

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

	x	Index
GUSTAVO MESA,		Number <u>15780</u> 2005
- against -		Motion
MATANA LLC, et al.,		Date <u>July 29,</u> 2008
	x	Motion
		Cal. Numbers <u>24, 25, 26</u>
		Motion Seq. Nos. <u>2, 3, 4</u>

The following papers numbered 1 to 36 read on this motion by defendant/third-party plaintiff Matana, LLC (Matana) pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims, or in the alternative, granting conditional summary judgment against defendant Vollmer Associates, LLP (Vollmer) for contractual indemnification; on the motion by defendant Vollmer pursuant to CPLR 3212 for summary judgment dismissing the complaint and further dismissing any and all cross claims asserted against them, or in the alternative, awarding Vollmer conditional common law indemnification on its cross claim against co-defendant Picasso Construction, Inc. (Picasso); on the motion by defendant Picasso pursuant to CPLR 3212 for summary judgment dismissing the complaint and all third-party claims and all cross claims; and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law § 240(1).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-15
Notice of Cross Motion - Affidavits - Exhibits...	16-19
Answering Affidavits - Exhibits.....	20-32
Reply Affidavits.....	33-36

Upon the foregoing papers it is ordered that the motions and cross motion are decided as follows:

This is an action to recover money damages for injuries allegedly suffered as a result of a work site accident. The accident occurred on March 14, 2005, at premises located at 50 West 23rd Street, New York, New York. The defendant Matana owned the

premises. Certain floors of the premises were leased to the defendant Vollmer. The defendant Vollmer hired the defendant Picasso as a contractor for the construction project to do drywall and painting work at the premises. The plaintiff, a painter, was an employee of Foreman Interior Services (Foreman Interior). The plaintiff claims that he sustained his injuries while painting when he fell from a ladder that was on top of a baker scaffold.

The plaintiff testified at his examination before trial that he was an employee of Foreman Interior, but that he would receive his directions from the boss from Picasso who would tell him and his co-employees at Foreman Interior what to do. The plaintiff testified that he was painting at the time of the accident. The plaintiff was standing on a ladder that was on top of a baker scaffold. In addition to the plaintiff's examination before trial there was a surveillance video which depicts the plaintiff's accident. The video shows that the plaintiff was working on the scaffold painting in various places. The plaintiff would climb an A-frame ladder that was placed on top of a baker scaffold to reach higher areas. When the plaintiff was ready to work in a new place one of his co-workers would move the scaffold. Most of the time it appeared from the video that the co-workers would attempt to lock some of the wheels of the scaffold. Immediately prior to the accident the scaffold was moved to a new location and a co-worker locked at least two wheels with his foot. The plaintiff moved the A-frame ladder on the scaffold and leaned it against a wall with the feet of the ladder on the scaffold platform. The plaintiff partially opened the A-frame ladder, but did not lock its hinges. When the plaintiff began climbing the ladder the scaffold moved away from the wall and both the ladder and the scaffold collapsed causing the plaintiff to fall to the floor below.

Charles DiMarco testified on behalf of the defendant Vollmer. He testified that Vollmer leased space at the premises from the defendant Matana. He testified that Vollmer was having renovation work done on the leased space. His role during the project was to make sure that the plans and designs for the work were carried out by the contractors hired by Vollmer, one of whom was Picasso. As part of his duties, he would inspect the work performed by Picasso. He testified that no one from Vollmer ever performed any actual direction or supervision of the painting work. He further testified that to his knowledge no one from Matana supervised or controlled the work performed by Picasso employees. Mr. DiMarco also submitted an affidavit in which he stated that Picasso was the only contractor hired for the renovation work, which included drywall and painting.

Fernando Simpson testified on behalf of the defendant Matana. He testified that the defendant Matana owned the premises. He was the building manager of the premises. No one notified anyone at Matana of the plaintiff's accident. He further testified that no one from Matana gave any direction to workers from Picasso and did not provide any tools or equipment to the plaintiff or his co-workers.

The defendant Picasso submitted an affidavit of its director of operations, Tom Camarda. He claimed that Picasso did dry wall installation at the premises. He claimed that Picasso did not hire Foreman Interior. He claimed that Picasso did not supervise or control the work of any Foreman Interior employee.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Here, the plaintiff does not oppose dismissal of the Labor Law § 241(6) as the provisions relied upon by the plaintiff are either general safety provisions or not applicable to the facts of the case. Therefore, the Labor Law § 241(6) cause of action is dismissed.

For an owner or general contractor to be liable under Labor Law § 200 or common law negligence, the plaintiff must show that the owner or general contractor supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. Here, the defendants Vollmer and Matana established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common law negligence claims. The evidence submitted by these defendants established as a matter of law that they had no actual or constructive knowledge of any alleged defective condition on the premises and exercised no control or supervision over the work of the plaintiff (see Lopez v Port Auth. of New York & New Jersey, 28 AD3d 430 [2006]; Parisi v Loewen Dev. of Wappingers Falls, LP, 5 AD3d 648 [2003]). In opposition, the plaintiffs failed to raise an issue of fact. The branch of the motion of the defendant Picasso to dismiss these claims, on the other hand, must be denied. In his deposition the plaintiff stated that he received direction and control from the defendant Picasso. Therefore, Picasso failed to establish its prima facie entitlement to summary judgment.

Owners and contractors are subject to strict liability under Labor Law § 240(1). To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]).

Here, the plaintiff laborer's injuries were caused by a fall from a height while performing a protected activity under Labor Law § 240(1) (see Ford v HRH Constr., 41 AD3d 639 [2007]). The plaintiff made a prima facie showing of entitlement to summary judgment by showing that he was not given proper safety equipment for the task he was doing. The fact that the plaintiff had to use an A-frame ladder on top of a baker scaffold establishes that the plaintiff was not given proper safety equipment which would provide adequate protection from the risks he faced in performing his assigned task nor did the defendants ensure that the scaffold was properly secured and braced (see Rudnik v Brogor Realty Corp., 45 AD3d 828 [2007]; Torres v Monroe College, 12 AD3d 261 [2004]). In opposition, the defendants failed to raise a triable issue of fact. While the defendants correctly point out that the plaintiff's expert's reliance on OSHA violations to support the Labor Law § 240(1) claim is misplaced, this does not change the fact that evidence establishes that plaintiff made a prima facie case under Labor Law § 240(1). The defendants' argument that the plaintiff's actions were the sole proximate cause of the accident also does not raise a triable issue of fact. Whether the ladder was in the open or closed position, the plaintiff's conduct cannot be considered the sole proximate cause of his injuries (see Rudnik, 45 AD3d at 829). The defendants' argument that the accident was the result of the plaintiff's actions of not locking the wheels is also without merit. The plaintiff's co-workers were moving the scaffold from place to place and the plaintiff was not in charge of locking the wheels at each location. In any event, whether the wheels were locked cannot be said to be the sole proximate cause of the accident. Additionally, while the plaintiff's testimony at his examination before trial may not be credible, it does not mean that the plaintiff should not prevail on his meritorious cause of action. The video depiction of the action does not raise any triable issues of fact that would warrant denial of the plaintiff's summary judgment motion for liability under Labor Law § 240(1). The defendant Picasso's argument that it was not a contractor is without merit. The evidence established that the defendant Picasso had the authority to supervise and control the work of the plaintiff even if it did not actually supervise the work of the plaintiff at the time of his injury (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). Further, although the plaintiff did not move for summary judgment against the defendant Vollmer, it is appropriate for this Court to search the record and sua sponte award summary judgment in favor of the plaintiff against Vollmer on the issue of liability under Labor Law § 240(1). The meaning of owners under Labor Law 240(1) includes those who fulfilled the role of owner by contracting to have work performed for its benefit (see Kwang Ho Kim v D & W Shin Realty Corp.,

47 AD3d 616 [2008]). Here, the defendant Vollmer was acting as an "owner" when it embarked on the construction project.

Turning next to the branch of the motion of defendant Matana for summary judgment on its cross claim for contractual indemnification against the defendant Vollmer and the branch of the defendant Vollmer's motion for summary judgment dismissing the cross claim, the plain language of paragraph eight of the lease requires the tenant to indemnify the owner for any injuries caused by a breach by the tenant, the tenant's agents or the tenants contractors (see Great N, Ins. Co., v Interior Constr. Corp., 7 NY3d 412 [2006]; Argueta v Pomona Panorama Estates, Ltd., 39 AD3d 785 [2007]). In opposition, Vollmer failed to submit evidence to raise a triable issue of fact which would preclude the granting of summary judgment on the contractual indemnification claim (see Reborchick v Broadway Mall Props., 10 AD3d 713 [2004]). Therefore, summary judgment should be awarded in favor of the defendant Matana on its cross claim for contractual indemnification against Vollmer. Finally, turning to the issue of Vollmer's common law indemnification cross claim against Picasso, issues of fact as to whether Picasso was negligent prevent summary disposition (see Kwang Ho Kim, 47 AD3d at 620).

Accordingly, the cross motion by the plaintiff for summary judgment on the issue of liability under Labor Law § 240(1) is granted in favor the plaintiff against defendants Matana, Vollmer and Picasso.

The branch of the motion by the defendant Matana for summary judgment dismissing the Labor Law § 240(1) claim is denied. The branches of the motion by defendant Matana for summary judgment dismissing the Labor Law §§ 200, 241(6) and common law negligence claims are granted and those claims are dismissed. The branch of the summary judgment motion by the defendant Matana on its claim for contractual indemnification against the defendant Vollmer is granted.

The branch of the motion by the defendant Vollmer for summary judgment dismissing the Labor Law § 240(1) claim is denied. The branches of the motion by the defendant Vollmer for summary judgment dismissing the Labor Law §§ 200, 241(6) and common law negligence claims are granted and those claims are dismissed. The branch of defendant's Vollmer summary judgment motion on its claim for common law indemnification against the defendant Picasso is denied.

The branches of the motion by the defendant Picasso for summary judgment dismissing the Labor Law §§ 200, 240(1) and common

law negligence causes of action are denied. The branch of the defendant Picasso's motion for summary judgment dismissing the Labor Law § 241(6) claim is granted and that claim is dismissed. The branch of the defendant Picasso's summary judgment motion dismissing the defendant Vollmer's claim for common law indemnification is denied.

Dated: October 31, 2008

AUGUSTUS C. AGATE, J.S.C.