

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

RUDOLF PISARCIK and BEATA x Index
KONECNA, Number 25849 2005

Plaintiffs,

- against -

Motion
Date August 15, 2007

TRIBORO BRIDGE AND TUNNEL AUTHORITY
D/B/A BRIDGE AND TUNNELS, CDE AIR
CONDITIONING, INC., LIRO ENGINEERS,
INC., AND LIRO PROGRAM & CONSTRUCTION
MANAGEMENT, P.C.,

Motion
Cal. Number 24

Motion Seq. No. 2

Defendants.

x

The following papers numbered 1 to 46 read on this motion by plaintiffs for summary judgment on the issue of liability on their claim for violation of Labor Law § 240(1); a cross motion by defendants Liro Engineers, Inc. and Liro Program & Construction Management, P.C. (jointly LiRo) for summary judgment dismissing all claims and cross claims against LiRo or, in the alternative, for contractual indemnification from defendant CDE Air Conditioning, Inc., (CDE); and cross motions by defendant CDE and defendant Triborough Bridge & Tunnel Authority s/h/a Triboro Bridge and Tunnel Authority d/b/a MTA Bridge and Tunnels (TBTA) for summary judgment dismissing all claims and cross claims against them.

Papers
Numbered

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

Plaintiff Rudolf Pisarcik allegedly was injured by falling from a scaffold while performing lead paint and asbestos abatement work on a construction project at the Queens Midtown Tunnel ventilation building. The accident occurred as he was descending from a platform on the upper level of a mobile scaffold by climbing down the horizontal tubes or rungs on the end of the frame of the scaffold. At the time, the scaffold was not equipped with an internal stairway or any other built-in or attached ladder, and the vertical side railings on the end of the frame were about four feet apart. It is alleged that the injured plaintiff fell 10 feet to the ground when his hand slipped from the horizontal rung, causing him to lose his grip and fall backward. Defendant TBTA is the owner of the ventilation building and hired CDE as the general contractor for the renovation project. TBTA also contracted with LiRo to act as the construction manager. The injured plaintiff was employed by nonparty Benjamin Kurzban, Inc. (Kurzban), a subcontractor hired by CDE. In this action, plaintiffs assert claims sounding in common-law negligence and for violation of Labor Law §§ 200, 240(1) and 241(6).

Before considering the merits of the parties' applications, the court turns to a procedural issue. The cross motion by defendant CDE is untimely, and CDE did not seek leave to make a late summary judgment motion or show good cause for its delay. (CPLR 3212[a]; see, Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004].) The court will consider the part of the cross motion that addresses plaintiff's Labor Law § 240(1) claim since the issues raised are so closely related to those in plaintiffs' timely motion for summary judgment on that claim. (See, Grande v Peteroy, 39 AD3d 590 [2007]; McDonald v Sunstone Assocs., 39 AD3d 603 [2007].) In all other respects, the cross motion by CDE is denied as untimely. (See, McDonald v Sunstone Assocs., supra.)

Plaintiffs have failed to demonstrate their entitlement to judgment as a matter of law on their claim under Labor Law § 240(1). (See, Ayotte v Gervasio, 81 NY2d 1062 [1993]; Mennerich v Esposito, 4 AD3d 399 [2004].) Labor Law § 240(1) requires that contractors, owners, and their agents provide workers with appropriate safety devices to protect them against such specific gravity-related accidents as falling from a height. (See, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494,

500 [1993]; Godoy v Baisley Lbr. Corp., 40 AD3d 920 [2007].) To prevail on a cause of action under section 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries sustained. (See, Bland v Manocherian, 66 NY2d 452 [1985]; Tylman v School Constr. Auth., 3 AD3d 488 [2004].) The supporting affidavit of plaintiff Rudolph Pisarcik states that it was translated for him into Slovakian, his native language, but it is not accompanied by an affidavit by the translator stating the translator's qualifications and that the translation provided to plaintiff was accurate. (CPLR 2101[b].) Nor did plaintiffs submit any deposition testimony in support of the motion. (CPLR 3212[b].) In any event, where, as here, the scaffold supplied to a worker as a safety device did not collapse, move or malfunction, the mere fact that the worker fell off the scaffold is insufficient, in and of itself, to establish that the device did not provide proper protection pursuant to Labor Law § 240(1). (See, Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]; Tylman v School Constr. Auth., *supra*; *cf.*, Panek v County of Albany, 99 NY2d 452 [2003].) Rather, the issue of whether such a scaffold provided proper protection is generally a question of fact for the jury. (See, Alava v City of New York, 246 AD2d 614 [1998]; Beesimer v Albany Ave./Rte. 9 Realty, 216 AD2d 853 [1995]; *see also*, Blake v Neighborhood Hous. Servs. of New York City, *supra*.) Without regard to whether it would otherwise be of probative value, the affidavit of plaintiffs' expert is insufficient to make a prima facie showing of a statutory violation since it is based upon a review of materials that were not submitted to the court in admissible form. (See, Concepcion v Walsh, 38 AD3d 317 [2007]; Mahoney v Zerillo, 6 AD3d 403 [2004].)

As part of its cross motion, LiRo contests its status as an entity subject to liability under Labor Law §§ 240(1) and 241(6). The evidence does not conclusively establish LiRo's assertions. The duties of these Labor Law provisions are imposed on "contractors and owners and their agents." (Labor Law §§ 240[1], 241[6].) A construction manager may be held liable for a workers' injuries under the Labor Law if the manager functions as an agent of the owner of the premises and had the ability to control the activity which brought about the injury. (See, Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]; Pino v Irvington Union Free School Dist., ___ AD3d ___, 2007 NY Slip Op 6969 [2d Dept 2007]; Lodato v Greyhawk N. Am., LLC, 39 AD3d 491 [2007].) Pursuant to its contract with TBTA, LiRo assumed the responsibility for "compliance with the most stringent provisions of the applicable statutes and regulations" concerning

safety and health requirements and for seeing that "the methods of performing the work do not involve undue danger to the personnel employed thereon" LiRo was also contractually obligated to require any safety deficiencies or violations to be "forthwith corrected." The contract further states that "[w]ork implicated by such deficiencies or violations shall not be permitted to continue until the correction(s) is (are) made," and CDE's project manager testified that he believed that LiRo had the authority to tell him what to do at the job site, and that LiRo had done so in regard to safety concerns. He also testified to the common belief on the project that LiRo had the authority to stop work on the job site for safety reasons. LiRo had a representative on site on a daily basis and was contractually obligated to closely monitor all items of work, take immediate action in emergencies, ensure that the construction schedule was adhered to, and ensure that unacceptable work was repaired and unacceptable material removed. Under the circumstances, LiRo has not established that it did not function as an agent of the owner. (See, Pino v Irvington Union Free School Dist., *supra*; Barraco v First Lenox Terrace Assocs., 25 AD3d 427 [2006]; see also, Lodato v Greyhawk N. Am., LLC, *supra*.) The presence and responsibilities of CDE as general contractor on the project did not negate the owner's independent duties under the Labor Law and, thus, does not preclude the possibility that LiRo assumed the owner's duties and is subject to liability as a statutory agent. (See, Pino v Irvington Union Free School Dist., *supra*.)

Defendants have not established their commonly asserted defense that the injured plaintiff's own actions were the sole proximate cause of the accident. (See generally, Blake v Neighborhood Hous. Servs. of New York City, *supra*.) The arguments concerning the wheels utilized by the injured plaintiff in assembling the scaffold are misplaced since plaintiffs do not attribute the accident to any defect in the wheels. (See, Coque v Wildflower Estates Devs., 31 AD3d 484 [2006].) Furthermore, plaintiff's supervisor testified at a deposition that he examined the subject scaffold after the accident and the wheels were locked properly. There is no evidence that the gloves plaintiff testified to wearing to protect his hands from the spray being used while working on the scaffold were intended as a safety device for gripping purposes. In addition, the conflicting testimony as to whether, in response to a request, plaintiff was told that no scaffold ladder or suitable extension ladder was available for accessing the scaffold and that he should climb up and down on the scaffold itself raises an issue of fact as to whether plaintiff knowingly failed to use a provided safety device. (See, Pichardo v Aurora Contrs., 29 AD3d 879 [2006];

Mercado v New York Univ., 29 AD3d 496 [2006]; cf., Robinson v East Med. Ctr., 6 NY3d 550 [2006]; Montgomery v Federal Express Corp., 4 NY3d 805 [2005]; Plass v Solotoff, 5 AD3d 365 [2004].)

Moreover, the availability of a particular safety device will not shield a defendant from liability under section 240(1) if the device was not sufficient to provide safety without the use of additional devices. (See, Nimirovski v Vornado Realty Trust Co., 29 AD3d 762 [2006]; see also, Bland v Manocherian, supra, at 461-462; Beesimer v Albany Ave./Rte. 9 Realty, supra.) Defendants have failed to establish, prima facie, that the scaffold was an adequate safety device and that no safety devices in addition to the scaffold were necessary. (See, Santo v Scro, ___ AD3d ___, 2007 NY Slip Op 6658 [2d Dept]; Karapati v K.J. Rocchio Inc., 12 AD3d 413 [2004]; Gange v Tilles Inv. Co., 220 AD2d 556 [1995].) Even if the court were to consider the expert's affidavit improperly submitted by TBTA for the first time in a "supplemental" filing in support of its cross motion (but see, GJF Constr. Corp. v Cosmopolitan Decorating Co., 35 AD3d 535 [2006]; Juseinoski v Board of Educ. of the City of New York, 15 AD3d 353 [2005]), it does not refute as a matter of law plaintiffs' claim that additional safety devices such as safety lines should have been provided to satisfy the statutory mandate. Furthermore, there is no indication that the TBTA expert examined the scaffold and, since the evidence that the side rungs of the scaffold were about four-feet wide is unrefuted and no evidence has been offered as to the measurement of the spacing between the rungs of the scaffold, there is no basis in the record for the expert's conclusion that the use of the rungs for access to and from the scaffold platform was an accepted construction industry practice and that the scaffold complied with recognized industry standards and government regulations. (See generally, Bennett v Kissing Bridge Corp., 5 NY3d 812 [2005], affq 17 AD3d 990 [2005]; Cassano v Hagstrom, 5 NY2d 643, 646 [1959]; Martinez v Mullarkey, 41 AD3d 666 [2007].)

Contrary to the contention in TBTA's cross motion, plaintiffs have alleged the violation of an administrative safety regulation sufficient to serve as a predicate for a claim under Labor Law § 241(6). (See, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Ares v State of New York, 80 NY2d 959 [1992].) The requirements of 12 NYCRR 23-5.3(f) concerning the provision of ladders, stairs, or ramps for access to and egress from the platform level of certain metal scaffolds are concrete and specific, and are applicable to the facts of this case. (See, e.g., Notaro v Bison Constr. Corp., 32 AD3d 1218 [2006]; Sopha v Combustion Eng'g., 261 AD2d 911 [1999].) The provisions of

12 NYCRR 23-5.18(c) relating to proper access to a manually propelled mobile scaffold are also specific enough to sustain a section 241(6) claim and arguably applicable to the facts of this case. (See, Robertson v Little Rapids Corp., 277 AD2d 560 [2000].) Issues of fact exist as to whether the regulations were violated.

Defendants TBTA and LiRo are entitled to summary judgment dismissing plaintiffs' claims based on common-law negligence and Labor Law § 200, which is a codification of an owner's or general contractor's common-law duty to maintain a safe work place. (See, Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993].) The evidence before the court establishes that neither TBTA nor LiRo exercised the degree of direct supervisory control over the manner in which the injured plaintiff's work was performed that is necessary to impose liability for common-law negligence or a violation of Labor Law § 200. (See, Burkoski v Structure Tone, Inc., 40 AD3d 378 [2007]; Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681 [2005]; Karpati v K.J. Rocchio, Inc., supra.) It is undisputed that the injured plaintiff was given directions and instructions only from his supervisors at Kurzban, and that all of the equipment used by plaintiff was supplied by Kurzban. Evidence of a party's overall responsibility for the safety of work being performed by subcontractors and authority to have unsafe conditions corrected or to stop the work does not raise a question of fact as to that party's liability for negligence or violation of section 200. (See, Burkoski v Structure Tone, Inc., supra.; Singh v Black Diamonds LLC, 24 AD3d 138 [2005]; Perri v Gilbert Johnson Enters., Ltd., supra.)

The alternative relief sought by defendant LiRo is not available. LiRo did not assert a cross claim against CDE for contractual indemnification.

Accordingly, the motion by plaintiffs and the cross motion by CDE are denied. The cross motions by TBTA and LiRo are granted only to the extent that they are awarded summary judgment dismissing the claims against them for negligence and violation of Labor Law § 200, and are denied in all other respects.

Dated: Oct. 30, 2007

J.S.C.