

<b>De Oliveira v CS Hotel 30W46th, LLC</b>
2022 NY Slip Op 30269(U)
January 28, 2022
Supreme Court, New York County
Docket Number: Index No. 153910/2020
Judge: Sabrina B. Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

CLAUDIO DE OLIVEIRA,
Plaintiff,

- v -

CS HOTEL 30W46TH, LLC, ABRACADABRA PAINTING
CO., INC., SKYSTONE GROUP, LLC,
Defendant.

INDEX NO. 153910/2020

04/27/2021,
01/21/2022,
01/21/2022,
MOTION DATE 01/21/2022

MOTION SEQ. NO. 001 002 003
004

DECISION + ORDER ON MOTION

-----X

ABRACADABRA PAINTING CO., INC.
Plaintiff,

-against-

SMALL FOX PAINTING

Defendant.

Third-Party
Index No. 595368/2021

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 83, 84, 85, 86, 87, 88, 91, 98, 99, 102, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 92, 93, 94, 97, 100, 103, 112

were read on this motion to/for SEVER ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 95, 96, 101, 104, 109, 110, 111

were read on this motion to/for JUDGMENT - SUMMARY

**BACKGROUND**

On June 5, 2019, plaintiff was working as a painter for Small Fox Painting at the Hotel Cambria located at 30 West 46<sup>th</sup> Street, New York, New York (Subject Premises). Plaintiff was removing paint from an external metal canopy attached to the Subject Premises. Plaintiff was standing on a ladder, which was unsecured and shifted causing him to fall and sustain injuries.

**PROCEDURAL HISTORY**

Plaintiff commenced this action on June 4, 2020, pursuant to a summons and complaint which named CS Hotel 30W46th, LLC (CS Hotel) and Abracadabra Painting Co., Inc. (Abracadabra). Both parties appeared by counsel and interposed answers.

On November 5, 2020, plaintiff filed a supplemental summons and amended complaint adding Skystone Group LLC (Skystone) as a defendant. To date, Skystone has failed to appear in this action.

On April 27, 2021, Abracadabra commenced a third-party action against Small Fox Painting (Small Fox).

On July 26, 2021, plaintiff filed a Note of Issue.

On August 27, 2021, Small Fox appeared by counsel and filed an answer.

**PENDING MOTIONS**

On January 21, 2022, three motions were marked submitted and referred to this court for determination (Mot Seq Nos 2-4). However, a review of NYCEF filed documents shows that in fact there are five motions which have been submitted and will be addressed by this court.

On May 19, 2021, plaintiff moved for a default judgment against Skystone (Mot Seq No 1). No opposition has been filed to this motion.

On October 20, 2021:

Abracadabra moved for summary judgment (Mot Seq No. 2); and

Small Fox moved for an order severing the third-party action, or alternatively striking the Note of Issue (Mot Seq No 3); and

Plaintiff moved for partial summary judgment against CS Hotel and Abracadabra, as well as seeking an order severing Small Fox from this action (Mot Seq No 4); and

CS Hotel cross-moved for summary judgment as against Abracadabra.

These motions are consolidated herein and determined as set forth below.

### **FACTS**

The following facts appear to be uncontested based on the parties' submissions.

CS Hotel is the owner of the Subject Premises. CS Hotel hired Skystone as the General Contractor for work being done on the Subject Premises. Skystone hired Abracadabra to do the scraping and painting work for the canopy. Abracadabra hired Small Fox to do the painting work at the Subject Premises.

On June 5, 2019, plaintiff was employed by Small Fox. Small Fox was tasked with removing paint that was peeling off an outdoor iron canopy outside of the entrance to the Subject Premises. To accomplish this task, plaintiff and his coworkers were provided with a paint-removing chemical that they applied to the canopy with paint brushes. They would then scrape the paint off.

In order to reach the canopy, plaintiff used a twenty-four (24') foot aluminum extension ladder that he rested against the Subject Premises. In order to protect the sidewalk from the chemical, plaintiff and his coworkers were instructed to place drop cloths on the ground before setting up the ladders. While he was performing this work, plaintiff descended the ladder to move it to a different position. He then ascended the ladder and after a few seconds, the ladder

fell, sending plaintiff downward, landing on the ladder. The ladder was not being held by anyone at the time of the incident, and plaintiff was not wearing a safety harness.

The agreement between Skystone and Abracadabra was memorialized in a scope of work document, which states that a scissor lift was to be provided to conduct overhead work on the canopy. A scissor lift is a motorized system that extends upward and down in a vertical fashion.

Robert Lepre, Jr. is an officer of Abracadabra. Prior to Small Fox performing the work, Mr. Lepre drove by the Subject Premises and determined that a scaffold or A-frame ladder should be used to reach the canopy. Mr. Lepre confirmed that he had stop work authority over Small Fox. Mr. Lepre testified that using an unsecured ladder on top of a drop cloth could be a safety hazard because the ladder could kick out and fall.

### DISCUSSION

#### *Plaintiff's Motion for A Default Judgment Against Skystone Is Granted*

“A plaintiff's right to recover upon a defendant's default in answering is governed by CPLR 3215 ... which requires that the plaintiff state a viable cause of action” (*Fappiano v. City of New York*, 5 A.D.3d 627, 628, 774 N.Y.S.2d 773 [2004], *lv. denied* 4 N.Y.3d 702, 790 N.Y.S.2d 648, 824 N.E.2d 49 [2004]; *accord Venturella-Ferretti v. Ferretti*, 74 A.D.3d 792, 793, 901 N.Y.S.2d 551 [2010] ). In evaluating whether plaintiff has fulfilled this obligation, defendant, as the defaulting party, is “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156 [2003] ). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (*see Matter of Dyno v. Rose*, 260 A.D.2d 694, 698, 687 N.Y.S.2d 497 [1999], *appeal dismissed* 93 N.Y.2d 998, 695 N.Y.S.2d 743, 717 N.E.2d 1080 [1999], *lv. denied* 94 N.Y.2d 753, 700 N.Y.S.2d 426, 722 N.E.2d 506 [1999] ).

*Walley v. Leatherstocking Healthcare, LLC*, 79 A.D.3d 1236, 1238 (2010).

As noted above, on November 5, 2020, plaintiff filed a supplemental summons and amended complaint adding Skystone as a defendant. Skystone is a domestic limited liability

company. Skystone was served by delivery to the Secretary of State on November 10, 2020, in accordance with Section 303 of the Limited Liability Company Law.

Plaintiff sent an additional copy of the pleadings along with a letter regarding their default to Skystone care of their registered agent for service on January 4, 2021.

Given that all facts in the amended complaint are deemed true as to Skystone, the court finds that plaintiff has established its causes of action against Skystone under Labor Law §240(1) and for negligence.

Based on the foregoing, plaintiff's motion for a default judgment as to liability against Skystone is granted. The inquest against Skystone for damages shall take place at the same time as the trial.

***Plaintiff's Motion for Partial Summary Judgment as Against  
CS Hotel and Abracadabra Pursuant to Labor Law §240(1) is Granted***

CPLR § 3212 (b) provides that summary judgment shall be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR § 3212(b)).

To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. (b)). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form.

*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562(1980).

Summary judgment shall be granted when there is no genuine issue of material fact in dispute to warrant a trial. *Corcoran Group, Inc. v. Morris*, 107 A.D.2d 622 (1st Dep't. 1985). Moreover, plaintiff is not required to demonstrate the absence of comparative fault to obtain

partial summary judgment on liability. *Rodriguez v. City of New York*, 76 N.Y.S.3d 898 (2018).

Nor will contributory negligence exonerate a defendant who has violated Labor Law § 240 (1) and proximately caused a plaintiff's injury" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]).

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

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.

The purpose of the statute is to protect workers and place liability on owners and contractors. As held by the Court of Appeals:

We have repeatedly observed that the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves (*see Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985]). Consistent with this objective, the section imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty that proximately causes a plaintiff's injury. As a result, this strict liability provision "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]).

*Panek v. Cty. of Albany*, 99 N.Y.2d 452, 457 (2003).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

It is well settled that a fall from an unsecured ladder establishes *prima facie* liability under Labor Law § 240(1). Here, plaintiff has made a *prima facie* showing of his entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240(1).

Plaintiff fell from an unsecured ladder which moved. Plaintiff was a covered worker engaging in a covered activity at the time of the accident. Defendants failed to provide plaintiff with any safety equipment to prevent him from falling or secure the ladder.

"Labor Law § 240(1) 'creates a liability that is strict, or absolute, in two senses: the duty it imposes is nondelegable, and thus contractors and owners are liable under the statute whether or not they supervise or control the work; and where an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense.'" [*Chlebowski v. Esber*, 58 A.D.3d 662, 663 (2d Dep't 2009) [*quoting from Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39 (2004)."

Defendant Abracadabra argues that because they are a "run of the mill" subcontractor no liability attaches as against them. Defendant cites no case law on point to support their position. The few cases that Abracadabra does cite are not relevant to this issue.

For example, *Opaliniski v City of New York* 110 AD3d 694 was not a case under Labor Law 240(1), but was a case where defendant cut his hand using a grinder. The court held defendants were entitled to summary judgment because the accident was caused by the means and method of plaintiff's work. Similarly, in *Torres v. Perry Street Development Corp* 104 AD2d 672 the court denied summary judgment because there was an issue of fact as to whether plaintiff was employed within the meaning of the Labor Law at the time of the accident. Neither of these issues is applicable to the case at bar.

Abracadabra remains liable, even though it subcontracted out its work, because it still had authority to enforce safety standards and choose the subcontractor, and it had authority to exercise control over the work, even if it chose not to do so. [*Cabrera v Arrow Steel Window Corp.*, 163 A.D.3d 758, 759 (2d Dep't. 2018)].

CS Hotel also fails to raise a triable issue of fact regarding plaintiff's 240(1) claim. CS Hotel argues that there is no evidence to show that plaintiff's fall was caused by the absence of the safety devices. CS Hotel does not address the fact that their own witness, Scott Cameron, testified that a ladder should not have been used for this work, or that the scope of work contemplated the use of motorized scissor lift which was not employed.

Moreover, CS Hotel offers no authority to counter the cases cited by plaintiff which stand for the proposition that where such an unsecured ladder moves, causing a fall, *prima facie* liability as to the owner is established [see eg *Alvarez v. Vingsan Ltd. P'ship*, 150 A.D.3d 1177, 1179 (2017) (*holding plaintiff made a prima facie showing of their entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), where plaintiff testified he was standing on an unsecured A-frame ladder when the ladder shifted for no apparent reason, causing him to fall*); *Rom v Eurostruct* 158 AD3d 570 (*holding plaintiff established his entitlement to partial summary judgment on the Labor Law §240(1) claim through his testimony that he was caused to fall to the ground when the unsecured ladder on which he was standing suddenly shifted and kicked out from underneath him*)].

Based on the foregoing, plaintiff's motion for partial summary judgment as against CS Hotel and Abracadabra pursuant to Labor Law §240(1) is granted, and for the same reasons, Abracadabra's motion for summary judgment is denied.

***Plaintiff Has Established the Liability of CS Hotel and Abracadabra Under Labor Law §241(6) For Their Violation Of §23-1.21(4)(iv) of the Industrial Code***

Labor Law §241(6) reads in pertinent part as follows:

All contractors and owners and their agents when constructing buildings shall comply with the following requirements:

6. All areas in which construction 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.

This section "... imposes a nondelegable duty upon owners and contractors, irrespective of their control or supervision of the work site, to provide reasonable and adequate protection to those involved in construction, excavation or demolition work [*Rapp v. Zandri Const. Corp.*, 165 A.D.2d 639, 64 (1991)]."

A cause of action alleging a violation of § 241(6) must be based upon a violation of a regulation that sets forth a specific standard of conduct.

New York State Industrial Code § 23-1.21(4)(iv) states as follows:

When work is being performed from ladder rungs between six and ten 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 the ladder is secured against slide 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.

The ladder in the case at bar was required to be secured in the manner described and admittedly was not.

Based on the foregoing, plaintiff is also entitled to summary judgment against CS Hotel and Abracadabra on this cause of action.

***The Motions of Small Fox and Plaintiff to Sever the  
Third-Party Action for a Separate Trial are Granted***

CPLR § 1010 provides that the court may order a separate trial of a third-party claim or make such other order as the court finds just. The statute further provides "(i)n exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and

the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.” N.Y. C.P.L.R. 1010 (McKinney).

CPLR §603 provides “(i)n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.” N.Y. C.P.L.R. 603 (McKinney).

In this case, plaintiff commenced this action in June 2020. The complaint filed on that date stated that Abracadabra had subcontracted out the painting job to Small Fox.

Abracadabra appeared and filed its answer in September 2020. Abracadabra had knowledge from the inception that it had subcontracted out the painting job to Small Fox. Despite this knowledge, Abracadabra took no action to commence a third-party action until April 27, 2021. Abracadabra offers absolutely no explanation for the delay in commencing its third-party action against Small Fox.

Plaintiff filed its note of issue on or about July 26, 2021. All discovery except as to the Third-Party action is complete.

These circumstances (*see, Miro v. Branford House*, 174 A.D.2d 363, 570 N.Y.S.2d 570; *Freeland v. New York Communications Ctr. Assocs.*, 193 A.D.2d 511, 598 N.Y.S.2d 454), together with the delays that will necessarily attend prosecution of the third-party action, including third-party defendants' own need for disclosure, warrant a severance of the third-party action in order to avoid prejudice to plaintiff (*see, Attie v. City of New York*, 221 A.D.2d 274, 634 N.Y.S.2d 88). While the main and third-party actions do involve common issues, any prejudice thereby caused to defendants is less than the prejudice caused to plaintiff by further delay (*see, Pena v. City of New York*, 222 A.D.2d 233, 635 N.Y.S.2d 10). In the latter regard, a judgment against defendants in the main action will not impede their ability to obtain a judgment against third-party defendants in a severed third-party action (*see, Ravo v. Rogatnick*, 70 N.Y.2d 305, 520 N.Y.S.2d 533, 514 N.E.2d 1104).

*Garcia v. Geshner Realty Corp.*, 280 A.D.2d 440, 440–41 (2001).

However, the order severing the third-party action for a separate trial is conditional. In the event, the parties are able to complete discovery on the third-party action and proceed to trial, prior to the time in which the main case is actually called for trial, then the claims may be jointly tried upon further application to this court or stipulation of all parties.

***CS Hotel's Motion for Summary Judgment Against Abracadabra Is Denied***

CS Hotel moves for summary judgment against Abracadabra on theory of common law indemnity.

“Implied[, or common-law,] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other” (*id.*, citing *McDermott v. City of New York*, 50 N.Y.2d 211, 216–217, 428 N.Y.S.2d 643, 406 N.E.2d 460 [1980]; see also *Rosado v. Proctor & Schwartz*, 66 N.Y.2d 21, 24, 494 N.Y.S.2d 851, 484 N.E.2d 1354 [1985] [indemnity may be implied “to prevent a result which is regarded as unjust or unsatisfactory” and “is frequently employed in favor of one who is vicariously liable for the tort of another” (internal quotation marks and citations omitted) ] ). Common-law indemnification is generally available “in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer” (*Mas*, 75 N.Y.2d at 690, 555 N.Y.S.2d 669, 554 N.E.2d 1257; see *D'Ambrosio v. City of New York*, 55 N.Y.2d 454, 460, 450 N.Y.S.2d 149, 435 N.E.2d 366 [1982] ).

*McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 375 (2011).

As further held by the Court of Appeals in *McCarthy*:

... a party's (e.g., a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision (see *Felker*, 90 N.Y.2d at 226, 660 N.Y.S.2d 349, 682 N.E.2d 950; see also *Colyer v. K Mart Corp.*, 273 A.D.2d 809, 810, 709 N.Y.S.2d 758 [4th Dept.2000] [for standard] ). Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone.

*McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 378 (2011).

The work being performed at the Subject Premises was being performed by Small Fox.

Applying this standard to the case at bar, CS Hotel has failed to establish the right to summary judgment as against Abracadabra on the theory of common law indemnity, and its motion for summary judgment is therefore denied.

**CONCLUSION**

Wherefore it is hereby

ORDERED that plaintiff's motion for a default judgment against Skystone Group, LLC (Mot Seq No 1) is granted, and a determination as to damages shall be made at trial; and it is further

ORDERED that the motion of Abracadabra Painting Co. for summary judgment (Mot Seq No 2) is denied; and it is further

ORDERED that the motion of Small Fox Painting for an order severing the third-party action (Mot Seq No 3) and plaintiff's motion for same are conditionally granted as set forth above; and it is further

ORDERED that the parties shall appear virtually for a Preliminary Conference on the Third-Party Action on April 5<sup>th</sup>, 2022 at 10:00 am, a virtual link shall be sent by the Part Clerk for same; and it is further

ORDERED that Plaintiff's motion for partial summary judgment as against CS Hotel 30W46th, LLC and Abracadabra Painting Co., Inc. is granted; and it is further

ORDERED that the cross-motion of CS Hotel 30W46th, LLC for summary judgment against Abracadabra Painting Co., Inc. is denied; and it is further

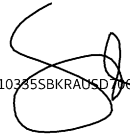
ORDERED that within 20 days from entry of this order plaintiff shall serve Skystone Group LLC with a copy of this order with notice of entry at 10 East 33<sup>rd</sup> Street, 4<sup>th</sup> Floor, New York, New York 10016; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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1/28/2022  
DATE

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SABRINA KRAUS, 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 checked="" type="checkbox"/> GRANTED IN PART <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