

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA PART 17  
Justice

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CESAR GUALOTUNA		Number <u>22565</u> 2005
-against-		Motion
		Date <u>January 2,</u> 2008
TREVOR PARK TERRACE, LLC, et al.		Motion
		Cal. Numbers <u>15 and 16</u>
	x	Motion Seq. Nos. <u>1 and 3</u>

The following papers numbered 1 to 36 read on motion by plaintiff Cesar Gualotuna for an order granting summary judgment on the issue of liability pursuant to Labor Law § 240(1) against all defendants, and setting the matter down for a trial as to damages. Defendants Trevor Park Terrace, LLC, i/s/h/a Trevor Park Terrace, JLH Management, LLC, i/s/h/a JLH Realty Management Services, Inc., J.A.H. Realties LP, i/s/h/a J.A.H. Realty, Inc., Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc. cross-move for an order granting summary judgment dismissing the complaint in its entirety and granting judgment in their favor on the cross claims asserted against defendants S&W Painting & Decorating Corp., and S&W Painting, Inc., for indemnification and costs. S&W Painting, Inc., s/h/a S&W Painting & Decorating Corp. Separately moves for an order granting summary judgment dismissing the complaint in its entirety and all cross claims.

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Upon the foregoing papers these motions are consolidated for the purpose of a single determination and are decided as follows:

Plaintiff Cesar Gualotuna, then aged 75, sustained personal injuries on June 2, 2005, when during the course of his employment, the ladder he was ascending slid to the right, causing him to fall 15 to 20 feet to the ground. The accident site, known as 201 Ravine Avenue, Yonkers, New York, is a seven story, multi-family building, owned by Trevor Park Terrace, LLC, i/s/h/a Trevor Park Terrace (Trevor). Trevor entered into an oral agreement with defendant S&W Painting, Inc., s/h/a S&W Painting & Decorating Corp. (S&W) to scrape and paint all exterior fire escapes located at the subject building. S&W entered subcontract with Cesar Gualotuna for the performance of this work, pursuant to an oral agreement. Mr. Gualotuna testified at his deposition that he worked as an independent contractor, performing mainly painting work, and had subcontracted with S&W on various jobs for 18 years, prior to the date of the accident. Mr. Gualotuna stated that he and his two assistants performed the work on this job, and that S&W provided him with the paint and all equipment to do the work, including an aluminum extension ladder, which he obtained from S&W's warehouse. He stated that no one had provided instructions regarding this work. He stated that he had been at the job for over a week and that all of the fire escapes had been painted and he intended to do some touch-up work that morning. He stated that he leaned the ladder against the fire escape; that the ladder reached the top level (handrail) of the first floor fire escape; that he was ascending the ladder in order to do some touch-up work, and was carrying a gallon paint container, with a brush inside it, in his right hand, when he fell off the ladder. He stated that the ladder fell with him, and that he did not know what caused the ladder to fall. He stated that this was the first time he had used the ladder on this job, that it appeared stable, that he knew how to set up an extension ladder and that the extension piece locked into place and was "okay." Plaintiff stated that S&W always provided the equipment and that he had used this ladder on other jobs. He stated that when he set up the ladder it was resting on the concrete, that the area was flat, that the ladder had rubber feet and that the weather conditions were good. Plaintiff stated that he was about four feet off the ground when he fell, that the right side of his body and his head hit the building's wall, that he did not recall what had happened to him, and that when he

regained consciousness he was in an ambulance. He stated that his memory has been affected since the accident.

Marlon Talin Celauí Cerezo testified that he was employed by Mr. Gualotuna as a helper. He stated that they picked up the paint from S&W's supplier, that the ladder came from S&W's warehouse, that they had been at the job site about a week and half, and performed the work in sections. Mr. Cerezo was carrying paint and walking towards the ladder when he witnessed the accident. He stated that Mr. Gualotuna had set up the ladder, and that it was leaning on the fire escape some 15 to 20 feet from the ground, which was level with the building's second floor. He stated that the fire escapes in that area had been scraped, and that Mr. Gualotuna was about to start the priming, when the accident occurred. He stated that Mr. Gualotuna was holding a plastic bucket of paint in his left hand and was holding onto the ladder with his right hand, and was nearly at the top of the ladder and was reaching for the fire escape with his free hand, when the ladder fell to his right, causing Mr. Gualotuna to fall to the ground. He stated that the ladder did not have any hooks on the top, that Mr. Gualotuna was not given any safety devices, and that the ladder did not break after the accident occurred. He stated that sometimes he would hold the bottom of the ladder if Mr. Gualotuna asked him, but that he had not asked him to do so that morning. Mr. Cerezo stated that the building's superintendent permitted them to store their equipment in a room in the building and that when they first started working the superintendent told them not to lean the ladder against the brick wall, as he did not want to wall to get dirty.

Warren Heit testified on behalf of S&W. He stated that S&W had entered into an oral agreement with Stillman Management to perform the work in question and that it had subcontracted the work out to Mr. Gualotuna. Mr. Heit stated that Mr. Gualotuna had performed work for S&W as a subcontractor for 25 years, and that he was paid directly for such work, and that S&W did not pay Mr. Gualotuna's employees. He also stated that Mr. Gualotuna had never been an employee of S&W. Mr. Heit stated that S&W only supplied Mr. Gualotuna with the paint and primer materials, and that Mr. Gualotuna had his own brushes, drop cloths, ladder, and safety equipment. Mr. Heit visited the subject job site once or twice to check on the progress of the work, but did not recall seeing any safety equipment. He stated that after the accident, there were about 18-20 fire escapes that had been primed and needed to be painted, and that S&W's employees finished the job.

Roy Stillman testified on behalf of Trevor. He stated that he is the president of Stillman Management and that this entity manages the subject property, and is paid by Trevor for management

services. He stated that he hired S&W to paint the fire escapes at the subject building, pursuant to an oral agreement. He stated that he did not tell S&W how to perform its work, and that neither Stillman Management nor Trevor provided any equipment to the individuals who actually performed the work in question.

Labor Law § 240(1) imposes absolute liability upon a contractor, owner or their agent who fails to provide safety devices to a worker at an elevated work site where the lack of such devices is a substantial factor in causing that worker's injuries (see Zimmer v Chemung Co. Performing Arts, 65 NY2d 513 [1985]). The statute is to be construed as liberally as possible to effectuate its purpose of providing for the health and safety of employees (see Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]). The scraping and painting performed by the plaintiff were protected activities under Labor Law § 240(1) and need not have been incidental to the other listed activities, such as construction, repair, or alteration, to be covered (see De Oliveira v Little John's Moving, 289 AD2d 108 [2001], citing Perez v Spring Cr. Assoc., 265 AD2d 314 [1999]; Livecchi v Eastman Kodak Co., 258 AD2d 916 [1999]). Defendants' claim that plaintiff failed to prove that there was a defect in the ladder is irrelevant, as evidence that a worker's fall was caused by the movement or slipping away of an unsecured ladder constitutes prima facie proof of a Labor Law § 240(1) violation (see Chlap v 43rd St.-Second Ave. Corp., 18 AD3d 598, 598 [2005]; Loreto v 376 St. Johns Condominium, Inc., 15 AD3d 454, 455, [2005]; Sztachanski v Morse Diesel Intl., Inc., 9 AD3d 457, 457 [2004]; Peter v Nisseli Realty Co., 300 AD2d 289, 290 [2002]; Madden v Trustees of Duryea Presbyt. Church, 210 AD2d 382, 382 [1994]). Here, the evidence presented establishes that although the plaintiff was unable to state what caused him to fall, Mr. Cerezo, an eyewitness, stated that plaintiff was injured when the ladder he was ascending shifted, causing plaintiff and the ladder to fall some 15 to 20 feet to the ground. Under these circumstances, the plaintiff established, prima facie, that the defendants violated their statutory duty pursuant to Labor Law § 240(1), and that the violation was a proximate cause of the plaintiff's injuries (see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280 [2003]; Panek v County of Albany, 99 NY2d 452 [2003]; Hanna v Gellman, 29 AD3d 953 [2006]; Loreto v 376 St. Johns Condominium, Inc., *supra*; Mannes v Kamber Mgt., 284 AD2d 310, 311 [2001]; Lacey v Turner Constr. Co., 275 AD2d 734 [2000]; Guzman v Gumley-Haft, Inc., 274 AD2d 555 [2000]; Bryan v City of New York, 206 AD2d 448 [1994]). Plaintiff, thus, has demonstrated that he is entitled to summary judgment under Labor Law § 240(1), and the burden shifts to defendants to demonstrate the existence of an issue of material fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

Defendants Trevor and S&W have not submitted any evidence disputing plaintiff's contention that the ladder was unsecured or that it slipped out from underneath him. Instead, these defendants claim that plaintiff's choice to use the ladder, while carrying a paint container, without asking the helper hold the bottom of the ladder, or without securing it to the fire escape was the sole proximate cause of this accident. However, there is no evidence that the ladder was unstable, which would have required that it be held by other workers. Indeed, if that were the case, such an unstable ladder could not have provided proper protection. In addition, there is no evidence that other safety devices were available to the plaintiff which would have given him access to the fire escape, or secured the ladder to the fire escape, or permitted him to safely move himself and the paint and brushes from the ground level to the second floor fire escape (cf. Robinson v East Med. Ctr., L.P., 6 NY3d 550 [2006]; Letterese v State of New York, 33 AD3d 593, 593-594 [2006]). Defendants, thus, have offered no proof to rebut plaintiff's showing that the owner and contractor failed to provide an adequate safety device which would permit him to gain access to the fire escapes, in violation of Section 240(1). "Where, as here, a violation of Labor Law § 240(1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it," and so the sole proximate cause defense does not apply (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 696, [2006]). Therefore, plaintiff's motion for partial summary judgment on the issue of liability on the cause of action for a violation of Labor Law § 240(1) is granted as to defendants Trevor and S&W, and those branches of Trevor's cross motion and S&W's motion which seek to dismiss this claim, are denied.

That branch of plaintiff's motion which seeks partial summary judgment on the issue of liability on the cause of action for a violation of Labor Law § 240(1) against defendants J.A.H. Realities, LP, JLH Management, LLC, Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc. is denied, and that portion of the cross motion which seeks to dismiss the complaint as to these defendants, is granted. JLH Management, LLC is a general partner and asset manager of J.A.H. Realities, LP, which owns Trevor. On June 2, 2005, Trevor was the record owner of the subject real property and there is no evidence that J.A.H. Realities, LP, or JLH Management, LLC owned, operated, controlled or managed the real property where the accident occurred. In addition, there is no evidence that these defendants contracted for the work in question or supervised, controlled, or directed the plaintiff's work. As to Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc., there is no evidence that these defendants owned, operated, controlled, or managed the property, or contracted for the work ultimately

performed by the plaintiff, or directed or controlled the plaintiff's work. Contrary to plaintiff's assertions, no evidence was presented as to who employed the subject building's superintendent. Therefore, plaintiff's claim that the superintendent was employed by Trevor or any of these defendants is purely speculative and does not raise an issue of fact. Furthermore, the evidence presented is insufficient to raise an issue of fact as to whether the building superintendent controlled or supervised the plaintiff's work. Therefore, under these circumstances these defendants cannot be liable to the plaintiff for a violation of Labor Law § 240(1), and this cause of action is dismissed as to these defendants.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (see Paladino v Soc'y of the NY Hosp., 307 AD2d 343 [2003]; Brasch v Yonkers Constr. Co., 306 AD2d 508 [2003]). Liability for such claims will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury (see Sprague v Peckham Materials Corp., 240 AD2d 392, 394 [1997]). Here, defendants' Trevor, JLH Management, LLC, J.A.H. Realities, LP, Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc. meet their burden of establishing that they neither directed nor controlled the method or manner in which the plaintiff conducted his work, (see Amaxes v Newmark & Co. Real Estate, 15 AD3d 321 [2005]), neither created nor had actual or constructive notice of a defective condition (see Beltrone v City of New York, 299 AD2d 306 [2002], nor had notice that the ladder was placed in a dangerous position. The court notes that although there was some testimony that the building superintendent instructed the plaintiff, or his helpers, not to lean the ladder against the wall of the building, there was no evidence as to which defendant, if any, was the superintendent's employer, and there was no evidence that the plaintiff could have safely accessed the fire escape had the ladder been leaned against the wall. Plaintiff, thus, cannot satisfy the requisite elements to sustain causes of action based on Labor Law § 200 and common-law negligence (see Lombardi v Stout, 80 NY2d 290 [1992]; Fumo v NAB Constr. Corp., \_19 AD3d 436 [2005]; Sattar v Natural Stone Indus., 19 AD3d 681 [2005]; Loreto v 376 St. Johns Condominium, Inc., *supra*; Gatto v Turano, 6 AD3d 390 [2004]). Therefore, that branch of defendants' Trevor, JLH Management, LLC, J.A.H. Realities, LP, Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc.'s cross motion for an order granting summary judgment dismissing the cause of action for a violation of Labor Law § 200, is granted.

That branch of S&W's motion which seeks to dismiss the cause of action for a violation of Labor Law § 200 is granted, as this defendant has met its burden of establishing that it neither directed nor controlled the method or manner in which the plaintiff conducted his work (see Amaxes v Newmark & Co. Real Estate, supra), that it neither created nor had actual or constructive notice of a defective condition (see Beltrone v City of New York, supra), nor had notice that the ladder was placed in a dangerous position. Plaintiff, thus, cannot satisfy the requisite elements to sustain causes of action based on Labor Law § 200 and common-law negligence against S&W (see Lombardi v Stout, supra; Fumo v NAB Constr. Corp., supra; Sattar v Natural Stone Indus., supra; Loreto v 376 St. Johns Condominium, Inc., supra; Gatto v Turano, supra).

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 878 [1993]). Labor Law § 241(6), is inapplicable outside the construction, demolition or excavation contexts (see Esposito v N.Y. City Indus. Dev. Agency, 1 NY3d 526, 528 [2003]; Nagel v D & R Realty Corp., 99 NY2d 98 [2002]; Deoki v Abner Props. Co., 46 AD3d 728 [2008]). Here, the evidence presented establishes that plaintiff's accident did not occur while performing "construction, excavation, or demolition" work (see Nagel v D & R Realty Corp., supra; Azad v 270 5th Realty Corp., 46 AD3d 728 [2007]). Therefore, that branch of defendants' Trevor, JLH Management, LLC, J.A.H. Realties, LP, Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc.'s cross motion for an order granting summary judgment dismissing the cause of action for a violation of Labor Law § 241(6), is granted. That branch of S&W's motion which seeks to dismiss the cause of action for a violation of Labor Law § 241(6) is also granted.

That branch of defendant Trevor's cross motion which seeks summary judgment in its favor on the cross claim against S&W for common-law indemnification is denied. It is well established that where an owner's liability is predicated solely on Labor Law § 240(1) and is not predicated on a finding of negligence on its part, it has a common-law right to indemnification from a contractor if the contractor's own negligence contributed to the accident or the contractor directed, supervised and controlled the work giving rise to the injury (see Buccini v 1568 Broadway Assocs., 250 AD2d 466, 468 [1998]; Marek v DePoalo & Son Bldg. Masonry Inc., 240 AD2d 1007, 1008 [1997]; Malecki v Wal-Mart Stores, Inc., 222 AD2d 1010, 1011 [1995]). To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the

causation of the accident" (Correia v Professional Data Mgt., 259 AD2d 60, 65 [1999]; accord Coque v Wildflower Estates Developers, Inc., 31 AD3d 484 [2006]; Priestly v Montefiore Med. Ctr., Einstein Med. Ctr., 10 AD3d 493, 495 [2004]) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 [2003]). Here, as the evidence presented establishes that Trevor's liability is purely statutory and vicarious, in order to be entitled to summary judgment for common-law indemnification against S&W, it is required to prove, as a matter of law, that S&W "was either negligent or exclusively supervised and controlled plaintiff's work site" (Reilly v DiGiacomo & Son, 261 AD2d 318 [1999]; see Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 685 [2005]; Hernandez v Two E. End Ave. Apt. Corp., supra, at 558). The evidence presented only establishes that S&W was also vicariously liable. There is no evidence that S&W was negligent, or that it exclusively supervised and controlled plaintiff's work site. Therefore, Trevor's cross claims for common-law indemnification must be denied and these cross claims are dismissed.

In view of the foregoing, plaintiff's motion for partial summary judgment on the claim for a violation of Labor Law § 240(1) is granted only as to defendants Trevor and S&W, and the matter is to be set down for a trial as to damages. Plaintiff's request for summary judgment on this cause of action as to all other defendants is denied, and that branch of the cross motion of defendants JLH Management, LLC, J.A.H. Realities, LP, Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc.'s to dismiss the cause of action for a violation of Labor Law § 240(1) is granted. Those branches of defendants Trevor, JLH Management, LLC, J.A.H. Realities, LP, Halpern Real Estate Development, LLC and Halpern Real Estate Development, Inc.'s cross motion which seek to dismiss plaintiff's claims for violations of Labor Law §§ 200 and 241(6) are granted. Defendant Trevor's request for summary judgment on its cross claims against defendants S&W Painting & Decorating Corp., and S&W Painting, Inc., for indemnification and costs is denied, and these cross claims are dismissed. Defendant S&W's motion for an order granting summary judgment dismissing the complaint is granted as to the causes of action based on violations of Labor Law §§ 200 and 241, and is further granted as to Trevor's cross claims, and is denied in all other respects.

Dated: March 12, 2008

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J.S.C.