York*, 94 A.D.3d 1, 9

[1st Dept 2012]). Any comparative negligence on the part of plaintiff does not preclude statutory liability under Labor Law 240(1) on the part of Target, BTM and Plaza.

With respect to defendants' attorneys' argument that the accident did not occur as described by plaintiff, there is no evidence that the accident occurred other than described by plaintiff. The absence of a witness to the accident does not open the door to speculation regarding the cause of plaintiff's injuries. It has been repeatedly held that "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegation or assertions are insufficient." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Accordingly, plaintiff's motion for partial summary judgment under Labor Law 240(1) claim is granted, and BTM, Target and Plaza are held liable for plaintiff's injuries under Labor Law 240(1).

PLAZA'S MOTION FOR SUMMARY JUDGMENT

That branch of Plaza's motion seeking dismissal of plaintiff's complaint as against it is moot pursuant to the aforementioned decision on plaintiff's motion.

With respect to that branch of Plaza's motion that seeks dismissal of all contractual and common-law indemnification:

In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant (*Brown v Two Exch. Plaza Partners*, supra). In distinction, in the case of common-

law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240 (1) (see, *McDermott v City of New York*, 50 NY2d 211).

(*Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept 1999]).

Correia is controlling as Plaza's liability is statutory, and there is no evidence of any negligence on the part of Plaza. Therefore all claims for common law indemnification as against Plaza must be dismissed.

As for claims for contractual indemnification, Plaza argues that the accident did not arise out of its work at the job site and therefore all claims for contractual indemnification must be dismissed as against it. However there is an issue of fact as to how comprehensive Plaza's duties were on the job site. Therefore that branch of Plaza's cross-motion that seeks dismissal of claims for contractual indemnification must be denied.

Plaza has not submitted any evidence of negligence on the part of any party, nor has Plaza specifically argued for indemnification from any other party. It is unclear whether Plaza was moving for indemnification from other parties or merely sought dismissal of indemnification claims as against it. To the extent that Plaza seeks indemnification, that branch of the motion is denied without prejudice.

Accordingly, Plaza's motion is granted to the limited extent that all claims for common law indemnification against Plaza is dismissed. The branch of Plaza's motion seeking dismissal of all cross-claims for contractual indemnification is denied. The branch of Plaza's motion seeking contractual and common law

indemnification is denied without prejudice.

BTM CROSS-MOTION FOR SUMMARY JUDGMENT AGASINT PLAZA

BTM moves pursuant to CPLR 3212 for summary judgment against Plaza as well as dismissing any and all cross-claims asserted against BTM. BTM indicates in its attorney's affirmation that BTM did not lodge any cross-claims as against Plaza, therefore to the extent that the motion appears to seek summary judgment on a non-existent cross-claim of BTM against Target movant the motion is denied.¹ That branch of BTM's motion that seeks to dismiss Plaza's cross-claims is granted. There is no evidence of any negligence on the part of BTM, nor are there any contractual provisions for indemnification from BTM to Plaza.

GETRONICS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAZA AND CERTIFIED

Getronics moves pursuant to CPLR 3212 for summary judgment dismissing Plaza's complaint and cross-claims against Getronics, and moves for contractual indemnification against Certified. Plaza did not oppose Getronics motion to the extent Getronics seeks to dismiss Plaza's contractual indemnification claims. There are no written agreements between Getronics and Plaza and therefore Plaza's claims for contractual indemnity and claims for failure to acquire contractually obligated insurance in favor of Plaza are dismissed.

With respect to Plaza's claim for common law indemnification, "if a party with contractual authority to direct and supervise the work at a job site never

¹ BTM's attorney's affirmation states in paragraph 6 "Alternatively, in the event Plaza can identify competent evidence before the court which substantiates that cross-claims were asserted by BTM against Plaza, any such cross-claims should not be dismissed. Under such circumstances, summary judgment in favor of Plaza would be inappropriate because common-law indemnification would act to shift an incurred loss from BTM to Plaza."

exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone.” (*McCarthy v Turner Constr., Inc.*, 17 N.Y.3d 369, 378 2011.) Getronics did subcontract the work plaintiff was engaged in to Certified and there is no evidence that Getronics actually ever exercised control over the work performed by Certified. Infrequent site visits and receiving reports from the job site is not supervision. Furthermore, there is no evidence of any negligence on the part of Getronics that is the proximate cause of plaintiff’s injuries. Therefore, Plaza’s common law negligence claim against Getronics is dismissed.

Paragraph 11(a) of the subcontract agreement between Getronics and Certified provides that Certified will “indemnify and hold Getronics harmless from any and all suits, claims, actions damages or losses whatsoever (including attorneys’ fees) arising from injury to persons...which results in any way from any act or omission of a subcontractor, its employees...in its performance hereunder.”

Certified argues that whether the aforementioned indemnity clause is triggered is a factual issue and argues that there are factual issues to this case precluding an award of indemnity to Getronics at this time. However, if plaintiff’s injuries arose out of a plaintiff’s act of jumping out of the lift or as a result of an act or omission of Certified, the indemnity clause is triggered. It is admitted that “Certified alone supervised, directed and controlled the work of the plaintiff in this matter and that no other party supervised, directed and controlled the plaintiff’s work” (par. 3 aff in partial opp).

Accordingly, Getronics summary judgment motion is granted in its entirety. Plaza’s complaint and all cross-claims against Getronics are hereby dismissed, and

Certified is obligated to provide contractual indemnification to Getronics.

TARGET'S MOTION FOR SUMMARY JUDGMENT FOR CONTRACTUAL
INDEMNIFICATION AGAINST GETRONICS

The contract between Target and Getronics provides for indemnification from both Target for Getronics as well as for indemnification from Getronics to Target, depending upon the circumstances. "If Target provides an OSHA non-compliant ladder to the Vendor [Getronics] technician and a third party claim arises from the Vendor technician's use of such an OSHA non-compliant ladder, then the indemnification provisions" providing for indemnification from Target to Getronics will apply. Conversely, "If, as a result of or directly arising from Vendor technicians' negligence or willful misconduct in the use of a Target-provided ladder to perform Maintenance of a failed component, a third party claim arises, the indemnification " is provided by Getronics to Target. (Section 9.8(e)(vii) of Target/Getronics contract)(emphasis added).

Getronics argues that the aforementioned section 9.8(e)(vii) applies only to "the use of a Target-provided ladder to perform Maintenance of a failed component." The Court does not give such a pinched interpretation to the provision. It is clear from the plain language that "the use of a Target-provided ladder to perform Maintenance of a failed component" refers only to willful misconduct. "Under well-established principles of contract interpretation, agreements are generally construed in accord with the parties' intent (*Slatt v. Slatt*, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 477 N.E.2d 1099 [1985]), and the best evidence of the parties' intent is "what they say in their writing" (*Slamow v. Del Col*, 79 N.Y.2d 1016, 1018, 584 N.Y.S.2d 424, 594 N.E.2d 918 [1992]). Thus, where the terms of a contract are clear and unambiguous, "the intent of the parties must be found within the four corners of the document" (*ABS Partnership v.*

AirTran Airways, 1 A.D.3d 24, 29, 765 N.Y.S.2d 616 [1st Dept.2003]). (*Osprey Partners, LLC v. Bank of New York Mellon Corp.*, 115 A.D.3d 561 [1st Dept 2014]).

Accordingly, Target's motion for indemnification as against Getronics is granted.

UNITED'S CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING ALL CLAIMS

It is undisputed that the only malfunction identified on the lift after plaintiff's injuries was a hydraulic fluid leak from a hole in a hose on the lift. United sold the lift to Certified "as is" under a warranty that excluded hoses from coverage. There is absolutely no evidence of any negligence on the part of United. Plaza speculates that United may have created or exacerbated a dangerous condition. (*Espinal v Melville Snow Contactors, Inc.*, 98 NY2d 136 [2003]). It has been repeatedly held that "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegation or assertions are insufficient." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Similarly, Plaza's unplead products liability argument has absolutely no evidence supporting its contention that any aspect of products liability jurisprudence applies to the facts of this case.

Accordingly, United's cross-motion for summary judgment dismissing all claims against United is granted.

CONCLUSION

Plaintiff's motion for partial summary judgment under Labor Law 240(1) claim is granted, and BTM, Target and Plaza are held liable for plaintiff's injuries under Labor Law 240(1). That branch of Plaza's motion seeking dismissal of plaintiff's complaint as against it is moot pursuant to the aforementioned decision on plaintiff's motion. Plaza's motion is granted to the limited extent that all claims for common law indemnification against Plaza is dismissed. The branch of Plaza's motion seeking dismissal of all cross-claims for contractual indemnification is denied. The branch of Plaza's motion seeking contractual and common law indemnification is denied without prejudice. BTM indicates in its attorney's affirmation that BTM did not lodge any cross-claims as against Plaza, therefore to the extent that the motion appears to seek summary judgment on a non-existent cross-claim of BTM against Target movant the motion is denied. That branch of BTM's motion that seeks to dismiss Plaza's cross-claims is granted. Getronics summary judgment motion is granted in its entirety. Plaza's complaint and all cross-claims against Getronics are hereby dismissed, and contractual indemnification is found against Certified in favor of Getronics. Target's motion for indemnification as against Getronics is granted. United's cross-motion for summary judgment dismissing all claims against United is granted.

The foregoing shall constitute the decision and order of this Court.

Date: SEP 18 2014



 KENNETH L. THOMPSON JR. J.S.C.