IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

DONALD NEW	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION FILE**
v.	)	**NO. 04-A-10731-2**
	)	
NDG FRAMING, INC.,	)	
	)	
Defendant.	)	

DEFENDANT NDG FRAMING INC.'S
BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant NDG Framing, Inc. (hereinafter "NDG Framing" or "Defendant"), by and through its undersigned counsel, and hereby files its Brief In Support of its Motion for Summary Judgment, pursuant to § 9-11-56 of the Georgia Civil Practice Act, against Plaintiff Donald New (hereinafter the "Plaintiff"). As set forth in greater detail below, there is no genuine issue as to any material fact and this Court should grant Defendant's Motion For Summary Judgment.

I. INTRODUCTION

This dispute arises out of the events of December 19, 2002 on an apartment construction site, wherein the Plaintiff, a construction worker, climbed a ladder up to a second floor balcony. Upon reaching and placing one foot onto the balcony, the Plaintiff hit his head on a brace and fell ten (10) to twelve (12) feet to the ground, injuring himself. On December 14, 2004, the Plaintiff filed this action against NDG Framing. In his Complaint, the Plaintiff alleges that: (1) the ladder he used to access the balcony lacked railings and was not in compliance with the regulations of the Occupational Safety Hazard Administration; (2) Defendant NDG Framing had fabricated that ladder and placed it at the balcony for the Plaintiff and others to use for access;

and (3) Defendant NDG Framing was negligent. The Plaintiff claims that he sustained injury due to the negligence of NDG Framing and prays for a damages judgment. In its Answer, NDG Framing, raised, inter alia, the affirmative defenses of assumption of the risk and contributory negligence. Defendant now moves for summary judgment on the Plaintiff's claims.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. PRS Construction, LLC (hereinafter "PRS") was the general contractor for the construction of the Cobblestone Landing apartment complex in Acworth, Georgia (the "Construction Site"). Plaintiff's Complaint for Damages at 3; See page 38 of the Transcript of Donald New (hereinafter "Depo. at ____."). Donald New's deposition is filed with the Court.

2. PRS subcontracted with US Sprinkler and NDG Framing to complete specific tasks on the Construction Site.

3. The Plaintiff was employed by US Sprinkler as a foreman and was responsible for the installation of fire sprinklers. Depo. at 11.

4. On Thursday, December 19, 2002, the Plaintiff was working at the Construction Site. Depo. at 15. The Plaintiff climbed a ladder (the "Ladder") that was placed against a second floor balcony (the "Balcony") of one of the buildings in order to take measurements as well as make markings for drilling holes. Depo at 18, 31-32. The Plaintiff carried a battery powered drill in his hand while he climbed the Ladder. Depo. at 32. When the Plaintiff stepped off the Ladder and onto the Balcony, he hit his head on "a noncompliance brace" (the "Brace"). Depo. at 18, 25.

5. After hitting his head on the Brace, the Plaintiff fell ten (10) to twelve (12) feet from the Balcony to the ground and was injured (hereinafter the "Incident"). Depo. at 18.

6. The Plaintiff suffered a broken left ankle as well as a dislocated and fractured right hip. Depo. at 18.

7. At the time of the Incident, the Plaintiff had worked for US Sprinkler for more than six (6) years and had more than twenty (20) years of experience with installing fire sprinklers. Depo. at 11-12, 14, 39.

8. On the Tuesday before the Incident, the Plaintiff was required to attend a safety meeting. Depo. at 74. At this safety meeting, the Plaintiff was instructed to be sure that the ladders and railings were in compliance with the regulations of the Occupational Safety Hazard Administration ("OSHA"). Depo. at 74.

9. The Plaintiff had read an OSHA manual before the Incident. Depo. at 75.

10. The Plaintiff was aware of OSHA regulations before the Incident. He testified as follows:

> Q: You seem to know a lot about OSHA requirements for barricades and ladders and so forth. Did you know all these requirements before you fell? Or did you learn about them after you fell?
> A: Before.
> Q: Well, if you knew about them before, you could look at them and see that these things didn't comply with OSHA, didn't you?
> A: Correct.
> Q. But you chose to use the ladder in any event?
> A. Due to a time line. I was on a time frame and I had to be in the building.
> Q. Well, I understand. But you understood that the ladder didn't comply with OSHA; is that correct?
> A. Correct.
> Q. But you climbed up it anyway?
> A. Correct.
>
> Depo. at p. 37 line 13 to p. 38 line 4.

11. At the time of the Incident, the Plaintiff understood that OSHA regulations require that ladders have hand rails and properly spaced rungs. Depo. at 22.

12. The Plaintiff referred to the ladder as a "Mexican" ladder that was built from dimensional lumber on the Construction Site. Depo. at 30. The Plaintiff contends that the Ladder did not have properly spaced rungs nor attached hand railings, was ten (10) feet tall and was constructed of two-by-four lumber. Depo at 23-24, 36.

13. The Plaintiff testified that if the Ladder had railings, the Plaintiff would have been able to grab the railing and prevent the Incident from occurring. Depo at 34.

14. The Plaintiff had safely climbed the Ladder to the Balcony on the day before the Incident. Depo. at 73.

15. The Plaintiff knew that the ladder did not comply with OSHA regulations, yet he climbed the Ladder anyway. Depo. at 18, 38, 75.

16. The Brace, the only brace on the Balcony, was five feet above the Balcony floor. Depo at 25.

17. The Plaintiff testified that OSHA regulations require two braces: one lower brace approximately eighteen (18) inches above the floor and another other above it. Depo. at 29-30.

18. Before the Incident, the Plaintiff had encountered the Brace and knew that it was not in compliance with OSHA regulations. Depo. at 18, 31, 38, 75. Specifically, he testified as follows:

> Q: At any time before you went up the ladder and fell, had you been up that ladder before?
> A: Been up it once previously the day before.
> Q: Were the conditions the same the day before?
> A: The exact same.
> Q: So you had seen the barrier rail that you hit your head on the day before?
> A: Yes.
> Q: But you didn't hit your head on it the day before, did you?
> A: No.

Q: And you didn't have any problems the first time you went up there?
A: No.

Depo at p. 73 lines 10-25.

19. The Plaintiff testified that he climbed up the alleged noncompliance ladder and encountered the alleged noncompliance brace on the day of the Incident because he was under pressure from PRS to complete the work. Depo at 37-38, 75.

20. The Plaintiff is not certain that NDG Framing constructed the Ladder or placed the Ladder at the Balcony but is suing NDG Framing because PRS had informed him that NDG Framing was responsible for creating ways for workers on the Construction Site to gain access to the buildings under construction. Depo. at 39.

21. NDG Framing fabricated ladders for use on the Construction Site and nailed and affixed the ladders in the breezeway of the apartment buildings. See Affidavit of Noradino Rivera at ¶ 6 (hereinafter "Rivera Aff. at ¶ ___").

22. NDG Framing placed two (2) ladders in each breezeway in order to allow access to all eight (8) units of each apartment building and reduce the number of ladders that NDG Framing needed to fabricate. Rivera Aff. at ¶ 9.

23. NDG Framing never placed the ladders that it fabricated on the Construction Site at individual apartment units or balconies. Rivera Aff. at ¶ 6, 10, 12.

24. NDG Framing fabricates ladders such that each ladder has railing on either side. Rivera Aff. at ¶ 8.

25. The permanent stairs made of steel were constructed by another sub-contractor on the Construction Site and that other sub-contractor, not NDG Framing, removed the ladders from the breezeway and disposed of them. Rivera Aff. at ¶ 7.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

Pursuant to O.C.G.A. § 9-11-56, in order to prevail at summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c). "A [defendant] who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474 (1991).

Georgia courts have long held that summary judgment is designed to provide an inexpensive method of disposing of any cause of action and eliminating the necessity for trial when the pleadings and evidence of record clearly show that there is no issue of material fact although the allegations of the pleadings standing alone may raise such an issue. Tony v. Pollard, 248 Ga. 86, 281 S.E.2d 557 (1981); Maxey-Bosshardt Lumber Co., Inc. v. Maxwell, 127 Ga. App. 429, 193 S.E.2d 885 (1972). The evidence of record in the present case clearly shows that there is no genuine issue as to any material fact and that, consequently, NDG Framing is entitled to judgment as a matter of law.

B. The Plaintiff's Claims Are Barred By The Defense Of Assumption Of The Risk.

Assumption of the risk is a defense to a claim of negligence and a negligent plaintiff's recovery is barred if he or she assumed the risk of injury. See, e.g., Goodman v. City of Smyrna,

230 Ga. App. 630, 631, 497 S.E.2d 372, 374 (1998). Although assumption of risk is generally a jury issue, the issue may be decided by a judge as a matter of law in plain and palpable cases such as the present case. Spooner v. City of Camilla, 256 Ga.App. 179, 181, 568 S.E.2d 109 (2000). In order to establish the defense of assumption of risk, NDG Framing is required to show the Court that the Plaintiff "(1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks." Williams v. Mitchell County Electric Membership Corp., 255 Ga.App. 668, 670, 566 S.E.2d 356, 359 (2002).

Furthermore, assumption of the risk acts as a bar to the plaintiff's recovery when the defendant shows that the plaintiff chose, without restriction, to pursue an obviously dangerous course of action with full knowledge of the danger. Vaughn v. Pleasant, 266 Ga. 862, 864, 471 S.E.2d 866, 868 (1996); Price v. Rogers, 205 Ga. App. 315, 422 S.E.2d 7, 8 (1996). "Assumption of the risk is a complete defense and arises when, even if a defendant is negligent, the plaintiff himself is negligent in such a way that his own negligence is the sole proximate cause." Mendez v. Jewett, 196 Ga. App. 565, 566, 396 S.E.2d 294 (1990). Courts apply an objective standard to determine what a person with ordinary, common sense would recognize as something that might cause him to trip, slip, or fall. See, Means v. Marshalls, 243 Ga. App. 419, 532 S.E.2d 740 (2000).

In this case, the undisputed facts plainly demonstrate that the Plaintiff assumed the risk of injury when he climbed the Ladder. The Plaintiff: (1) had actual knowledge of the alleged danger of climbing the non-compliant Ladder, which lacked hand rails; (2) clearly understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks. The Plaintiff had many years of experience working on construction sites and was

well aware of the risk of falling from a ladder, especially a ladder without handrails. The Plaintiff even testified that he knew that railing on the Ladder would have prevented the Incident. Thus, there is sufficient evidence to prove that the Plaintiff knew of the danger he faced when he voluntarily chose to climb the ladder, even carrying a drill in his hand as he did so.

The Plaintiff had worked on construction sites for twenty (20) years. The Plaintiff admits that it was hazardous to climb the Ladder because it lacked railings that he could grab in the event he should lose his balance. Therefore, the Plaintiff voluntarily exposed himself to the risk of falling and his own actions were the proximate cause of the Incident and his injuries.

Furthermore, the Plaintiff's claims are barred by the defense of assumption of the risk because under Georgia law, "[i]f the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." O.C.G.A. § 51-11-7. Where the plaintiff has knowledge of the condition or defect complained of and knows or should know of the danger in encountering the condition or defect, the plaintiff's claim is barred by his assumption of the risk. See, e.g., Mitchell v. Young Refining Corp., 517 F.2d 1036 (5th Cir. 1975.) Furthermore and by way of example, O.C.G.A. § 34-7-23 provides, in pertinent part, as follows:

> An employee assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself. In actions for injuries arising from the negligence of the employer . . . in order that the employee may recover . . . it must also appear that the employee injured did not know and had not equal means of knowing [of the defects or danger] and by the exercise of ordinary care could not have known thereof.

Even though the Plaintiff was not an "employee" of NDG Framing within the contemplation of O.C.G.A. § 34-7-23, it is clear that his assumption of the risk is a bar to the claims made in the present litigation. See also Strickland v. Howard, 214 Ga. App. 307, 447

S.E.2d 637 (1994) (where the evidence was uncontroverted that the employee had equal knowledge with the employer of a defect in the "power takeoff" of the tractor, his claim was barred); Hollingsworth v. Thomas, 148 Ga. App. 38, 250 S.E.2d 791 (1978) (when one enters the service of another, he is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which his employment relates); Atlanta, Birmingham & Coast R.R. v. King, 55 Ga. App. 1, 189 S.E.2d 580 (1936) (when a peril is so obvious or so patent as to be readily understood by the employee by the reasonable use of his senses, having in view his age, intelligence, and experience, he will not be heard to say that he did not realize or appreciate it).

The Plaintiff knew that the Ladder lacked railings before he climbed it on December 19, 2002. Since the Plaintiff climbed the Ladder armed with this knowledge, it is beyond question that the Plaintiff assumed the risk that what did occur, could occur – that he could fall and be injured. Here, the Plaintiff undertook an obvious risk of physical injury when he climbed the Ladder and, as a matter of law, the doctrine of assumption of the risk bars the Plaintiff's claims.

C. The Plaintiff's Claims Are Barred By The Doctrine Of Contributory Negligence.

Contributory negligence acts as a bar to a plaintiff's right of recovery and is comprised of two distinct defenses which are as follows: "(1) at all times a plaintiff must use ordinary care for his own safety, and must not, by his own negligence, be the sole proximate cause of his own injuries; and (2) a plaintiff must use ordinary care to avoid the defendant's negligence when such negligence is apparent or should in the exercise of ordinary care be apparent to him." Ridgeway v. Whisman, 210 Ga. App. 169, 170, 435 S.E.2d 624 (1993). Additionally, "[b]efore any negligence, even if proven, can be actionable, that negligence must be the proximate cause of the injuries sued upon." Sapp v. Effingham County Bd. of Educ., 200 Ga. App. 695, 696, 409 S.E.2d 89, 91 (1991). "[W]here an intervening act is established as the proximate cause of injury or death,

a valid defense arises in the defendant as a matter of law." Harmon v. City of College Park, 218 Ga. App. 136, 460 S.E.2d 554, 557 (1995).

The Plaintiff's actions which precipitated the Incident constitute contributory negligence as a matter of law. By his own testimony, it was apparent to the Plaintiff that the Ladder lacked railings and was otherwise not in compliance with OSHA requirements. Therefore, even if NDG Framing was responsible for the placement of the Ladder (which it is not), then the Plaintiff was aware of NDG Framing's alleged negligence and did not exercise ordinary care to prevent his Injuries. Given the Plaintiff's knowledge that Ladder had no railings and his climbing the ladder and risking injury regardless, the Plaintiff's own actions were the sole proximate cause of his injury.

"Georgia law is clear that 'when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom.' " Anderson v. L&R Smith, Inc., 265 Ga. App. 469, 471, 594 S.E.2d 688 (2004); Wood v. Winn-Dixie Stores, 244 Ga. App. 187, 189, 534 S.E.2d 556 (2000). The Plaintiff had climbed the Ladder to the Balcony the day before the Incident. Even though the Plaintiff admits to the knowledge of the alleged dangerous condition (the Ladder's lack of railings) such knowledge is also presumed because the Plaintiff had climbed the Ladder on an occasion prior to the Incident. Therefore, the Plaintiff is precluded from recovering for injuries that he sustained as a result of the Incident. Thus, NDG Framing is entitled to judgment as a matter of law on the Plaintiff's claims.

In addition, the Plaintiff's own actions constitute contributory negligence per se. Negligence per se, which normally occurs when a statue or ordinance is violated, can also occur when one violates certain mandatory regulations that impose a legal duty. Kull v. Six Flags Over Georgia, 264 Ga. App. 715,716, 592 S.E.2d 143, 144 (2003). Before negligence per se can be

determined, the court must consider (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm the statute was intended to guard against. Id. The declared purpose and policy of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C.A. § 651 (2005). Thus, OSHA regulations are promulgated for the protection of workers and to prevent on the job accidents. The Plaintiff was a worker involved in an on the job accident. The Plaintiff falls within the class of persons that OSHA regulations were intended to protect. As an employee, the Plaintiff also had the duty to comply with OSHA standards and rules, regulations and order, which are applicable to his own actions and conduct. 29 U.S.C. § 654 (b) (2005). At the time of the Incident, the Plaintiff was well aware from the safety meeting that he had attended earlier that week and the OSHA manual that he had read before the Incident, of his duty to ensure that ladders and railings on the Construction Site were OSHA compliant. The Plaintiff by his own testimony was in dereliction of the duty imposed on him by the OSHA regulations. Therefore, the Plaintiff's actions constitute negligence per se.

The Georgia Court of Appeals recently held that a plaintiff's contributory negligence bars any recovery, if his failure to use ordinary care for his own safety is the sole proximate cause of his injuries even if such negligence concurs with the negligence of the defendant. Kull, 264 Ga. App. at 718, 592 S.E.2d at 146. In Kull, the plaintiff changed a light bulb and did not make certain that the power supply was turned off. Id. at 716. The plaintiff received an electric shock as a result. Id. OSHA standards, having incorporated by reference the regulations of the National Fire Protection Association, required that the plaintiff turn the power off before attempting to change the light bulb. Id. at 717. The court found that: OSHA regulations are

mandatory and have the force of law; the plaintiff was in the protected class; that the regulations were intended to guard against the injuries that he suffered; and that his negligence per se proximately caused his injuries. Id. at 718. The Court of Appeals held that, as a matter of law, the plaintiff's actions constituted negligence per se. Id. Likewise the Plaintiff in this case, purposely used the Ladder which he knew did not comply with OSHA standards or rules, and by his own admission suffered injuries as a result of his actions.

The Plaintiff claims that he climbed the Ladder because he was pressured by the general contractor, PRS, to finish the work. This does not excuse the Plaintiff from his obligation to use due care for his own safety. No one from NDG Framing forced or encouraged the Plaintiff to climb the Ladder. The Plaintiff could have chosen other balconies or areas to work on or to access the Balcony by some other means – he was not at all forced to climb the Ladder.

Additionally, there is no evidence in the record that the NDG Framing either (1) fabricated the Ladder or (2) placed the Ladder at the Balcony where the Plaintiff climbed it. The Ladder was discarded after the Incident and there are no photographs of the Ladder. There is no evidence that NDG Framing was in any way negligent. Furthermore, NDG Framing fabricates its ladder so that each ladder has railing on either side and did not place the Ladder at the Balcony. However, even if NDG Framing had somehow been negligent regarding the placement of the Ladder or omission to add railings to the Ladder, such negligence was not the proximate cause of the Plaintiff's injuries. Instead, the proximate cause was the actions of the Plaintiff in climbing the Ladder to the Balcony. For these reasons, NDG Framing is entitled to judgment as a matter of law.

IV. CONCLUSION

Although questions of contributory negligence and assumption of the risk are ordinarily for the jury to resolve, summary judgment is appropriate where, as here, "the evidence is plain, palpable, and undisputed." Allen v. King Plow Company, 227 Ga. App. 795, 799, 490 S.E.2d 457, 462 (1997). The Plaintiff assumed the risk of injury and was contributorily negligent. The Plaintiff's conduct constitutes negligence per se and was the sole proximate cause of his injury. Thus, for the foregoing reasons, there is no genuine issue as to any material fact and NDG Framing is entitled to judgment on the Plaintiff's claims as a matter of law.

Respectfully submitted this the 25th day of August 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT NDG FRAMING, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** has been sent by U.S. Mail, properly addressed with sufficient postage affixed thereon to ensure proper delivery to:

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Respectfully submitted this the 25th day of August 2005.

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