

<b>Batista v Manhattanville Coll. of the Female Academy of the Heart</b>
2014 NY Slip Op 33801(U)
July 2, 2014
Supreme Court, Bronx County
Docket Number: 301184/07
Judge: Kenneth L. Thompson, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20

RAFAEL BATISTA,

Plaintiff,

-against-

MANHATTANVILLE COLLEGE OF THE FEMALE  
ACADEMY OF THE HEART AND TJR INC,

Defendants.

Index No. 301184/07

DECISION/ORDER

Present:

HON. KENNETH L. THOMPSON, Jr.

TJR INC,

Third-Party Plaintiff,

-against-

AMERICAN SCAFFOLD and EQUIPMENT CORP.,

Third-Party Defendants.

MANHATTANVILLE COLLEGE,

Second Third-Party Plaintiff,

-against-

AMERICAN SCAFFOLD and EQUIPMENT CORP.,

Second Third-Party Defendants.

The following papers numbered 1 to 8 read on this motion,

*for summary judgment*

No On Calendar of 03/28/14

PAPERS NUMBERED

Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed

1,5,8

Answering Affidavit and Exhibits

2,3,6

Replying Affidavit and Exhibits

4,7

Affidavit

Memorandum Of Law

Stipulation -- Referee's Report --Minutes

Filed papers

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff, Rafael Batista, (Batista), moves pursuant to CPLR 3212 for partial summary judgment on liability as a result of violation of Labor Law 240(1), against defendants, Manhattanville College, (Manhattanville), and TJR, Inc., (TJR). Manhattanville moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint, or in the alternative, granting Manhattanville judgment on its cross-claim for common law indemnification against TJR. TJR moves pursuant to CPLR 3212 for summary judgment, dismissing plaintiff's complaint on grounds that plaintiff was the sole proximate cause of his accident and/or that TJR

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was not negligent and did not direct, control or supervise plaintiff's manner of work. In his motion, plaintiff discontinued his Labor Law 200 and negligence causes of action. The third-party action of TJR against American Scaffold and Equipment Corp., (American), was discontinued, by stipulation dated June 5, 2013. The aforementioned motions are hereby consolidated for purposes of decision and disposition.

#### LABOR LAW 240(1)

It is undisputed that plaintiff was the foreman for American and was engaged in constructing scaffolding at Manhattanville's campus. TJR was the general contractor at the site. It is undisputed that plaintiff fell two stories from a scaffold when a plank broke beneath him. An eye witness avers that plaintiff was bouncing on the scaffold plank to determine if the plank was strong enough to hold weight. Plaintiff denies he bounced on the scaffold, however, on a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *Dauman Displays Inc. v. Masturzo*, 168 A.D.2d 204, 562 N.Y.S.2d 89 (1st Dept. 1990). Therefore, for purposes of plaintiff's summary judgment motion, it must be assumed that plaintiff bounced on the board that collapsed.

Labor Law §240 (1) applies even in those situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed (*see, e.g., Reed v State of New York*, 249 AD2d 719 [partially dismantled scaffold tipped, causing plaintiff to fall]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012 [plaintiff fell to his death through floor of scaffold he was in the process of dismantling]; *Engel v Nedwidek*, 91 AD2d 794.

*Kyle v City of NY*, 268 AD 2d 192, 197-198 (1<sup>st</sup> Dept 2000).

"It is well established that the duty imposed by Labor law §240(1) is nondelegable, and, consequently, an owner and/or contractor who breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (*Ross v Curtis-*

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*palmer Hydro-Elec. Co.*, 81 NY2d 494, 500; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513) and regardless of whether the worker's negligence contributed to the mishap (*Rocovich v Consolidated Edison Co.*, *supra*, at 513; *Bland v Manocherian*, 66 NY2d 452, 459-461).” *Cosban v New York City Transit Authority*, 227 AD2d 160, 160-161 (1<sup>st</sup> Dept 1996).

Defendants argue that *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 290 [2003], applies to plaintiff's claims. “Plaintiff argues that he is entitled to recover in the face of a record that shows no violation and reveals that he was entirely responsible for his own injuries. There is no basis for this argument.” *Id.* At 290. However, in *Blake* the issue was “whether a plaintiff who was injured while using a ladder may prevail in a Labor Law § 240 (1) action even when a jury finds that the ladder was so constructed and operated as to give him proper protection and he was the sole cause of his injury.” *Blake* at 283. It is manifestly clear that the scaffold Batista fell from did not give him proper protection. Batista did not just fall from an intact scaffold, he fell because a board broke and he fell two stories. Defendants argument that Batista's placing a non OSHA approved plank on the scaffold and then testing the strength of the board by hopping on it was the sole proximate cause of his injuries is unavailing. It was the procedure for the planking to be tested for strength in American's yard by Batista's supervisor, Peter Sacheli, (Sacheli). Then the planks would be bundled and sent to the job site. Therefore, the boards used on the scaffold are screened by someone other than plaintiff. Therefore, even if, *arguendo*, it was negligent for plaintiff to have tested the plank on the scaffold rather than on the ground, the board that gave way should have been tested on the ground prior to being sent to the job site where plaintiff fell from the scaffold.

With respect to defendants' argument that as foreman, plaintiff negligently placed spruce planks rather than OSHA approved planks for flooring, plaintiff avers he was told by Sacheli, to

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first use all of the OSHA planks for flooring and then use spruce planks, when there are no more OSHA approved planks. Plaintiff further avers that there were no more OSHA approved planks available when he placed a spruce plank on the floor of the scaffold. Moreover, even if plaintiff had placed a spruce plank on the floor improperly, “[e]vidence by the defendant that [plaintiff] placed a rotten plank on the scaffold, when he was told to use a safe plank, does not create a question of fact as to whether he was a recalcitrant worker (see, *Stolt v General Foods Corp.*, 81 NY2d 918 [An instruction by an employer or owner to avoid using unsafe equipment does not create an issue of fact sufficient to support a recalcitrant worker defense]; see also, *Singh v Barrett*, 192 AD2d 378).” (*Scorza v CBE, Inc.*, 231 A.D.2d 564, [2<sup>nd</sup> Dept 1996].

Under the facts of this case, construed most favorably to defendants, plaintiff is not the sole proximate cause of his fall from the scaffold.

Accordingly, plaintiff’s motion is granted to the extent that defendants are liable for plaintiff’s injuries on grounds of violation of Labor Law 240(1). Defendants’ motions to dismiss plaintiff’s Labor Law 241(6) claims are moot.

#### COMMON LAW INDEMNIFICATION

Manhattanville seeks common law indemnification from its general contractor, TJR. However, Sacheli testified on behalf of American, that all employees of American were under the direction of American employees. Sacheli specifically testified that TJR did not give any direction to American employees as to the installation of the scaffold. (p.130).

“[A] party’s (e.g., a general contractor’s) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision (see *Felker*, 90 NY2d at 226; see also *Colyer v K Mart Corp.*, 273

AD2d 809, 810 [4th Dept 2000] [for standard]). Thus, if a party with contractual authority to direct and supervise the work at a job site never 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]).

Accordingly, that branch of Manhattanville's motion for common law indemnification from TJR is denied.

CONCLUSION

Plaintiff's motion is granted to the extent that defendants are liable for plaintiff's injuries on grounds of violation of Labor Law 240(1). Defendants' motions to dismiss plaintiff's Labor Law 241(6) claims are moot. That branch of Manhattanville's motion for common law indemnification from TJR is denied. Plaintiff discontinued his Labor Law 200 and negligence causes of action.

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

Dated: JUL 0 2 2014



J.S.C.

KENNETH L. THOMPSON, JR.