

Upon the foregoing papers it is ordered that the motions and cross motion are decided as follows.

This is an action for personal injuries allegedly sustained by plaintiff on March 3, 1999, when he fell while working on a construction site at 155-25 Styler Road in Jamaica, New York (the "premises"). The premises is owned by Elmhurst Dairy. Pursuant to an oral contract, Elmhurst Dairy hired Lita Construction as the general contractor to build a ramp for the loading dock at the premises. Lita Construction hired City Ready to supply the cement for the ramp. On the day of the accident, plaintiff was employed by Gemca Corp. (not a party herein) as a laborer.

Plaintiff commenced this action against the defendants alleging violations of Labor Law § 240, § 241(6) and § 200, as well as for common-law negligence. The defendants have each interposed an answer denying liability, asserting affirmative defenses against the plaintiff and cross claims against each other. Discovery has been completed, and the notice of issue has been filed. The instant motions and cross motion ensued.

Workers' Compensation

Lita Construction seeks leave to amend its answer to assert the affirmative defense of Workers' Compensation, and based upon such proposed defense, seeks dismissal of the complaint. In its proposed answer, Lita Construction contends that plaintiff was the general employee of Gemco but was a special employee of Lita Construction at the time of the accident, and that by reason thereof, plaintiff's sole and exclusive remedy is the right to receive Workers' Compensation benefits.

In opposition, plaintiff alleges that this argument is in bad faith and it has always been Lita Construction's contention that on the date of the subject accident, plaintiff no longer was employed by Lita Construction. Additionally, plaintiff argues that an employer-employee relationship has not been proven, but rather, at best, there is an issue of fact as to whether plaintiff was a special employee of Lita Construction.

Lita Construction's motion for leave to amend their answer to assert the affirmative defense of Workers' Compensation is denied. In its answer, Lita Construction, and during his deposition Andrew Ferrara, a principal of Lita Construction, expressly denied that plaintiff was an employee. Therefore, the burden is on Lita Construction, in the first instance, to satisfactorily demonstrate that plaintiff was in fact its special employee on the date of the

subject incident. (See, Vaughn v City of New York, 108 Misc 2d 994, affd 89 AD2d 944.)

Lita Construction has failed to satisfy this burden as it has not submitted any evidence to support the claim that plaintiff was a special employee. (See, e.g., Biney v Rodriguez, 262 AD2d 592.) The court notes that in addition to failing to proffer an adequate showing of merit, Lita Construction did not seek leave to amend in a timely manner, has failed to offer a reasonable excuse for the delay, and the interposition of such a defense at this stage of the litigation would be unduly prejudicial. (See, Francisco v 201 Saw Mill River Rd. Dev. Corp., 289 AD2d 374; Hassan v Schweizer, 277 AD2d 797.) Therefore, the motion for leave to amend is denied. (See, Biney v Rodriguez, supra; see also, Francisco v 201 Saw Mill River Rd. Dev. Corp., 289 AD2d 374.) A fortiori, that branch of Lita Construction's motion which seeks summary dismissal of the complaint based on the proposed amendment is denied as moot.

Labor Law

The statutory duty imposed by sections 240(1), 241(6) and 200 of the Labor Law places ultimate responsibility for safety practices upon the owner of the work site, its general contractor and their agents (see, Gordon v Eastern Ry. Supply, 82 NY2d 555; Russin v Picciano & Son, 54 NY2d 311; Kowalska v Board of Educ. of the City of N.Y., 260 AD2d 546). Elmhurst Dairy and Honeywell Properties contend that Honeywell Properties is not the owner of, and was not a general contractor or agent on the premises. Therefore, Elmhurst Dairy and Honeywell Properties argue that the action should be summarily dismissed against Honeywell Properties.

In support of this argument, Elmhurst Dairy and Honeywell Properties have submitted the affidavit of their general counsel, Richard J. DeFeo, Jr. DeFeo asserts that Honeywell Properties owns the adjoining property not the premises upon which plaintiff's accident occurred. Also submitted is a deed which reflects that Honeywell Farms, Inc., which is now known as Elmhurst Dairy, owns the premises. Based on this uncontroverted evidence, Honeywell Properties cannot be held liable under the Labor Law or for common-law negligence, and therefore, is entitled to summary judgment dismissing the complaint as asserted against it (see, Rizzuto v Wenger Contr. Co., 91 NY2d 343; Comes v New York State Elec. & Gas Corp., 82 NY2d 876; Allen v Cloutier Constr. Corp., 44 NY2d 290).

City Ready also argues that it cannot be held liable for plaintiff's injuries under the Labor Law. The court agrees. Since City Ready is clearly not an owner or general contractor, the only

possible basis for the imposition of statutory liability is if City Ready is somehow found to be an agent of Elmhurst Dairy or Lita Construction (see, Murray v South End Improvement Corp., 263 AD2d 577). Based upon the evidence proffered, City Ready had no authority to control the manner in which plaintiff chose to perform the assigned task. Moreover, there is no evidence that City Ready had any contact whatsoever with the owner, Elmhurst Dairy. Consequently, City Ready could not be considered an agent of Lita Construction or of City Ready under the Labor Law statute (see, Russin v Picciano & Son, supra; Lopez v Strober King Building Supply Ctrs., Inc., 307 AD2d 681; Schultz v Iwachiw, 284 AD2d 980, lv dismissed in part, lv denied in part 97 NY2d 625; Barker v Menard, 237 AD2d 839, lv denied 90 NY2d 804). Accordingly, City Ready's motion to renew is granted, and upon renewal, summary judgment is granted to the extent of dismissing the Labor Law claims asserted against this defendant. However, since an issue of fact exists as to how plaintiff's accident occurred and as to whether the conduct of the cement truck driver in stepping on the wood board was foreseeable and a proximate cause of plaintiff's injuries, the common-law negligence claim against City Ready remains viable.

The court will now address plaintiff's cross motion for summary judgment on his Labor Law § 240 claim and Elmhurst Dairy's motion to dismiss this claim. Elmhurst Dairy argues that it is entitled to summary judgment because neither plaintiff nor the equipment he was using was elevated above the ground. Plaintiff argues that he is entitled to summary judgment against the defendants on the issue of liability on the ground that he was not provided with proper protection to prevent him from falling from an elevated height.

During his deposition, plaintiff testified that at the time of his accident he, along with several other laborers, as well as Andrew Ferrara, a principal of Lita Construction, were shoveling cement being poured from the City Ready cement truck. Plaintiff testified that to shovel the cement from the truck, he had to stand on a wood plank covering a trench which had been dug as part of the ramp project. Plaintiff testified that while standing on the wood plank, the driver of the cement truck walked onto the plank and a few seconds thereafter, the wood plank collapsed, causing him to fall about four feet into the trench below and to sustain serious injuries.

Accepting this account of how the accident occurred, it can hardly be gainsaid that the four-foot deep excavated trench bridged by a wood plank which furnished the means for plaintiff to perform the task of shoveling cement out of the City Ready truck,

constituted a difference in elevation and, therefore, a risk within the contemplation of the statute (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494; Castronovo v Doe, 274 AD2d 442; Jenkins v Board of Managers of Southampton Meadows Condominium, 269 AD2d 427; see also, Gottstine v Dunlop Tire Corp., 272 AD2d 863; LaJeunesse v Feinman, 218 AD2d 827; DeLong v State St. Assocs. L.P., 211 AD2d 891; Nichols v Deer Run Investors L.P., 204 AD2d 929; [stating that while plaintiff's worksite was at ground level, his injury nevertheless resulted from a difference between the elevation level of the required work and a lower level]; cf., Edwards v C & D Unlimited, Inc., 289 AD2d 370). Moreover, under these circumstances, the wood plank constitutes a safety device under Labor Law § 240(1) (see, Gottstine v Dunlop Tire Corp., supra; Colern v State of New York, 170 AD2d 1000; cf., Gile v General Elec. Co., 272 AD2d 833). Thus, under this version, plaintiff has made a prima facie showing that the statute was violated and that the violation was a proximate cause of his injuries (see, e.g., Centeno v 80 Pine, Inc., 294 AD2d 326).

However, in his application for Workers' Compensation benefits, plaintiff alleged that on March 3, 1999, he was on a scaffold, passing tools to an electrician when he misplaced his footing and fell four feet injuring his left ankle. Under this account of the accident, plaintiff would not be entitled to summary judgment, as there is a question of fact as to whether the ladder provided proper protection (see, Khan v Convention Overlook, Inc., 232 AD2d 529; Xirakis v 1115 Fifth Ave. Corp., 226 AD2d 452). Furthermore, the two different versions of the accident given by plaintiff create an issue of fact as to how the accident occurred and as to his credibility, thereby precluding the grant of summary judgment to any party on the Labor Law § 240 claim (see, Groves v Land's End Hous. Co., 80 NY2d 978; Centeno v 80 Pine, Inc., supra; Castronovo v Doe, supra; Khan v Convention Overlook, supra).

Elmhurst Dairy also moves for summary judgment dismissing plaintiff's Labor Law § 241(6). It is well settled that in order to support a § 241(6) claim, a plaintiff must allege a New York Industrial Code violation this is both concrete and applicable given the circumstances surrounding the accident (see, Ross v Curtis-Palmer Hydro-Elec. Co., supra; Fair v 431 Fifth Ave. Assocs., 249 AD2d 262; Vernieri v Empire Rlty. Co., 219 AD2d 593).

In support of its motion for summary dismissal of the § 241(6) claim, Elmhurst Dairy points out that plaintiff did not allege any Industrial Code violations in the complaint or bill of particulars. In response, plaintiff cross-moves for leave to serve a supplemental bill of particulars to allege that defendants violated the Industrial Code, 12 NYCRR §§ 23-1.7(b)(1)(I), 23-1.22(b)(1),

(b)(2), (b)(4) and (c)(1). The fact that plaintiff did not cite these provisions in his initial pleadings or bill of particulars does not necessarily require dismissal of the § 241(6) claim or denial of the cross motion for leave to serve a supplemental bill of particulars (see, Noetzell v Park Ave. Hall Hous. Dev. Fund Corp., 271 AD2d 231; Pasquarello v Citicorp/Quotron, 251 AD2d 477; White v Farash Corp., 224 AD2d 978).

Plaintiff's belated identification of the aforementioned Industrial Code sections entails no new factual allegations, raises no new theories of liability, and therefore, contrary to Lita Construction's argument, has caused no prejudice (see, O'Connor v Lincoln Metrocenter Partners, L.P., 266 AD2d 60). First, 12 NYCRR § 23-1.7(b)(1) provides that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing ..." According to one version of plaintiff's account of how the accident occurred, the trench was unguarded and large enough for a person to fall into. These allegations, therefore, are sufficient to allege a violation of 12 NYCRR § 23-1.7[b][1][I] and this regulation is adequately specific and concrete to support a Labor Law § 241(6) claim (see, Claus v John Hancock Mut. Life Ins. Co., 254 AD2d 102).

Similarly, 12 NYCRR 23-1.22 also sets forth specific standards of conduct sufficient to support a Labor Law § 241(6) claim (see, O'Hare v City of New York, 280 AD2d 458; Reisch v Amadori Constr. Co., Inc., 273 AD2d 855). Moreover, the subsections relied upon all pertain to specifications for ramps, runways and working platforms for "the use of persons," and, thus, are applicable to the facts of this case. Consequently, that branch of plaintiff's motion which seeks leave to serve a supplemental bill of particulars is granted (see, e.g., O'Connor v Lincoln MetroCenter Partners, L.P., supra). Hence, that branch of Elmhurst Dairy's motion which seeks dismissal of the § 241(6) claim is denied.

That branch of Elmhurst Dairy's motion which seeks summary dismissal of the Labor Law § 200 claim is granted. Based on the record before the court, there is no evidence that Elmhurst Dairy exercised any direction or control over the work plaintiff was performing (see, Johnson v Incorporated Village of Freeport, 279 AD2d 451; Bratton v J.L.G. Indus., 247 AD2d 571; Simms v City of New York, 221 AD2d 332). Moreover, there is no evidence that Elmhurst Dairy created or had actual or constructive notice of the dangerous condition which allegedly caused plaintiff's accident (see, Raposo v WAM Great Neck Assn. II, 251 AD2d 392; Maggi v Innovax Methods Group Co., 250 AD2d 576, lv denied 92 NY2d 819; DaSilva v Seville Cent. Mix Corp., 237 AD2d 244, lv denied 92 NY2d 804). Indeed, plaintiff testified that he did not receive

any directions from, or use any tools provided by Elmhurst Dairy. Hence, Elmhurst Dairy is entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims asserted against it.

Indemnification

Elmhurst Dairy seeks summary judgment on its common-law indemnification cross claims, and dismissal of the common-law indemnification cross claims asserted against it. "Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive and, thus, its liability is purely vicarious" (Charles v Eisenberg, 250 AD2d 801, 802; see also, Kemp v Lakelands Precast, Inc., 55 NY2d 1032). The obligation of common-law indemnification runs against the party, who by virtue of its direction and supervision over the injury-producing work, was actively at fault in bringing about the injury (see, Felker v Corning, Inc., 90 NY2d 219; Glielmi v Toys "R" Us, Inc., 62 NY2d 664; Kennelty v Darlind Constr., Inc., 260 AD2d 443). Nevertheless, where more than one party might be responsible for an accident, summary judgment granting indemnification against one party is improper (see, Barabash v Farmingdale Union Free School Dist., 250 AD2d 794; Freeman v National Audubon Socy., 243 AD2d 608; see also, Edholm v Smithtown DiCanio Org., 217 AD2d 569).

In the instant case, the court has already determined that Elmhurst Dairy did not direct or supervise the work which plaintiff was performing. Therefore, Elmhurst Dairy cannot be held at fault for bringing about plaintiff's injuries, thereby, entitling it to summary judgment dismissing the common-law indemnification claims asserted against it by Lita Construction and City Ready.

However, it has not been established whether or not any of the actors herein, Lita Construction, City Ready or plaintiff's employer, were responsible for the accident. Indeed, it is unclear as to how the accident actually occurred. Consequently, based on the evidence before the court, the "actor who caused the accident" cannot be determined (Freeman v National Audubon Socy., Inc., supra, at 609; see, La Lima v Epstein, 143 AD2d 886). Therefore, that branch of Elmhurst Dairy's motion which seeks summary judgment on its cross claims for common-law indemnification against Lita Construction and City Ready must be denied.

To summarize, the motion by Elmhurst Dairy and Honeywell Properties is granted to the extent of severing and summarily dismissing the complaint as asserted against Honeywell Properties, and severing and dismissing the cross claims for common-law

indemnification asserted against Elmhurst Dairy and Honeywell Properties by Lita Construction and City Ready. The motion is otherwise denied. The motion by Lita Construction is denied in its entirety. The motion by City Ready to renew is granted and upon renewal the Labor Law § 240, § 241(6) and § 200 claims are hereby severed and dismissed. The motion is otherwise denied. The cross motion by plaintiff is granted to the extent of granting leave to serve a supplemental bill of particulars. The supplemental bill of particulars is deemed served in the form attached to plaintiff's papers. Plaintiff's cross motion is otherwise denied.

Dated: February 3, 2004

J.S.C.