

<b>Garcia v 250 N. 10th St. LLC</b>
2015 NY Slip Op 31307(U)
July 15, 2015
Supreme Court, Queens County
Docket Number: 872/13
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

CROGWLIN ORLY GARCIA,

Plaintiff,

-against-

250 NORTH 10<sup>TH</sup> STREET LLC, LCOR, INC.,  
RYDER CONSTRUCTION INC., ROCKLEDGE  
SCAFFOLD CORP AND TECTONIC  
INDUSTRIES, CORP.

Defendants.

RYDER CONSTRUCTION COMPANY INC.,

Third-party Plaintiff

-against-

BARONE STEEL FABRICATORS, INC., BARONE  
STEEL, INC. and TECTONIC INDUSTRIES CORP.,

Third-party Defendants.

x

The following papers numbered 1 to 43 read on this motion by defendant/third-party defendant Tectonic Industries, Corp. pursuant to CPLR 3212 for summary judgment dismissing all claims against it; on the motion by third-party defendant Barone Steel Inc. (Barone Steel), dismissing all third-party claims and cross claims; on the cross motion by plaintiff for summary judgment on its Labor Law § 240(1) cause of action against defendants 250 North 10<sup>th</sup> Street, LLC (250 North) and Ryder Construction, Inc. (Ryder); and on the cross motion by defendant/third-party plaintiff Ryder pursuant to CPLR 3212 for summary judgment on its third-party claims for contractual indemnification against third-party defendants Barone Steel Fabricators (Barone Fabricators), Barone Steel and Tectonic.

Papers  
Numbered

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

This is an action to recover money damages for injuries allegedly suffered as a result of an accident at a work site. The accident occurred at 250 North 10<sup>th</sup> Street, Brooklyn, New York on November 28, 2012. The premises were owned by defendant 250 North 10<sup>th</sup> Street LLC. The defendant Ryder Construction was the general contractor at the construction site. Ryder hired Tectonic Industries to perform concrete superstructure work at the site. Ryder also hired Barone Steel to do work at the site. The plaintiff was an employee of Barone Steel, which was hired at by Barone Fabricators to do steel work at the construction site

The plaintiff testified at an examination before trial. He testified that he was an employee of Barone Steel. He testified that on the day of the accident he and approximately ten other Barone Steel employees were working at the construction site. At the time of the accident the plaintiff was working with two other co-workers installing and welding a 22-foot long 6/7 inch wide 120-pound structural angle in the frame of a new construction wall. He was working on a scaffold approximately six feet in the air. The plaintiff testified that Barone Steel did not have any scaffolds at the construction site. He further stated that his supervisor told him and his co-workers to ask other contractors to use their scaffolds. He testified that he and his co-workers borrowed scaffolds from other contractors. The plaintiff testified that the accident occurred when he was holding the angle, he put his strength against the angle and the scaffold fell causing him to fall to the ground.

There were two reports filled out after the plaintiff's accident. Barone Steel filled out an employee injury/incident report that described the accident but also states that the Baker scaffold belonged to Tectonic and no authorization was given to Barone Steel to use the scaffold. Ryder Construction also filled out an accident/incident report describing the accident,. That report stated that accident occurred because the plaintiff was applying pressure to the angle and "the plaintiff should have been award of the weight of the angle iron...could have used a

jack/dolly to lift angle into place relieving weight from tradesman."

The plaintiff submitted an expert affidavit from a Board Certified Safety Professional. The plaintiff's expert opinion is that the accident occurred because the plaintiff was not given proper safety equipment to support the angles while he was working on a scaffold.

First, though the cross motion by the plaintiff and the cross motion by Ryder are untimely, they are made on nearly identical grounds as the timely motions and will therefore be considered (see *Ellman v Village of Rhinebeck*, 41 AD3d 635 [2d Dept 2007]; *Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]).

On a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Owners and contractors are subject to strict liability under Labor Law § 240(1). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (see *Blake v Neighborhood Hous. Servs. of New York City*, 1 NY3d 280 [2003]). Here, the plaintiff's injuries were caused by a fall from a height while performing a protected activity under Labor Law § 240(1) (see *Ford v HRH Constr.*, 41 AD3d 639 [2007]). The plaintiff has made a prima facie showing of entitlement to summary judgment by showing that the scaffold he was working from did not provide him with proper protection for the task he was doing.

In opposition, the defendants failed to raise a triable issue of fact. The defendants have not raised an issue of fact as to whether the plaintiff's actions were the sole proximate cause of the accident (see *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]). The fact that the plaintiff did not use a dolly or jack to secure the angle iron is insufficient to prove that the plaintiff's failure to use a jack or dolly was the sole proximate cause of the action. Inasmuch as there is no evidence that the plaintiff received instructions to use a jack or dolly to complete his work, the evidence does not establish that the plaintiff failed to follow instructions to use other safety equipment that the defendants, now with the benefit of hindsight, claim he should have used along with the scaffold (see *Balzer v City of New York*, 61 AD3d 796 [2009]). In fact, not only was the manner in which the plaintiff performed his work consistent with his supervisor's instructions, but the plaintiff did the work with the tacit

approval of his supervisor (see *Rico-Castro v Do & Co New York Catering*, 60 AD3d 749 [2009]; *Pichardo v Aurora Contrs.*, 29 AD3d 879 [2006]). Furthermore, it is not relevant precisely how the plaintiff laborer fell from the scaffold, as the defendant's failure to provide proper safety devices such, as a jack or dolly or safety harness, which would have prevented him from being knocked off the scaffold is a proximate cause of the accident (see *Triola*, 62 AD3d at 986, *Vergara v SS 133 West 21, LLC*, 21 AD3d 279 [2005]). Therefore, the plaintiff is entitled to summary judgment on his Labor Law § 240(1) cause of action against the defendants 250 North and Ryder.

The Court next turns to branches of the summary judgment motion by Tectonic to dismiss the plaintiff's complaint against it. The branch of Tectonic's motion for summary judgment dismissing the plaintiff's Labor Law §§ 240(1) and 241(6) causes of action are granted. Inasmuch as Tectonic was neither an owner, statutory agent, nor general contractor and did not have the authority to control the work that plaintiff was performing, the causes of action under Labor Law §§ 240(1) and 241(6) should be dismissed (see *Kelarakos v Massapequa Water Dist.*, 38 AD3d 717 [2d Dept 2007]; *Bopp v A.M. Rizzo Elec. Contrs.*, 19 AD3d 348 [2d Dept 2005]; *Zervos v City of New York*, 8 AD3d 477 [2d Dept 2004]).

For a contractor to be liable under Labor Law § 200 or common law negligence, the plaintiff must show that the contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. Here, the defendant Tectonic established its prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence put forth by the defendants, including the deposition testimony of the plaintiff, established as a matter of law the Tectonic did not have notice of any defective condition nor did it have the authority to control or supervise the plaintiff, nor did the plaintiff receive any instructions from the defendants in the performance of his duties. (see *Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an issue of fact. Even if Tectonic had given permission to the plaintiff to use the scaffold there is no evidence that the scaffold used by the plaintiff was defective or negligently maintained. Inasmuch as Tectonic did not supervise the method of work while the plaintiff performed his work it cannot be held liable for the accident.

All cross claims against Tectonic for common law indemnification or common law contribution must be dismissed as Tectonic has established that it was free of any negligence.

Additionally, the contractual indemnification claim by Ryder in the third-party complaint must be dismissed. The contract between Ryder and Tectonic contained two contradictory indemnification clauses. One clause limits indemnification to instances of negligence while the other clause allows indemnification for any incident arising out of the work done by the subcontractor. Inasmuch as the accident did not arise out of the work that Tectonic performed at the construction site, neither indemnification clause is triggered and the cause of action for contractual indemnification against Tectonic must be dismissed. The fact that the accident occurred on a scaffold owned by Tectonic does not amount to the accident arising out of the work done by Tectonic. Therefore, the branch of the motion by Tectonic to dismiss the third-party complaint is granted and the branch of the motion by Ryder for summary judgment on its contractual indemnification cause of action against Tectonic is denied.

Finally, both the branches of the motion by Ryder for contractual indemnification against Barone Steel Fabricators and Barone Steel and Barone Steel's motion against Ryder for summary judgment dismissing the third-party complaint are denied. First, as to the cause of action for contractual indemnification, the contract between Barone Fabricators and Ryder contain two indemnification clauses that completely contradict each other with one expressly limiting indemnification to instances where Barone Fabricators is negligent and the other to all instances that arise out of the work of Barone Fabricators. The Court cannot on the papers submitted conclude as a matter of law which indemnification provision controls and summary judgment is not appropriate.

Second, while Barone Steel argues that it did not have a contract and therefore cannot be found liable for contractual indemnification, there is an issue of fact as to whether Barone Steel was the alter ego of Barone Fabricators. (*Arboleda v Rockledge Scaffold Corp.*, 123 AD3d 854 [2d Dept 2014]; *Crespo v Pucciarelli*; *Thompson v Bernard G. Janowiz Constr. Corp.*, 301 AD2d 50 [2d Dept 2003]). Here, both companies share offices, were founded by the same person and have the same president, and have the same insurance policy. Furthermore, at the site at the time of the accident they were working together with employees from Barone Fabricators supervising employees of Barone Steel.

Third, the argument by Barone Fabricators that the contractual indemnification cause of action asserted against it must be dismissed because the accident did not arise out of the acts or omissions of Barone Fabricators is not supported by the evidence. Here, there are issues of fact as to the role of Barone Fabricators on the construction site and whether it was supervising the work of

the plaintiff and whether the indemnification clause was thus, triggered. According to the testimony of Nick Barone, Preisident of both Barone Fabricators and Barone Steel, the plaintiff's supervisor was Alex Vergara, an employee of Barone Steel. Mr. Vergara's supervisor was John Scala, an employee of Barone Fabricators. Mr. Vergara would receive daily instructions from Mr. Scala. Therefore, summary judgment dismissing, the contractual indemnification cause of action against Barone Fabricators must be denied.

Finally, Barone Steel argues that it cannot be held liable for common law indemnification since it was the employer of the plaintiff and the plaintiff did not suffer a grave injury. Workers' Compensation Law § 11 bars common law claims against an employer, as well as third party claims for contribution or indemnity, except those based on a written contract, unless the employee suffered a grave injury (see *Tonking v Port Authority of New York & New Jersey*, 3 NY3d 486, 490 [2004]; *Konior v Zucker*, 299 AD2d 320, 321 [2002]). Under *Rubeis v Aqua Club* (3 NY3d 408 [2004]) a plaintiff suffering a traumatic brain injury suffers a "grave injury" when he or she is rendered incapable of employment in any capacity. Here, through the submission of the affirmation of the plaintiff's treating psychiatrist and the affirmed report of his treating psychiatrist that detail the plaintiff's traumatic brain injury, there is an issue of fact as to whether the plaintiff suffered a grave injury under Workers Compensation Law.

Accordingly, the motion by defendant Tectonic for summary judgment is granted in its entirety and the complaint and all cross claims and the third-party complaint is dismissed against Tectonic.

The motion by third-party defendant Barone Steel for summary judgment dismissing the third-party complaint against it is denied.

The cross motion by the plaintiff for summary judgment on its cause of action for Labor Law § 240(1) against the defendants Ryder and 250 North is granted.

The cross motion by the defendant/third-party plaintiff Ryder for summary judgment on its causes of action for contractual indemnification against the third-party defendants is denied.

Dated: July 15, 2015

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J.S.C.