SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 113198/2007
GASPAR, JORGE
vs.
LC MAIN
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by third-party defendant Pro Safety Services, LLC is decided in accordance with the attached memorandum decision. (consolidated for disposition with motion sequence 003)

FILED
APR 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 4/8/10

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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JORGE GASPAR,

Plaintiff,

-against-

LC MAIN, LLC, THE RITZ-CARLTON HOTEL COMPANY OF NEW YORK, INC. and GEORGE A. FULLER COMPANY, INC.,

Defendants.

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LC MAIN, LLC and GEORGE A. FULLER COMPANY, INC.,

Third-Party Plaintiffs,

-against-

ROGER & SONS CONCRETE, INC. and PRO SAFETY SERVICES, LLC,

Third-Party Defendants.

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Index No.: 113198/07
DECISION/ORDER

Motion Seq. No.:
002 & 003

Index No.: 590384/09

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, third-party defendant Pro Safety Services, LLC (Pro Safety) moves for summary judgment to dismiss the third-party complaint (motion sequence number 002). Defendants LC Main, LLC (Main) and George A. Fuller Company, Inc. (Fuller) move for summary judgment to dismiss the complaint (motion sequence number 003). For the following reasons, third-party defendant Pros Safety's motion is granted in part and denied in part, and defendants Main and Fuller's motion is denied.

BACKGROUND

On February 23, 2006, plaintiff Jorge Gaspar (Gaspar) suffered injuries to his right leg while using a "SkilSaw" (a hand-held, electrical, circular saw) to cut plywood forms that were to

be used for pouring concrete. *See* Notice of Motion (motion sequence number 003), Plousadis Affirmation, ¶ 8. At that time, Gaspar was employed by third-party defendant Roger & Sons Concrete, Inc. (Roger & Sons), a New York State corporation. *Id.* Roger & Sons had been engaged as a subcontractor for concrete work on a building renovation project (the project) by the general contractor, defendant Fuller. *Id.* The project involved work on a building (the building), located at 221 Main Street, White Plains, New York, that is owned by defendant Main. While defendant the Ritz-Carlton Hotel Company of New York, Inc."s (Ritz-Carlton) exact relationship with the building is unclear since Ritz-Carlton never appeared or filed an answer in this action, it appears that Ritz Carlton manages/operates the building. *Id.* Fuller had also engaged third-party defendant Pro Safety, a New York State limited liability company, as the project's safety consultant. *Id.*

The relevant portions of the subcontracting agreement between Fuller and Pro Safety (the Pro Safety subcontracting agreement), which is denominated a "purchase order," provide as follows:

> Vendor [i.e., Pro Safety] ... [t]o provide full time safety consultant, working for the "wrap up" insurance program, performing at a minimum, the following:
>
> Development & implementation of a site specific safety plan.
> Daily monitoring of the site to identify hazards and/or potential hazards to prevent and reduce injuries and incidents.
> New employee orientation training.
> Review al[l] potential subcontractors' safety programs.
> Monitor subcontractor compliance to provide a safe and healthy workplace.
> Develop, implement and monitor a complete accident investigation program with the safety consultant functioning as the point person.
> Function as liaison for the project and the wrap up program with respect to claims.
> Implement a disciplinary injury policy procedure.
> Conduct weekly safety toolbox talks with all crafts.
> Conduct task hazard analysis to create a safe work plan for new and additional

work activities.
Develop, implement and monitor a first aid/rescue/emergency evacuation plan.

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Insurance Requirements before commencing the Work ... [Pro Safety] shall procure and maintain, at its own expense, until final acceptance of the Work and throughout the term of the warranty of the Work, at least the following insurances in the amounts specified, from insurance companies acceptable to [Fuller]:

1. Workers Compensation
2. Commercial Liability & "XCU"
3. Automobile Liability
4. Excess Liability

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Wherever the term "Owner" appears in the ... insurance provisions of the Contract, it shall be deemed to include [Fuller] and [Main] ... [which] shall be named as Additional Insureds.

See Notice of Motion (motion sequence number 002), Exhibit L.

At his deposition on March 17, 2009, Gaspar stated that he did not receive any safety equipment from Pro Safety, and that he took direction in his work only from Roger & Sons. *See* Notice of Motion (motion sequence number 002), Exhibit H, at 17-18, 130-131. Gaspar also stated that the blade guard on the Fuller SkilSaw that caused his injuries was partially broken. *Id.* Gaspar's co-worker, Jose Pereira (Pereira), who observed Gaspar's accident, also indicated that he received directions only from Roger & Sons. *Id.*; Exhibit I, at 16, 59-60; Smitelli Affirmation in Opposition, Exhibit D. Pro Safety employee Robert Kressler (Kressler), who was the safety consultant working at the building, also states that he did not distribute safety equipment or supervise or control the work of any of the workers on the project, although he could stop their work "only ... if I noticed any work activity that posed a[n] imminent, serious threat to the safety

of a construction worker or any of the surrounding workers." *Id.*; Kressler Affidavit, ¶¶ 3, 5.

Gaspar initially commenced this action on October 23, 2007, and later filed an amended complaint on March 19, 2008 that sets forth one cause of action for negligence based on violations of Labor Law §§ 200, 240 (1) and 241 (6) (along with several provisions of the Industrial Code). Notice of Motion sequence 003; Exhibit A. Main and Fuller filed an amended answer in the primary action on February 10, 2008.[1] *Id.*; Exhibit B. Main and Fuller then also commenced the instant third-party action on May 13, 2008, by filing a complaint that sets forth causes of action for: 1) contractual indemnity; 2) breach of contract; and 3) common-law indemnity. *See* Notice of Motion (motion sequence number 002), Exhibit A. Roger & Sons filed an answer on July 15, 2008, and Pro Safety filed an answer on October 6, 2008. *Id.*; Exhibits C, B. On September 3, 2009, Main and Fuller executed a stipulation to discontinue the third-party action as against Roger & Sons. *Id.*; Exhibit G. Pro Safety now moves for summary judgment to dismiss the third-party complaint (motion sequence number 002), while Main and Fuller move separately to dismiss the complaint (motion sequence number 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action.

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[1] *See* fn 1.

See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy,* 35 NY2d 361 (1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). Here, the Pro Safety has met its burden of proof with respect to two of the three causes of action asserted against it; however, defendants Main and Fuller have failed to meet their burden of proof.

Pro Safety's Motion

In its motion, Pro Safety requests summary judgment dismissing the three causes of action raised in the third-party complaint. The first of these seeks to impose liability on Pro Safety to Main and Fuller on the theory of contractual indemnity for any injuries to Gaspar that Main and Fuller may be found liable for. *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 13-21. Pro Safety argues that this claim should be dismissed because the Pro Safety subcontracting agreement does not contain an indemnity obligation. *See* Third-Party Defendant's Memorandum of Law, at 2-3. Main and Fuller do not contest this argument in their opposition papers. It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, it is clear that the Pro Safety subcontracting agreement does *not* contain an indemnification clause.

Therefore, there is no basis for Main's and Fuller's contractual indemnity claim against Pro Safety, and Pro Safety's motion for summary judgment is granted with respect to the first third-party cause of action.

Main's and Fuller's second cause of action against Pro Safety seeks damages for breach of contract. *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 22-30. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Here, Main and Fuller have presented a copy of the Pro Safety subcontracting agreement, and allege that Pro Safety failed to procure the insurance that that contract specified. *See* Notice of Motion (motion sequence number 002), Exhibits A, ¶ 24; L. However, Pro Safety argues that this claim must fail, as a matter of law, because Main and Fuller have not established the damages element of their claim. *See* Third-Party Defendant's Memorandum of Law, at 8-9. Pro Safety specifically refers to the holding of the Appellate Division, First Department, in *Amato v Rock-McGraw, Inc.* (297 AD2d 217, 219 [1st Dept 2002]) that a general contractor is limited to seeking damages for out-of-pocket expenses (such as premiums, additional costs, deductibles, co-payments and increased future premiums) that it incurred as a result of a subcontractor's failure to procure insurance. Once again, Main and Fuller do not respond to Pro Safety's argument in their opposition papers. The court notes, however, that the *Amato* holding does not require that a general contractor's breach of contract claim be dismissed, but, rather, that it be limited in the amount and type of damages that may be recovered; the same result should occur here. Therefore, Pro Safety's motion is denied with respect to the second third-party cause of action.

Main's and Fuller's third cause of action against Pro Safety seeks to impose liability on the theory of common-law indemnity. *See* Notice of Motion (motion sequence number 002), Exhibit A, ¶¶ 31-34. Pro Safety argues that this claim must fail, as a matter of law, because its role was limited to observing and advising Main and Fuller about safety violations, and because it did not supervise, control or direct Gaspar's work. *See* Third-Party Defendant's Memorandum of Law, at 3-7. Main and Fuller respond that there are issues of fact regarding both the extent of Pro Safety's supervisory control over Gaspar, and Pro Safety's responsibility for site safety. *See* Plousadis Affirmation in Opposition, ¶¶ 11-18. Pro Safety denies these arguments. *See* Lyson Reply Affirmation, ¶¶ 3-23. After careful consideration, Pro Safety's arguments are more persuasive.

With respect to responsibility for workplace safety, the Appellate Division, First Department, has held that "[a] construction manager whose 'duties [are] limited to observing the work and reporting to the contractor safety violations by the employees' does not thereby become liable to the contractor's employee when the latter is injured by a dangerous condition arising from the contractor's negligent methods." *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468 (1st Dept 1998), quoting *Comes v New York State Elec. & Gas Co.*, 82 N.2d 876, 877 (1993). Here, Pro Safety refers to the Pro Safety subcontracting agreement and Kressler's testimony as evidence that Pro Safety's activity at the project was limited to observing and reporting on safety conditions and violations. *See* Notice of Motion, Kressler Affidavit; Exhibit L. Main and Fuller point to no contravening evidence, but respond that an issue of fact, nevertheless, exists because Kressler also acknowledged that "he had authority to stop work that he believed presented an imminent danger of injury to any worker." *See* Plousadis Affirmation in Opposition, ¶ 9.

However, the Appellate Division, First Department, specifically rejected this argument in *Buccini v 1568 Broadway Assoc.*, when it found that a "construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees." *Buccini*, 250 AD2d at 468, citing *Fox v Jenny Engineering Corp.*, 122 AD2d 532, 533 (4th Dept 1986), *affd* 70 NY2d 761 (1987). Therefore, the court also rejects Main's and Fullers' argument regarding Pro Safety's responsibility for workplace safety.

With respect to supervision and control, "'[i]t is well settled that an implicit precondition to th[e] duty [to maintain a safe construction site] is that the party to be charged with that obligation " 'have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition'." *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007), quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998), quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 (1981). The Appellate Division, First Department, has held that this rule will bar claims against a safety consultant where the safety consultant "was not the supplier of safety equipment to the job site, did not direct, supervise or control plaintiff or his coworkers in the performance of their duties, and there is no evidence that it acted negligently or otherwise unreasonably as the site safety consultant." *Doherty v City of New York*, 16 AD3d 124, 125 (1st Dept 2005). Here, Pro Safety argues that the testimony of Gaspar, Pereira and Kressler all confirms that Pro Safety did not supply any safety equipment or supervise or control the work of any of the workers on the project. *See* Notice of Motion (motion sequence number 002), Exhibit H, at 17-18, 130-131; Exhibit I, at 16, 59-60; Kressler Affidavit, ¶ 3. Although Main and Fuller argue that Kressler's statements disclose issues of fact regarding Pro Safety's authority to supervise and control the workers, they fail to specifically identify any

such issues. Instead, Main and Fuller cite the Appellate Division, First Department's, holdings in *Greaves v Obayashi Corp.* (61 AD3d 570 [1st Dept 2009]) and *Barraco v First Lenox Terrace Associates* (25 AD3d 427 [1st Dept 2006]), and this court's (Starkey, J.) holding in *Goodleaf v Tzivos Hashem, Inc.* (19 Misc 3d 1104[A], 2008 NY Slip Op 50555 [u] [Sup Ct, Kings County 2008], *affd* 68 AD3d 817 [2d Dept 2009]), for the proposition that an issue of fact exists regarding "supervision and control" where a safety consultant has the authority to stop an unsafe work practice. However, the Appellate Division, First Department, clearly rejected this contention in *Hughes v Tishman Const. Corp.* (40 AD3d at 309, *supra).* Therefore, the court likewise rejects Main's and Fuller's argument regarding Pro Safety's purported supervision and control of Gaspar's work, as no issues of fact have been established. Thus, Pro Safety's motion is granted with respect to the third third-party cause of action.

Main's and Fuller's Motion

As previously mentioned, Main's and Fuller's motion seeks summary judgment dismissing Gaspar's amended complaint, which sets forth a sole cause of action for negligence. Gaspar has identified three grounds for his claim, each of which the court will review in turn.

The first basis that Gaspar asserts for his negligence claim is Labor Law § 200, which, as the Court of Appeals explained in *Rizzuto v L.A. Wenger Contracting Co., Inc.* (91 NY2d 343, 352 [1998]):

> is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site. It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation "have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition [internal citations omitted]."

Here, Main and Fuller argue that the record is clear that neither of them ever exercised any

supervisory direction or control over plaintiff's work practices or methods, including his method of operating his employer's SkilSaw to cut pieces of plywood. Defendants' Memorandum of Law, at 2-8. Main and Fuller refer specifically to Gaspar's, Pereira's and Kressler's testimony that Gaspar took instructions about his work *only* from his supervisors at Roger & Sons. *See* Notice of Motion (motion sequence number 003), Exhibit F, at 17-20, 117-118; Exhibit I, at 15-17, 59-60; Exhibit H, at 30-32. Gaspar responds that his injury "was not merely caused by defendants' clear instructions to rush to finish the forming so that cement could be poured, but also due to defendants' failure to provide sufficient and proper equipment, namely the [saw]horses to perform said job and a properly guarded saw." Smitelli Affirmation in Opposition, at 14. Main and Fuller reply that there is no proof of these allegations in the evidence. *See* Plousadis Reply Affirmation, ¶¶ 3-6. They are partially correct. A review of the deposition testimony reveals both Gaspar's and Pereira's statements that they were *only* supervised by Roger & Sons, but it does not say anywhere that they had been told by representatives of Main and Fuller to hurry the forming job.[2] Notice of Motion (motion sequence number 003), Exhibit F, at 134-137; Exhibit I, at 25-26. Thus, it appears that Gaspar's opposition argument consists entirely of conclusory statements that are without foundation in the record. "'[A]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment' [citation omitted]." *Banco Popular North America v Victory Taxi Mgmt.*, 1 NY3d 381, 383 (2004). Therefore, the court rejects Gaspar's argument; Main and Fuller have presented sufficient evidence to establish that they neither controlled nor supervised Gaspar's

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[2] Gaspar's and Pereira's deposition testimony regarding the availability of sawhorses and the condition of the SkilSaw do not bear on Gaspar's Labor Law § 200 argument.

work. As a result, Labor Law § 200 affords no support for Gaspar's negligence cause of action.

The second basis that Gaspar asserts for his negligence claim is Labor Law § 240 (1). *See* Notice of Motion (motion sequence number 003), Exhibit A (complaint), ¶ 18. Main and Fuller argue that this statute is clearly inapplicable herein, because it deals with scaffolds and elevation-related injuries, and there is no evidence that Gaspar's injuries were elevation-related. *See* Defendants' Memorandum of Law, at 2-8. Gaspar does not contest this point in his opposition papers. After reviewing the record, the court agrees that there is no evidence that Gaspar was injured in a scaffolding accident or any other type of elevation-related activity. Therefore, Labor Law § 240 (1) affords no support for Gaspar's negligence cause of action.

The third basis that Gaspar asserts for his negligence claim is Labor Law § 241 (6) in conjunction with several sections of the Industrial Code, specifically, 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.8 (a), 23-1.8 (b), 23-1.8 (c) (1), (2), (3) and (4), 23-1.8 (d), 23-1.10, 23-1.10 (a), 23-1.10 (b) (1), (2) and (3), 23-1.12 (a), (b), (c), (d), (e), (f) and (g) and 23-1.25. *See* Notice of Motion (motion sequence number 003), Exhibits A (complaint), ¶ 18, K, L. Main and Fuller argue, for a variety of reasons, that none of these Code provisions are sufficient to support liability under Labor Law § 241 (6). *See* Defendants' Memorandum of Law, at 10-22. In his opposition papers, however, Gaspar identifies one of the foregoing Industrial Code sections - 12 NYCRR 23-1.12 (c) (1) - which he argues is sufficient to support a negligence claim pursuant to Labor Law § 241 (6); The court agrees. *See e.g. Haider v Davis*, 35 AD3d 363 (2d Dept 2006). Gaspar also argues that the deposition testimony discloses an issue of fact as to whether the SkilSaw that Fuller supplied him with violated that Code provision. *See* Smitelli Affirmation in Opposition, at 12. After careful consideration, the court further agrees.

12 NYCRR 23-1.12 (c) (1) provides as follows:

> (c) Power-driven saws.
> (1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.

Here, Gaspar presents his deposition testimony and Pereira's affidavit that the blade guard on the SkilSaw that Fuller provided him with was broken. *See* Notice of Motion (motion sequence number 003), Exhibit F, at 56-57, 67-70, 134-135; Smitelli Affirmation in Opposition, Exhibit D. Main and Fuller respond with the expert affidavit of engineer Richard Otterbein (Otterbein), who avers that the guard on the saw in question was not broken, and opines that there was no violation of 12 NYCRR 23-1.12 (c) (1). *See* Notice of Motion (motion sequence number 003), Otterbein Affidavit. This contradictory testimony discloses, at least, an issue of fact with respect to the condition of the SkilSaw. The court further notes that it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Indus.*, 295 AD2d 218 (1st Dept 2002). Therefore, the court rejects Main's and Fuller's argument, as there is a triable issue of fact as to whether Labor Law § 241 (6) and 12 NYCRR 23-1.12 (c) (1) afford a sufficient legal basis for Gaspar's negligence claim. Accordingly, the court finds that Main's and Fuller's motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Pro Safety Services, LLC is granted solely to the extent that the first and third causes of action in the third-

party complaint are dismissed, but is otherwise denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants LC Main, LLC and George A. Fuller Company, Inc. is denied; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that within 30 days of entry of this order, Pro Safety shall serve a copy upon all parties with notice of entry.

Dated: New York, New York
April 7, 2010

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\gasparvmain.lane.wpd