

**Newton v Nan Shan Local Dev. Corp.**

2019 NY Slip Op 31294(U)

March 19, 2019

Supreme Court, Kings County

Docket Number: 503352/2014

Judge: Devin P. Cohen

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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 503352/2014

*Seq # 006, 007*

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

\_\_\_\_\_  
BASSAINE NEWTON AND SASHANA NEWTON,  
  
Plaintiffs,  
  
against  
  
NAN SHAN LOCAL DEVELOPMENT CORP. AND  
MC GOWAN BUILDERS, INC.,  
  
Defendants.

Papers	Numbered
Notice of Motion and Affidavits Annexed . . . .	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed . . . .	<u>3, 4</u>
Answering Affidavits . . . . .	<u>5</u>
Replying Affidavits . . . . .	<u>  </u>
Exhibits . . . . .	<u>  </u>
Other . . . . .	<u>  </u>

\_\_\_\_\_  
MC GOWAN BUILDERS, INC.,  
  
Third-Party Plaintiff,  
  
against  
  
A & V STEEL, LLC,  
  
Third-Party Defendants.

\_\_\_\_\_  
NAN SHAN LOCAL DEVELOPMENT CORP. AND MC  
GOWAN BUILDERS, INC.,  
  
Second Third-Party Plaintiffs,  
  
against  
  
FITZCON CONSTRUCTION/REN CORP.,  
  
Second Third-Party Defendant.

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Upon the foregoing papers, plaintiff's motions for summary judgment (Mot. Seq. 006) and defendant's motion to amend their answer and for summary judgment (Mot. Seq. 007) are decided as follows:

### **Factual Background**

Defendant Nan Shan Local Development Corp. (“Nan Shan”) owned the premises located at 133-14 41st Avenue, Queens, New York. Nan Shan hired defendant McGowan Builders, Inc. (“McGowan”) to be the general contractor for building a community center. McGowan hired third-party defendant, A&V Steel, LLC (“A&V Steel”) to erect steel for the project. Second third-party defendant Fitzcon Construction/Ren Corp. (“Fitzcon”) was retained to perform concrete work. Plaintiff Bassaine Newton is an employee of A&V Steel.<sup>1</sup>

Plaintiff described the accident during his deposition. He testified that, on the day of the accident, he and two others were tasked with installing a 30-foot column weighing 7,500 pounds (plaintiff’s deposition transcript at 39, 44-46). Because a crane was not available that day, the team used a roustabout to lift the column on to a 4-wheeled A-frame dolly, which would be used to transport the column to its ultimate destination (*id.* at 51-53). Plaintiff described the dolly as being one-foot from the ground (*id.* at 53). As they moved the column on the dolly, the wheels of the dolly jammed because the column was too heavy and because there was debris on the ground (*id.* at 47, 48, 54 and 60). The column was not secured to the dolly during transport (*id.* at 74). As they continued to try to move the dolly and column, the dolly tipped and the column fell off the dolly (*id.* at 58-60). Plaintiff attempted to move away, but slipped on concrete debris, and the column fell on to his left foot (*id.* at 63-65).

Brian Volosin, an assistant project manager with McGowan, testified at his deposition that Nan Shan hired a site safety manager, Construction Realty Safety Group, Inc. (“CRSG”) (Brian Volosin deposition transcript at 21). CRSG was responsible for, among other things,

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<sup>1</sup> All references to “plaintiff” in this decision and order, unless otherwise specified, are to plaintiff Bassaine Newton.

investigating accidents and taking witness statements (*id.* at 21-23, 30). CRSG created an accident report for this accident, which included a statement from Eugene Lkhihibhojere, plaintiff's foreman (*id.* at 85-86). Plaintiff submits a copy of the report, which was marked as an exhibit at Mr. Volosin's deposition. Mr. Lkhihibhojere's statement reads, in part, that "We had a steel beam on a dolly and were moving it into position to raise it when the dolly tipped and the steel beam slipped off the dolly and struck Bassain Newton across the toes of his left foot."

Avinash Jamnparasad, the vice president of A&V Steel, testified at his deposition that the dolly used in plaintiff's accident had a weight capacity of 4,500 pounds, and was eight inches from the ground (Avinash Jamnparasad deposition transcript at 55, 65). He also testified that, when moving a steel column with a dolly, the steel is supposed to be secured to the dolly with a come-along, which is a mechanical chain pulley device that would wrap around the dolly and the steel column thereby securing the column to the dolly (*id.* at 49).

Additionally, plaintiffs submit the affidavit of William G. Hough, who describes himself in his affidavit as a "project manager, crane operator, qualified rigger and signal person [who has] been in the crane rigging and heavy lift industry actively since 1981". Mr. Hough states, in short, that the proper method to move the column was using a crane, and the dolly was inadequate for the task.

### **Claims Asserted by the Parties**

Plaintiff asserts claims against Nan Shan and McGowan for negligence and violation of Labor Law 200, 240(1) and 241(6). McGowan asserts third-party claims against A&V Steel for contractual and common law indemnification, contribution, and breach of contract for failure to procure insurance. Nan Shan Local and McGowan commenced a second third-party against Fitzcon for contractual and common law indemnification, contribution, and breach of contract for

failure to procure insurance:

**Analysis**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiffs' motion for summary judgment has already been resolved by stipulation, dated October 16, 2017. In the stipulation, plaintiffs, Nan Shan and McGowan agreed that Nan Shan Local and McGowan are liable to plaintiff for violating Labor Law 240(1) in return for plaintiffs' discontinuance of its Labor Law 200 and 241(6) claims against Nan Shan Local and McGowan. Although plaintiffs assert no direct claims against them, third-party defendant A&V Steel opposes plaintiff's motion, perhaps because defendant McGowan is seeking indemnification from A&V Steel.

Labor Law § 240(1) imposes upon owners and general contractors a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). "With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267–268 [2001], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991] [alteration in original]). Therefore, "a plaintiff must show more than simply that an object fell, thereby causing injury to a worker" (*Turczynski v City of New York*, 17 AD3d 450, 451 [2d Dept 2005]). "[A] plaintiff must show

that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking” (*Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2d Dept 2013]).

A&V Steel opposes plaintiff’s motion solely on the basis that it is not a falling object case. Instead, A&V Steel argues that this is a tripping case because the dolly tipped on debris. However, this argument is not supported by the descriptions of the accident by plaintiff or his foreman. Plaintiff testified at his deposition that the dolly wheels jammed because the column was too heavy *and* because of the debris on the ground. Plaintiff’s foreman, Eugene, states in his report that the dolly tipped and the steel beam slipped off the dolly, hitting plaintiff.

Based on these facts, this is a situation where “the harm flows directly from the application of the force of gravity to the object” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604-05 [2009]). In addition, the column fell from the dolly because it was not secured by the come-along pulley described by Mr. Jamnparasad, A&V Steel’s vice president. Contrary to A&V Steel’s argument, the object does not need to be in the process of being hoisted or secured. As A&V Steel acknowledges (*see* Affirmation of Abraham Warmbrand at ¶¶ 9, 33), Section 240(1) alternatively requires the falling object to have been secured while it was being handled (*Banscher*, 103 AD3d at 824). Accordingly, there is no basis to object to the stipulation of liability between plaintiff, Nan Shan and McGowan.<sup>2</sup>

Turning now to Nan Shan and McGowan’s cross-motion, Nan Shan seeks to amend its answer to assert third-party claims against A&V Steel for contractual and common law

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<sup>2</sup> A&V Steel submitted, without permission, a supplemental affirmation in opposition to plaintiff’s motion. The court will not consider motion papers that are not permitted by the CPLR.

indemnification, contribution, and breach of contract for failure to provide insurance. While it is true that, in general, leave to amend a pleading is “freely given upon such terms as may be just” (CPLR 3025[b]), such leave is far more restricted after a note of issue is filed (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640-41 [2d Dept 2015]). When Nan Shan filed this cross-motion, this action was already in the Jury Coordinating Part and the note of issue had already been filed. Standards and Goals for this action was October 1, 2018. This action has progressed too far to add additional claims. Accordingly, Nan Shan’s motion to amend is denied.

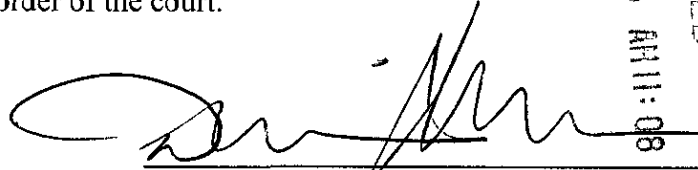
Finally, McGowan moves for summary judgment on its third-party claims for contractual and common law indemnification. In order to prove both claims, McGowan must establish that it was not negligent (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]; *Cava Const. Co., Inc. v Gealtac Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). Mr. Volosin testified at his deposition that McGowan agreed to the use of the dolly for transporting the column (Brian Volosin deposition transcript at pp 40-41). Accordingly, there are issues of fact regarding McGowan’s possible negligence, and its motion for summary judgment is denied.

**Conclusion**

For the foregoing reasons, plaintiffs’ motion is granted to the extent of the stipulation previously executed by the parties, and defendants Nan Shan and McGowan’s motion is denied. The parties shall contact JCP to schedule a further appearance.

This constitutes the decision and order of the court.

March 19, 2019  
DATE

  
\_\_\_\_\_  
DEVIN P. COHEN  
Justice of the Supreme Court

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