SHORT FORM ORDER

INDEX No. 11-11364
CAL. No. 16-02266OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 12-17-18 (008)
MOTION DATE 12-18-18 (009)
ADJ. DATE 3-5-19
Mot. Seq. # 008 - MD
009 - MotD

KEVIN T. McNAMARA AND EILEEN McNAMARA,

Plaintiffs,

- against -

GUSMAR ENTERPRISES LLC, GUSMAR REALTY CORP., METAL MONK, LTD., STARBUCKS CORPORATION a/k/a STARBUCKS COFFEE COMPANY AND CATAPANO ENGINEERING, P.C.,

Defendants.

GUSMAR ENTERPRISES LLC and GUSMAR REALTY CORP.,

Third-Party Plaintiffs,

- against -

SENTRY AUTOMATIC FIRE PROTECTION, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 35 read on these motions to reargue: Notice of Motion and supporting papers numbered 1 - 20, 21 - 27; Answering Affidavits and supporting papers numbered 28 - 29, 30 - 31, 32 - 33; and Replying Affidavits and supporting papers numbered 34 - 35, 36 - 37, it is,

ORDERED that the motion (008) by plaintiffs Kevin McNamara and Eileen McNamara and the motion (009) by defendant Metal Monk, Ltd., are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiffs Kevin McNamara and Eileen McNamara for leave to reargue their prior motion seeking summary judgment in Kevin McNamara's favor on the issue of liability with respect to his Labor Law §240 claim against defendant Gusmar Enterprises, LLC, which was denied by order of this Court dated August 27, 2018, is granted; and it is

ORDERED that the motion by defendant Metal Monk, Ltd., for leave to reargue the branches of its prior motion seeking, inter alia, dismissal of certain claims and cross-claims against it, and for a declaratory judgment in its favor, which was denied by order of this Court dated August 27, 2018, is granted; and it is

ORDERED that upon reargument, the parties' respective motions are determined as follows:

Plaintiff Kevin McNamara commenced this action to recover damages for personal injuries allegedly sustained on May 14, 2008, when he fell from a ladder while performing renovation-related work in a building allegedly owned by defendant/third-party plaintiff Gusmar Enterprises, LLC ("Gusmar"). Gusmar hired McNamara's employer, third-party defendant Sentry Automatic Fire Sprinkler, Inc. ("Sentry"), to adjust the building's existing sprinkler heads in order to make them flush with a newly installed drop ceiling. McNamara alleges that he placed an inverted milk crate at the very top of the 8-foot A-frame ladder on which he was working and stood on it in order to access and loosen an existing sprinkler head. While he was standing on the inverted milk crate, an unidentified employee of defendant Metal Monk, Ltd. ("Metal Monk"), the tenant occupying the storefront space where McNamara was working, allegedly bumped the ladder and caused plaintiff to fall to the floor. The complaint asserts causes of actions against the defendants based upon common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The complaint also asserts a derivative claim on behalf of plaintiff's wife, Eileen McNamara, for loss of consortium and reimbursement of medical expenses. After issue was joined, Gusmar commenced a third-party action against plaintiff's employer, Sentry.

By order dated August 27, 2018, this court denied a motion by plaintiff seeking summary judgment on the issue of liability with respect to his claim under Labor Law § 240 (1). The court's order also denied the branches of a motion made by Metal Monk that sought dismissal of the Labor Law § 200 claims against it, dismissal of the contractual indemnification cross-claim against it and the request for a judgment declaring indemnification provisions contained in its lease agreement with Gusmar void and

unenforceable pursuant to General Obligations Law § 5-321. Plaintiffs and Metal Monk now make separate motions seeking to reargue those very same portions of the court's determination.

Plaintiff argues that the court misapprehended relevant facts and misapplied controlling principles of law in denying the underlying motion for partial summary judgment in their favor on the issue of liability with respect to their Labor Law § 240 (1) claim. Specifically, plaintiff claims that the court incorrectly states that he was using a 6-foot ladder rather than an 8-foot ladder at the time of his accident and that the court misconstrued the testimony of nonparty witness, Peter Fallon, as to the adequacy of the subject ladder on which plaintiff was working at the time of the accident and the number of ladders that were available at the worksite. Although plaintiff acknowledges that Fallon's testimony raises issues of fact as to whether he was utilizing a 12-foot ladder rather than a 8-foot ladder at the time of the accident, and whether plaintiff fell not because a Metal Monk employee bumped the subject ladder but because he was attempting unscrew an overly tightened sprinkler head, plaintiff argues that under either version of those facts he would still be entitled to partial summary judgment on the issue of liability.

Plaintiff's arguments are rejected. Prima facie liability under Labor Law § 240 (1) is established only "in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Blake v Neighborhood Hous. Serv. of N.Y. City***, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]). Thus, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in Labor Law § 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated [in the statute]" (***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). And while contributory negligence on the part of the worker is not a defense to a Labor Law §240 (1) claim where no safety devices are provided or those that are provided are inadequate (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*), liability does not attach where a plaintiff's conduct is the sole proximate cause of his or her own injuries, as where adequate safety devices are available at the worksite, but the worker for no good reason either does not use or misuses them (*see* ***Gallagher v New York Post***, 14 NY3d 83, 896 NYS2d 732 [2010]; ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 814 NYS2d 589 [2006]; ***Montgomery v Fed. Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]). Furthermore, "[w]here credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (***Ellerbe v Port Auth. of N.Y. & N.J.***, 91 AD3d 441, 442, 936 NYS2d 39 [1st Dept 2012]; *see* ***Santiago v Fred-Doug 117, L.L.C.***, 68 AD3d 555, 891 NYS2d 59 [1st Dept 2009]).

Here, the evidence submitted on the underlying motion reveals differing versions of the accident, one under which Gusmar would be liable and another under which plaintiff's attempt to perform his work while standing on an inverted milk crate rather than utilizing the 12-foot ladder that Fallon testified was available to plaintiff at the worksite could be deemed the sole proximate cause of the accident. Therefore, triable issue of fact and credibility exists warranting the denial of plaintiff's motion (*see* ***Lorde v Margaret Tietz Nursing & Rehabilitation Ctr.***, 162 AD3d 878, 79 NYS3d 89 [2d Dept 2018];

Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441, 936 NYS2d 39 [1st Dept 2012]; ***Reyes v Khan***, 90 AD3d 734, 934 NYS2d 328 [2d Dept 2011]; ***Santiago v Fred-Doug 117, L.L.C.***, *supra*). Accordingly, the Court adheres to its previous determination denying plaintiff's motion for partial summary judgment in his favor on the issue of liability with respect to his claim under Labor Law § 240 (1).

Turning to Metal Monk's current motion, the defendant argues that the court erred in not granting the branch of its motion seeking dismissal of the Labor Law § 200 claim against it, as it was not an owner, contractor or agent vis á vis plaintiff, of common law negligence. Metal Monk further asserts that as any liability it might have for plaintiff's injuries could only be for common law negligence based upon the alleged conduct of its employee, Gusmar could not be held liable for such conduct. As a result, Metal Monk argues that the contractual indemnity claim against it should have been dismissed. Conversely, Metal Monk contends that the indemnification provision in its lease agreement with Gusmar should be declared void and unenforceable, as the provision fails to make any exceptions for those instances where Gusmar is negligent, and does not limit Gusmar's recovery to proceeds from Metal Monk's insurance policy.

Upon reargument, Metal Monk has established its entitlement to dismissal of the Labor Law § 200 claim against it by demonstrating that it was not an owner, agent or contractor or in any other way connected with the work plaintiff was performing at the premises in question and that it lacked any control over plaintiff's work (*see* ***Garcia v Market Assoc.***, 123 AD3d 661, 998 NYS2d 193 [2d Dept 2014]; ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]). In opposition, Gusmar failed to raise a triable issue of fact warranting denial of this branch of Metal Monk's motion. Therefore, the branch of Metal Monk's motion seeking dismissal of the Labor Law § 200 claim against it is granted. It is noted, however, that Metal Monk failed to establish its entitlement to dismissal of plaintiff's cause of action predicated on common law negligence, and that claim shall proceed against it. Indeed, Metal Monk concedes that it could be held liable under a theory of common law negligence if it is proved that one of its employees negligently caused the accident by bumping into the ladder upon which plaintiff was standing and such negligence was a proximate cause of plaintiff's injuries (*see* ***Havas v Victory Paper Stock Co.***, 49 NY2d 381, 426 NYS2d 233 [1980]; ***Riviello v Waldron***, 47 NY2d 297, 418 NYS2d 300 [1979]).

Finally, the court adheres to the portion of its order denying the branches of Metal Monk's motion which sought dismissal of the contractual indemnification cross-claim against it and a declaration that the indemnification provisions contained in its lease agreement with Gusmar are void and unenforceable. Metal Monk has not established that the indemnification provision - which refers to indemnification for liabilities arising from personal injury or property damage "occasioned wholly or in part by bany act or acts, omission or omissions of the Tenant or the employees, guests, agents, assigns or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises . . . . ." - runs afoul of the General Obligations Law by requiring that Gusmar be indemnified for its own negligence and, therefore, that it can stand only if Gusmar's recovery is limited to insurance proceeds (*see* ***Campisi v Gambar Food Corp.***, 130 AD3d 854, 13 NYS3d 567 [2d Dept 2015]; ***Karanikolas v Elias Taverna, LLC***, 120 AD3d 552, 992 NYS2d 31 [2d Dept 2014]; ***DeCourcey v Briarcliff Cong. Church***, 104 AD3d 799, 961 NYS2d 487 [2d Dept 2013]). In any event, as Gusmar's

liability, if any, for plaintiff's injuries would be statutory and not based upon a finding of negligence on its own part, the contractual indemnification agreement, as applied in this case, would not run afoul of the proscriptions of General Obligations Law § 5-322.1 (*see* ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 786, 658 NYS2d 903 [1997]; ***Guryev v Tomchinsky***, 114 AD3d 723, 981 NYS2d 429 [2d Dept 2014]; ***Lazzaro v MJM Indus.***, 288 AD2d 440, 733 NYS2d 500 [2d Dept 2001]).

The foregoing constitutes the decision and order of the court.

Dated: 10/28/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**