

Hrychorczuk v 1677 43rd St. LLC

2020 NY Slip Op 32544(U)

August 3, 2020

Supreme Court, Kings County

Docket Number: 502912/2017

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 3rd day of August 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X
DARIUSZ HRYCHORCZUK,

Plaintiff,

Index No.: 502912/2017

DECISION & ORDER

-against-

1677 43rd STREET LLC and BBM
CONSTRUCTION CORP.,

Defendants.

-----X
1677 43rd STREET LLC,

Third-Party Plaintiff,

-against-

BBM CONSTRUCTION CORP.,

Third-Party Defendant.

-----X
BBM CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

GILMAR DESIGN CORPORATION,

Second Third-Party Defendant.

-----X

1677 43rd STREET LLC,

Third Third-Party Plaintiff,

-against-

GILMAR DESIGN CORPORATION,

Third Third-Party Defendant.

-----X

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

NYSCEF Doc. No.:

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	<u>112-113, 129-131, 157-157, 176</u>
Opposing Affidavits (Affirmations)	<u>179, 184, 200 187, 204, 190, 193, 194</u>
Reply Affidavits (Affirmations)	<u>213, 214, 216</u>

Introduction

Upon the foregoing papers, plaintiff Dariusz Hrychorezuk (plaintiff) moves, in motion (mot.) sequence (seq.) number (no.) 5, for an order awarding him summary judgment pursuant to CPLR 3212 under his Labor Law §§ 240 (1) and 241 (6) causes of action against defendant/third-party plaintiff/third third-party plaintiff 1677 43rd St LLC (1677).

1677 moves, in mot. seq. no. 6, for an order awarding it summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, as well as all cross claims against it. 1677 further moves for summary judgment under its third-party common-law and contractual indemnification claims against defendant/third-party defendant/second third-party plaintiff BBM Construction Corp. (BBM).

Second third-party defendant/third third-party defendant Gilmar Design Corporation (Gilmar) moves, in mot. seq. no. 7, for summary judgment dismissing all third-party claims against it.

Background & Procedural History

The instant action arises out of personal injuries sustained by plaintiff on December 14, 2016 during the course of a construction/renovation project on an existing three-story residential apartment building located at 1677 43rd Street in Brooklyn, New York (the building). Prior to the accident, in a written agreement dated June 28, 2016, 1677, which owned the building, hired BBM to serve as the general contractor on the project. The project itself involved building an extension onto the rear of the building involving all three floors. After entering into the contract with 1677, BBM hired several subcontractors to perform work on the project, including Gilmar, which was responsible for performing masonry work.

At the time of the accident, plaintiff had been working on the project for approximately two weeks pursuant to his employment with BBM as a carpenter/laborer. While working on the project, plaintiff was supervised by "Mikail," a fellow BBM carpenter, at all relevant times. Plaintiff testified that when he began working on the project, he was instructed by BBM's owner, Moses Kupferstein, to access the work area using a temporary wooden staircase that had approximately ten steps and led from ground level to a porch/platform, some eight feet above the ground. By using the temporary staircase, workers were able to avoid disturbing the tenants in the building. These

workers included Gilmar's masons, who used the stairs to access the upper levels of the work area and to carry bricks and other materials they needed to perform their work. The bottom of the staircase rested upon two cinder blocks and the top of the staircase had an overhang that rested upon the platform/porch. According to plaintiff, there was nothing securing the staircase to the platform/porch. However, Mr. Kupferstein testified that the overhang at the top of the stairs was shaped so that it could be "hooked" onto the platform to prevent the staircase from pulling away from the building. Mr. Kupferstein further testified that the staircase could be moved from side to side when hooked to the platform.

On the day of the accident, plaintiff arrived at the job site at approximately 7:00 a.m. and set up the temporary staircase along with three of his BBM coworkers. Thereafter, plaintiff ascended the staircase and began installing flooring in the upper level of the extension. At approximately 3:30 p.m., plaintiff realized that he needed to retrieve a drill at ground level. When he got to the top of the staircase, plaintiff noticed that it had been moved approximately five feet to the left side of the platform/porch since he had last climbed the stairs, approximately three hours earlier. Plaintiff did not know who moved the staircase, or why it had been moved. The accident occurred when plaintiff stepped onto the temporary staircase. In particular, after stepping on the second step from the top of the stairs, the entire temporary staircase toppled over and otherwise collapsed. As a result, plaintiff fell to the ground and sustained various injuries, including a fracture to his lumbar spine that has caused quadriplegia. When asked at his

deposition whether the foot of the staircase was resting upon the cinder blocks after it had been moved five feet to the left, plaintiff testified, "I don't know, probably not because it fell with me."

On or about February 13, 2017, plaintiff commenced the instant action against 1677 and BBM by filing a summons and verified complaint with the County Clerk. The complaint asserted several causes of action against 1677 and BBM, including violations of Labor Law §§ 240 (1), 241 (6), and 200. Thereafter, 1677 commenced a third-party action against BBM seeking common-law and contractual indemnification, as well as damages for breach of contract to procure liability insurance. BBM subsequently served an answer to the third-party complaint which contained a counterclaim sounding in common-law indemnity. BBM also commenced a second third-party action against Gilmar seeking indemnification. On February 1, 2018, the parties entered into a written stipulation whereby it was agreed that plaintiff's first party claims against BBM would be discontinued. On October 28, 2018, 1677 commenced a third third-party action against Gilmar seeking common-law and contractual indemnification. Among other things, the third third-party complaint alleged that plaintiff's accident was caused by Gilmar's negligence. On March 12, 2019, plaintiff filed a note of issue. In an order dated June 4, 2019, the Hon. Lizette Colon extended the deadline for making summary judgment motions to November 29, 2019. Discovery is now complete, and the instant motions are now before the court.

Discussion

Plaintiff's Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment against 1677 under his Labor Law § 240 (1) cause of action. In support of this branch of his motion, plaintiff points to the undisputed fact that he was injured during the course of a construction accident when the temporary staircase that he was descending collapsed, thereby causing him to fall some eight feet to the ground and sustain injuries. Plaintiff maintains that the collapse of the temporary staircase constitutes prima facie evidence of a Labor Law §240 (1) violation. Plaintiff further maintains that, as the owner of the building, 1677 is liable for this violation as a matter of law.

In opposition to this branch of plaintiff's motion, 1677, BBM, and Gilmar all argue that there is an issue of fact regarding whether plaintiff's own actions were the sole proximate cause of the accident. In particular, the opposing parties point to Mr. Kupferstein's deposition testimony, wherein he stated that the staircase could be secured to the porch/platform by hooking its overhang to the platform. Thus, 1677, BBM and Gilmar maintain that the trier of fact could conclude that plaintiff's failure to secure the staircase was the sole proximate cause of the accident. In addition, the opposing parties note that Mr. Kupferstein testified that plaintiff and a co-worker constructed the wooden staircase. Accordingly, to the extent that the accident was caused by the absence of handrails on the staircase, 1677, BBM, and Gilmar maintain that plaintiff's failure to construct the staircase with handrails was the sole proximate cause of the accident.

Labor Law § 240 (1) provides, in pertinent part, that:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . 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) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who “are best situated to bear that responsibility” (*id.* at 500; *see also Zimmer v. Chemung County Perf. Arts*, 65 N.Y.2d 513, 520 [1985]). “The duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross*, 81 N.Y.2d at 500). However, given the exceptional protection afforded by Labor Law § 240(1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 N.Y.2d at 501; *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 [1991]).

Plaintiff has made a prima facie showing of his entitlement to summary judgment against 1677 under his Labor Law § 240 (1) cause of action. In particular, it is undisputed that, at the time of the accident, plaintiff was carrying out construction/renovation work on a building owned by 1677. It is also undisputed that plaintiff fell and sustained injuries when the temporary staircase that he was descending collapsed. It is settled law that a temporary wooden staircase, such as the one involved in the instant case, constitutes the functional equivalent of a ladder or scaffold and falls within the meaning of “other devices” under Labor Law § 240 (1) (*Stiegman v. The Barden & Robeson Corp.*, 162 A.D.3d 1694, 1696 [2018]). Thus, a fall caused by the collapse of a temporary staircase constitutes prima facie evidence of a violation of Labor Law § 240 (1) just as a fall caused by the collapse of a ladder or scaffold is deemed to be presumptive proof that the statute was violated (*Menga v. Tishman Constr. Corp. of Manhattan*, 306 A.D.3d 163, 164 [2003]; *see also O'Brien v. Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33 [2017]). Accordingly, the burden shifts to 1677, BBM, and/or Gilmar to submit evidence which is sufficient to raise a triable issue of fact regarding whether plaintiff's injuries were caused by a violation of Labor Law § 240 (1).

1677, BBM, and Gilmar have failed to raise a triable issue of fact regarding whether plaintiff's own actions were the sole proximate cause of the accident. The sole proximate cause defense applies when, for no good reason, a plaintiff fails to use a readily available safety device that would have prevented the accident even though he/she knew that they were expected to use the device (*Gallagher v. New York Post*, 14 N.Y.3d 83, 88 [2010]; *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39-40 [2004]).

Here, Mr. Kupferstein did not testify that plaintiff failed to “hook” the overhang on the staircase to the platform. To the contrary, Mr. Kupferstein testified that when he went to the job site after the accident, he did not see this securing mechanism and that this piece “gave out” and “probably went flying.” Moreover, at no point did Mr. Kupferstein testify that plaintiff had been directed to construct the staircase with a safety railing. In any event, given the fact that the entire staircase collapsed, the absence of a safety railing could not have been the sole proximate cause of the accident.

Accordingly, plaintiff is entitled to summary judgment against 1677 under his Labor Law § 240 (1) of action.

Plaintiff's Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment against 1677 under his Labor Law § 241 (6) cause of action. In support of this branch of his motion, plaintiff maintains that 1677 violated 12 NYCRR 23-1.7 (f) and that this violation proximately caused the accident. In opposition to this branch of plaintiff's motion, 1677, BBM, and Gilmar maintain that there are issues of fact regarding whether plaintiff's own actions were the sole proximate cause of the accident.

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

“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 persons employed therein or lawfully frequenting such places.”

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 N.Y.2d at 501-502). Accordingly, to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ortega v. Puccia*, 57 A.D.3d 54, 60 [2008]).

12 NYCRR 23-1.7 (f) provides that, “[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.” This regulation, which is sufficiently specific to support a Labor Law § 241 (6) claim, requires that workers be provided with a safe means of accessing working levels above and below ground level (*Conklin v. Triborough Bridge and Tunnel Auth.*, 49 A.D.3d 320, 321 [2008]; *Miano v. Skyline New Homes Corp.*, 37 A.D.3d 563, 565 [2007]; *O’Hare v. City of New York*, 280 A.D.2d 458, 458 [2001]).

Here, plaintiff has made a prima facie showing that 23-1.7 (f) was violated. In particular, given the fact that the temporary stairway collapsed, plaintiff has demonstrated that he was not provided with a safe means of accessing the elevated work area. Further, 1677, BBM, and Gilmar have failed to raise an issue of fact regarding whether the

accident was proximately caused by a violation of the subject Industrial Code provision as the court has already determined that plaintiff's own actions were not the sole proximate cause of the accident. Accordingly, plaintiff is entitled to summary judgment against 1677 under his Labor Law § 241 (6) cause of action.

Plaintiff's Labor Law § 200 and Common-Law Negligence Claims

1677 moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it. 1677 also moves to dismiss all cross claims asserted against it. In support of this branch of its motion, 1677 argues that it did not exercise any control or supervision over plaintiff's work. In this regard, 1677 points to plaintiff's own deposition testimony, wherein he stated that he was supervised solely by his BBM co-worker, Mikail. 1677 also notes that plaintiff did not speak English, and that Mikail translated Mr. Kupferstein's directives to plaintiff. Finally, 1677 submits an affidavit by its property manager, Chaim Pinter, who resided at the building at the time of the accident. Mr. Pinter states that he did not control or supervise BBM's work and that he did not provide BBM with any tools or equipment.

No opposition has been submitted to 1677's motion to dismiss plaintiff's Labor Law § 200 and common-law negligence claims against it. However, Gilmar opposes 1677's motion to dismiss Gilmar's cross claims against 1677.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v. Herbert Constr. Co.*, 275 A.D.2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who

exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v. Morgan Stanley & Co., Inc.*, 21 A.D.3d 866, 868 [2005]; *Aranda v. Park East Constr.*, 4 A.D.3d 315 [2004]; *Akins v. Baker*, 247 A.D.2d 562, 563 [1998]). Specifically, “[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*Ortega v. Puccia*, 57 A.D.3d 54, 61 [2008]).

On the other hand, “when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had authority to supervise or control the performance of the work” (*id.*). General supervisory authority to oversee the progress of the work is insufficient to impose liability. Rather, [a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed” (*Ortega*, 57 A.D.3d at 62). Further, “the right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common law negligence” (*Austin v. Consolidated Edison, Inc.*, 79 A.D.3d 682, 684 [2] [internal quotation marks omitted]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under

Labor Law § x 200 or the common law” (*LaRosa v. Internap Network Serv. Corp.*, 83 A.D.3d 905 [2011]).

Here, the accident arose out of defects and dangers in the methods and material of the work. Further, 1677 has made a prima facie showing that it did not control or supervise the means and methods employed by plaintiff and BBM in carrying out the work. In particular, plaintiff’s own deposition testimony and Mr. Pinter’s affidavit demonstrate that plaintiff was supervised solely by BBM personnel. Further, it is undisputed that 1677 did not construct or position the temporary staircase that collapsed. Under the circumstances, 1677 is entitled to summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence claims against it. Moreover, inasmuch as 1677 was not negligent, there is no basis for any of the cross claims asserted against it by BBM or Gilmar.

1677’s Common-Law Indemnification Claim Against BBM

1677 moves for summary judgment against BBM under its third-party common-law indemnification claim. In so moving, 1677 initially contends that its common-law indemnity claim is not barred under Workers’ Compensation Law § 11 since plaintiff sustained a “grave injury” as defined under the statute. In particular, 1677 notes that Workers’ Compensation Law § 11 specifically lists quadriplegia as a grave injury. 1677 further submits a copy of a medical report generated by Rene Elkin, M.D., a neurologist who examined plaintiff on October 11, 2018. Among other things, Dr. Elkin opines that plaintiff “remains quadriparetic with minimal movement of the upper and lower extremities and that his “prognosis for any neurological recovery to his spinal cord injury

is poor.” Finally Dr. Elkin states that plaintiff’s “life will be confined to a wheelchair with minimal use of his limbs and total dependence.” In addition, 1677 submits a medical report by Andrew Farber, M.D., an orthopaedist who examined plaintiff on October 12, 2018. Based upon his examination, Dr. Farber opines that plaintiff “is now paralyzed and confined to a wheelchair.” 1677 further submits a medical report by David Simpson, M.D., who examined plaintiff on November 12, 2018. Dr. Simpson opines that plaintiff has “spastic quadriparesis” and that “[t]here is limited likelihood of further meaningful neurological recovery.” Finally, 1677 submits a medical report by Marc S. Arginteanu, M.D., who examined plaintiff on October 24, 2018. Dr. Arginteanu opines that, “[a]lthough there may be some slight improvement in the future, I believe [plaintiff] will never recover significantly enough to be able to walk, to use his hands, or to control his bladder or bowel.”

In further support of its motion for common-law indemnification against BBM, 1677 maintains that plaintiff was controlled and supervised solely by BBM personnel and that the accident was not caused by any negligence on 1677's part. As such, 1677 maintains that it is entitled to common-law indemnification against BBM.

In opposition to this branch of 1677's motion, BBM maintains that 1677 has failed to submit sufficient evidence demonstrating that plaintiff sustained a grave injury for purposes of Workers' Compensation Law § 11. BBM also argues that there is evidence that 1677's own negligence contributed to the accident. In support of this contention, BBM notes that Mr. Pinter admitted at his deposition that 1677 failed to obtain the required construction permits prior to beginning the work.

Workers' Compensation Law § 11 precludes all common-law indemnification claims against an injured worker's employer unless it can be shown that plaintiff sustained a "grave injury," which is defined under the statute as:

"death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Here, contrary to BBC's contention, 1677 has demonstrated that plaintiff sustained a grave injury in the form of quadriplegia. In particular, as noted above, 1677 has submitted medical reports from several physicians who have examined plaintiff. These reports indicate that plaintiff has quadriparesis with extremely limited use of his upper and lower extremities, no control over his bladder or bowel functions, that the prognosis for any meaningful recovery is poor, and that plaintiff will be confined to a wheelchair for the rest of his life. Under the circumstances, 1677's common-law indemnity claim against BBM is not barred by Workers' Compensation Law § 11.

"In order to establish their claim for common-law indemnification, [an owner is] required to prove not only that they were not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Benedetto v. Carrera Realty Corp.*, 32 A.D.3d 874, 875 [2006]). Moreover, when more than one party may be responsible for the accident, it is

improper to grant summary judgment against a single party under a common-law indemnification claim (*Wrighten v. ZHN Contracting Corp.*, 32 A.D.3d 1019, 1021 [2006]; *Singh v. Congregation Bais Avrohom K'krula*, 300 A.D.2d 567, 569 [2002]; *Freeman v. National Audubon Soc. Inc.*, 243 A.D.2d 608, 609 [1997]).

Here, the court has already determined that the accident was not caused by any negligence on 1677's part. Moreover, the mere fact that 1677 failed to obtain building permits is insufficient to raise a triable fact regarding its negligence in the absence of any evidence linking the lack of permits to the accident. In addition, it is undisputed that BBM directed, controlled, and supervised plaintiff's work. However, as will be more fully discussed below, there is an issue of fact regarding whether Gilmar's actions may have played a role in the accident. Under the circumstances, 1677 is not entitled to summary judgment under its common-law indemnification claim against BBM inasmuch as more than one party may be responsible for the accident.

1677's Contractual Indemnification Claim Against BBM

1677 moves for summary judgment under its contractual indemnification claim against BBM. In support of this branch of its motion, 1677 points to its June 28, 2016 contract with BBM. Specifically, 1677 notes that this agreement contains a clause which provides that:

"To the fullest extent permitted by law, [BBM] shall indemnify and hold harmless [1677] . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the contractors and Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . caused in whole or in part by

negligent acts or omissions of the contractor or Subcontractor.”

According to 1677, this clause was clearly triggered by plaintiff’s accident inasmuch as it was caused by the negligence of BBM and/or its subcontractor, Gilmar. 1677 also argues that it is not precluded from enforcing this indemnification provision under General Obligations Law § 5-322.1 since that accident was not caused by any negligence on 1677’s part.

In opposition to this branch of 1677’s motion, BBM reiterates its argument that there is an issue of fact regarding whether 1677 was negligent since it failed to obtain the necessary construction permits from the Department of Buildings for the underlying work. In addition, BBM maintains that 1677 has failed to demonstrate that the accident was caused by BBM’s negligence, as is required under the indemnification provision. BBM also argues that there is an issue of fact regarding whether the subject indemnification clause was in effect on the date of the accident. In support of this contention, BBM notes that 1677 has submitted two agreements between the parties for the performance of the underlying work, only one of which contains the indemnification agreement. Specifically, BBM points out that the second agreement, which was signed by Chaim Pinter on August 31, 2016, does not contain an indemnification provision. BBM further notes this second agreement states that it supersedes all prior agreements between the parties. Finally, BBM points out that the first agreement, which contains that subject indemnification clause, was signed by the parties on June 28, 2016. Under the circumstances, BBM argues that there is an issue of fact as to whether

indemnification clause was not in effect since it was superseded by the second agreement, which did not contain such a clause.

“The right to contractual indemnification depends upon the specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 930 [2009]). Moreover, “a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662 [2009], citing General Obligations Law § 5-322.1).

The subject indemnification provision requires that BBM indemnify 1677 for accidents arising out of BBM’s work, but only if caused by the negligence of BBM or its subcontractors. Here, the accident clearly arose out of BBM’s work since plaintiff was a BBM employee carrying out BBM’s work at the time of the accident. Further, the accident arose out of the negligence of BBM and/or Gilmar since BBM workers constructed and set up the temporary staircase that ultimately collapsed and Gilmar workers allegedly moved the staircase prior to the accident. In addition, the court has already ruled that the accident was not caused by 1677’s negligence. Thus, General Obligations Law § 5-322.1 does not bar enforcement of the indemnification provision. As a final matter, there is no merit to BBM’s argument that the subject indemnification clause was not in effect at the time of the accident. In particular, both agreements were dated June 28, 2016. Further, although Chaim Pinter apparently signed the agreement

with the indemnification provision on behalf of 1677 on August 31, 2016, BBM, which is the indemnitor, signed both agreements on the same date (i.e., June 28, 2016). Thus, it is clear that the agreement containing the indemnification provision was not superseded by any subsequent agreement. Accordingly, 1677 is entitled to summary judgment under its contractual indemnification claim against BBM.

Gilmar's Motion for Summary Judgment

Gilmar moves for summary judgment dismissing all third-party claims against it. In so moving, Gilmar maintains that there is no basis for BBM and 1677's common-law indemnification claims against it inasmuch as it is undisputed that Gilmar did not supervise or control plaintiff's work and there is no evidence that Gilmar did anything that caused the temporary staircase to collapse. With respect to this latter point, Gilmar notes that plaintiff testified that he did not know who moved the staircase prior to his accident. Further, Gilmar points to the testimony of its own employee, Ravshan Djalilov. In particular, Mr. Djalilov testified that the only Gilmar workers present at the job site on the day of the accident were himself and a co-worker, Sobir Narzikulov. Mr. Djalilov further testified that neither he nor Sobir moved the staircase at any point on the day of the accident. Under the circumstances, Gilmar maintains that there is no basis for the common-law indemnification claims asserted against it.

Gilmar further argues that BBM and 1677's contractual indemnification claims against it must be dismissed. In particular, Gilmar points out that, although it agreed to indemnify BBM and 1677 in its contract with BBM, this obligation was contingent upon the accident being caused by Gilmar's negligence. As noted above, Gilmar maintains

that the evidence in this case conclusively proves that the accident was not caused by its negligence.

In opposition to Gilmar's motion, 1677 maintains that there is an issue of fact regarding whether or not Gilmar's employees moved the temporary staircase prior to its collapse. In particular, 1677 notes that, on the day of the accident, Gilmar's workers Mr. Djalilov and Sobir were building a wall on the platform/porch to which supported the top of the temporary stairway, while plaintiff and his BBM co-workers were working a higher level of the building, away from the porch. 1677 further notes that Mr. Djalilov testified that, prior to the accident, he and Sobir used the stairway to carry approximately 100 bricks and cement up to the platform/porch and that he last used the stairway half an hour before the accident. In contrast, plaintiff testified that he last used the stairway several hours before the accident and, between that time and the time of the accident, the stairway had been moved five feet. Under the circumstances, 1677 maintains that there is an issue of fact regarding whether or not Gilmar workers moved the stairway off of its cinder block supports, thereby causing the accident.

Here, there are triable issues of fact regarding whether or not Gilmar proximately caused the accident by moving the temporary staircase prior to same. In this regard, it is true that Mr. Djalilov denied that he or Sobir moved the stairway prior to the accident. It is also true that plaintiff testified that he did not know who moved the stairway. However, Mr. Djalilov also testified that he, Sobir, and plaintiff and his BBM co-workers were the only workers present at the job site on the day of the accident. Further, Mr. Djalilov and Sobir were working on the platform in close proximity to the stairway while

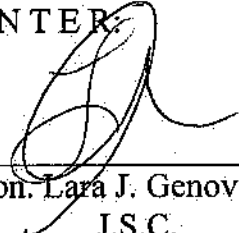
plaintiff and his co-workers were working in a different area. In addition, Mr. Djalilov admitted to using the stairway half an hour before the accident while plaintiff had not used the stairs for several hours before the accident. Under the circumstances, there is circumstantial evidence that would allow the trier of fact to conclude that Gilmar employees moved the stairway, thereby causing the accident (*Kennedy v. Atlas Fence, Inc.*, 90 A.D.3d 1122, 1123-1124 [2011]; *Bettineschi v. Healy Elec. Contr., Inc.*, 73 A.D.3d 1109 [2010]). Accordingly, Gilmar's motion to dismiss all third-party claims against it is denied.

Conclusion

Accordingly, (1) Plaintiff's motion, in mot. seq. 5, for summary judgment against 1677 under his Labor Law §§ 240 (1) and 241 (6) causes of action is granted; (2) that branch of 1677's motion, in mot. seq. 6, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is granted. That branch of 1677's motion for common-law indemnification against BBM is denied. That branch of 1677's motion for contractual indemnification against BBM is granted; and (3) Gilmar's motion, in mot. seq. 7, for summary judgment dismissing all third-party claims against it is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.