

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

IAS PART 12

- - - - - x

STEVEN GILLMAN,

Plaintiff,

Index No.: 11314/2006

- against -

Motion Date: 10/31/07

COLUMBIA UNIVERSITY and BARNARD
COLLEGE,

Motion Nos.: 21, 19 & 20

Defendants.

Motion Seq. Nos. 3, 1 & 2

- - - - - x

BARNARD COLLEGE,

Third-Party Plaintiff,

Third-Party Index No.
350426/2006

- against -

YORK SCAFFOLD EQUIPMENT CORP.,

Third-Party Defendant.

- - - - - x

The following papers numbered 1 to 29 on this motion:

Papers
Numbered

MOTION NO. 1

Plaintiff's Notice of Motion-Affirmation- Service-Exhibits	1-4
Barnard College's Affirmation in Opposition- Service	5-7
Plaintiff's Reply Affirmation	8-9

MOTION NO. 2

York Scaffold Equipment Corp.'s Notice of Motion-Affirmation-Service-Exhibits	1-4
Barnard College's Affirmation in Opposition Service-Exhibits	5-8

MOTION NO. 3

Barnard's Notice of Motion- Affirmation-Service-Exhibits	1-4
Plaintiff's Affirmation in Opposition Service-Exhibits	5-7
York Scaffold Equipment Corp.'s Affirmation in Opposition-Service-Exhibits	8-10
Barnard's Reply Affirmation	11-12

The Court shall consider the following three motions in this single action:

MOTION NO. 1

By notice of motion, plaintiff, Steven Gillman (Gillman), seeks an order of the Court, granting him summary judgment as to Barnard College on his claims pursuant to Labor Law §§ 240(1) and 241(6).

Defendant, Barnard College, files an affirmation in opposition and plaintiff replies.

MOTION NO. 2

By notice of motion, third-party defendant, York Scaffold Equipment Corp. (York), seeks an order of the Court pursuant to CPLR § 3212, granting them summary judgment and dismissal of the first and second causes of action by Barnard in the third-party complaint on the grounds that said claims are barred by Worker's Compensation Law § 11, and dismissing the third cause of action on the grounds that York owed no duty to indemnify third-party plaintiff, Barnard.

Barnard files an affirmation in opposition.

MOTION NO. 3

By notice of motion, defendant, third-party plaintiff, Barnard seeks an order of the Court pursuant to CPLR § 3212, granting them summary judgment on its third party complaint against York for contractual and common law indemnification and summary judgment and dismissal of plaintiff's complaint as against them.

Third-party defendant York files an affirmation in opposition. Plaintiff files an affirmation in opposition, and Barnard files a reply as to both oppositions.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a workplace accident on August 19, 2005.

On that date, plaintiff was engaged as an employee of York, who was in turn engaged by Barnard College to build sidewalk bridge(s) at the site in anticipation of certain construction work to be done on the school's facade. A sidewalk bridge is an "enclosed structure of scaffolding, with a roof, over a sidewalk, meant to protect pedestrians from falling materials and equipment."

On that day, plaintiff maintains that he was called to come down off the sidewalk bridge, by his supervisor, to relieve another worker for a break. As he came down the plank that connected the bridge to a flatbed truck, the plank broke in half, striking him in the face and causing him to fall twelve (12) feet to the sidewalk.

It is undisputed that there were no ladders at the site on that day.

Defendant Barnard maintains that plaintiff's testimony establishes that the plank he used to get down from the bridge was only in place for thirty (30) seconds; that the plaintiff "...thought, in his head some place that there was a ladder," but that he never asked for one; and, that as he crawled backwards down the plank, it snapped in half, hitting his nose and mouth and causing him to fall.

Plaintiff worked at the Barnard site on August 18 and August 19, 2005. On the 18th, a ladder was available for use, but no ladder was available for use on the 19th.

Thomas Farrelly, the York foreman, testified that no one asked for or about a ladder on the 19th of August. He maintained that the workers used the cab of the flat bed truck to access the deck of the sidewalk bridge. Farrelly denied seeing any workers using planks to gain access to the deck of the bridge; in fact, when he told plaintiff to get down from the sidewalk bridge to start cleaning up the sawdust, he says he also told him not to use the planks because they were bad. He told plaintiff to use the cab of the truck to get down.

Farrelly testified further that he was the only one supervising plaintiff; no one from Barnard ever directed the work being done by York.

MOTION NO. 1 AND MOTION NO. 3

**(PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY AGAINST
DEFENDANT BARNARD AND DEFENDANT, THIRD-PARTY PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND DISMISSAL)**

"Section 240(1) of the Labor Law provides that 'All contractors and owners and their agents... who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning, or painting 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.' Section 240(1) of the Labor Law was designed to place the responsibility for a worker's safety squarely upon the owner and contractor rather than on the worker (Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 520). Section 240(1) is to be liberally construed to achieve its objectives (65 NY2d, at 521)." Felkner v. Corning Inc., 90 NY2d 219, 223, 224, 660 NYS2d 349 (1997).

It is undisputed that the work being performed by plaintiff comes within the ambit of 240(1), and that the absence of the claimed safety device, to wit, a ladder, is one enumerated in the statute.

Defendant argues, however, that plaintiff can not sustain his burden pursuant to Section 240(1) of the Labor Law because his own actions are the sole proximate cause of the accident; that is, plaintiff's failure to ask for the ladder. Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 771 NYS2d 484 (2003).

Following Blake, in Cahill v. Triborough Bridge and Tunnel Authority (4 NY3d 35, 39, 40, 790 NYS2d 74 (2004)), the Court of Appeals went on to give examples of circumstances where the plaintiff worker could be found to be the "sole proximate cause" of the accident. For instance, the "recalcitrant worker" case, where a worker receives "specific instructions to use a safety line while climbing, and [chooses] to disregard those instructions." Id.

Thus, the Court explained in Cahill, "...a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to

use them; that he chose for no good reason not to do so; and, that had he not made that choice he would not have been injured. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240(1), and therefore summary judgment should not have been granted in plaintiff's favor." Id. at 40.

That of course, as conceded by defendant, is not the case in this instance. At best, if accepted as true, defendant directed plaintiff to climb down from the deck of the sidewalk bridge by using, not a safety device enumerated in the statute, but the "cab" of the flat bed truck parked next to the bridge.

In this instance, it is undisputed that a particular safety device, a ladder, was not available at the site where they were working. Having established his prima facie entitlement to summary judgment pursuant to Labor Law § 240(1), it was incumbent upon defendants to raise a triable issue of fact. They have not. Granillo v. Donna Karen Co., 17 AD3d 531, 793 NYS2d 465 (2d Dep't 2005). See also Salazar v. United Rentals, Inc., 41 AD3d 684, 685, 838 NYS2d 615 (2d Dep't 2007) (defendant fails to show that injured plaintiff was a recalcitrant worker who refused to use an available safety device after being given specific instructions to do so).

In support of his claim against Barnard College, plaintiff also alleges violations of the following Industrial Code provisions: 23-1.7(b)(iii); 23-1.22(b)(2) and (4); and 23-1.7(f).

"To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards." See, Plass v. Solotoff, 5 AD3d 365, 357 (2d Dep't. 2004); Ross v. Curtis Palmer Hydro Elec. Co., 81 NY2d 94 (1993); Ferrero v. Best Modular Homes, Inc., 33 AD3d 847, 851, 823 NYS2d 477 (2^d Dep't. 2006). "In addition, the provision must be applicable to the facts of the case." See, Singleton v. Citnalta Constr. Corp., 291 AD2d 393, 394 (2d Dep't 2002). Id. 851.

The first section of the Industrial Code cited by plaintiff, 23-1.7(b)(iii) has to do with the safety requirements associated with "hazardous openings." Although "hazardous openings" are not defined by the statute, the courts have interpreted them to mean a hole large enough for a man to fall through. See Alvia v. Teman Elec. Contr., 287 AD2d 421, 422, 423, 731 NYS2d 462 (2d Dep't 2001). It is apparent that the opening between the deck of the sidewalk bridge and the flat bed truck was sufficiently large

for a man to fall through, since plaintiff did just that.

Plaintiff also bases his Labor Law § 241(6) claim on an alleged violation of § 23-1.22(b)(2) and (4) of the Industrial Code. This section has to do with structural runways, ramps, and platforms. In this instance, plaintiff relies on those sections, (b)(2) and (4) having to do with runways or ramps constructed for the "use of persons only." Part (2) of section (b) requires such ramps to be a least 18 inches wide, 2 inches thick, supported and braced to prevent spring, and, "laid close, butt jointed, and securely nailed."

Part (4) of section (b) requires a "...a safety railing constructed and installed... on every open side."

On these facts it does not appear that these regulations apply in these circumstances where plaintiff used a plank offered to him by a fellow employee to make a "make shift" ramp. Curley v. Gateway Communications, 250 AD2d 888, 891, 672 NYS2d 523 (3rd Dep't 1998). This is particularly true where, as noted above, the building of stairways, ramps or runways to allow plaintiff or other workers access to the deck of the sidewalk bridge would be impractical.

To the extent that plaintiff relies on a violation of 12 NYCRR 23-1.7(f) to support his claim for relief pursuant to Labor Law § 241(6), the Court concludes that such reliance is justified. Gonzalez v. Pon Lin Realty Corp., 34 AD3d 638, 639, 826 NYS2d 94 (2d Dep't 2006). This section of the "industrial code" provides in essence that if stairways, ramps or runways are impractical, ladders or other safe means of getting to another work level shall be provided.

There is no dispute that defendants had no ladder available at that site on the day of the accident. Defendants' argument that the alternate means of access to and from the deck of the bridge was the cab of the flat bed truck was not a safe alternative means within the meaning of the regulation. McGovern v. Gleason Bldrs., Inc., 41 AD3d 1295, 1296, 839 NYS2d 384 (4th Dep't 2007); Seepersaud v. City of New York, 38 AD3d 753, 755, 835 NYS2d 199 (2d Dep't 2007) (defendant denied summary judgment and dismissal where they failed to prove plaintiff was provided with "safe" alternate means of access).

MOTION NO. 2 AND MOTION NO. 3

(THIRD-PARTY DEFENDANT YORK'S MOTION FOR SUMMARY JUDGMENT AND DISMISSAL OF THE THIRD-PARTY COMPLAINT AND DEFENDANT BARNARD'S MOTION FOR SUMMARY JUDGMENT ON ITS THIRD-PARTY COMPLAINT)

York Scaffold Equipment Corp. (York), seeks an order granting them summary judgment and dismissal of the third-party complaint against them by Barnard College on the grounds that plaintiff did not suffer a "grave injury" within the meaning of Worker's Compensation Law § 11, and therefore York owes no common law duty to indemnify Barnard College. Moreover, York maintains that it owes no contractual duty to indemnify Barnard either.

In support of their motion for summary judgment and dismissal, defendant York submits the unaffirmed reports of plaintiff's treating physician, Dr. James M. Liguori, plaintiff's bill of particulars, and plaintiff's EBT.

In opposition to the motion for summary judgment, plaintiff submits the unaffirmed medical records and plaintiff's bill of particulars.

"Worker's Compensation Law § 11 permits an owner to bring a third-party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a "grave injury" or the employer has entered into a written contract to indemnify the owner." Flores v. Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 365, 795 NYS2d 491 (2005).

To sustain the action for contribution or indemnification based on "grave injury" the third-party plaintiff is required to support such claim with "competent evidence." Theodoreu v. Chester Fire Dep't., 12 AD3d 499, 500, 785 NYS2d 91 (2d Dep't 2004). In fact, the statute itself says in pertinent part, "...An employer shall not be liable for contribution or indemnity to any third person... unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury'..." Worker's Compensation Law § 11, 3rd paragraph (emphasis added).

"As the proponents of the summary judgment motion [however] the [third-party] defendants were required to submit sufficient evidence in admissible form to establish their prima facie entitlement to judgment as a matter of law (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The unsworn physician's reports on which the defendants relied were not in admissible form, and as such were not capable of establishing a prima facie case... (see CPLR 3212[b]; Washington v. City of Yonkers, 293 AD2d 741; Hargrove v. Baltic Estates, 278 AD2d 278)." Baez v. Sugrue, 300 AD2d 519, 520, 752 NYS2d 385 (2d Dep't 2002).

Thus, third-party defendant York has failed to submit sufficient competent medical evidence to establish their prima facie entitlement to summary judgment and dismissal of the third-

party complaint for contribution based on a claim that plaintiff failed to suffer a "grave injury"

York also contends that they owe no contractual duty to contribute to or indemnify Barnard on the grounds that their proposal to Barnard coupled with Barnard's letter of intent constituted the contract or agreement between the parties without any written indemnification agreement.

Barnard contends that their reference to the "purchase order" and the parties' subsequent execution of the purchase order constituted the contract applicable to this incident, which contained an agreement for York to indemnify Barnard.

Here, as in Spiegler v. Gerken Bldg. Corp. (35 AD3d 715, 717) third-party defendant York "...fail(s) to establish its prima facie entitlement to judgment as a matter of law dismissing the contractual indemnification claim because its submission leaves unresolved material issues of fact as to whether the parties... [to the transaction] ...intended the provisions of the [purchase order] to be incorporated by reference... (see Kenner v. Avis Rent-a-Car Sys., 254 AD2d 704 (1998); cf. Liberty Mgt. & Constr. v. Fifth Avenue & Sixty-Sixth St. Corp., 208 AD2d 73, 77-78 (1995); Sweeting v. Board of Coop. Educ. Servs., 83 AD2d 103, 112 (1981); Matter of International Aviation Servs. of N.Y. v. Flagsim Co., 43 AD2d 971 (1974)." Id. at 717.

"A term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made' as of [a pre-accident date] and that the parties intended that it apply as of that date.' (Stabile v. Viener, 291 AD2d 395, 396 (2002), lv dismissed 98 NY2d 727 (2002); cf. Burke v. Fisher Sixth Ave. Co., 287 AD2d 410 (2001)." Pena v. Chateau Woodmere Corp., 304 AD2d 442, 443, 444, 759 NYS2d 451 (1st Dep't 2003).

As the Court of Appeals noted in Flores, supra, "...the common-law rule... authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract - governs the validity of a written indemnification agreement under Worker's Compensation Law § 11." Id. at 369, 370.

Accordingly, upon all of the foregoing, the motions are decided as follows, and, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability as against defendant Barnard College based on

Labor Law § 240(1) is granted; and, it is further

ORDERED, that plaintiff's motion for summary judgment on the issue of liability as against Barnard College based on Labor Law § 241(6) and Industrial Code provisions 12 NYCRR 23-1.7(b)(iii) and 23-1.7(f) is granted, and, it is further

ORDERED, that third-party defendant, York Scaffold Equipment Corp.'s motion for summary judgment and dismissal of the third-party complaint is denied; and, it is further

ORDERED, that defendant Barnard College's motions for summary judgment are denied; and, it is further

ORDERED, that the amount of judgment to be entered in favor of plaintiff shall be determined at the trial herein; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
February 5, 2008

JOSEPH P. DORSA
J.S.C.