

Ramirez v 255 W. 108th St. Corp
2019 NY Slip Op 31175(U)
April 24, 2019
Supreme Court, New York County
Docket Number: 154692/2013
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 154692/2013

PEDRO RAMIREZ,

MOTION DATE 06/26/2018

Plaintiff,

MOTION SEQ. NO. 004 005

- v -

255 WEST 108TH STREET CORP., DOUGLAS ELLIMAN, and
ALL-CON CONTRACTING CORP.,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137 were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion (sequence number 004) of third-party defendant Dorel Home Furnishings, Inc., f/k/a Ameriwood Industries, Inc., incorrectly sued herein as Dorel Juvenile Group, Inc., d/b/a Cosco Home & Office Products, for summary judgment dismissing the third-party complaint is granted and the third-party complaint is dismissed with costs and disbursements to said third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion of defendants/third-party plaintiffs 255 West 108th Street Corp., Douglas Elliman, and All-Con Contracting Corp. for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 005) of plaintiff Pedro Ramirez for partial summary judgment under Labor Law § 240 (1) is granted on the issue of liability as against defendants 255 West 108th Street Corp. and All-Con Contracting Corp., with the issue of plaintiff's damages to be determined at the trial of this action, and is otherwise denied; and it is further

ORDERED that the cross motion of defendants/third-party plaintiffs 255 West 108th Street Corp., Douglas Elliman, and All-Con Contracting Corp. for summary judgment is granted to the extent of dismissing:

(1) plaintiff's Labor Law § 241 (6) claim except as to 12 NYCRR 23-1.21 (b) (1), 12 NYCRR 23-1.21 (b) (3) (iv), and 12 NYCRR 23-1.21 (b) (4) (iv),

(2) plaintiff's Labor Law § 200 claim, and

(3) plaintiff's common-law negligence claim,

and is otherwise denied.

DECISION

In this action arising out of a construction site accident, third-party defendant Dorel Home Furnishings, Inc. f/k/a Ameriwood Industries, Inc. (Dorel), incorrectly sued herein as Dorel Juvenile Group, Inc. d/b/a Cosco Home & Office Products, moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint with prejudice (motion sequence number 004).

Defendants/third-party plaintiffs 255 West 108th Street Corp., Douglas Elliman, and All-Con Contracting Corp. (All-Con) (collectively, defendants/third-party plaintiffs) cross-move, pursuant to CPLR 3212, for conditional summary judgment on their third-party claims for common-law indemnification sounding in strict products liability and common-law negligence against Dorel.

Plaintiff Pedro Ramirez moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants and for an immediate jury trial on damages (motion sequence number 005).

Defendants/third-party plaintiffs again cross-move, under CPLR 3212, for: (1) summary judgment dismissing the complaint; and (2) summary judgment on their common-law indemnification claim sounding in strict products liability and common-law negligence against Dorel.

Background

In this action, plaintiff seeks damages for injuries he allegedly suffered on April 29, 2013 while performing masonry/façade pointing work at 255 West 108th Street in Manhattan (hereinafter, the premises). Plaintiff claims he fell from a defective ladder.

It is undisputed that 255 West 108th Street Corp. was the owner and that Douglas Elliman was the managing agent of the subject premises. Pursuant to an agreement dated August 7, 2012, 255 West 108th Street Corp. hired All-Con as a general contractor to perform façade repairs. On September 28, 2012, All-Con retained nonparty Jade Restoration Corp. (Jade) to perform pointing work at the site. Plaintiff was employed by Jade at the time of his accident.

Defendants/third-party plaintiffs alleges that Dorel was the manufacturer of the ladder.

Analysis

A. Plaintiff's Motion for Partial Summary Judgment Under Labor Law § 240 (1) (Motion Sequence No. 005)

Plaintiff moves for partial summary judgment under Labor Law § 240 (1) as against defendants/third-party plaintiffs. Plaintiff argues that he is entitled to judgment because: (1) he was a member of the special class of workers entitled to

statutory protection; and (2) he was injured when one of the rungs suddenly broke off and collapsed.

In opposition, defendants/third-party plaintiffs argue that plaintiff has failed to meet his prima facie burden. Specifically, defendants/third-party plaintiffs contend that plaintiff has not submitted any evidence as to the lack of safety devices elsewhere on the site. Defendants/third-party plaintiffs also point out that plaintiff has submitted only his own testimony to support his motion.

Labor Law § 240 (1) provides, in relevant part, as follows:

"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) requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (Labor Law § 240 [1]; see also Klein v City of New York, 89 NY2d 833, 834-835 [1996]). To prevail on a cause of action alleging a violation of Labor Law § 240 (1), plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her

injuries (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]).

However, "liability under Labor Law § 240 (1) does not attach" where the plaintiff's actions are the sole proximate cause of an injury (see Robinson v East Med. Ctr., LP, 6 NY3d 550, 554 [2006] [citation omitted]). The plaintiff's actions are the sole proximate cause of an accident where: (1) the plaintiff had "adequate safety devices available," (2) "[the plaintiff] knew both that they were available and that he [or she] was expected to use them," (3) "[the plaintiff] chose for no good reason not to do so," and (4) "had [the plaintiff] not made that choice he [or she] would not have been injured" (Valente v Lend Lease (US) Constr. LMB, Inc., 29 NY3d 1104, 1105 [2017] [internal quotation marks and citation omitted]; see also Gallagher v New York Post, 14 NY3d 83, 88 [2010] ["Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident"]).

At the outset, plaintiff has established that 255 West 108th Street Corp. may be found liable under section 240 (1). Dunne testified that 255 West 108th Street Corp. was the owner of the premise. "Liability rests upon the fact of ownership and

whether [255 West 108th Street Corp.] had contracted for the work or benefitted from it are legally irrelevant" (Gordon v Eastern Ry. Supply, 82 NY2d 555, 560 [1993]).

As for All-Con, its president testified that All-Con was the general contractor, and that it hired Jade as its subcontractor. Moreover, defendants/third-party plaintiffs have not disputed that All-Con had the power to enforce safety standards and choose responsible contractors. Therefore, All-Con may also be held liable under the statute (see Milanese v Kellerman, 41 AD3d 1058, 1061 [3d Dept 2007] ["an entity is deemed a contractor within the meaning of Labor Law § 241 (6) (and § 240 [1]) 'if it had the power to enforce safety standards and choose responsible subcontractors'"] [internal citation omitted]; see also Aversano v JWH Contr., LLC, 37 AD3d 745, 746 [2d Dept 2007]).

However, plaintiff has failed to demonstrate that Douglas Elliman, the managing agent, may be found liable under Labor Law § 240 (1). A managing agent may be liable under the statute as a statutory agent (see Fox v Brozman-Archer Realty Servs., 266 AD2d 97, 98 [1st Dept 1999] ["motion court correctly found LaSala to be a statutory agent within the meaning of Labor Law § 240 (1) since the management contract vested LaSala with authority to supervise the injury-producing work"]; see also Voultepsis v Gumley-Haft-Klierer, Inc., 60 AD3d 524, 524 [1st

Dept 2009])). However, plaintiff has not submitted Douglas Elliman's management agreement, and makes no arguments as to how Douglas Elliman may be liable under section 240 (1). Indeed, Douglas Elliman's property manager testified that Douglas Elliman did not provide ladders for the work, and that it did not supervise Jade's work.

Plaintiff has established prima facie entitlement to partial summary judgment under Labor Law § 240 (1) as against 255 West 108th Street Corp. and All-Con. Plaintiff testified that he fell when a piece of the ladder broke off. This evidence establishes a prima facie violation of Labor Law § 240(1), since the ladder was "'inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 [2009], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993] [emphasis omitted]). Plaintiff was not required to prove that the ladder was defective (see Messina v City of New York, 148 AD3d 493, 494 [1st Dept 2017])).

Defendants/third-party plaintiffs have failed to raise an issue of fact as to 255 West 108th Street and All-Con's liability. Although defendants/third-party plaintiffs argue that plaintiff has failed to present evidence as to the lack of other safety devices, plaintiff has shown that the ladder was an

inadequate safety device. "The worker's burden is to show that the absence of adequate safety devices, or the inadequacy of the safety devices provided to protect the worker from a fall, was a proximate cause of his or her injuries" (Nazario v 222 Broadway, LLC, 135 AD3d 506, 507 [1st Dept 2016], affd as mod 28 NY3d 1054 [2016]). "The mere presence of [other safety devices] somewhere at the work[]site" does not satisfy defendants' duty to provide appropriate safety devices (Zimmer v Chemung County Performing Arts, 65 NY2d 513, 524 [1985], rearg denied 65 NY2d 1054 [1985]). In addition, defendants/third-party plaintiffs have not pointed to any evidence indicating that adequate safety devices were available, and that he failed to use them for no good reason (see Gallagher, 14 NY3d at 88; Lizama v 1801 Univ. Assoc., LLC, 100 AD3d 497, 498 [1st Dept 2012]).

Moreover, "[t]hat the accident was unwitnessed presents no bar to summary judgment in favor of plaintiff" (Franco v Jemal, 280 AD2d 409, 410 [1st Dept 2001]). Here, there is no "substantiated challenge to [plaintiff's] credibility" (id.).

In light of the above, plaintiff's motion for partial summary judgment under Labor Law § 240 (1) is granted as against 255 West 108th Street Corp. and All-Con.

B. Defendants/Third-Party Plaintiffs' Cross Motion for Summary Judgment Dismissing Plaintiff's Claims

1. Labor Law § 200 and Common-Law Negligence

Defendants/third-party plaintiffs contend that plaintiff has abandoned his Labor Law § 200 and common-law negligence claims, since he has not sought any relief in his motion on these causes of action. In addition, defendants/third-party plaintiffs argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed, because plaintiff's accident was not caused by a defective or dangerous premises condition, and because the methods of plaintiff's work were exclusively controlled by Jade.

In response, plaintiff contends that he has not abandoned these claims, and that he has a valid section 200 claim, pointing out that the ladder was defective.

Labor Law § 200 (1) provides as follows:

"1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Liability under Labor Law § 200 "generally falls into two broad **categories**: instances involving the manner in which the

work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (Abelleira v City of New York, 120 AD3d 1163, 1164 [2d Dept 2014]). "These two categories should be viewed in the disjunctive" (Ortega v Puccia, 57 AD3d 54, 61 [2d Dept 2008]). The statute is governed by the "generally applicable standards of the prudent [person], the foreseeability of harm, and the rule of reason" (Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp., 9 AD2d 379, 382 [1st Dept 1959]).

Where the worker is injured as a result of the manner in which the work is performed, including the equipment used, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 [1st Dept 2012]; see also Foley v Consolidated Edison Co. of N.Y., Inc., 84 AD3d 476, 477 [1st Dept 2011]).

By contrast, "[w]here . . . plaintiff alleged that defendants—the premises owners—provided him with the defective ladder, 'the legal standard that governs claims under Labor Law § 200 is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof,' not whether the accident arose out of the means and methods of plaintiff's work" (Jaycoxe v VNO Bruckner Plaza, LLC, 146 AD3d

411, 412 [1st Dept 2017], quoting Chowdhury v Rodriguez, 57 AD3d 121, 123 [2d Dept 2008]). Similarly, a general contractor may be liable under section 200 and the common law if it had "control over the work site and knew or should have known of the unsafe condition that allegedly brought about plaintiff's injury" (Gallagher v Levien & Co., 72 AD3d 407, 409 [1st Dept 2010]).

Contrary to defendants/third-party plaintiffs' contention, plaintiff did not abandon these claims. Nevertheless, the court finds that defendants/third-party plaintiffs are entitled to dismissal of these claims.

Applying the above standards, defendants/third-party plaintiffs have demonstrated that plaintiff's accident arose out of the means and methods of the work, and that they did not exercise supervision over the work (see Cappabianca, 99 AD3d at 144). Plaintiff testified that Jade owned the ladder. 255's building superintendent and Douglas Ellman's property manager testified that the contractors provided their own equipment on the job, and that neither 255 West 108th Street Corp. nor Douglas Elliman supervised the work). Additionally, All-Con's president testified that All-Con did not own hinged ladders like the subject ladder.

Although plaintiff makes a conclusory assertion that he has a valid section 200 claim, he has failed to raise an issue of

fact as to whether defendants/third-party plaintiffs provided the ladder or supervised the work that resulted in plaintiff's accident. Therefore, plaintiff's section 200 and common-law negligence claims are dismissed.

2. Labor Law § 241 (6)

Labor Law § 241 (6) states, in pertinent part, that:

"All contractors and owners and their agents, ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

"6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith."

"Labor Law § 241 (6), by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition is being performed" (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998] [internal quotation marks and citation omitted]). "To establish a claim under [Labor Law § 241 (6)], a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (Cappabianca, 99 AD3d at 146).

Plaintiff's verified bill of particulars alleges the following violations: 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.8 (c) (1); 21 NYCRR 23-1.7 (f); 12 NYCRR 23-1.15; 12 NYCRR

23-1.16 (a), (b); 12 NYCRR 23-1.17; 12 NYCRR 23-1.21, including, but not limited to 12 NYCRR 23-1.21 (b) (1), 12 NYCRR 23-1.21 (b) (3) (i), 12 NYCRR (b) (4) (ii), 12 NYCRR 23-1.21 (b) (4) (iv), and 12 NYCRR 23-1.21 (e). Additionally, plaintiff's verified bill of particulars asserts violations of Occupational Safety and Health Act (OSHA) regulations and ANSI/ANSE safety requirements for scaffolding.

Defendants/third-party plaintiffs argue that plaintiff has abandoned his Labor Law 241 § (6) claim, because he has not sought any relief under this statute in his motion. In addition, defendants/third-party plaintiffs maintain that the cited provisions in his bill of particulars are either too general or are inapplicable.

In plaintiff's reply and opposition to defendants/third-party plaintiffs' cross motion, plaintiff only addresses Industrial Code section 23-1.21, including section 23-1.21 (b) (1), section 23-1.21 (b) (3) (iv), and section 23-1.21 (b) (4) (iv). Therefore, plaintiff has abandoned reliance on the other Industrial Code provisions cited in his bill of particulars (see Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant . . . moves [for summary judgment dismissing a plaintiff's Labor Law § 241 (6) claim], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain [Industrial Code] section is inapplicable or was not

violated be deemed to abandon reliance on that particular Industrial Code section”). Contrary to defendants/third-party plaintiffs’ assertion, plaintiff did not abandon his Labor Law § 241 (6) claim in moving for summary judgment under Labor Law § 240 (1), but not under Labor Law § 241 (6).

Nonetheless, plaintiff has abandoned reliance on the remaining parts of section 23-1.21 by failing to “specify any particular subsection(s) and subdivision(s)” (Caminiti v Extell W. 57th St. LLC, 166 AD3d 440, 441 [1st Dept 2018] [internal quotation marks and citation omitted]). Thus, the court shall only consider the alleged violations of sections 23-1.21 (b) (1), 23-1.21 (b) (3) (iv), and 23-1.21 (b) (4) (iv).

12 NYCRR 23-1.21

Section 23-1.21, entitled “Ladders and ladderways,” provides as follows:

“(b) General requirements for ladders.

“(1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.

“(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

“(i) If it has a broken member or part.

“(ii) If it has any insecure joints between members or parts.

"(iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.

"(iv) If it has any flaw or defect of material that may cause ladder failure.

"(4) Installation and use.

"(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used"

(12 NYCRR 23-1.21 [b] [1], [b] [3], [b] [4]).

Sections 23-1.21 (b) (1), (b) (3), and (b) (4) have been held to be sufficiently specific to support a Labor Law § 241 (6) claim (see Vargas v New York City Tr. Auth., 60 AD3d 438, 439 [1st Dept 2009]; De Oliveira v Little John's Moving, 289 AD2d 108, 109 [1st Dept 2001]; Beckford v 40th St. Assoc. (NY Partnership), 287 AD2d 586, 587 [2d Dept 2001]).

Here, defendants/third-party plaintiffs have failed to establish, prima facie, that sections 23-1.21 (b) (1), (b) (3), and (b) (4) are inapplicable or were not violated (see Przyborowski v A&M Cook, LLC, 120 AD3d 651, 654 [2d Dept 2014]). Although they argue that plaintiff has not submitted an expert affidavit, a defendant may not "sustain[] [its burden] by pointing out gaps in the plaintiff's proof" (Iannucci v Kucker &

Bruh, LLP, 161 AD3d 959, 960 [2d Dept 2018] [internal quotation marks and citation omitted]). Moreover, the fact that the ladder was provided by Jade does not absolve defendants/third-party plaintiffs of liability under section 241 (6) (see Rizzuto, 91 NY2d at 352 ["an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition . . ."])).

Therefore, plaintiff's Labor Law § 241 (6) claim is dismissed except as to the alleged violations of sections 23-1.21 (b) (1), (b) (3), and (b) (4).

C. Dorel's Motion for Summary Judgment/Defendants/Third-Party Plaintiffs' Cross Motion for Summary Judgment Against Dorel

Dorel moves for summary judgment dismissing the third-party complaint, arguing that it did not manufacture or distribute the ladder from which plaintiff fell. Specifically, Dorel relies on the deposition testimony of Cosco Home & Office Products (Cosco)'s senior director of strategic projects, the affidavit from such senior director, and photographs of the subject ladder indicating that that the ladder differs from a Dorel ladder in three key respects: (1) it is missing over a dozen warning and instruction labels glued to the rails of every Dorel ladder of a similar design; (2) it is missing the date of manufacture that is indelibly stamped onto the metal rails of every Dorel ladder

of a similar design; and (3) it is missing the words "Cosco" or "Safety 1st" stamped on the hinge knobs of every Dorel ladder of a similar design.

In addition, Dorel points out that, although the decorative plastic caps contain the name "Cosco," these are interchangeable component parts that can be used on many types of articulating ladders. Cosco does not hold a patent for the design of the Cosco-GP ladder, and GP sold articulating ladders of the same design to a number of other ladder distributors. The fact that the ladder's four plastic caps contain the word "Cosco," simply means that GP or a knock-off manufacturer erroneously used third-party "Cosco" caps on a non-Cosco ladder. In addition, according to Dorel, none of defendants' witnesses knew the identity of the manufacturer or distributor of the ladder.

In opposition, and in support of their cross motion for summary judgment, defendants/third-party plaintiffs contend that they are entitled to common-law indemnification against Dorel. Defendants/third-party plaintiffs further argue that Dorel has failed to establish prima facie entitlement to summary judgment. They contend that Cosco's senior director's testimony confirms that his company's brand name, Cosco, appears four times on black caps on the rail lock assembly, and that the rail lock assembly is a standard part of articulated ladders. In addition, defendants/third-party plaintiffs assert that Cosco's

senior director was inconsistent about the presence of stamps on the ladder. Further, defendants/third-party plaintiffs maintain that Dorel has refused to provide "any legitimate discovery" to establish that it did not manufacture or distribute the subject ladder.

To support their position, defendants/third-party plaintiffs offer an affidavit from an engineer expert, who inspected the ladder on September 30, 2016, and reviewed plaintiff's deposition testimony, Cosco's senior director of strategic projects deposition testimony and affidavit, and the photographs annexed to Dorel's motion. The engineer expert opines, to a reasonable degree of engineering certainty, that the rung failed because the welding was inadequate and improper. Such engineer states that the ladder has four plastic caps attached to the top rungs of the ladder, and that the caps are engraved with the "Cosco" brand label. According to the engineer expert, the end caps on the ladder are not generic and are of the type that Cosco uses for its ladders. The ladder did not have labels on it at the time of his inspection. However, the labels and adhesive are not permanent parts of the ladder. The engineer points out that Cosco's senior director did not set forth Cosco's inspection policy and procedures to ensure that its ladders had all warning labels and stamps before leaving manufacturing facilities. The expert also asserts that the caps

cannot be removed without breaking the rivets and replacing the rivets. At the time of the engineer's inspection, there was no evidence of any modification, damage or alterations, which would suggest that the "Cosco" caps are not original to the ladder. In any event, according to such expert, Cosco's strategic director did not compare the ladder in question to ladders distributed by Cosco.

Under New York law, in a products liability action, the plaintiff must identify the exact defendant whose product injured the plaintiff (Hymowitz v Eli Lilly & Co., 73 NY2d 487, 504 [1989], cert denied 493 US 944 [1989]). The identity of a manufacturer or distributor of a defective product may be established by circumstantial evidence (Healey v Firestone Tire & Rubber Co., 87 NY2d 596, 601 [1996]). "Whether direct or circumstantial, the evidence must establish that it is 'reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product'" (Cavanaugh v Ford Motor Co., 2017 WL 2805057, *5 [ED NY 2017], adopted 2017 WL 2804934 [ED NY 2017], quoting Healey, 87 NY2d at 601-602).

A defendant who seeks summary judgment claiming that it did not manufacture or distribute the product in question has "the initial burden of establishing its defense sufficiently to warrant an award of judgment in its favor as a matter of law"

(Antonucci v Emeco Indus., 223 AD2d 913, 914 [3d Dept 1996]), with "affirmative evidence that [it] did not manufacture" or distribute the product at issue (Universal Resources Holdings, Inc. v North Penn Pipe & Supply, Inc., 129 AD3d 1671, 1671 [4th Dept 2015] [internal quotation marks and citation omitted]). The burden then shifts to the opposing party to "rebut this showing with affirmative evidence sufficient to create a reasonable inference that the defendant's product caused the injury" (Baum v Eco-Tec, Inc., 5 AD3d 842, 844 [3d Dept 2004]). Here, Dorel has met its prima facie burden with "affirmative evidence that [it] did not manufacture" or distribute the ladder at issue (Universal Resources Holdings, Inc. v North Penn Pipe & Supply, Inc., 129 AD3d at 1671 [[internal quotation marks and citation omitted]]). According to its senior director, Cosco does not manufacture or distribute any ladders that do not have the labels required by ANSI, and that even if the labels were taken off, there would be a residue from the labels because the labels are affixed with a permanent adhesive. The expert did not observe any labels or residue after an examination of the ladder at issue. Additionally, Cosco's senior director stated that Cosco's ladders have a metal stamp on two areas of the ladder that show the date of manufacture. However, such senior director stated that he did not see any metal stamps on the ladder. Cosco's senior director testified that the stamp

indicating the date of manufacture has always been so located since the ladders have been manufactured. In addition, Cosco's senior director indicates that every articulating ladder had either the name "Cosco" or "Safety 1st" stamped on the hinge knob, and the ladder at issue did not have any name on them. Thus, Dorel has "detail[ed] specific differences between that [ladder] and those manufactured [or distributed] by" Dorel (Smith v Johnson Prods. Co., 95 AD2d 675, 676 [1st Dept 1983]). Moreover, contrary to defendants/third-party plaintiffs' contention, Dorel was not required to demonstrate inspection protocols or procedures to meet its burden (see Antonucci, 223 AD2d at 914; Zwirn v Bic Corp., 181 AD2d 574, 575 [1st Dept 1992]).

Defendants/third-party plaintiffs have failed to demonstrate that it is reasonably probable that Dorel was the source of the offending product. Although defendants/third-party plaintiffs contend that Cosco's senior director's testimony was inconsistent as to the presence of stamping on the ladder, such senior director testified about stamps other than the date of manufacture. Such senior director testified that he did not know whether the language just below the hinges on Cosco's ladders was the same as on the subject ladder. That language instructed users to ensure that the rail locks were fully engaged before use.

In addition, plaintiff, Douglas Elliman's property manager, the building superintendent, and All-Con's president each testified that each did not know about the provenance of the ladder. Nor did defendants/third-party plaintiffs "produce[] . . . receipts or other documentation to support their identification" of the ladder (Whelan v GTE Sylvania, 182 AD2d 446, 449 [1st Dept 1992]; see also Bevens v Tarrant Mfg. Co., Inc., 48 AD3d 939, 941-942 [3d Dept 2008]).

Further, contrary to defendants/third-party plaintiffs' contention, Dorel has offered an alternative explanation as to how the word "Cosco" ended up on the ladder. Cosco's senior director avers that the four decorative caps containing the words "Cosco" are interchangeable component parts, and that the fact that these caps exist on the incident ladder "simply means that GP, or a knock-off manufacturer improperly (whether by accident or design) used third-party 'Cosco' caps on a non-Cosco ladder". Defendants/third-party plaintiffs also speculate that the labels and stamps could have worn off over time. Nevertheless, "[s]peculative or conjectural evidence of the manufacturer's [or distributor's] identity is not enough" (Healey, 87 NY2d at 602).

Since there is no triable issue of fact as to whether Dorel manufactured or distributed the ladder, it was not required to

present expert testimony as to the adequacy of the weld on the ladder.

Thus, Dorel's motion for summary judgment dismissing the third-party complaint must be granted. In view of the foregoing, defendants/third-party plaintiffs' cross motion for summary judgment on their common-law indemnification claim against Dorel must be denied.

4/24/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE