

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK COUNTY OF NASSAU

Present:

Hon. Thomas Feinman
Justice

THOMAS DALVANO,

Plaintiff,

- against -

RACANELLI CONSTRUCTION COMPANY, INC.,
LONG ISLAND LUTHERAN MIDDLE and HIGH
SCHOOL, LUTHERAN HIGH SCHOOL
ASSOCIATION, LUTHERAN HIGH SCHOOL
ASSOCIATION OF NASSAU and SUFFOLK
COUNTIES,

Defendants.

RACANELLI CONSTRUCTION COMPANY, INC.

Third-Party Plaintiff,

- against -

TORINO INDUSTRIAL, INC.,

Third-Party Defendant.

TRIAL/IAS PART 15
NASSAU COUNTY

INDEX NO. 6949/08

MOTION SUBMISSION
DATE: 1/26/10

MOTION SEQUENCE
NOS. 1, 2, 3, 5

The following papers read on this motion:

Order to Show Cause and Affidavits.....	<u>X</u>
Affirmation in Opposition.....	<u>X</u>
Reply Affirmation.....	<u>X</u>

Relief Requested

The third-party defendant, Torino Industrial, Inc., (hereinafter referred to as "Torino"), moves for an order pursuant to CPLR §3212 granting summary judgment to Torino dismissing the third party complaint as and against Torino. The defendants, Racanelli Construction Company, Inc., Long Island Lutheran Middle and High School, Lutheran High School Association, Lutheran High School

Association of Nassau and Suffolk Counties, (hereinafter referred to as "Racanelli"), cross-move for an order pursuant to CPLR §3212 granting summary judgment to Racanelli as third-party plaintiff as and against the third-party defendant, Torino, and oppose Torino's motion for summary judgment. The third-party defendant, Torino, submits an affirmation in opposition to the defendants' cross-motion and in reply to the defendants' opposition to Torino's motion. The defendants, Racanelli, submit a reply affirmation.

The defendants, collectively referred to as Racanelli, move for partial summary judgment dismissing plaintiff's cause of action for common law negligence, and plaintiff's Section 200 Labor Law claim against the owner defendant, and/or the defendant general contractor. The plaintiff cross-moves for an order pursuant to CPLR §3212 granting plaintiff summary judgment on the issue of liability under plaintiff's Labor Law claims §§240(1) and 241(6), and opposes the defendants' motion for partial summary judgment dismissing plaintiff's common law negligence and Section 200 Labor Law claim.

Background

The plaintiff initiated an action as and against the defendants, collectively referred to as Racanelli, for injuries sustained as a result of defendants' alleged violation of Labor Law §§240(1), 241(6), 200 and for common law negligence. The plaintiff, an iron worker employed by Torino, claims to have suffered severe personal injuries as a result of falling off a ladder while performing work at a job site located at the Long Island Lutheran Middle and High School at 131 Brookville Road, Brookville, New York, during the construction of a school gymnasium on December 5, 2005. The plaintiff claims that the ladder he was using when he fell, a one-half of a two piece extension ladder, was missing a third rung.

The third-party plaintiff, Racanelli, initiated a third-party action as and against Torino for failure to furnish Racanelli with general liability insurance for the benefit of Racanelli, common law contribution from Torino on the theory that plaintiff's injuries were caused by Torino's negligence, and contractual indemnification whereby Torino agreed to indemnify Racanelli for any liability claims brought about due to Torino's negligence.

Torino's Motion for Summary Judgment, and Racanelli's Cross-Motion for Summary Judgment

The third-party plaintiff, Racanelli, initiated a third-party action as and against Torino. Torino, by way of motion, seeks to dismiss the third-party complaint, pursuant to CPLR §3212. Racanelli cross-moves for summary judgment in its favor.

Torino has demonstrated that pursuant to the pertinent contract between Torino and Racanelli, Torino purchased insurance. However, Racanelli has demonstrated that the insurance carrier has disclaimed as to Racanelli and Torino under the grounds of late notice, and therefore, Racanelli has commenced a declaratory judgment action. Racanelli, by way of declaratory judgment action entitled *Racanelli Construction Co. Inc., Long Island Lutheran Middle and High School, Lutheran High School Association, Lutheran High School Association of Nassau and Suffolk Counties v. Westchester Fire Insurance Company, Thomas Dalvano and Torino Industrial, Inc.*, bearing Index No. 22945/08, alleges that the plaintiffs duly gave notice of the instant claim to the

defendant carrier. Racanelli submits that the carrier claims Torino provided late notice. Racanelli contends that Torino merely procured a policy, however, this, in and of itself, does not satisfy Torino's obligation under contract with Racanelli, as to date, Racanelli has not been defended nor indemnified in accordance with the terms of the contractual agreement, as the carrier has disclaimed as to both Racanelli and Torino for late notice.

Upon the submissions herein, Torino has not established, as a matter of law, that no issue of fact exists as to whether Torino contributed to the happening of the event. An issue exists as to whether the subject ladder was supplied by Torino or Racanelli. Torino asserts, in its moving papers, that the subject ladder "had apparently been put in use for access into the basement area by the concrete subcontractor on the project known as Condos Brothers", without referring to any admissible supporting evidence. Racanelli refers to the deposition testimony of Torino's Vice President, Keith Passante, who testified that a certain foreman was hired by Torino to provide the equipment necessary to do the job, and that foreman was responsible for job safety. Racanelli's project Superintendent, Dennis Salvatore, testified that contractors would bring their own ladders to the job site.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

In light of the foregoing, Torino's motion for summary judgment dismissing the third-party complaint as and against Torino is denied, and Racanelli's cross-motion for summary judgment in its favor, as and against Torino, is denied.

Racanelli's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment

Racanelli moves for partial summary judgment dismissing plaintiff's causes of action as and against Racanelli for common law negligence and plaintiff's Section 200 Labor Law claim. Plaintiff cross-moves for summary judgment on liability under plaintiff's claims under Labor Law §240(1) and §241(b), and opposes Racanelli's motion.

Applicable Law

Section 240(1) of the Labor Law requires that owners and general contractors "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, swings, 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." Violation of Labor Law §240(1) mandates the imposition of liability regardless of negligence and is deemed to create a statutory cause of action unrelated to questions of negligence. "Labor Law

§240 imposes absolute liability on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards.” (*Striegel v. Hillcrest Heights Development Corporation*, 100 NY2d 974). “The statute is to be interpreted liberally to accomplish its purpose.” (*Id.*, citing *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509). Labor Law §240(1) applies to both “falling worker” and “falling object” cases. (*Id.*)

Additionally, it is well-settled that a plaintiff proceeding under Labor Law §241(6) must prove that there was a causative violation of a “concrete” provision of the Industrial Code. (*Ross v. Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494). Plaintiff must show that some “concrete specification” in the regulations was violated, and that this was a substantial factor in causing the subject accident. (*Morrison v. City of New York*, 5 AD3d 642; *Singleton v. Citnalta Construction Corporation*, 291 AD2d 393).

Labor Law §200 mandates that all workplaces be so equipped, operated and conducted so as to provide “reasonable and adequate” protection to the persons employed there. A common law negligence claim and a Section 200 Labor law claim are essentially one and the same. (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876). It is a general requirement to provide workers with a safe place to work. (*Id.*)

Discussion

Here, the plaintiff has made a *prima facie* showing of entitlement to summary judgment on liability against the defendants, collectively referred to as Racanelli, on the Labor Law claims under §240(1) and §241(6). The plaintiff has demonstrated that he was engaged in the construction, repair, building and/or renovation of a structure at the direction of the defendants, and/or owned by the defendants herein. The plaintiff has set forth, and it is not disputed, that plaintiff fell off a defective ladder as it was missing a rung. Accordingly, the plaintiff has demonstrated entitlement to summary judgment as a matter of law against the defendants, owner-contractor, by establishing that he was subject to an elevation-related risk and that the defendants violated Labor Law §240(1). (*Striegel v. Hillcrest Hights Development Corporation*, *supra*).

Likewise, the plaintiff has demonstrated that defendants violated §241(6) of the Labor Law, as the defendants violated Industry Code Section NYCRR 23-1.21(b) in failing to provide a ladder free of any flaw or defect. Such provision provides that “[a]ll ladders shall be maintained in good condition. A ladder shall not be used . . . (i). If it has a broken member or part”. In the case at bar, the use of a defective ladder violated the Industrial Code which provides the underlying violation of Labor Law §241(6). (*DeOliveira v. Little John Moving, Inc.*, 734 NYS2d 165). The plaintiff has also demonstrated that the owner-contractor supervised or controlled the work. (*Rizzuto v. L.A. Wenger Contracting Co. Inc.*, 91 NY2d 343). The defendants, in opposition to the plaintiff’s motion, fail to raise an issue of fact to defeat the plaintiff’s motion.

However, the plaintiff, in opposition to the defendants’ motion for partial summary judgment dismissing plaintiff’s claims under common law negligence and Section 200 of the Labor Law, have raised an issue of fact warranting the denial of defendants’ motion. The plaintiff has raised a triable issue of fact as to whether the defendants supplied the defective ladder, or whether the defendants had actual or constructive notice of the dangerous condition, the defective ladder, which caused plaintiff’s injuries. (*Riccio v. NHT Owners, LLC*, 13 Misc.3d 1209(A); *Kinsler v. Lu-Four*

Associates, 215 AD2d 63). On a motion for summary judgment, the evidence must be viewed in a light most favorable to a non-moving party. (*Gonzalez v. Metropolitan Life Ins. Co.*, 269 AD2d 495). In reviewing a motion for summary judgment, the Court accepts as true the evidence presented by the non-moving party, and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue". (*Baker v. Briarcliff School District*, 205 AD2d 652). Here, it cannot be determined, as a matter of law, that the defendants had no constructive notice of the defective ladder. Therefore, under these circumstances, summary judgment of plaintiffs' cause of action under Labor Law §200, and common law negligence, is not warranted.

In light of the foregoing, the plaintiff's motion for summary judgment on liability under Labor Law §§240(1) and 241(6) is granted, and the defendants' motion for partial summary judgment is denied.

Conclusion

Upon the foregoing, it is hereby

ORDERED that the third-party defendant, Torino's, motion for summary judgment dismissing the third-party complaint hereby is denied, and it is hereby further

ORDERED that the defendant/third-party plaintiff, Racanelli's, motion for summary judgment on the third-party complaint is denied, and it is hereby further

ORDERED that the plaintiff's motion for summary judgment on plaintiff's Labor Law §240(1) and §241(6) is granted, and it is hereby further

ORDERED that the defendants' Racanelli's, motion for partial summary judgment dismissing plaintiff's Labor Law §200 claim, and common law negligence claim is denied.

ENTER:

J.S.C.

Dated: March 17, 2010

cc: Foley Griffin Jacobson & Faria, LLP
Mulholland, Minion & Roe
Peter C. Cotelidis, Esq.

ENTERED

MAR 22 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**