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

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PETER KEENAN and JOAN KEENAN, Index No: 114134/08

Plaintiffs,

-against-

SIMON PROPERTY GROUP, INC. THE ART OF SHAVING, INC., THE ART OF SHAVING-NY, LLC, ALERT GLASS & ARCHITECTURAL METALS CORP., THE RETAIL PROPERTY TRUST and SIMON DeBARTOLO GROUP, INC.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,
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INTRODUCTION

This memorandum of law is respectfully submitted in support of defendants Simon Property Group, Inc., The Art of Shaving, Inc., The Art of Shaving-NY, LLC, The Retail Property Trust and Simon DeBartolo Group, Inc. [hereinafter collectively "Retail Defendants"] motion for an order:

(a) Granting summary judgment against plaintiff pursuant to CPLR 3212 on all causes of action for the Retail Defendants on the ground that Plaintiff was the sole proximate cause of his accident and injury; or, alternatively,

(b) Granting summary judgment against plaintiff to defendants Simon Property Group, Inc., Simon DeBartolo Group, Inc. and The Art of Shaving Group, Inc. because they are neither the owner nor the lessor of the property at issue at the time of the occurrence and thus have no actual or vicarious liability; and,

(c) Granting ssummary judgment against the subcontractor/co-defendant Alert Glass and Architectural Metals Corp. for the Retail Defendants on the ground of common law indemnity because Alert is the active tortfeasor whereas the Retail Defendants are only allegedly vicariously liable by statute; and,

(d) Granting such other and further relief as the court deems just and proper.

FACTS

In sum and substance, plaintiffs claim injury as a result of Peter Keenan's alleged fall from an A-frame step ladder while installing store front glass at a newly leased Art of Shaving Store at Roosevelt Field Mall in Nassau County on or about December 5, 2005 while working for sub-subcontractor non-party Proper Construction, Inc.

Mr. Keenan was a union glazer on December 5, 2005 who was sent to Roosevelt

Field Mall to install glass for Proper Construction, Inc. (Proper) (Ex. "I" at 15-17). Proper was a sub-subcontractor hired by co-defendant/sub-contractor Alert Glass & Architectural Metals Corp. (Alert) during that year for all union job sites including the work at the Art of Shaving store at Roosevelt Field (Ex. "J" at 13-17; Ex. "L"). Alert, in turn, was subcontracted by non-party general contractor M.D. Collins, Inc. to "furnish labor and all necessary equipment and appliance to complete project"… "all safety equipment" for installation of the storefront glass (Ex. "N").

One of the Retail Defendants, The Retail Property Trust owns the mall (Ex. "M"). Another, The Art of Shaving – NY, LLC leased the store at the mall from the Trust (Ex. "L"). The other Retail Defendants, Simon Property Group, Inc., Simon DeBartolo Group, Inc. and The Art of Shaving Group, Inc. are neither the owner nor the lessor of the premises at issue, and therefore respectfully submit that they should not be in this lawsuit because there is no cognizable legal claim against them of either actual or vicarious liability. It is undisputed that the lessor hired non-party general contractor M.D. Collins, Inc. to build out the store (Ex. "M") and that M.D. Collins subcontracted the storefront to Alert (Ex. "N"). It is further not disputed that the only potential liability of any of the Retail Defendants is vicarious pursuant to the Labor Laws and not actual liability.

On December 5, 2005, plaintiff's job was to permanently secure the glass front by installing vinyl into the frame around the temporarily installed glass with a pry bar and a mallet (Ex. "I" at 24-25). The vinyl comes in twenty pound rolls that had to be cut as plaintiff stood on a ladder and then installed into the frame (Ex. "I" at 25). At the time of the accident, Mr. Keenan had placed his arm through the roll so that it rested on his shoulder and weighed about ten pounds (Ex. "I" at 26-27). He did not have any helper

although there were others working at the store including his supervisor, Brian Walsh from Proper (Ex. "I" at 27-28), but nobody was watching him at the time of the accident (Ex. "I" at 28). Mr. Walsh testified that he was elsewhere making a telephone call (Ex. "J" at 48-50) and Mr. Keenan agreed that Mr. Walsh was elsewhere (Ex. "I" at 28).

Mr. Keenan testified, "There was all sorts of A-frame ladders" on the job as well as straight ladders but he does not know who supplied them (Ex. "I" at 17-18). He was not aware of any other safety equipment that he could have been using except for perhaps a hard hat (Ex. "I" at 29-30). There is no allegation that the lack of a hard hat is the proximate cause of his fall (Ex. "D").

On the day of the accident, there were two heavy duty fiberglass A-frame ladders on an Alert truck parked at the Roosevelt Field loading dock, as well as a fiber glass extension ladder for use by Mr. Keenan and Mr. Walsh (Ex. "J" at 35-37). Mr. Walsh testified that he always brought the ten foot fiberglass A-Frame ladder with him from the truck to the job site although he does not specifically recall what ladders were brought from the truck to the job site that day (Ex. "J" at 53-56). It was standard operating procedure for Proper employees to use these ladders although Mr. Walsh would not necessarily stop one of his crew from using someone else's ladder at the job site (Ex. "J" at 77-79).

The ladders on the truck belonged to Alert (Ex. "K" at 52) as well as the truck itself and all other equipment on the truck (Ex. "K" at 34). Alert's owner inspected the site before the job started and after the job was completed (Ex. "K" at 35-42). Alert was obligated by its contract with M.D. Collins to provide all labor, materials, appliances and safety equipment to do the job of installing the store front glass (Ex. "N").

Mr. Keenan chose to use an aluminum ladder he saw leaning against a pole (Ex. "I" at 31). He testified that Mr. Walsh did not instruct him which ladder to use (Ex. "I" at 31). When plaintiff set up the ladder for himself, Mr. Walsh was not present (Ex. "I" at 31). Mr. Keenan had no idea who owned the ladder but he thought it was a painter's ladder (Ex. "I" at 18).

There was a wooden partition set up in the mall to block the public from the store that was being constructed (Ex. "I" at 19) (Ex. "J" at 22-23) (Ex. "K" at 39-41). At the time of the accident, Mr. Keenan was working between the barrier and the store front (Ex. "I" at 19). Mr. Keenan estimated the space was approximately four feet wide by ten feet long (Ex. "I" at 19). Alert estimated that the space was approximately two to three feet wide (Ex. "K" at 41).

Mr. Keenan admitted under oath that he never opened the A-frame ladder from the time he started working at 7 A.M. until he fell in the afternoon (Ex. "I" at 114-15). He merely leaned the unopened aluminum ladder against the glass, and climbed up the ladder with his twenty pound roll of vinyl, his snips and his pry bar (Ex. "I" at 114-116, 32-33). He further admitted that the ladder was wobbly and not secure (Ex. "I" at 115-16). He was aware from his experience that an A-frame ladder that is not opened is not as secure as an A-frame ladder that is opened (Ex. "I" at 129) and he conceded that the four feet of the ladder were not flat on the ground when he was working on the ladder because two feet were up in the air (Ex. "I" at 148). He used his tool bag to keep the unopened ladder with two feet up in the air from slipping on the marble floor of the mall as he was working on the ladder (Ex. "I" at 149-50).

Mr. Keenan said that he did not open up the ladder so that its side was to the glass

between the wood barrier and the store front because there was debris on the floor that he did not move because he did not want to take the time to do so and he never said anything to his supervisor about moving the debris so he could open the A-frame ladder (Ex. "I" at 143-45).

Mr. Keenan's supervisor did not see Mr. Keenan using an A-frame ladder unopened and he would have stopped him if he saw it (Ex. "J" at 78-79). The supervisor did not recall if there was enough room to open an A-frame ladder that day, but if that was the case he would have used a Baker, which is a type of scaffolding, instead (Ex. "J" at 80-81). There was a Baker on the truck along with the A-frame ladders (Ex. "J" at 83).

Mr. Keenan fell backward descending the leaning A-Frame ladder at a height of approximately six feet, with a ten pound roll of vinyl around his shoulder, his snips in his pocket and his pry bar in hand and recalls little else about the accident (Ex. "I" at 26-27; 32-36). There were no witnesses to the actual fall. He was taken to Winthrop hospital where, according to emergency room records, he admitted Vicodin use, was treated for complaints of knee pain and released (Ex. "O"). Currently he claims rotator cuff injury and he has a pre-existing herniated disc and subsequent unrelated foot injuries (Ex. "D"). At Winthrop, Mr. Keenan tested positive for Cannabinoid and Carboxy THC (Ex. "P"). Mr. Keenan admits he smokes marijuana but denied using it in the hours or days immediately prior to the accident (Ex. "I" at 84-92).

A workers' compensation investigator prepared a written statement from Mr. Kennan three months after the accident in which statement plaintiff admits that he was prescribed Vicodin prior to the accident for his pre-existing herniated disc and that he takes Vicodin every day (Ex. "Q"). Mr. Keenan refused to sign the statement (Ex. "Q").

He testified that he did not recall the workers' compensation statement but he admitted that he was prescribed Vicodin prior to the accident for his herniated disc to take as needed, but he denied taking Vicodin on the day of the accident (Ex. "I" at 11-14).

Dr. Steven Cagen performed an independent medical exam on Mr. Keenan for Workers' Compensation on April 26, 2006 (Ex. "R") and Dr. Cagen reports that Mr. Keenan admitted that he takes Vicodin every day (Ex. "R" at 3). Dr. Cagen noted the positive tests at Winthrop for Cannabinoid and Carboxy THC indicating marijuana use and Mr. Keenan's admission that he used the drug. Dr. Cagen opines that by Mr. Keenan's medical history, Mr. Keenan was using marijuana in the days prior to the accident on December 5, 2005 (Ex. "R" at 2). The doctor concludes that "concurrent Vicodin and marijuana use impaired his coordinative skills contributing to the work accident of December 5, 2005" (Ex. "R" at 4).

ARGUMENT

I. Plaintiff Was The Sole Proximate Cause Of His Accident

According to the Court of Appeals, the basis for liability under the scaffold laws (Labor Law 240 *et seq*.) does not attach if the plaintiff is the sole proximate cause of his injury and this is the case where adequate safety equipment is available at the job site but the plaintiff chooses not to use them or misuses them. *Robinson v. East Medical Cen., LP*, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006) (employee who chose to use 6 foot ladder instead of 8 foot ladder when there were 8 foot ladders at the site is the sole cause of his accident). *Accord Miro v. Plaza Construction Corp.*, 38 A.D.3d 454, 834 N.Y.S.2d 36 (1st Dep't 2007) (Plaintiff's decision to use ladder he knew was covered with fire proofing material and not request another ladder is the sole proximate cause of his

accident); *Meade v. Rock-McGraw, Inc*., 307 A.D.2d 156, 760 N.Y.S.2d 39 (1st Dep't 2003) (Plaintiff's use of A-frame ladder by leaning it instead of opening it up is an improper use of a safety device and the sole cause of his accident).

In this case, plaintiff testified that there was adequate safety equipment at the site and that specifically, "there was all sorts of A-frame ladders" on the job as well as straight ladders. Regardless, he chose what he admits he knew was an aluminum A-frame painter's ladder and proceeded to climb it without opening it up, propping it up with his tool bag on a marble floor and with two of its footings in the air. Plaintiff further admits that he could have opened the A-frame ladder if he had taken the time to move some debris out of his way, but he did not want to take the time.

In addition to plaintiff's admission that there other ladders at the site, it is uncontested that there were heavy duty fiberglass A-frame ladders on the truck parked downstairs at the loading dock according to two witnesses and testimony that at least one of these fiberglass ladders was brought to the location from the truck. Additionally, there is uncontested testimony that Baker scaffolding was available on the truck. Plaintiff's supervisor testified that using the A-frame ladder without opening it as plaintiff admits, is improper and the supervisor would have used the Baker if the A-frame could not be opened due to site conditions as plaintiff asserts.

The case bears a striking similarity to *Meade* in which the plaintiff used a closed A-frame ladder in a closet because he thought there was not enough room to open it without having its feet outside the closet which would cause the door header to block him. 307 A.D.2d at 157, 760 N.Y.S.2d at 41. The supervisor did not see plaintiff use the ladder in that fashion and testified that such a use is improper and had he see it he would

have stopped plaintiff. *Id.* There was also testimony that there were other ladders at the site but plaintiff never asked for another one or went looking for another one. 307 A.D.2d at 159-60, 760 N.Y.S.2d at 42. The First Department held that plaintiff was the sole proximate cause of his own accident because the basis for liability under the Labor Laws is the lack of adequate safety devices but here the ladder was an adequate safety device used improperly by the plaintiff.

Similarly in *Mirro*, plaintiff testified that he recognized that the ladder he used was covered with fire proofing material but inexplicably chose to use it anyway even though other ladders were available to him. 38 A.D.3d at 455-56, 834 N.Y.S.2d at 37-38. Accordingly, it was not the defective ladder that caused his accident but plaintiff's decision to use what he knew was a defective ladder making him the sole proximate cause of his accident. *Id.*

Mr. Keenan does not assert that he was deprived of any safety equipment and indeed testified to the contrary. Further, there is no evidence that any supervisor stopped him from using the A-frame ladder correctly and plaintiff's own testimony was that he chose to use the ladder in an improper way intentionally, propping it up with his tool bag to save time and avoid clearing the area of debris.

There is also evidence from the plaintiff's hospital tests after the accident and in an independent medical examination by a workers' compensation doctor that drugs in Mr. Keenan's blood stream caused by marijuana use result in physical and mental impairment. Additionally, the evidence in the form of plaintiff's various (albeit inconsistent in a self-serving way) admissions that he took Vicodin, is also relevant to his fall because as the Doctor stated, Vicodin use causes physical and mental impairment.

Indeed, the evidence from the workers' compensation medical doctor's opinion is that Vicodin and marijuana use contributed to the accident. The drug use which impaired plaintiff's judgment is particularly significant when considered in light of the foregoing evidence that plaintiff chose to use a safety device, an A-frame ladder, in an improper way.

There is no evidence that adequate safety devices were not provided to plaintiff for the job that he was doing on December 5, 2006. Plaintiff would not have fallen if he had used the ladder correctly. Thus, all the uncontested evidence is that plaintiff was the sole proximate cause of his fall on December 5, 2005 and accordingly, there is no liability under labor or common law to the Retail Defendants.

II. Three Of The Five Retail Defendants Have No Legal Connection To The Job Site

It is undisputed that defendants Simon Property Group, Inc., Simon DeBartolo Group, Inc. and The Art of Shaving Group, Inc. are neither the owner nor the lessor of the property at issue at the time of the occurrence. Accordingly, there is neither a statutory nor common law basis to keep them in this law suit. Accordingly, they respectfully request that the Court order their dismissal from this suit.

III. The Retail Defendants Are Entitled To Common Law Indemnity From Alert

Commercial property owners and lessors who have only alleged vicarious liability under the labor law statutes to an allegedly injured worker may shift their burden to the sub-contractor actually responsible for the accident. *Cunha v. City of New York*, 12 N.Y.3d 504, 882 N.Y.S.2d 674 (2009); *Picchione v. Sweet Construction Corp*., 60 A.D.3d 510, 875 N.Y.S.2d 42 (1st Dep't 2009). This is true "***regardless*** of whether any actual negligence by the latter has been proven, since it is undisputed that the former did

not exercise any actual control or supervision over the work" and the subcontractor was hired to exercise such supervision or control. *Ortega v. Catamount Constr. Corp*., 264 A.D.2d 323, 324, 694 N.Y.S.2d 367, 369 (1st Dep't 1999) (*emphasis added*).

It is undisputed that none of the Retail Defendants exercised any control or supervision over the construction of the store and Alert was contracted to do that job (Ex. "N"). It is not a defense to common law indemnity as between the Retail Defendants and Alert that Alert in-turn sub-subcontracted the work to Proper because as to the Retail Defendants, Alert was still responsible. *See Ortega*, 264 A.D.2d at 324, 694 N.Y.S.2d at 369. The Retail Defendants do not have to prove active negligence by Alert and need only show that Alert was contracted to do the job at issue. 264 A.D.2d at 324, 694 N.Y.S.2d at 369. In *Ortega*, the First Department held that the vicarious liable owner was entitled to common law indemnity from the construction manager even though there was no evidence that the latter supervised the work or was aware of the lack of appropriate scaffolding. *Id.* Here, there is evidence that Alert undertook some supervisory role as it inspected the site before and after the job and supplied all the equipment including safety devices such as ladders and Bakers. Accordingly, the Retail Defendants respectfully request that the Court grant them summary judgment on their common-law indemnity cross-claims against Alert.

CONCLUSION

Wherefore, the Retail Defendants respectfully request that the court issue an order as follows:

(a) Granting summary judgment against plaintiff pursuant to CPLR 3212 on all causes of action for the Retail Defendants on the ground that Plaintiff was the sole proximate cause of his accident and injury; or alternatively,

(b) Granting summary judgment against plaintiff to defendants Simon Property Group, Inc., Simon DeBartolo Group, Inc. and The Art of Shaving Group, Inc. because they are neither the owner nor the lessor of the property at issue at the time of the occurrence and thus have no actual or vicarious liability; and,

(c) Granting Summary judgment against the subcontractor/co-defendant Alert Glass and Architectural Metals Corp. for the Retail Defendants on the ground of common law indemnity because Alert is the active tortfeasor whereas the retail defendants are only allegedly vicariously liable by statute; and,

(d) Granting such other and further relief as the court deems just and proper.

Dated: Islip, N.Y.
November 18, 2011

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