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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

BARRY TEGER and LOUISE M. TEGER,

Plaintiff(s),

- against -

HOME BOX OFFICE, INC., LEHR ASSOCIATES, INC., 1100 AVENUE OF THE AMERICAS ASSOCIATES, CEDARWOOD PLUMBING AND HEATING CO., INC. and ULTIMATE SIGNS AND DESIGNS CORP.,

Defendant(s).

HOME BOX OFFICE, INC. and 1100 AVENUE OF THE AMERICAS ASSOCIATES,

Third-Party Plaintiff(s),

- against-

HUGH O'KANE ELECTRIC CO., INC., s/h/a HUGH O'KANE ELECTRIC, INC.,

Third-Party Defendant(s).

ULTIMATE SIGNS AND DESIGNS CORP.,

Second Third-Party Plaintiff(s),

- against -

HUGH O'KANE ELECTRIC CO., INC.,

Second Third-Party Defendant(s).

TRIAL/IAS PART 21

INDEX NO. 24678/96

MOTION SEQUENCE NO. 7, 8, 9 & 10

MOTION SUBMISSION DATE: November 21, 2000

The following papers read on this motion:

Notice of Motion	**XXXX**
Affirmation in Partial Opposition	**XXXX**
Reply Affirmation	**XXX**
Memorandum of Law	**XXX**

Upon the foregoing papers, the motion, by defendants/third-party plaintiffs Home Box Office, Inc. and 1100 Avenue of the Americas Associates, for an Order, pursuant to CPLR 3212, granting summary judgment and awarding common-law indemnity against Hugh O'Kane Electric Co., Inc. on the ground that Hugh O'Kane Electric, Inc. is entirety at fault for what happened;

a Notice of Cross-Motion, by plaintiffs Teger, for an Order, pursuant to CPLR 3212, granting plaintiffs summary judgment with respect to their cause of action predicated on Labor Law § 240[1] and for such other, further and different relief as to this Court may seem just and proper; and an Amended Notice of Cross-Motion, by plaintiffs, for the duplicate relief;

a Notice of Cross-Motion, by defendants/third-party plaintiffs Home Box Office, Inc. and 1100 Avenue of the Americas Associates, for an Order granting summary judgment to the defendants/third-party plaintiffs Home Box Office, Inc., a division of Time Warner Entertainment Company, L.P. s/h/a Home Box Office Inc. and 1100 Avenue Associates, pursuant to CPLR 3212, against plaintiffs as there are no material issues of fact or law, dismissing the plaintiffs' complaint alleging common law negligence and Labor Law §§ 200, 241 and 241 violations with prejudice, are all determined as hereinafter set forth.

In September of 1993, the injured plaintiff Barry Teger, then employed by third-party defendant Hugh O'Kane Electric, Inc. (hereinafter "O'Kane"), sustained personal injuries when he fell from a six foot "A-frame" ladder, which he and his supervisor Anthony Alessi had leaned against a wall before installing certain electrical fixtures at premises leased by co-defendant Home Box Office, Inc. (hereinafter "HBO") and owned by co-defendant 1100 Avenue of the Americas (hereinafter "Avenue") (see Teger aff., ¶¶ 2-3; Teger dep. at 52; Alessi dep. at 19).

More specifically, the record reveals that HBO utilized certain O'Kane employees as so-called "in house" electricians, who performed specific tasks and projects at the direction of HBO's Design and Construction Department. The Design and Construction Department was responsible for, inter alia, assigning and overseeing any such "in-house" alterations or electrical work performed within the HBO building (Bowes dep., at 9-10, 44-45, 55). Significantly, HBO's Design and Construction Department had assigned the above-reference work and had itself purchased the fixtures which were to be installed by the plaintiff and his supervisor (Bowes dep. at 61).

The work was to be performed in a small machine, or "fan shaft room", and called for the installation of a metal support channel or "kindorf" on a wall area located approximately eight feet above floor level, to which several permanent electrical lighting fixtures were to be attached ITeger dep. at 42-43, 52, 54, 63; Alessi dep. at 13, 22-24; Bowes dep. at 25, 30-35).

Apparently, the part of the room where the work at issue was to be performed was too small and/or obstructed with, inter alia, HVAC duct work to permit extension of the ladder's legs in a fully opened or locked position (Teger dep. at 56-57, 67; see Alessi dep. at 12, 25). Therefore, and in order to provide

access to the elevated work site, the plaintiff, allegedly at the direction of his supervisor, leaned or angled the ladder against the wall in a closed position with its legs braced against a portion of the duct system (Teger dep. at 57; Alessi dep. at 24-25). With the closed ladder resting against the wall, the plaintiff scaled the ladder several times before he ultimately lost his footing, fell backwards and struck his neck on a piece of duct work (Teger dep. at 76-78; Alessi dep. at 30).

Thereafter, the plaintiffs commenced the within action to recover damages for personal injuries, interposing claims sounding in common law negligence and further alleging violations of the Labor Law §§ 200, 240[1] and 241[6] (HBO motion, Exhibit A). Co-defendants HBO and Avenue subsequently instituted a third-party action seeking both contractual and/or common law indemnification and contribution from third-party defendant O'Kane (HBO cross-motion, Exhibit A).

Initially, and with respect to that branch of the motion by HBO/Avenue which is to dismiss those causes of action alleging violation of Labor Law §§ 200 and 241[6], the Court notes that the plaintiffs have not addressed, much less opposed, the foregoing portions of the motion. Accordingly, and in light of the above, those branches of the motion which are for dismissal of the plaintiffs' causes of action predicated upon Labor Law §§ 200 and 241[6] are **granted**.

That branch of HBO/Avenue's cross-motion which is for dismissal of the plaintiffs' claim, pursuant to Labor Law § 240[1], and the plaintiffs' motion for summary judgment with respect thereto are **denied**.

The Court of Appeals has observed that "Labor Law § 240[1] imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by the failure" **(Jock v. Fien, 80 NY2d 965, 967-968; see also, Misseritti v. Mark IV Constr. Co., Inc., 86 NY2d 487, 490; O'Connell v. Consol. Ed., Co., 714 NYS2d 328)**. Although the reach of Labor Law § 240[1] is not limited to work performed in actual construction sites **(Martinez v. City of New York, 93 NY2d 322, 326)**, in order to establish entitlement to the statute's protections, a plaintiff must demonstrate that he or she was performing work during the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" **(Joblon v. Solow, 91 NY2d 457, 463; see also, Lombardi v. Stout, 80 NY2d 290, 295; Guzman v. Gumley-Haft, Inc., 274 AD2d 555; Bedassee v. 3500 Snyder Ave. Owners Corp., 266 AD2d 250, 251)**. Although § 240[1] is to be liberally construed to further its intended remedial purposes**(see, Martinez v. City of New York, supra at 326)**, "routine maintenance activities in a nonconstruction, nonrenovation context are not protected by Labor Law § 240" **(Paciente v. MGB Dev., Inc., 715 NYS2d 436; see, Brown v. Christopher St. Owners Corp., 87 NY2d 928, 939).**

Significantly, it has been held that a mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is alone insufficient to establish as a matter of law that the ladder did not provide appropriate protection to the worker **(Briggs v. Halterman, 267 AD2d 753, 755; see also, Williams v. Dover Home Improv. Inc., 714 NYS2d 318; Garieri v. Broadway Plaza, 271 AD2d 569; Nelson v. Ciba-Geigy, 268 AD2d 570, 571-572; cf. Lacey v. Turner Construction, Co., 713 NYS2d 207; Prass v. Viva Loco of 110, Inc., 275 AD2d 403)**. Rather, and in such a case, " 'the issue of whether the [safety] device provided proper protection within the meaning of Labor Law § 240[1] is a question of fact for the jury' " **(Garieri v. Broadway Plaza, supra, quoting, Romano v. Hotel Carlyle Owners Corp., 226 AD2d 441, 442; see, Williams v. Dover Home Improv. Inc., supra)**.

Here, there are triable issues presented with respect to, inter alia, the precise manner in which

the accident occurred, and whether, under the circumstances presented, the "A" frame ladder provided to the injured plaintiff afforded sufficient and adequate protection in light of the narrowly confined work space in which the job was to be performed (Teger affidavit, ¶ 4). With respect to the manner in which the accident occurred, while the injured plaintiff has submitted an affidavit in which he claims that the ladder shifted prior to his fall (Teger affidavit, ¶¶ 3-4), his deposition testimony was equivocal in connection with that issue, since he testified, inter alia, that the ladder, "might have shifted a touch, but I don't think it really moved" (Teger dep. at 67-68; see also, Alessi dep. at 25-26) **(cf. Garieri v. Broadway Plaza, supra).**

Lastly, and contrary to the movants' contentions, the Court is satisfied that the work performed (installation of several permanent light fixtures on metal "kindorf" support channels) constitutes an "alteration", as that term has been construed for the purposes of Labor Law § 240[1] **(see, e.g., Joblon v. Solow, supra at 465; see also Guzman v. Gumely-Haft, Inc., supra; cf. Morales v. City of New York, 245 AD2d 431, 432).**

That branch of HBO/Avenues' motion which is for common law indemnity is **denied** in part and **granted** in part.

An owner or general contractor held vicariously liable under Labor Law § 240 is entitled to full, common law indemnity from an actively negligent party, provided that the owner or contractor did not direct, control or supervise the work at issue **(see, Dawson v. Pavarini Constr. Co., Inc., 228 AD2d 466, 468; see, Stouraitis v. Long Island Railroad, 269 AD2d 589, 590; cf. Comes v. New York State Elec. and Gas Corp., 82 NY2d 876, 878; Kim v. Herbert Constr. Co., Inc., __AD2d__, 713 NYS2d 190).**

Here, HBO/Avenue have submitted, inter alia, the affidavit of Lauren Bowes, presently Manager of HBO's Design and Construction Department, who avers, amongst other things, that HBO did not exercise supervisory control over the work site or over the methods employed by the contractor.

However, and in opposing the above application, third-party defendant O'Kane has submitted Bowes' deposition testimony, in which she testified in substance, that HBO utilized O'Kane employees, including the injured plaintiff, as "in-house" electricians (Bowes dep. at 10); that these electricians reported to her department for assignments and submitted their time sheets thereto for signature and approval (Bowes dep. at 12, 17, 21); that the Design and Construction Department was responsible for, inter alia, assigning and overseeing, inter alia, "in-house" electrical, mechanical and engineering jobs (Bowes dep. at 9); and that HBO assigned the electrical job which the injured plaintiff performed and also purchased the lighting fixtures which were to be installed (Bowes dep. at 61; Teger dep. at 135-136).

It also bears noting in this respect that Bowes described the role generally played by the Design and Construction Department in connection with the scheduling and performance of a particular job, by stating that when a problem arose, her department would, "gather information, * * * go to the site, figure out logically what was involved and again coordinate the sequencing of the work * * * [a]nd during construction * * * [the Department] would be checking in [and] keeping in touch with the progress" (Bowes dep. at 58-59).

Summary judgment is a drastic remedy which should be granted only when there is no clear triable issue of fact presented **(Andre v. Pomeroy, 35 NY2d 361, 364).** Indeed, "[e]ven the color of a triable issue forecloses the remedy" **(Rudnitsky v. Robbins, 191 AD2d 488, 489; Benincasa v. Garrubbo, 141 AD2d 636, 637).** Here, the parties' evidentiary submissions present triable issues with respect to the precise nature and scope of HBO's supervisory authority and involvement in the project **(cf. Williams v. Dover**

Home Improv., Inc. supra), and, therefore, preclude any award of summary judgment with respect to its claim for common law indemnity **(see, Duffy v. J. Kokolakis Contr. Inc., __AD2d__, [2d Dept., Dec. 26, 2000]; Castrogiovanni v. Corporate Property Investors, 714 NYS2d 332)**.

However, the above application is **granted** insofar as it relates to co-defendant Avenue. There has been no evidence tendered suggesting that this defendant exercised any measure of control, direction or supervision over the work at issue. In light of the foregoing, Avenue shall, therefore, be entitled to an award of conditional, common law indemnity in the event the plaintiffs recover from it in the main action **(see, Clark v. 345 East 52nd Street Owners, Inc., 245 AD2d 410; see, Friscia v. New Plan Realty Trust, 267 AD2d 197).**

The foregoing constitutes the decision and Order of the Court.

SO ORDERED.

DATED: 1/10/2001

Roy S. Mahon
J.S.C.

ENTERED

JAN 17 2001

NASSAU COUNTY
COUNTY CLERK'S OFFICE