

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

IAS PART 12

- - - - - x

SCOTT HENDRICKSON and PRISCILLA
HENDRICKSON,

Index No.: 22884/04

Plaintiffs,

- against -

DYNAMIC MEDICAL IMAGING, P.C. and
MITCHELL MACHINERY MOVING, INC. d/b/a
STERLING TRANSPORTATION, INC.,

Defendants.

- - - - - x

MITCHELL MACHINERY MOVING, INC. d/b/a
STERLING TRANSPORTATION, INC.,

Third-Party Plaintiff,

- against -

FONAR CORPORATION,

Third-Party Defendant.

- - - - - x

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Motion No. 1

By notice of motion, defendant, Dynamic Medical Imaging, P.C. (Dynamic), seeks an order of this Court, granting them summary judgment and dismissing plaintiff's complaint, as well as any cross-claims as to them, or in the alternative, granting Dynamic conditional summary judgment on its cross-claims as to defendant, Mitchell Machinery Moving, Inc. d/b/a Sterling Transportation, Inc. (Mitchell) and Fonar Corporation (Fonar), on the grounds that Dynamic bears only vicarious liability in this case and where, as here, defendant alleges Mitchell and Fonar were actively negligent and had authority to direct, supervise and control plaintiff's work. Defendant Dynamic is entitled to conditional common law indemnification from Mitchell and Fonar.

Plaintiff submits an affirmation in opposition. Defendant Mitchell submits an affirmation in partial opposition, and Dynamic files a reply.

Motion No. 2

Defendant Mitchell submits a motion for an order granting summary judgment and dismissal of plaintiff's Labor Law § 240(1) claim, and summary judgment and dismissal of plaintiff's Labor Law § 241(6) claim.

Plaintiff submits an affirmation in opposition, and defendant Mitchell replies.

Motion No. 3

Third-party defendant, Fonar, files a cross-motion seeking an order for summary judgment and dismissal of defendant third-party plaintiff's (Mitchell's) complaint. Dynamic files an affirmation in opposition, and Fonar files a reply.

The underlying action is a claim by plaintiff for injuries he sustained on February 3, 2004, at premises owned by Dynamic Medical Imaging, P.C. (Dynamic), located at 73-36 Grand Avenue, Maspeth, Queens, N.Y.

At that time and place, plaintiff was employed by Fonar as a "rigger supervisor." While preparing to install one of four 10,000 lb. steel slabs which formed the shielding for the MRI, plaintiff was injured when the slab being hoisted fell, striking his leg and foot.

Plaintiff brings his claim for the injuries he sustained against Dynamic, the owner of the premises, and Mitchell pursuant to alleged violations of Labor Law §§ 200, 240(1) and § 241(6).

Mitchell was under contract with Dynamic to deliver, unload and install the Fonar MRI.

Submitted in support of the various motions herein, are the depositions of plaintiff, Scott Hendrickson, Mitchell Greenspan, president and owner of Mitchell, and Joseph P. Cioffi, administrator of the business operations of Dynamic. Plaintiffs submit the affirmation and report of an expert witness, Howard I. Edelson, CSP, CHCM in support of their opposition to the defendants' motions.

Suffice it to say, without enumerating the details, there are numerous instances of disagreement between the witnesses as to how the accident occurred and who was directing, supervising and controlling the work being done.

Turning first to defendant Mitchell's motion (Motion No. 2), which seeks summary judgment and dismissal of plaintiff's claims against them based on Labor Law §§ 240(1) and 241 (6).

Mitchell first maintains that Labor Law § 240(1) does not apply in this instance because the accident alleged does not involve the kind of elevation related injury contemplated by the statute.

In Narducci v. Manhasset Bay Assoc. (96 NY2d 259, 267, 268

(2001)), the Court of Appeals made clear the kinds of actions which come within the ambit of Labor Law § 240(1) which go beyond the definition provided in Rocovich v. Consolidated Edison Co. (78 NY2d 509). "Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases. With respect to falling objects Labor Law § 240 (1) applies where the falling of an object is related to 'a significant risk inherent in... the relative elevation... at which materials or loads must be positioned or secured (Racovich v. Consolidated Edison Co., supra. at 514). Thus, for section 240(1) to apply, plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute. (See, e.g. Pope v. Supreme-K.R.W. Constr. Corp., 261 AD2d 523; Baker v. Barron's Educ. Serv. Corp., 248 AD2d 655). Id.

Since Narducci, supra., the Appellate Division, Second Department has had numerous instances to apply the principles set forth by the Narducci holding: (error to deny partial summary judgment to plaintiff injured while working on ground floor of construction site hit by unsecured roofing material fallen from the roof, Orner v. Port. Auth. of N.Y. & N.J., 293 AD2d 517 (2nd Dep't. 2002)); (summary judgment and dismissal of Labor Law § 240(1) claims upheld where plaintiff, who was working in a trench was "struck by a falling segment of overhanging concrete sidewalk slab," Natale v. City of N.Y., 33 AD3d 772, 773 (2nd Dep't. 2006)); (denial of summary judgment to plaintiff upheld where plaintiff injured by c-clamp which fell or was thrown off side of scaffolding, insufficient evidence that plaintiff injured when objects being hoisted or secured fell because of absence or inadequacy of a safety device of the kind enumerated in the statute," Galvan v. Triborough Bridge & Tunnel Auth., 29 AD3d 517 (2nd Dep't. 2006)).

Defendant maintains that when the steel slab being hoisted fell on plaintiff's foot and leg it was not more than six inches off the ground where plaintiff was standing. Thus, defendant argues, such an accident is not covered by Labor Law § 240(1) as "[it] is well settled that Labor Law § 240(1), which imposes absolute liability, 'is addressed to situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated worksite'" (Rocovich v. Consolidated Edison Co., 167 AD2d 524, 526, 562 NYS2d 197, aff'd 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932; Phillips v. City of N.Y., 228 AD2d 570, 644 NYS2d 764, 765 (2nd Dep't. 1996). "Furthermore, "[a]n object falling from a minuscule height is not the type of elevation-related injury that

this statute was intended to protect against." Id. (citing, Schreiner v. Cremosa Cheese Corp., 202 AD2d 657, 658, 609 NYS2d 322; see also Rodriguez v. Tietz Ctr. for Nursing Care, 84 NY2d 841, 616 NYS2d 900, 640 NE2d 1134; Corsaro v. Mt. Cavalry Cemetery, 214 AD2d 950, 625 NYS2d 634; Carringi v. International Paper Co., 184 AD2d 137, 140, 591 NYS2d 600).

This line of cases, however, which follows the reasoning and logic of Rocovich, supra., focuses only on a need to prove the "elevation" of the worker, the work site, or the object, while ignoring the risk which the Narducci court recognized of objects falling "...while being hoisted or secured because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (Narducci, at 267, 268).

In Thompson v. St. Charles Condominiums, (303 AD2d 152, 756 NYS2d 539 (1st Dep't. 2003)), plaintiff was injured when some 20 masonry blocks, weighing 40 lbs. each, two mortar pans weighing 60 lbs. each, and a co-worker who had climbed onto the four foot high scaffold collapsed and fell on top of plaintiff. Id., at 153. Defendants in that case argued that "...plaintiff's claim must fail because there was not a 'significant' height differential between the level at which the plaintiff was situated and the level from which the items (and the brick layer) fell. However, there is no 'seven-foot rule' or other definitive height differential at which section 240(1) begins to apply." Id., at 154. (See also, Kok Choy Yeem v. NWE, Corp., 2007 WL 466101 (NYAD 2nd Dep't)).

Accordingly, defendant's motion for summary judgment in so far as it seeks dismissal of plaintiff's cause of action based on Labor Law § 240(1) is denied. "Under the statute, liability may be imposed where an object or material that fell, causing injury was "a load that required securing for the purposes of the undertaking at the time it fell" (Portillo v. Roby Anne Development, LLC, 32 AD3d 421 (2nd Dep't. 2006) (citing Narducci v. Manhasset Bay Assoc., supra.; see Ross v. Curtis Palmer Hydro Electric Co., 81 NY2d 494 [1993]; Orner v. Port Auth. of N.Y. & N.J., supra.; Baker v. Barron's Educ. Serv. Corp., supra. (See also, Keaney v. City of New York, 24 AD3d 615, 808 NYS2d 335 (2nd Dep't. 2005); Locicero v. Princeton Restoration, Inc., ___ AD3d ___, ___ NYS2d ___, 2006 WL 197342 (2nd Dep't. 2006); Outar v. City of N.Y., 5 NY3d 731, 799 NYS2d 770 (2005); Salinas v. Barney Skanska Construction Co., 2 AD3d 619, 769 NYS2d 559, 562 (2nd Dep't. 2003)).

"To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries

were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards (see, Plass v. Solotoff, 5 AD3d 365, 367 (2004); Ross v. Curtis Palmer Hydro-Elec. Co., 81 NY2d 94, 503-505 (1993); Ferrero v. Best Modular Homes, Inc., 33 AD3d 847, 851, 823 NYS2d 477 (2nd Dep't. 2006)). "In addition, the provision must be applicable to the facts of the case." (See, Singleton v. Citnalta Constr. Corp., 291 AD2d 393, 394 (2002). Id. 851.

Defendant maintains that none of the Industrial Code violations cited by plaintiff in his bill of particulars, with the possible exceptions of 12 NYCRR § 23-6.1 and 6.2, are sufficiently specific enough and/or applicable to the facts and circumstances of this case to support plaintiff's cause of action based on Labor Law § 241(6).

In response, plaintiff maintains through the affidavit and report of an expert witness, Howard I. Edelson, a "Certified Safety Professional," that the accident occurred because of violations of N.Y. Industrial Code provisions 12 NYCRR §§ 23-6.1(c)(1), 23-6.2(d)(1) and § 23-8.1(f)(1)(iv).

Defendant maintains that the Code Section 23-6.1(c) is too general in its proscriptions to form a basis for a Labor Law § 241(6) action; that Code section 23-6.2(d) is inapplicable to the facts of this case since the code fails to make mention of any "straps" or chain strap hybrids; and, that plaintiff can not now rely on Code Section 23-8.1 as it was never enumerated by plaintiff in his complaint or bill of particulars as a code section alleged to have been violated.

Upon a careful reading, the Court notes that 12 NYCRR § 23-6.1, sub-section (a) states as follows:

Application of Subpart. The general requirements of this Subpart shall apply to all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks (emphasis added).

It is undisputed that on the date of the accident, Mitchell Greenspan was making use of a fork-lift truck to move the steel slab which ultimately fell on plaintiff's foot. Plaintiff's expert argues that defendant, Mitchell Greenspan, President of Mitchell Machinery Moving Corp. was using the forklift "as if it were a hoist or a crane." (See, plaintiff's Exh. Edelson Letter). Plaintiff, however, cites no basis for bringing the use of a fork-life truck within this code provision.

Accordingly, it is apparent on the facts presented herein, that plaintiff has failed to allege violations of Industrial Code provisions sufficiently specific enough and applicable in this context to support a cause of action based on Labor Law Section 241(6) (Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 351, 693 NE2d 1068, 670 NYS2d 816 (1998)).

In Motion No. 1, Dynamic seeks dismissal of plaintiff's claims against them based on Labor Law §§ 240(1) and 241(6). As already noted the Court concludes that plaintiff has a triable cause of action based on Labor Law § 240(1), but has failed to sustain a cause of action based on Labor Law § 241(6).

Dynamic also seeks dismissal of any and all cross-claims or in the alternative, summary judgment on its cross-claim granting Dynamic conditional common law indemnification as against Mitchell and Fonar.

Finally, Dynamic seeks dismissal of any all of plaintiff's claims against Dynamic based on Labor Law § 200 on the ground that Dynamic exercised no supervisory control over the operation, installation and construction of the MRI equipment in question. Specifically, although Dynamic concedes that there are numerous questions of fact as to how the accident occurred, there is no claim that Dynamic, as the owner of the business where the MRI was being installed, created any "dangerous condition" which contributed to the accident.

Third-party defendant, Fonar, maintains Dynamic has not successfully demonstrated that Fonar, as a proposed indemnitor, was guilty of any negligence in the accident which occurred. Specifically, Fonar maintains that they had no authority to direct, supervise, or control the work which resulted in plaintiff's injury. Moreover, Fonar maintains that Dynamic was the general contractor on this work project.

Defendant, third-party plaintiff Mitchell, opposes Dynamic's motion to dismiss plaintiff's Labor Law §200 cause of action as against them on the grounds that Dynamic exercised authority and control over the activity which caused the unsafe condition which contributed to plaintiff's accident and injury. Specifically, Mitchell argues that Dynamic hired Mitchell, chose the party to do the work, was responsible for "preparing the site," and had "control of," "access to," and "responsibility for" maintaining the site where the accident happened. Moreover, Mitchell argues that summary judgment to Dynamic on the issue of common law indemnification is premature where numerous questions of fact exist on the issues of negligence and the authority to supervise

and control the work in question.

As a general rule "[c]ommon law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus it's liability is purely vicarious. (See, Charles v. Eisenberg, 250 AD2d 801" (Taeschner v. M&M Restoration, 295 AD2d 598, 600 (2nd Dep't. 2002)).

"In order to establish their claim for common-law indemnification... [however]... the owners [Dynamic] [are] required to prove not only that they were not negligent, but also that the proposed indemnitor[s] [Mitchell and Fonar] [were] responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury. Where, as here, the owner [Dynamic] [has] alleged liability [if any] is purely statutory and vicarious conditional summary judgment in their favor on the basis of common law indemnification against [Mitchell and Fonar] is premature absent proof, as a matter of law, that [Mitchell and/or Fonar] was negligent or had authority to direct, supervise and control the work giving rise to plaintiff's injury (See, Perri v. Gilbert Johnson Enters. Ltd., 14 AD3d 681, 684-685 (2005); Priestly v. Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493, 495 (2004); Hernandez v. Two E. End Avenue Apt. Corp., 303 AD2d 556, 557-558 (2003); Reilly v. DiGiacomo & Son, 261 AD2d 318 (1999))." (Benedetto v. Carrera Realty, 32 AD3d 874, 875 (2nd Dep't. 2006)).

In this instance, there remain numerous questions of fact regarding the alleged negligence of defendants, Mitchell, Fonar and Dynamic, and who may or may not have exercised the requisite supervision authority and control of the work site in question. Accordingly, with the exception of Dynamic's motion to dismiss, plaintiff's claim based on Labor Law § 241(6), the motion is denied.

Finally, in Motion No. 3, third-party defendant, Fonar, seeks summary judgment and dismissal of defendant Mitchell's third-party complaint.

Fonar argues that no matter who suggested the use of the Kevlar straps on the date of the accident, whether Mitchell or plaintiff, they (Fonar) can not be held liable as plaintiff was not, at the time of the accident, performing a task for which he was hired.

Fonar also argues that plaintiff's Labor Law §§ 240(1) and

241(6) claims should be dismissed for the reasons previously cited, and finally, that defendant Mitchell's third-party claims for indemnification should be dismissed. These issues, as noted above, have already been addressed.

Fonar maintains that despite plaintiff's title, or "rigging supervisor," he was not a qualified rigger, and had no responsibility for rigging. Plaintiff, Fonar maintains, was simply there to direct the order in which to place the pieces, install the load pads and other general duties.

Moreover, Fonar argues because in this instance they were neither general contractor nor owner of the cite, they can not be held liable under Labor Law §§200, 240(1) or § 241(6).

Finally, Fonar argues that defendant third-party plaintiff Mitchell, provides no basis for its claim for contractual indemnification from Fonar.

As has already been noted, defendant Mitchell, through the testimony of their president, Mitchell Greenspan, describes plaintiff as a rigging supervisor with equal authority to supervise the applicable work at the site.

Mr. Greenspan maintains that plaintiff was frequently on the phone with Fonar during the whole process and that he, plaintiff, was instrumental in deciding how the work was to be conducted on that date.

It should be noted that the third-party action may be brought in these circumstances where the amputation of several of plaintiff's toes constitutes a "grave injury" within the meaning of Worker's Compensation Law § 11 (Storms v. Dominican Coll. of Blauvelt, 308 AD2d 575, 577 (2nd Dep't. 2003)).

To make a prima facie case for dismissal of the Labor Law §§200, and 240(1) claims against them, Fonar must demonstrate "...that they neither directed nor controlled the method or manner in which the injured plaintiff conducted his work..." (Perron v. Hendrickson/Sculaniandre/Posillico (TV), 22 AD3d 731, 732 (2nd Dep't. 2005)).

In reviewing a motion for summary judgment, the court accepts as true the evidence presented by the non-moving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue (Baker v. Briarcliff School Dist., 205 AD2d 652, 653 (1994))." (Fleming v. Graham, 34 AD3d 525, 526 (2nd Dep't. 2006)).

Clearly, there are material disputes regarding who had supervision control and authority over the work performed on that date precluding Fonar's motion for summary judgment on the issue of liability.

To the extent, however, that defendant Mitchell seeks contractual indemnification from Fonar as part of their third-party action, such is dismissed as defendant Mitchell provides no basis for such relief (Daniels v. Bohn/Fiore, Inc., 300 AD2d 341, 342 (2nd Dep't. 2002)).

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendants' motion(s) for summary judgment on plaintiff's cause of action, based on Labor Law § 241(6) is granted and said cause of action and any and all cross-claims derived therefrom are hereby severed and dismissed as against all defendants, and the Clerk is directed to enter judgment on said cause of action in favor of defendants; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
February 27, 2007

JOSEPH P. DORSA
J.S.C.