

Garcia v Fed LI, LLC
2020 NY Slip Op 35812(U)
December 26, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 15887/2015
Judge: Sanford Neil Berland
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SHORT FORM ORDER

INDEX 15887/2015
CAL. No. 201901971OT

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 2/18/20 (002 & 003)
MOTION DATE 4/14/20 (004 & 005)
ADJ. DATE 10/6/20
Mot. Seq. # 002 MD
 # 003 MG
 # 004 MD
 # 005 MD

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JOSE GARCIA and MARIA FLORES,

FRANK A. CETERO, ESQ.
Attorney for Plaintiffs
248 Higbie Lane
West Islip, New York 11795

Plaintiffs,

CRAFA & SOFIELD, LLP
Attorney for Defendants FED LI, LLC,
GSM LI, LLC, ICA LI LLC and SAF LI, LLC
840 Franklin Avenue
Garden City, New York 11530

- against -

FED LI, LLC, GSM LI, LLC, ICA LI, LLC, SAF
LI, LLC, CHESAPEAKE CORPORATION,
MULTI PACKAGING SOLUTIONS, INC., and
ABC COMPANIES 1-5 (fictitious names meant
to describe the general contractors whose names
are presently unknown),

AHMUTY, DEMERS & MCMANUS, ESQS.
Attorney for Defendant/Third-Party Plaintiffs
MPS HRL, LLC
20 West Main Street, Ste. 205
Riverhead, New York 11901

Defendants.

DESENA & SWEENEY, LLP
Attorney for Third-Party Defendant
J.P.S. Electric Co., Inc.
1500 Lakeland Avenue
Bohemia, New York 11716

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MPS HRL, LLC f/k/a CHESAPEAKE
PHARMACEUTICAL PACKAGING
CORPORATION, LLC, INCORRECTLY
NAMED HEREIN AS CHESAPEAKE
CORPORATION MULTI PACKAGING
SOLUTIONS, INC.,

Third-Party Plaintiffs,

- against -

J.P.S. ELECTRIC CO., INC.,

Third-Party Defendant.

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Upon the following papers read on these motions for summary judgment: Notice of Motion and supporting papers by plaintiffs, dated January 23, 2020; Notice of Motion and supporting papers by third-party defendant J.P.S. Electric Co., Inc., dated January 30, 2020; Notice of Cross-Motion and supporting papers by defendant/third-party plaintiff MPS HRL, LLC, dated March 17, 2020; Notice of Cross-Motion and supporting papers by defendant/third-party plaintiff MPS HRL, LLC, dated March 17, 2020; Answering Affidavits and supporting papers by defendants Fed LI LLC, GSM LI LLC, ICA LI LLC and SAF LI LLC, dated February 11, 2020; Answering Affidavits and supporting papers by third-party defendant J.P.S. Electric Co., Inc., dated May 5, 2020; Answering Affidavits and supporting papers by plaintiff, dated June 1, 2020; Replying Affidavit and supporting papers by plaintiff, dated March 11, 2020; Replying Affidavits and supporting papers by third-party defendant J.P.S. Electric Co., Inc., dated September 30, 2020; Replying Affidavits and supporting papers by defendant/third-party plaintiff MPS HRL, LLC, dated September 6, 2020, it is

ORDERED that the motion (002) by plaintiffs, the motion (003) by third-party defendant J.P.S. Electric Co., Inc., the cross-motion (004) by defendant-third-party plaintiff MPS HRL, LLC, and the cross-motion (005) by defendant-third-party plaintiff MPS HRL, LLC, are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiffs for partial summary judgment against defendants with respect to their claims under Labor Law §§ 240 (1) and 241 (6) is denied; and it is

ORDERED that the motion by third-party defendant J.P.S. Electric Co., Inc., for summary judgment dismissing the third-party complaint against is granted; and it is

ORDERED that the cross-motion by defendant/third-party plaintiff MPS HRL, LLC, for summary judgment dismissing plaintiff's complaint and all cross claims against it is denied; and it is

ORDERED that the cross-motion by defendant-third-party plaintiff MPS HRL, LLC, for summary judgment with respect to its claims against third-party defendant J.P.S. Electric Co., Inc. for contractual indemnification is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Jose Garcia ("plaintiff") on June 24, 2014, as the result of a fall from a ladder at the premises located at 325 Duffy

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Avenue, Hicksville, New York. At the time of the accident, plaintiff was working for third-party defendant J.P.S. Electric Co., Inc. (hereinafter referred to as "JPS") at the subject property. Defendants FED LI LLC, GSM LI LLC, ICA LI, LLC, and SAF LI LLC (hereinafter collectively referred to as "FED LI") owned the subject property. Defendant-third-party plaintiff MPS HRL, LLC (hereinafter referred to as "MPS") leased a portion of the subject property and hired JPS to perform electrical work in connection with the installation of three new printing presses in the leased premises. Plaintiff alleges that his injuries were the result of defendants' negligence and violations of Labor Law §§ 200, 240 and 241 and certain provisions of the New York Industrial Code and OSHA. Plaintiff Maria Flores asserts derivative claims for loss of services and society arising from plaintiff's injuries.

Plaintiffs move for summary judgment on the issue of defendants' liability pursuant to Labor Law §§ 240 (1) and 241 (6). In support of their motion, plaintiffs submit, *inter alia*, copies of the pleadings and the transcripts of the parties' deposition testimony. Defendant-third-party plaintiff MPS cross-moves for summary judgment dismissing the complaint and all cross-claims and counterclaims against it. JPS moves for summary judgment dismissing the third-party action against it, based upon the exclusivity provisions of the Workers' Compensation Law. MPS cross-moves for summary judgment against JPS with respect to its claims for contractual indemnification.

Plaintiff testified that, at the time of the accident, he was standing on an extension ladder attaching conduit pipe to a metal I-beam, which was approximately 17 feet from the ground. Plaintiff, who had placed the ladder on the cement floor prior to his work, testified that the floor was dry and not slippery. He also testified that he had used the ladder on prior occasions with no difficulty, and that he climbed up and down the ladder approximately four times prior to the accident without encountering any problems. Plaintiff further testified that the pipe that he was working on was directly beneath him and that he did not feel the ladder slip or shift prior to his accident. However, while standing on the ladder and securing the pipe to the I-beam, the ladder suddenly slipped backwards, causing plaintiff to fall to the ground. Plaintiff testified that he did not observe the feet of the ladder but that after the accident, he heard other individuals say that there was little or no rubber on the ladder's feet.

Kevin Schmiermann is the manager of JPS. He testified that plaintiff was employed by JPS as a junior mechanic in 2014. He did not witness the accident, but he arrived at the subject premises after plaintiff was removed from the scene. Schmiermann testified that he observed the ladder that the plaintiff had been using and noted that there were no rubber pads on the feet of the ladder. He also testified that the ladder did not have the letters "JPS" painted on it, and he denied that the ladder was owned by JPS. He was told that the accident occurred when plaintiff "hopped" the ladder to straighten it out, while standing on the ladder, rather than climbing down from the ladder to reposition it.

The transcript of nonparty Douglas Ferri's deposition was also submitted in support of plaintiffs' motion. Ferri was employed as an electrician by JPS in June 2014, and he witnessed plaintiff's accident. He testified that prior to the accident, plaintiff was using an extension ladder owned by JPS, and that he was working approximately eight feet above the ground. Ferri further testified that he observed plaintiff attempt to reposition himself by hopping on the ladder to "move the whole ladder with his body." The ladder then came out from underneath him and fell straight down. Ferri does not recall any problems with the ladder. He did not look at the feet of the ladder after the accident.

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The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form, and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law § 240 (1) imposes absolute liability upon owners and contractors, and their agents, who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35 [1995]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). “The term ‘owner’ within the meaning of article 10 of the Labor Law encompasses a ‘person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit’” (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566, 473 NYS2d 494 [1984]).

Labor Law § 240 (1) requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so “constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a 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, 771 NYS2d 484 [2003]; *Corchado v 5030 Broadway Properties, LLC*, 103 AD3d 768, 962 NYS2d 185 [2d Dept 2013]; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 944 NYS2d 630 [2d Dept 2012]). Liability under Labor Law § 240 (1) will not attach where a worker’s voluntary conduct was the sole proximate cause of the accident, such as where he or she chooses not use an available safety device or misuses the device (*see generally Robinson v East Med. Ctr., LP*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra*; *Daley v 250 Park Ave.*, 126 AD3d 747, 5 NYS3d 267 [2d Dept 2015]; *Corchado v 5030 Broadway Properties, LLC*, *supra*).

Here, neither plaintiff nor MPS has established *prima facie* entitlement to summary judgment with respect to plaintiff’s claims under Labor Law § 240 (1). Rather, the deposition testimony submitted in support of the motions raises issues of fact regarding the manner in which the accident occurred, including whether plaintiff’s accident was proximately caused by the failure or absence of any protective equipment, or whether plaintiff’s alleged “hopping” of the ladder, in an attempt to reposition the ladder while standing on it, was the sole proximate cause of the accident. Accordingly, the branch of plaintiff’s motion for summary judgment with respect to his claims under Labor Law § 240 (1) is denied and the branch of MPS’s cross-motion for summary judgment dismissing plaintiff’s claims under Labor Law § 240 (1) is also denied (*see Loretta v Split Dev. Corp.*, 168 AD3d 823, 92 NYS3d 92 [2d Dept 2019]; *Shaughnessy v Huntington Hosp. Assoc.*, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]; *Assevero v Hamilton & Church Properties*,

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LLC, 131 AD3d 553, 15 NYS3d 399 [2d Dept 2015]; *Daley v 250 Park Ave.*, *supra*; *Corchado v 5030 Broadway Properties, LLC*, *supra*; *see also Guite v Cooke Bros. of Brockport, Inc.*, 178 Misc.2d 948, 682 NYS2d 816 [Sup Ct, Monroe County 1998]).

Labor Law § 241 (6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Comes v New York State Elec. & Gas*, 82 NY2d 876, 878, 609 NYS2d 168 [1993]). To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish that his or her injuries were proximately caused by the violation of an Industrial Code provision that sets forth specific, applicable safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505, 601 NYS2d 49 [1993]; *Biafora v City of New York*, 27 AD3d 506, 811 NYS2d 764 [2d Dept 2006]).

With regard to plaintiff's claims under Labor Law § 241 (6), the evidence submitted in support of plaintiff's motion and MPS's cross-motion, including the deposition testimony of the parties and nonparties, fails to eliminate questions of fact regarding whether the alleged violations of the Industrial Code proximately caused plaintiff's accident. Rather, as noted above, issues of fact are present regarding whether plaintiff's accident was proximately caused by a defect in the ladder or whether plaintiff's alleged "hopping" of the ladder to reposition it was the sole proximate cause of the accident. In light of these issues of fact, the branches of plaintiff's motion, and of MPS's cross-motion, for summary judgment with respect to his claims under Labor Law § 241 (6) are denied (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Contreras v 3335 Decatur Ave. Corp.*, 173 AD3d 496, 497, 99 NYS3d 879 [1st Dept 2019]; *Riffo-Veloza v Village of Scarsdale*, 68 AD3d 839, 891 NYS2d 418 [2d Dept 2009]; *Johnson v Flatbush Presbyt. Church*, 29 AD3d 862, 815 NYS2d 260 [2d Dept 2006]).

The remaining branches of MPS's cross-motion are denied as untimely. CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Plaintiff's note of issue in this matter was filed on October 4, 2019. As such, the deadline for summary judgment motions was February 1, 2020. MPS's motion was not made until March 17, 2020, and there was no explanation in the moving papers for its delay in seeking summary judgment. While the issues raised in the branches of MPS's cross motion for summary judgment with respect to plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) are identical to those raised in plaintiff's timely motion, the issues raised in the additional branches of MPS' motion are not "nearly identical" to the grounds underlying plaintiff's motion. Thus, the branches of MPS's motion for summary judgment dismissing plaintiff's claims under Labor Law § 200, common law negligence, the New York State Industrial Code and OSHA are denied as untimely (*see Bressingham v Jamaica Hosp. Med. Ctr.*, 17AD3d 496, 793 NYS2d 176 [2d Dept 2005]).

Third-party defendant JPS moves for summary judgment dismissing the third-party action by MPS based on the exclusivity provisions contained in the Workers' Compensation Law. Specifically, JPS argues that the third-party claims for contribution are barred by Section 11 of the Workers' Compensation Law because plaintiff has not sustained a "grave injury" as defined by the statute. In addition, JPS argues that dismissal of MPS's third-party claims for contractual indemnification is warranted because it did not enter into any written contract with MPS in which it expressly agreed to indemnify MPS for the subject accident.

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MPS cross-moves for summary judgment against JPS with respect to its third-party claims for contractual indemnification.

Dismissal of the third-party contribution claims against JPS is granted, as it is undisputed that plaintiff did not suffer a grave injury as a result of the alleged accident (*see Masiello v 21 E. 79th St. Corp.*, 126 AD3d 596, 7 NYS3d 35 [1st Dept 2015]; *Lue v Finkelstein & Partners, LLP*, 94 AD3d 1386, 943 NYS2d 636 [3d Dept 2012]). Claims for common law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury (*see Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8 [2008]; *Flores v Lower East Side Serv. Ctr., Inc.*, 4 NY3d 363, 795 NYS2d 491 [2005]; *Ironshore Indem., Inc. v W&W Glass, LLC*, 151 AD3d 511, 58 NYS3d 10 [1st Dept 2017]; *Grech v HRC Corp.*, 150 AD3d 829, 54 NYS3d 433 [2d Dept 2017]). It is further noted that as MPS failed to oppose the branches of JPS's motion seeking dismissal of the third-party claims for common law contribution, MPS is deemed to have abandoned those causes of action (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]).

In addition, the branch of JPS's motion for summary judgment requesting dismissal of MPS's third-party claims for contractual indemnification is granted. New York Worker's Compensation Law § 11 permits third-party indemnification claims against employers where such claims are based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see Rodrigues v N&S Blg. Contrs. Inc.*, 5 NY3d 427, 805 NYS2d 299 [2005]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1998]; *Gikas v 42-51 Hunter Street, LLC*, 134 AD3d 987, 24 NYS3d 87 [2d Dept 2015]). "[A]n indemnification agreement executed by a party after the plaintiff's accident occurred will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the agreement to apply as of that date" (*Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 912, 912 NYS2d 233 [2d Dept 2010]; *see also Zalewski v MH Residential1, LLC*, 163 AD3d 900, 82 NYS3d 40 [2d Dept 2018]).

JPS has satisfied its prima facie burden on its motion for summary judgment through the affidavits of the owners, manager and secretary of JPS attesting that there was no written contract in effect on the date of the alleged accident obligating JPS to indemnify GPS for claims relating to the work that it performed at the subject premises. In opposition to JPS's motion, MPS argues that plaintiff's work at the time of the accident was performed pursuant to a purchase order, issued to JPS after the accident, that included an indemnification clause to which the parties agreed. In support of this contention, MPS submits the affidavit of George Stumpf, who was employed by MPS as Manufacturing Manager at the Duffy Avenue site at the time of plaintiff's accident and states that it was MPS's "intent and expectation" when it contracted with JPS to perform work there that JPS would be bound by the terms and conditions referred to in the subsequently issued purchase order. MPS also submits several purchase orders that it contends were issued to JPS for work performed prior to the date of the plaintiff's accident and which refer to "terms and conditions available upon request." However, the evidence submitted in support of JPS's motion, including the deposition testimony of the parties, establishes that the purchase orders were created by MPS after its receipt of invoices for the work from JPS. There was no evidence submitted in opposition to JPS's motion that establishes the existence of any written contract between MPS and JPS, entered into by them prior to the accident, that contained an express agreement on the part of JPS to indemnify MPS for claims arising from

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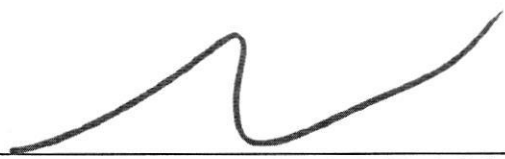
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the subject work. As such, MPS's claims for contractual indemnification against JPS, plaintiff's employer, are barred under the New York Workers' Compensation Law and are dismissed (*see Tonking v Port Auth. of New York and New Jersey*, 3 NY3d 486, 787 NYS2d 708 [2004]; *Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 549 NYS2d 365 [1989]; *Gikas v 42-51 Hunter Street, LLC*, 134 AD3d 987, 24 NYS3d 87 [2d Dept 2015]; *Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410, 731 NYS2d 724 [1st Dept 2001]). Accordingly, the branch of JPS' motion for summary judgment requesting dismissal of MPS's third-party claims for contractual indemnification is granted, and MPS's cross motion for summary judgment against JPS with respect to its claims for contractual indemnification is denied.

The foregoing constitutes the decision and order of the court.

Dated: December 26, 2020



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

FINAL DISPOSITION X NON-FINAL DISPOSITION