SCANNED ON 8/7/2012

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.
Justice

PART 57

Index Number : 105897/2009
DJALAZOV, JULIAN
vs.
PENTHOUSE ACQUISITIONS
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined as per accompanying decision/order dated 7/31/12.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):
for random reassignment to a new
7/31/12 Marcy Friedman
MARCY S. FRIEDMAN, J.S.C.

FILED
AUG 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/31/12

[signature]
J.S.C.
MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

---X

JULIAN DJALAZOV and LUCY DJALAZOV,

Plaintiffs,

-against-

PENTHOUSE ACQUISITION, LLC, R.D. RICE CONSTRUCTION, INC., and JED JOHNSON ASSOCIATES, INC.,

Defendants.

---X

Index No.: 105897/09
Motion Seq. Nos. 003 and 004

Decision and Order

FILED

AUG 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

MARCY S. FRIEDMAN, J.S.C.:

In this action involving a painter's fall from a scaffold, defendant Jed Johnson Associates, Inc. (Jed Johnson) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against it (Motion Seq. No. 003). Plaintiff Julian Djalazov moves for partial summary judgment as to liability against defendant R.D. Rice Construction, Inc. (R.D. Rice) on his Labor Law § 240 (1) claim (Motion Seq. No. 004). R.D. Rice cross-moves for summary judgment dismissing plaintiff's complaint, and for liability on its common-law indemnification claim against Jed Johnson.

BACKGROUND

On October 26, 2008, plaintiff, through his employment with nonparty Gotham Painting (Gotham), was working in the master bathroom of a penthouse apartment, owned by Penthouse Acquisition, LLC (Penthouse) and located at 80 Columbus Circle in Manhattan. October 26, 2008 was a Sunday, and only plaintiff and two other Gotham workers, including plaintiff's foreman, were present at the jobsite. (Plaintiff's Deposition, at 23-27.) Plaintiff testified that the scaffold moved while he was working, causing him to fall to the ground and to injure his right

heel. (Id., at 37, 75.)

Plaintiff's complaint alleges that defendants are liable under Labor Law §§ 240(1), 241(6), and 200, and for common-law negligence. Lucy Djalazov, plaintiff's wife, seeks damages for loss of her husband's services and consortium. Plaintiff has stipulated to discontinue his claims against Penthouse.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing." (Brandy B. v Eden Cent. School Dist., 15 NY3d 297, 302 [2010], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986].) However, if the moving party fails to make a prima facie showing, the court must deny the motion "regardless of the sufficiency of the opposing papers." (Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008] [internal citation omitted] [emphasis in original].)

Initially, the court will grant the branch of Jed Johnson's motion that seeks dismissal of the complaint as against it, as plaintiff, by not opposing, has shown "an intention to abandon" his claims against Jed Johnson. (Gary v Flair Beverage Corp., 60 AD3d 413, 413 [1st Dept 2009].) Moreover, plaintiff has not opposed the branches of R.D. Rice's motion that seek dismissal of plaintiff's claims under Labor Law §§ 241(6) and 200 and for common-law negligence. Accordingly, the court will also dismiss those causes of action.

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

"All contractors and owners and their agents ... 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, 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury. (Bland v Manocherian, 66 NY2d 452, 459 [1985].) A statutory violation is present where an owner or general contractor fails to provide a worker engaged in § 240 activity with "adequate protection against a risk arising from a physically significant elevation differential." (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009].) Where there is a violation, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment." (Matter of 51st Street Crane Collapse Litig., 89 AD3d 426, 428 [1st Dept 2011] [citation omitted].)

The first issue in contention between plaintiff and R.D. Rice is whether R.D. Rice was a general contractor on the project. The contract between Penthouse and R.D. Rice is titled "Standard Form Agreement Between Owner and Construction Manager where the Construction Manager is Also the Constructor." Moreover, plaintiff submits the deposition testimony of Kevin Adams (Adams), a supervisor for R.D. Rice on the project, who testified that R.D. Rice is a general contractor (Adams Deposition, at 19), and that it served as such on the subject project:

> "Q: So, R.D. Rice, it is your position, you were the general contractor for this project?
>
> A: Yes.
>
> Q: You had the authority to control and supervise all the construction work

except for those subcontractors not hired by R.D. Rice?

...

A: No. I mean, every person who was on the job I supervised. Like I stated earlier, if I walked into a room and I saw someone standing in a bucket of water with a light bulb, I would stop them.

Q: But that applied to all subcontractors, not just the ones hired by R.D. Rice; is that fair?

A: That's fair."

(Id. at 45-46.)

R.D. Rice argues that Penthouse separately hired Jed Johnson as the general contractor with respect to the painting work at the subject project. (See Aff. of A. Muraidekh [R.D. Rice's Attorney] In Support of Cross-Motion, ¶¶ 8, 22.) R.D. Rice relies on § 6.1.2 of the General Conditions of its contract with Penthouse, which states:

> "When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the 'Contractor' in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement."

Plaintiff submits a copy of an engagement letter signed by Jed Johnson and Penthouse for "interior design services." The engagement letter also states:

> "Any painting, carpentry, or other construction work contracted through or supervised by [Jed Johnson] will be billed at cost plus 20 percent. If an outside architect is retained who will be supervising construction, this 20% on construction does not apply. JJA will consult on an hourly basis for all construction related work. Painting will, however, incur a 20% fee to JJA."

(Jed Johnson/Penthouse April 2, 2007 Engagement Letter, ¶ I[E].)

R.D. Rice submits the deposition testimony of Janice Harding (Harding), who works as an estate manager for Hugo Enterprises LLC, which, like Penthouse, is owned and controlled by nonparty Joe Ricketts. At her deposition, Harding was handed a document that she identified as a "contract that I signed for Mr. Ricketts so that Jed Johnson could oversee Gotham Painting for

the total amount listed here and we did it in three installments." (Harding Deposition, at 195.) R.D. Rice focuses on the word "oversee" and contends in effect that it indicates that Jed Johnson's function was that of a general contractor with respect to the painting on the subject project. R.D. Rice also emphasizes that painting was taken out of R.D. Rice's budget. Harding testified in this regard:

> "Once Gotham Painting was brought on board, and I don't remember the exact details of when -- I assume it occurred at one of our construction meetings, but there came a point in time where, during one of those meetings I was present and R.D. Rice, Jed Johnson, and other people who were at the construction meeting, we came to the decision to remove the painting budget from R.D. Rice and give that control of painting over to Jed Johnson because we felt they had the expertise to oversee it. At that time we just thought that made more sense. R.D. Rice removed their budget line; I then went into a contract with Jed Johnson, that I signed on behalf of Mr. Ricketts, that had phases of installments for the overall painting. Pam Cozzi was at the meetings, and R.D. Rice said that they were still going to oversee all the scheduling of the painting because that was Pam's job, in order to keep the project running on time."

(Id. at 184-185.)

R.D. Rice also submits an e-mail thread, dated January 14, 2008 and January 15, 2008, between Harding and Jed Johnson's Arthur Dunnam, in which the two negotiate over the rate of "mark-up" Jed Johnson would get on the painting work done on the project. (R.D. Rice Cross-Motion, Ex. J.)

However, plaintiff and Jed Johnson both contend that Jed Johnson's oversight responsibilities were limited to those of an interior designer, e.g., matching paint colors with other furnishings. Heather Ann Moore (Moore), a senior designer with Jed Johnson, testified that Jed Johnson had no role with regard to safety and that R.D. Rice was responsible for safety on the job site. (Moore Deposition, at 59-60.) Harding, Penthouse's witness, testified that R.D.

Rice retained safety oversight for the entire project, painting included, and that Jed Johnson's oversight was limited to matters of interior decoration:

> "Q: ... was it your intention [in signing the Penthouse/Jed Johnson April 2, 2007 Engagement Letter] to change or abrogate any of the duties of R.D. Rice as it concerns the safety and supervision of the project?
>
> ...
>
> A: No.
>
> Q: Would it be fair to say, when you signed that contract, that was strictly for the interior design services to be provided to your client by Jed Johnson?
>
> ...
>
> Q: Yes.
>
> A: And it wasn't to change any of the site safety meetings or site safety responsibilities whatsoever by R.D. Rice; would that be fair to say?
>
> ...
>
> A: Correct
>
> ...
>
> Q: Just to elaborate further, going back to the [Penthouse/Jed Johnson correspondence], where it refers to supervising construction, was that only with respect to interior design functions of Jed Johnson?
>
> A: Yes. That was my understanding, yes.
>
> ...
>
> Q: And that had to do with whether the paint was matching or the fabric was the right fabric?
>
> A: Right.
>
> ...
>
> Q: As opposed to R.D. Rice's responsibilities, which were for construction related activities; is that correct?
>
> ...
>
> A: Yes.
>
> Q: And that would include the monitoring of the means and methods of the subcontractors, such as Gotham Painting?
>
> ...
>
> A: Yes.
>
> Q: And it would be fair to say that Jed Johnson did not have those responsibilities?
>
> ...
>
> A: Correct.
>
> Q: It would be fair to say that R.D. Rice was responsible for site safety over Gotham Painting on October 26th, 2008?
>
> ...
>
> A: Yes."

(Harding's Deposition, at 228-232.)

Based on the testimony of Penthouse's Harding, R.D. Rice's Adams, and Jed Johnson's Moore, as well as the plain language of the Penthouse/Jed Johnson Engagement Letter, the court holds that Jed Johnson never displaced R.D. Rice as the general contractor for any part of the subject project under § 6.1.2 of the Penthouse/R.D. Rice agreement. Jed Johnson provided only interior design services, and it supervised the painting work only with respect to interior design matters. In contrast, the record establishes that R.D. Rice typically coordinated that painting work, and it retained the ability to correct unsafe practices by the painters.

"While Labor Law § 240 (1) . . . claims have been dismissed on the ground that a plaintiff's work at the time of the accident was outside the scope of the general contractor's contract, this defense inures only to the benefit of parties who lacked the authority to supervise or control the work." (Butt v Bovis Lend Lease LMB, Inc., 47 AD3d 338, 340-341 [1st Dept 2007] [internal quotation marks and citations omitted]; see also Moracho v Open Door Family Med. Ctr., Inc., 74 AD3d 657 [1st Dept 2010].)

Here, as discussed above, the record clearly demonstrates that R.D. Rice had the authority to supervise plaintiff's work. Whether R.D. exercised this authority is not relevant to this inquiry. (Id.) Thus, the fact that plaintiff was working on a Sunday, and R.D. Rice was not present on the jobsite, is irrelevant.

The cases on which R.D. Rice relies to support its claim that it was not a general contractor for purposes of the painting work are not persuasive, as the defendants in these cases lacked the authority to control the work giving rise to the plaintiff's injury. (See e.g. Wong v New York Times Co., 297 AD2d 544, 549 [1st Dept 2002]; Aviles v City of New York, 277

AD2d 19, 19 [1st Dept 2000]; Balthazar v Full Circle Constr. Corp., 268 AD2d 96, 98 [1st Dept 2000]; Phillips v Wilmorite, Inc., 281 AD2d 945, 946 [4th Dept 2001].)

The court further holds that plaintiff makes a prima showing of entitlement to judgment against R.D. Rice under Labor Law § 240(1), based on his deposition testimony that he was thrown off a scaffold when it moved while he was sanding a ceiling in preparation for painting it. (Plaintiff's Deposition, at 38, 41-42.) Plaintiff was engaged in the protected activity of painting. As the scaffold moved, it did not provide adequate protection against the risk of falling that arose from the physically significant height at which plaintiff was performing his work. The scaffold's failure was thus a proximate cause of plaintiff's accident. (See Zengotita v JFK Intl. Air Term., LLC, 67 AD3d 426, 427 [1st Dept 2009] [holding that plaintiff was entitled to summary judgment as to liability under Labor Law § 240 (1) where he slipped off a scaffold because the scaffold moved and defendants did not provide plaintiff with any additional safety devices to prevent his fall].)

In opposition, R.D. Rice argues that there is a question of fact as to whether plaintiff was the sole proximate cause of his accident because he failed to lock the scaffold's wheels. R.D. Rice's reliance on Blake v Neighborhood Hous. Servs. of N.Y. City (1 NY3d 280 [2003]) is misplaced. There, the plaintiff testified that he was uncertain as to whether he had locked the extension clips of a ladder, and it was clearly his responsibility to lock the clips, as he owned the ladder and was working by himself on behalf of his own contracting company. (Id. at 283-284.) Here, plaintiff's uncontroverted testimony is that "the foreman is supposed to lock the wheels" of the scaffold before plaintiff gets on it. (Plaintiff's Deposition, at 37.) Plaintiff also testified that he did not check whether the wheel locks were engaged, as he assumed that the scaffold was in a

safe condition:

"Q: If it was already in that spot and you were going to work there, you would just climb on the ladder, on to the scaffold and start your work?
A: Yes, I thought it's safe. It's okay.
Q: If a scaffold is already in that spot and it had not been moved and you decided to work on that area and climb up it, would you have checked the wheel locks before climbing up to ensure that it was safe?
A: No.
Q: On this particular occasion, did you check the wheel locks to make sure they were locked before you climbed up?
A: No."

(Plaintiff's Deposition, at 63.)

Even if plaintiff's failure to check the wheel locks were negligent, plaintiff has established a statutory violation by showing that the scaffold he was directed to work on malfunctioned or was improperly set up by his foreman. Thus, any negligence on plaintiff's part was not the sole proximate cause his accident. As Blake held, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." (Id. at 290.)

Apparently relying on the fact that the accident was unwitnessed, defendant also argues that there is a question of fact as to whether plaintiff fell off of the scaffold. However, where there is no "substantial challenge" to a plaintiff's credibility, "[t]hat the accident may not have been witnessed by others does not bar summary judgment in plaintiff's favor." (Mannino v J.A. Jones Constr. Group, LLC, 16 AD3d 235, 236 [1st Dept 2005], citing Klein v City of New York (89 NY2d 833, 834 [1996].) Contrary to defendant's contention, plaintiff had no obligation to come forward with affidavits from the two co-workers who were present on the day of the accident. Nor did plaintiff's failure to do so raise a question as to the credibility of plaintiff's testimony about how the accident happened.

R.D. Rice also fails to raise a question as to plaintiff's credibility based on a Worker's Compensation Board form entitled "Employer's Report of Injured Employee's Change in Employment Status Resulting From Injury, dated January 15, 2009 and prepared by a Gotham employee. In the section of the form for "Nature of Injury," a note states: "Claims he fractured heel falling off a ladder." (R.D. Rice Cross-Motion, Ex. K.) There is no indication in the form that plaintiff was the author of this statement. The report is hearsay and cannot serve, in the absence of any admissible evidence, to defeat summary judgment. (See San Andres v 1254 Sherman Ave. Corp., 94 AD3d 590, 591 [1st Dept 2012]; compare Ellerbe v Port Auth. of N.Y. & N.J., 91 AD3d 441, 442 [1st Dept 2012] [finding issue regarding plaintiff's credibility as to cause of accident where site safety manager testified to different version of accident and made incident report containing admission attributed to plaintiff that contradicted plaintiff's deposition testimony].) It is noted, moreover, that the report is contradicted by an earlier Worker's Compensation Board form, dated October 27, 2008 and prepared by Gotham's President, which states in the section for "Cause of Accident": "fell off scaffold while working above his head."

The court has considered R.D. Rice's remaining contentions and finds them without merit. Plaintiff's motion for partial summary judgment as to R.D. Rice's liability under Labor Law § 240 (1) will therefore be granted.

II. Common-Law Indemnification

The equitable doctrine of common-law indemnification requires a party that is "actively at fault in bringing about the injury" to indemnify another party that "is held responsible solely by operation of law because of [its] relation to the actual wrongdoer." (McCarthy v Turner Constr., Inc., 17 NY3d 369, 374, 375 [2011] [internal quotation marks and citation omitted]).

Here, R.D. Rice submits no evidence that Jed Johnson was actively at fault. In fact, the record indicates that Jed Johnson was not present at the time of plaintiff's accident and that it had no responsibility for safety on the jobsite. R.D. Rice's cross claim for common-law indemnification should therefore be dismissed.

ORDER

It is hereby ORDERED that defendant Jed Johnson Associates, Inc.'s motion for summary judgment dismissing all claims and cross claims as against it is granted, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against R.D. Rice Construction, Inc., the remaining defendant; and it is further

ORDERED that plaintiffs' motion for partial summary judgment as to liability on their Labor Law § 240 (1) claim against defendant R.D. Rice Construction, Inc. is granted; and it is further

ORDERED that defendant R.D. Rice Construction, Inc.'s cross motion is granted only to the extent that plaintiff's claims under Labor Law §§ 200 and 241(6) and for common-law negligence are dismissed; and it is further

ORDERED that the Clerk of the Trial Support Office shall place this matter upon the trial calendar, upon payment of the appropriate fees, if any, for an assessment as to damages.

FILED
AUG 07 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
July 31, 2012

MARCY FRIEDMAN, J.S.C.