

Guadalupe v MTA Bus Co.

2014 NY Slip Op 33157(U)

November 10, 2014

Supreme Court, Queens County

Docket Number: 700946/12

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

VICTOR GUADALUPE as ADMINISTRATOR or the
ESTATE OF CESAR CESPEDES, deceased,

Index No. 700946/12

Plaintiff,

Motion

Date June 11, 2014

- against-

Motion

MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK
CITY TRANSIT AUTHORITY, LONG ISLAND
RAILROAD, CITY OF NEW YORK CITY, F&S
CONTRACTING INC., GREATER JAMAICA
DEVELOPMENT CORP., PRIDE EQUIPMENT
CORP., JLG INDUSTRIES and LAWRENCE BATTLE,

Cal. No. 53, 54, 55, 56 & 57

Motion

Seq. No. 8, 9, 10, 11 & 12

Defendants.

MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK
CITY TRANSIT AUTHORITY and CITY OF NEW
YORK CITY,

Third-Party Plaintiffs,

- against -

EGG ELECTRIC INC.,

Third-Party Defendant.

The following papers numbered EF 150 to EF 351 read on this **(1)** motion by plaintiff for summary judgment in plaintiff's favor on the issue of liability as against defendants, Long Island Rail Road (LIRR), and F&S Contracting, Inc. (F&S), and for summary judgment pursuant to CPLR 3212, against MTA Bus Company and Lawrence Battle; **(2)** motion by the MTA Bus Company and Lawrence Battle for summary judgment in their favor; **(3)** motion by JLG Industries, Inc. (JLG), for summary judgment in its favor; **(4)** motion by the Metropolitan Transportation Authority (MTA), Long Island Rail Road Company (LIRR), and Greater Jamaica Development Corporation (GJDC), herein collectively referred to as the "owner defendants," to dismiss the complaint and all cross and counterclaims against them; for summary judgment in their favor on their claims for contractual and common-law

indemnification against F&S and for contractual indemnification from EGG, and, in the alternative, for a conditional order of contractual and/or common-law indemnification from F&S and EGG; **(5)** motion by Pride Equipment Corp. (Pride), for summary judgment in its favor dismissing all cross claims and or counterclaims of MTA Bus Company and Battle and the cross claims and or counterclaims of the owner defendants as against Pride; and to dismiss the cross claims of the MTA/Battle and the owner defendants on the grounds that there are no pending claims against Pride and the proper remedy is a third-party action against Pride pursuant to CPLR 1007; and to dismiss the cross claims even if they are converted to a third-party action; **(6)** cross motion by MTA Bus Company and Battle to convert the cross claims into a third-party complaint and amend the caption accordingly; and **(7)** cross motion by F&S Contracting Inc. (F&S), for summary judgment dismissing the Labor Law §200 and common law negligence claims against it.

Papers
Numbered

| | |
|--|------------------------------|
| Notice of Motion - Affirmation - Exhibits..... | EF 150-157, 166-206, 221-257 |
| Notice of Cross Motion - Affirmation - Exhibits..... | EF 207-220, 270-275 |
| Affirmation in Opposition - Exhibits..... | EF 258-259, 276-283, 288-338 |
| Reply Affirmation..... | EF 268-269, 286-287, 339-351 |

Upon the foregoing papers, it is ordered that the motions and cross motions are determined as follows:

Decedent in this negligence/labor law action seeks damages for personal injuries sustained in an accident on September 19, 2011, when a bus owned by the MTA Bus Company, and operated by Lawrence Battle, collided into a scissor lift on which Cesar Cespedes and another co-worker (DelGreco), were working. Cespedes subsequently died as a result of his injuries and his estate commenced this action. The separate actions of Del Greco and Cespedes have been joined for trial.

The accident occurred under the underpass in the vicinity of Sutphin Boulevard near the intersection of 94th Street, in Jamaica, New York. Long Island Railroad Company (LIRR), is the owner of the subject premises. Greater Jamaica Development Corp. (GJDC), acted as the developer of the LIRR underpass project and retained F&S Contracting, Inc., to act as general contractor on the subject construction project. F&S retained Egg to provide labor and to perform electrical renovation work for the rehabilitation of the LIRR underpass at Sutphin Boulevard. Pride rented the subject scissor lift to Egg. The scissor lift was manufactured by JLG. On the date in question, decedent was employed by Egg as a Local 3 Union electrician.

In addition to the negligence claims, decedent alleges that defendants violated New York State Labor Law §§200, 240 (1) and 241 (6), in failing to provide decedent with proper protection.

Facts

DelGreco testified, upon his examination before trial, as follows: In August of 2011, the decedent worked the night shift on the subject project with Egg employees, Thomas DeCrescenzo and DelGreco. No foreman was present on the night shift, however there was a “lead guy” who was DeCrescenzo. Egg provided tow scissor lifts for the job along with equipment including tools, vests and hard hats. The subject scissor lifts have a platform that raises up. Plaintiff used scissor lifts every day at the property. The LIRR underpass is situated over Sutphin Boulevard which is a divided road with three lanes of traffic running in opposite directions. A median separates the six lanes of traffic. In order to perform their work, Egg had to close one lane of traffic. Egg used orange cones and barrels to close off the lane they were working in. Normally, DelGreco was the “signal guy” with a flag to slow down traffic. Egg would also have a “work” sign or a “work in progress” sign and a stop sign or an orange flag. The orange cones/barrels were placed at an angle so that vehicles would begin to merge into one lane of traffic. When DelGreco acted as the signal guy, he would slow down traffic or stop traffic if the Egg employees needed to switch lanes or bring the lift out. On the night in question, DeCrescenzo was scheduled to work but did not come to work. Cespedes informed DelGreco that he would not be a flag man that night and that DelGreco would work up on the lift. After cones were set up in the middle lane of the roadway, DelGreco and Cespedes set up the lift perpendicular to Sutphin Boulevard in the closed middle lane to perform the dome light installation work underneath the underpass. Cespedes decided how to set up the lift on the date of the accident. As the lift was raised approximately 15 feet in the air and DelGreco and Cespedes were performing the installation work, an MTA Bus company bus operated by Lawrence Battle came into contact with the scissor lift knocking it over.

Sherman Roberts testified on behalf of Egg as follows: he was employed as a foreman for Egg at the project. Egg provided equipment to its employees for the project including harnesses, lanyards, cones, barrels and signs to block traffic. Roberts trained Egg employees on how to operate scissor lifts. In order to shut down traffic lanes for the performance of their work, Egg would use plastic cones and barrels to shut down the lane and would use a flagman in conjunction with shutting down the traffic. Roberts learned after the accident that DeCrescenzo did not show up for work that evening. It was a violation of Egg’s procedure for DeCrescenzo not to call in and inform Egg that he was not coming in. Roberts advised Egg employees prior to the accident that if someone was absent, they were required to call him. Roberts informed Egg employees that if someone was absent, they were not to perform work on the scissor lift in the road and that it was essential that three workers perform the night shift.

Roberts testified that he gave instruction to Egg workers in the use of a scissor lift. Roberts testified that he personally trained Del Greco and Cespedes in the use of the lift at the LIRR project. Egg personnel were working on the lighting underneath the overpass on the night shift because of the heavy traffic in the area during the daytime. Egg did not have an attenuator truck for use in directing traffic. The testimony of all of the witnesses confirm that Egg alone directed, supervised and controlled the means and methods of work on the subject project. No

one from F&S directed, supervised or controlled the work of the Egg employees on the night in question.

Motion by Plaintiff

It is well-settled that to establish a *prima facie* violation of Labor Law § 240 (1) a plaintiff must establish that “the statute was violated and that this violation was a proximate cause of his or her injuries” (*Gardner v New York City Tr. Auth.*, 282 AD2d 430 [2d Dept 2001], citing *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 393 [2d Dept 1997]). The evidence submitted by the estate of Cespedes on the motion for summary judgment established a violation of Labor Law § 240 (1), as Cespedes was not provided with proper equipment to perform work at an elevated height (*see Figueroa v Manhattanville Coll.*, 193 AD2d 778 [2d Dept 1993]). Cespedes was only provided with an unsecured lift, which had already been placed at the location where DelGreco and Cespedes were directed to work. The scissor lift was unprotected and unguarded. There were no guards, barriers, flagmen or lighting in place at the construction site at the time of the subject accident.

In opposition, defendants failed to raise an issue of fact whether Cespedes was a recalcitrant worker or the sole proximate cause of his accident (*see Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]). The only evidence they submitted was the testimony of the foreman of Egg (Roberts), that Egg provided equipment to its employees for the subject project, including harnesses, lanyards, cones and barrels and signs to block traffic. Roberts further testified that the deceased and plaintiff, DelGreco, were directed not to work on the project when one of the three men assigned were out, as there were to be three persons working with one serving as the flagman. The mere allegation that decedent had disobeyed his supervisor's instructions and worked the shift using only two persons does not provide a basis for a defense against decedent's Labor Law § 240 (1) cause of action. It is well-settled that the injured's contributory negligence is not a defense to a claim based on Labor Law § 240 (1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices (*e.g.*, *Bland v Manocherian*, 66 NY2d 452 [1985]). Further, it cannot be said that decedent's alleged disregard of his supervisor's order was a supervening cause of the accident, since decedent's injuries were the direct result of the failure by defendants to supply safety equipment to give “proper protection” to workers in decedent's position (*cf.*, *Mack v Altmans Stage Light. Co.*, 98 AD2d 468 [2d Dept 1984]).

The so-called “recalcitrant worker” defense cannot be invoked under the circumstances of this case (*see Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361 [4th Dept 1982], *appeal dismissed* 58 NY2d 824 [1983]). That defense requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer (*see Hagins v State of New York*, 81 NY2d 921 [1993]). It has no application in the case at bar, as no adequate safety devices were provided (*see Stolt v General Foods Corp.*, 81 NY2d 918 [1993]). Even if decedent knew that appropriate safety devices were “readily available,” there is no evidence that decedent “knew he was expected to use” the safety devices for the assigned

task. There is no evidence that decedent received directions to use any specified safety devices. Nor is there evidence of any “standing order” conveyed to workers, directing them to use safety devices in performing such a task (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Moreover, an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a “safety device” (*Id.*). Accordingly, decedent is entitled to summary judgment on the § 240 (1) claim.

The branch of the motion by decedent which is for summary judgment against the MTA Bus Company and defendant, Battle, is denied. “[A] plaintiff moving for summary judgment the issue of liability in an action for negligence must eliminate any material issue, not only as to the defendant's negligence, but also as to whether the plaintiff's own comparative negligence contributed to the incident” (*Calcano v Rodriguez*, 91 AD3d 468 [1st Dept 2012]). Based on this holding, a summary judgment motion by a “plaintiff who cannot eliminate an issue as to his or her own comparative fault should simply be denied” (*id.* at 471). In the instant case, a question as to the decedent’s comparative negligence is raised. First, there is the question of whether the decedent disobeyed instructions not to work on that part of the project without a third person acting as a flagman. Next, while there was a sign at the entrance warning of a 12'5" underpass clearance, there was no indication that the scissor lift extended out into the travel lane of traffic such that it reduced the available safe height thereby preventing the 11' bus from driving by in the travel lane. The undisputed record indicates that there was no flagman to direct the traffic and defendants presented evidence that the presence of the same would likely have prevented the accident, as might have cones, barrels, signs, etc protecting the total width taken by the scissor lift’s operation partially in the travel lane of traffic. Further, there is no evidence that the bus was traveling at an unsafe speed. Therefore, the factual issue to be resolved is the *extent* of the decedent’s culpable conduct; in other words, whether the decedent’s negligence was, indeed, a *substantial* factor in events that led to his death (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Motion by MTA Bus Company and Lawrence Battle

An operator of a motor vehicle traveling with the right-of-way has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles (*see Fried v Misser*, 115 AD3d 910 [2d Dept 2014]; *Allen v Echols*, 88 AD3d 926, 926 [2d Dept 2011]; *Pollack v Margolin*, 84 AD3d 1341, 1342 [2d Dept 2011]; *Bonilla v Calabria*, 80 AD3d 720, 720 [2d Dept 2011]; *Todd v Godek*, 71 AD3d 872, 872 [2d Dept 2010]). Battle testified that he observed cones in the right lane of travel and the scaffolding ahead of that, and that he observed that the scaffold was extended in height on wheels. Battle admitted that he did not know the height of the MTA hybrid bus and that he did not know the clearance for the top of the bus in relation to the underside of the overpass. As he passed by the scaffolding, Battle testified, he did not take into consideration the possible clearance of the bus. In fact, he testified, that he first became aware of the accident involving decedent and the scaffold a few seconds after he passed the scaffold when “[he] heard a loud bang that was behind [my] bus and [from] what [he] could see in the rear view mirror, it was

just a cloud of dust.” Battle testified that the bus he was operating had two battery “banks” on the top, with one at the rear and the other towards the middle of the bus. He did not know how high these battery “banks” protruded above the top of the bus. Evidence was submitted indicating that there was damage to the rear battery “bank,” suggesting that there was contact between this portion of the bus and the scissor lift on which decedent was standing at the time of the accident. Accordingly, Battle failed to demonstrate, *prima facie*, that he kept a proper lookout and that his alleged negligence did not contribute to the happening of the accident (*see Brandt v Zahner*, 110 AD3d 752 [2d Dept 2013]; *Topalis v Zwolski*, 76 AD3d 524 [2d Dept 2010]).

That branch of the motion is to dismiss the complaint insofar as asserted against Battle’s employer, the MTA Bus Company is also denied. Pursuant to the doctrine of respondent superior, an employer is vicariously liable for torts committed by an employee within the scope of employment and in furtherance of the employer’s business (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932 [1999]; *Nerey v Greenpoint Mortg. Funding, Inc.*, 116 AD3d 1015 [2d Dept 2014]).

Motion by JLG

The motion by JLG for summary judgment in its favor is granted. To establish a *prima facie* case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff’s injury (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102 [1983]). In this case, there is no proof that any design or workplace safety standards had been violated, and no evidence was presented that the scissor lift, as designed, was not reasonably safe for its intended purpose (*see Denny v Ford Motor Co.*, 87 NY2d 248, 258-59 [1995]; *Affuso v Crestline Plastic Pipe Co.*, 194 AD2d 884 [3d Dept 1993]; *Schimmenti v Ply Gem Indus.*, 156 AD2d 658, 659 [2d Dept 1989]). The undisputed record indicates that the scissor lift is not designed to be operated in the path of oncoming vehicular traffic, as it was at the time of the accident. Rather, it is intended to be used in clearly-delineated work areas that are free of obstructions and hazards in the scissor lift’s immediate proximity. To this end, JLG provided specific warnings to operators in the ANSI Manual of Responsibilities regarding the need to keep the scissor lift clear of surrounding vehicular traffic.

In any event, significantly, no proof was adduced to demonstrate that any alleged design defect was the proximate cause of the accident. Evidence in the record indicates that the accident may have been caused by the placement of the scissor lift in close proximity to oncoming traffic and Battle’s alleged failure to operate the MTA bus with reasonable care as he approached the LIRR underpass. “Where the evidence adduced reveals the existence of several possible causes of an injury, for one or more of which the defendant is not responsible, a plaintiff cannot recover without proving the injury was sustained wholly or in part by reason of

the defendant's negligence” (*LaPaglia v Sears Roebuck & Co.*, 143 AD2d 173, 176 [2d Dept 1988]; *see Bernstein v City of New York*, 69 NY2d 1020, 1021-1022 [1987]). The opponents of the motion fail to prove that the injury was sustained in whole or in part by reason of JLG’s alleged negligence.

Accordingly, the motion by JLG for summary judgment in its favor is granted.

Motion by the Owner/Defendants

The motion seeking to dismiss plaintiff’s Labor Law § 200 claims and common law negligence claims as asserted against the owner-defendants is granted.

The owner defendants demonstrated, *prima facie*, that decedent's injuries were sustained as a result of the means and methods used in the injury-producing work, rather than as a result of a dangerous condition at the site, and that the owner defendants did not exercise supervisory control over that work (*Quilliams v Half Hollow Hills S.D.*, 67 AD3d 763 [2d Dept 2009]). The decedent acknowledged that at the time of the accident he was following the instructions and direction of his foreman. There is no evidence, other than speculation, that the owner defendants were negligent, or that they directed, controlled, or supervised the manner in which plaintiff performed his work or supplied the materials or tools used by the decedent.

That branch of the motion dismiss the Labor Law §§ 240 (1) and 241 (6) claims against the MTA, NYCEDC and GJDC, is granted since these defendants are not “owners” of the subject premises and are not general contractors (*see* Labor Law §§ 200, 240 [1]; *Chiu Wong v City of New York*, 65 AD3d 1000 [2d Dept 2009]; *Imling v Port Auth. of N.Y. & N.J.*, 289 AD2d 104, 105 [1st Dept 2001]).

That branch of the motion seeking dismissal of decedent’s Labor Law § 240 (1) claim on the ground that decedent was the sole proximate cause of the accident, is denied. While the owner defendants also submitted evidence that the decedent's injuries could have been prevented if he had been wearing an available safety harness, the owner-defendants failed to make a *prima facie* showing that the decedent's alleged negligence in failing to wear the harness was the sole proximate cause of the accident (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Wahab v Agris & Brenner, LLC*, 102 AD3d 672 [2d Dept 2013]; *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 639 [2d Dept 2005]).

That branch of the motion by the owner-defendants to dismiss decedent’s claims under Labor Law § 241 (6), is granted. In support of the alleged claims decedent alleges that defendants violated Sections 12 NYCRR 23-1.5 and 12 NYCRR 23-1.32. 12 NYCRR 23-1.5 merely establishes a general safety standard that is insufficient to give rise to the non-delegable duty imposed by Labor Law § 241 (6) (*see Ferreira v Unico Serv. Corp.*, 262 AD2d 524 [2d Dept 1999]; *Vernieri v Empire Realty Co.*, 219 AD2d 593 [2d Dept 1995]); and since there was uncontroverted evidence that defendants never received written notice of an Industrial Code violation, 12 NYCRR 23-1.32 is inapplicable (*Mancini v Pedra Const.*, 293 AD2d 453 [2d

Dept 2002]).

That branch of the motion by the owner-defendants for contractual indemnification from F&S and Egg is granted. A party is entitled to full contractual indemnification provided that the “intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also, Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 159 [1977]). The contract between Egg and F&S requires Egg to

“indemnify and hold harmless *the owner, contractor, architect, architect’s consultants and agents and employees* of any of them from and against all claims, damages [. . .] arising out of or resulting from the performance of the subcontractor’s work under this subcontract [. . .].”

There is no evidence that the MTA, GJDC or LIRR directed, supervised or controlled the means and methods of F&S’, Egg’s or plaintiff’s decedent’s work. Further, the record indicates that the MTA, GJDC and LIRR were not negligent in any way. Therefore, liability, if any, on their part would only be statutory. Where liability is solely statutory in nature, a party is entitled to recover under a contract of indemnity (*see Brown v Two Exchange Plaza Partners, et al.*, 76 NY2d 172 [1990]; *Correia v Professional Data Management, Inc., et al.*, 259 AD3d 60 [1999]). In addition, where a party is entitled to indemnification under a contract of indemnity, it is also entitled to its costs, including attorneys’ fees, pursuant to the agreement (*see Holt v Welding Services, Inc., et al.*, 264 AD2d 562 [1st Dept 1999]).

The broad form indemnification clause of the contract between the GJDC and F&S provides that the indemnification is triggered if the incident arose out of the acts or omissions, among other things, of the contractor or its subcontractors. Clearly, a claim by workers of its subcontractor, EGG, arises out of the acts or omissions of F&S and or EGG and the MTA, GJDC and LIRR are entitled to be indemnified by F&S, including costs and attorneys’ fees.

The broad form indemnification clause of the contract between F&S and EGG provides that the indemnification is triggered if the incident arose out of the work to the extent caused in whole or in part of negligent acts or omissions of EGG or anyone directly or indirectly employed by them. Similarly, a claim by two of its workers related to its work, who only received direction from EGG or EGG employees, arose out of its negligent acts or omissions and the MTA, GJDC and LIRR are entitled to be indemnified by EGG.

The owner-defendants are entitled to a conditional order of common-law indemnification from F&S and EGG. The owner defendants are also entitled to a conditional order of common-law indemnification from F&S. The liability of the owner defendants to plaintiff, is clearly premised on their ownership of the premises and on section 240 (1). There is no suggestion that the owner-defendants had the authority to supervise or control the subject project (*see Public Adm’r of Bronx County v Trump Vil. Constr. Corp.*, 177 AD2d 258, 259 [1st Dept 1991]).

There is no suggestion that the owner defendants exercised control over the placement of the scissor lift. Where there is no evidence that the owner(s) directed the work, “the basis of his liability remains vicarious, and he may recover over against the wrongdoer under the theory of implied indemnification” (*Blaskovic v Penguin House Tenants Corp.*, 158 AD2d 434, 435 [1st Dept 1990]; *see also, Seecharran v 100 W. 33rd St. Realty Corp.*, 198 AD2d 121, 122 [1st Dept 1993]). This is not a case in which the owner-defendants had supervision or control of the project and exercised it negligently (*see Carr v Perl Assocs.*, 201 AD2d 296, 297 [1st Dept 1994]).

Motion by Pride

The branch of Pride’s motion is to dismiss all cross claims against it is granted. The key element of a cause of action for indemnification” is a duty owed from the indemnitor to the indemnitee arising from “the principle that ‘every one is responsible for the consequences of his own negligence, and if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him’ ” (*see Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Oceanic Steam Nav. Co. [Ltd.] v Compania Transatlantica Espanola*, 134 NY 461, 468 [1892]). There is no evidence that Pride caused or contributed to the subject accident. There was no showing that a defective or inappropriate scissor lift had been provided, or that any act or omission by Pride Equipment Corporation caused the deceased’s injuries. As the record indicates, Pride was no more than a lessor of the scissor lift. It had no personnel at the site; nor did it control or direct the operation of the scissor lift. No evidence was offered in opposition to Pride’s *prima facie* showing based upon the affidavit of Pride representative, Gary Cataldo, that it merely leased the new scissor lift to Egg and did not supervise the lift operator(s) or have any on-site responsibility. Furthermore, absent the ability to control the work, Pride could not be considered a statutory agent of the owner or contractor under Labor Law § 240 (1) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

The Court will not consider the expert affidavits since MTA/Battle did not identify Dr. Robert Kennedy or Mr. Richard Hermance in pre-trial disclosure and Pride was unaware of them until Pride was served with the affidavit in response to their summary judgment motion, made after the note of issue and certificate of readiness were filed (*see Construction by Singletree, Inc. v Lowe*, 55 AD3d 861 [2d Dept 2008]). The courts have repeatedly held that, under such circumstances, preclusion is warranted as well (*see DeLeon v State of New York*, 22 AD3d 786 [2d Dept 2005]; *Safrin v DST Russian & Turkish Bath, Inc.*, 16 AD3d 656 [2d Dept 2005]; *Dawson v Cafiero*, 292 AD2d 488 [2d Dept 2002]).

It is noted that neither Kennedy nor Hermance opine that the scissor lift was defective. Instead Dr. Kennedy proffers an opinion that there was a problem with the visibility of the scissor lift and Dr. Hermance opines that the presence of a flagman would have resolved any issues with regard to the visibility of the scissor lift. Therefore, the problems with the scissor lift as opined by these experts, were not within the control of Pride.

That branch of the motion to convert the cross claims into a third-party action is denied, in this case, as moot. It is noted, nonetheless since decedent did not sue Pride, the cross claims by defendants for indemnification and contribution should have been maintained in a third-party action (*see Arcuri v Ramos*, 7 AD3d 741 [2d Dept 2004]; *Jones v New York City Hous. Auth.*, 293 AD2d 371 [1st Dept 2002]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [1st Dept 2001]).

Cross Motion by MTA Bus Company/Battle

For reasons noted above, the cross motion by MTA Bus Company and Battle to convert the cross claims into a third-party complaint is denied.

Cross Motion by F&S

The cross motion by F&S Contracting Inc. (F&S), for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against it, is granted. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2d Dept 2006]). Where the injury allegedly arises from the means and methods of the work performed, an implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury (*see Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2d Dept 2006]). In the instant action, the challenged methods are those of a subcontractor, and the owner or general contractor exercises no supervisory control over the operation, no liability attaches to the owner or general contractor under common-law or under Labor Law § 200 (*see Haider v Davis*, 35 AD3d 363 [2d Dept 2006]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2d Dept 2006]). F&S demonstrated, *prima facie*, that decedent's injury was sustained as a result of the manner in which the work was performed, rather than as a result of a dangerous condition at the site, and that F&S did not exercise supervisory control over the work (*see Haider v Davis, supra; Ferrero v Best Modular Homes, Inc., supra*).

In opposition, decedent and the other defendants failed to raise a triable issue of fact. Although there is evidence that F&S assumed some general supervisory duties over the entire project, those duties did not rise to the level of supervision or control necessary to hold it liable under Labor Law § 200 (*see Kajo v E.W. Howell Co., Inc.*, 52 AD3d 659 [2d Dept 2008]). Charles Warshaw (a principal of F&S), testified that Colin McDonough was the F&S supervisor for the project and his role was to “coordinate the work, to progress the project,” not to oversee the job. Warsaw identified himself as the quality engineer and was present to make sure the quality of the work met specifications. F&S had no responsibility with regard to the means and methods of work of the trades. Accordingly, the cross motion by F&S to dismiss the Labor Law § 200 and common-law negligence claims against it, is granted.

Conclusion

The branch of the motion by decedent which is for summary judgment on the § 240 (1) claim, is granted. The branch of the motion by decedent which is for summary judgment against the MTA Bus Company and defendant Battle, is denied.

The motion by defendants, MTA Bus Company and Battle, for summary judgment in their favor is denied.

The motion by JLG for summary judgment in its favor is granted.

The branch of the motion by the owner-defendants to dismiss decedent's Labor Law § 200 claims and common-law negligence claims as asserted against the owner-defendants is granted. The branch of the motion by the owner-defendants which is to dismiss the Labor Law §§ 240 (1) and 241 (6) claims against the MTA, NYCEDC and GJDC, is granted. The branch of the motion by the owner-defendants to dismiss plaintiff's Labor Law § 240 (1) claim, is denied. The branch of the motion which is to dismiss decedent's Labor Law § 241 (6), claim is granted. The branch of the motion by the owner-defendants which is for contractual indemnification from F&S and Egg is granted. The branch of the motion by the owner-defendants which is a conditional order of common-law indemnification from F&S and EGG, is granted.

The motion by Pride to dismiss all cross claims against it, is granted.

The cross motion by MTA Bus Company and Battle to convert the cross claims into a third-party complaint, is denied.

The cross motion by F&S to dismiss the Labor Law § 200 and common-law negligence claims against it, is granted.

Dated: November 10, 2014

DARRELL L. GAVRIN, J.S.C.