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

PRESENT: PAULA J. OMANSKY PART 47

0111189/2002

TIKUNOV, VLADIMIR
vs
MUSEUM OF MODERN ART

INDEX NO. _____

MOTION DATE 8/30/04

SEQ 2

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. 143

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion have been decided in accordance with the accompanying memorandum decision

FILED
OCT 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/18/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

----------X

VALDIMIR TIKUNOV and NELY TIKUNOV

Index No. 111189/02

Plaintiffs,

DECISION AND ORDER

-against-

THE MUSEUM OF MODERN ART and AMEC CONSTRUCTION MANAGEMENT, INC.

Defendants.

---------- X

THE MUSEUM OF MODERN ART and AMEC CONSTRUCTION MANAGEMENT, INC.

Index No. 590971/02

Third-Party Plaintiffs,

-against-

BREEZE NATIONAL, INC., a/k/a BREEZE CARTING CORP.

Third-Party Defendants.

---------- X

PAULA J. OMANSKY, J.:

In this action for personal injuries arising out of negligence and alleged violation of sections 200, 240(1) and 241(6) of the Labor Law, defendants and third-party plaintiffs The Museum of Modern Art ("MOMA") and Amec Construction Management, Inc. ("Amec") move, pursuant to CPLR 3212, for summary judgment against third-party defendant Breeze National, Inc s/h/a Breeze National, Inc., a/k/a Breeze Carting Corp. ("Breeze") for common law indemnification and contribution, contractual indemnification, breach of insurance contract and breach of construction contract which allegedly caused plaintiff's injuries.

Breeze cross-moves for summary judgment dismissing plaintiffs'

complaint against MOMA and Amec[1].

Plaintiffs Vladimir Tikunov and Nely Tikunov cross move for partial summary judgment on the issue of liability under section 240(1) and 241(6), and to amend plaintiffs' bill of particulars.

FACTS

Plaintiff Valdimir Tikunov, an employee of third-party defendant Breeze, alleges that, on August 12, 2001, he was injured by a shoring pole which fell on him. Plaintiffs state that Mr. Tikunov was working at construction site owned by defendant Museum of Modern Art ("MOMA") located at 11 West 53rd Street, in Manhattan. Defendant Amec Construction Management ("Amec"), is the successor-in-interest to Morse Diesel International, Inc. ("Morse Diesel", a non-party), the company engaged by MOMA as the "construction manager."

Amec subcontracted the demolition work to Breeze. The existing MOMA structure was razed one floor at a time, starting with the upper floors. To maintain the structural integrity of the building as the demolition proceeded, the lower floors were reinforced with a matrix of braces and shoring poles interconnected to prevent a catastrophic collapse and permit the building to be essentially disassembled piecemeal. This temporary support structure was generally constructed on the three floor below the floor which was being demolished. As the upper floors were

[1]Plaintiffs have not commenced any claims against Breeze. Breeze's application challenges the validity of the complaint in order to limit its potential liability, if any, to defendants MOMA and Amec.

demolished, the support system would be disassembled as well and moved into position below the next portion of structure to be taken down. While shoring was positioned below the portion of the floor slab that was being demolished, it did not necessarily cover the entire floor. Instead, as the floor slab was demolished and a new section was being made ready for work, the shoring would be moved into position below. No work could proceed before the shoring was in place. Daniel Collins, Breeze's labor foreman, estimated that the floor-ceiling height of the area being demolished at approximately 10 feet.

The support system consisted of two different types of equipment. The first was a device known as a "aquajack" shore, which is a "single metal post." The second device is a metal frame, consisting of four metal posts with cross-bracing for stability. Plaintiff alleges that the metal frame is similar to a scaffold. Both systems had "screw-jacks" at the top of the posts. The screw-jacks were threaded metal rods that could be raised or lowered to adjust to the shoring pole to the ceiling height. The screw-jack was capped with a square-shaped flat metal plate, which would press against the floor slab above to hold it in place.

After the shoring of the floors below was in place, the floor was demolished by jack hammers on the arms of excavators attached to Bobcats, a four-wheeled construction vehicle. Debris was removed by Bobcats below the floor being demolished; the debris was dumped down stair openings to chutes below.

Collins testified that the shore pole were supported with

cross-bracing. Plaintiff, however, testified that the there were no bracing devices and the shoring poles permitted adjustments without the need to climb a ladder to adjust the top screw jack. In addition, Collins testified that the arrangement of the single post shoring poles, the aquajack, and the cross bracing was "like a scaffold frame shoring" (Collins 10/29/2003 EBT at 31, lines 19-20)

On August 2, 2001, Mr. Tikunov, a laborer, was working on the first floor of the west wing portion of the MOMA building. His job that day was to erect special support pipes because the floor directly above him was scheduled to be demolished. Plaintiffs claim that the use of the jackhammer on the elevated surface above Mr. Tikunov caused the single post-post aquajack scaffold to vibrate. Mr. Tikunov states that he was working with three other Breeze employees that day, and that erecting the support pipes was their only responsibility.

At approximately 2:30 p.m., Mr. Tikunov and another employee, Sergei, noticed that some of the single pole aquajacks appeared to be loose due to the vibrations coming from the demolition of the floor above. Serge suggested that they tighten the poles to prevent them from toppling over. Mr. Tikunov states that he was not involved in the erection of the single shoring poles. Nonetheless, Tikunov and Sergei attempted to tighten the poles by adjusting the screw-jacks with a hammer.

As Mr. Tikunov was adjusting a shoring pole, a different single shoring pole nearby apparently lost contact with the ceiling

above and fell. Sergei shouted a warning, but Tikunov was unable to avoid the falling pole. The flat metal plate from the screw-jack at the top of the falling pole landed on Tikunov's right foot.

Tikunov was rushed to the hospital and was admitted for treatment of several broken toes. His foot required surgery to close the wound caused by the screw-jack.

Claude Wuytack, MOMA's general superintendent, did not recall seeing any unsafe shoring; however, Wuytack and Collins both testified that single pole aquajacks were always "tied-off" to stationary objects in at least two separate directions so that they would be stable. Wuytack claims that he conducted a walk-through at approximately 8:00 a.m and did not notice any single pole aquajacks without proper bracing.

DISCUSSION

A motion for summary judgment must be made no later than 120 days after the filing of the note of issue except with leave of court with good cause shown (CPLR 3212[a]). In an order dated February 6, 2004, the court granted an extension of time to move for summary judgment only to Breeze.

This court will treat MOMA and Amec's application as a request for leave to file a motion for summary judgement.

Breeze alleges that it is prejudiced by MOMA and Amec's application since these parties have moved for an order directing Breeze to defend and indemnify them in this action. Breeze alleges that in the event that MOMA and Amec prevail in their motion, its attorney will be compelled to defend two new clients on the eve of

trial. Breeze states that MOMA and Amec have not submitted progress reports. As a result, Breeze maintains that it is unable to to determine if MOMA and Amec supervised or controlled plaintiff's work at the time of the accident.

Breeze cannot claim prejudice since it is aware of whether it contractually agreed to defend and indemnify the owner and general contractor. Moreover, as the injured worker's employer, Breeze is in the best position to know which entity was responsible for supervising Mr. Tikunov's work

Furthermore, the issue of whether MOMA and Amec actually controlled Mr. Tikonov's work is also not relevant to the issue of whether they are liable for violation of section 240(1) and 241(6) of the Labor Law. In particular, the duty imposed by section 240(1) of the Labor Law is nondelegable and consequently the owner and general contractor[2] who breach that duty may be held liable in

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[2] Amec does not state whether it is a general contractor. However, its predecessor Morse Diesel is referred to as a Construction Manager. Morse Diesel's contract with MOMA indicates that Morse Diesel functioned as a general contractor because it was responsible for the coordination and execution of all the work at the site (Feltt v Owens, 247 AD2d 689, 691 [3d Dept 1998], citing Russin v Louis N. Picciano & Son, 54 NY2d 311, 316 [1981][remaining citation omitted]). In addition, Morse Diesel also "had overall responsibility for completion of the project, for the writing, bidding, purchasing, coordinating and scheduling of all subcontracts, and for 'initiating, maintaining and supervising all safety precautions and programs in connection with the [overall project]" (Dennis v Beltrone Constr. Co., Inc., 195 AD2d 688, 689-690 [3d Dept 1993]).

Moreover, a party, such as Amec, which has the responsibility to coordinate and the authority to supervise all aspects of the renovation project is considered to act as an agent of the owner for purposes of liability under the Labor Law and as a contractor with nondelegable duties (Kerr v Rochester Gas and Electrical Corp., 113 AD2d 412, 417 [4th Dept 1985]; see,

damages regardless of whether it actually exercised supervision or control over the actual work which caused the alleged injury (Cosban v New York City Transit Authority, 227 AD2d 160, 161 [1st Dept 1996] citing Ross v Curtis-Palmer Hydro-Electric. Co., 81 NY2d 494, 500 [1993] [remaining citation omitted]). Under section 240(1) of the Labor Law, an owner or general contractor will be responsible for the injuries sustained by a worker regardless of which entity actually provided the defective device (D'Amico v Manufacturers Hanover Trust Co., 177 AD2d 441, 442 [1st Dept 1991]).

Moreover, the duty of an owner or general contractor to provide proper protection and equipment is also non-delegable under section 241(6) of the Labor Law (Leon v J&M Peppe Realty Corp, 190 AD2d 400 [1st Dept 1993]). Therefore, defendants MOMA and Amec are vicariously liable under section 241(6) for the negligent failure of their contractor or subcontractor to maintain the construction site in a reasonably safe condition where the alleged defect or hazard is proven to be the proximate cause of plaintiff's injury (Kane v Coundorous, 293 AD2d 309, 312 [1st Dept 2002]).

Accordingly, the court grants that branch of MOMA and Amec's motion to file a late application for summary judgment. Since Breeze has an opportunity to address movants' claims, there is no need for further delay and the court shall consider the merits of the third-party claims.

Maniscalco v Liro Engineering Constr. Mgt, P.C., 305 AD2d 378, [2d Dept 2002] and Falsitta v Metropolitan Life Inc., Co, Inc., 279 AD2d 879, 800 [3d Dept 2001]).

1. Labor Law § 240(1)

a. Falling Object

Defendant Breeze correctly argues that Mr. Tikunov's injuries are not the result of a violation of the "falling object" section of 240(1) of the Labor Law since the object which fell on plaintiff was not a material being hoisted or loaded or an item that required securing for the purposes of the undertaking at the time (Misseritti v Mark IV Constr. Co., 86 NY2d 487, 491 [1995], rearg denied 86 NY2d 487 [1996]; Orthlieb v Town of Malone, 307 AD2d 679, 680 [3d Dept 2003], citing Narducci v Manhasset Bay Assocs., 96 NY2d 259, 267-268 [2001]; cf., Sherman v Babylon Recycling Ctr., 218 AD2d 631 [1st Dept], lv dismissed 87 NY2d 895 [1995] [inadequate secured beam being hoisted is a hazard within section 240(1).

Breeze's cross motion for summary judgment is granted to the extent of dismissing all portions of the complaint which allege a violation of the "falling object section of 240(1) of the Labor Law.

b. Elevation Related Risk

Section 240(1) of the Labor Law requires all owners and contractors to "'furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays ladders,... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed'" (Panek v County of Albany, 99 NY2d 452, 456-457 [2003], quoting Labor law § 240[1]). In addition, any structure which is

a functioning elevated work site and is created during the construction process requires the safety devices enumerated in section 240(1) of the Labor Law (see, Fox v Tioga Constr. Co., Inc., 1 Misc3d 261 [Sup Court, Oneida County 2003] [pedestrian bridge functioned as elevated work platform], citing Keefe v E& D Specialty Stands, 259 AD2d 994, 995 [4th Dept 1999], lv dismissed 93 NY2d 999 [1999], lv denied 95 NY2d 761 [2000]).

Liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of a safety device to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (Ross v Curtis-Palmer Hydro-Electric Co., supra, 81 NY2d, at 501). The term "special hazards," referred to in the statute, does not encompass any and all perils that may be connected in some tangential way with the effects of gravity (ibid.). Rather, "[w]here an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists" (Nieves v Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914, 916 [1999]).

Breeze maintains that plaintiffs' cause of action for violation of section 240(1) of the Labor Law is without merit since there was no elevated risk because Mr. Tikunov was situated at the same level as the object which fell (cf., Carsaro v Mt. Calvary Cemetery, 214 AD2d 950, 951 [4th Dept 1995] [injury the result of a falling concrete form anchored to ground next to where plaintiff

was walking]). Breeze also argues that the shoring pole was neither an elevated work site nor an object which fell from an elevated work surface. According to Breeze, the single shoring post bracing system is not covered under section 240(1) since this device is not utilized by workers to access different levels of elevation but to hold up the flooring (Hargobin v K.A.F.C.I. Corp., 282 AD2d 31, 35, order issued 2001 WL 463240 [1st Dept 2001]).

Plaintiffs, however, argue that the protective purposes of section 240(1) of the Labor Law would not be served if the court adopts defendants' arguments. Plaintiffs maintain that section 240(1) protects all workers on the site from collapsing scaffolds, not just those who were actually working on, or who fell from, the scaffold's platform (cf., Thompson v St. Charles Condominiums, 303 AD2d 152, 154 [1st Dept], lv dismissed 100 NY2d 556, lv dismissed sub nom Striver's Row Associates, L.P. v Seavey Organization, __ NY2d __, [2003] [protections apply whenever the employee is injured as a result of a defective protective device "regardless of whether the employee was on or under the scaffold when it collapsed" [emphasis in original]).

In order to succeed on his claim, plaintiffs must prove that the circumstances of the work task created a risk related to an elevation differential (Cruz v Turner Constr. Co., 279 AD2d 322 [1st Dept 2001] citing Rocovitch v Consolidated Edison Co., 78 NY2d 509, 514 [1991]). Plaintiffs must eventually show that

> "the contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a

> difference between the elevation level where the worker is positioned ...

(Melber v 6333 Main Street, Inc., 91 NY2d 759, 762 [1998], quoting Rocovitch v Consolidated Edison Co., supra). In analyzing section 240(1) of the Labor Law, reviewing courts have looked to the circumstances surrounding the height differential to determine whether the work being performed was an actual height-related risk necessitating the safety devices enumerated in the statute (Masullo v City of New York, 253 AD2d 541 [2d Dept 1998]). Reviewing courts are required to scrutinize both "the work that is being performed by the laborer, and the nature of the protective device and the manner in which it is being utilized" (Harqobin v K.A.F.C.I. Corp., supra, 282 AD2d, at 35).

The court finds that Mr. Tikunov was working at a protected activity within the contemplation of section 240(1) of the Labor Law. There is clearly an elevation differential between the site of the demolition work and the area where the shoring poles were being installed in anticipation of that work. Although Mr. Tikunov was on the ground floor at the time of the accident, he was clearly involved in the demolition work which was being performed at a higher floor levels since preparatory labor for demolition is still considered part of the demolition process and is protect by section 240(1) (Panek v County of Albany, supra, 99 NY2d, at 458; see, Oden v Chemung County Indus. Development Agency, 183 AD2d 998, 999 [3d Dept 1992], affd 87 NY2d 81 [1995]).

The issue is whether the system of jacks, braces and cross bars employed at the site constitutes an elevation-related device

under the purview of section 240(1) of the Labor Law.

The First Department held that the test of whether a device fits within one of the categories mentioned in section 240(1) depends upon "whether the protective device being utilized is intended to facilitate access to a different elevation level for the worker or his materials" (Hargobin v K.A.F.C.I. Corp., supra, 282 AD2d, at 35, citing Melber v 6333 Main St., supra, 91 NY2d, at 762 [remaining citation omitted]).

Plaintiffs view the bracing system used during the demolition as a type of scaffold. The term "scaffold" as it is used in the Labor Law is broadly interpreted and New York courts have held that

> [a]lmost any platform, no matter how temporary or makeshift which is intended to provide a construction worker with support and footing above the ground level will qualify as a scaffold within the purview of the labor law, and it matters not that the "scaffold" (or the structure serving as same) is in the process of being constructed or dismantled when it fails to provide "proper protection" within the meaning of Labor law section 240"

(McMahon v 42nd St. Development Project Inc., 188 Misc2d 25, 31 [Sup Ct, Bronx County 2001], quoting Torino v KLM Const., Inc., 257 AD2d 541 [1st Dept 1999] [remaining citation omitted]).

Plaintiffs argue that the pole/cross bracing system functioned as a scaffold because its use is integral to the demolition process which involved the use of equipment and the placement of workers on the floor above Mr. Tikunov (Richardson v Matarese, 206 AD2d 354 [2d Dept 1994]). Plaintiffs point out that Collins, himself, compared the single post shoring poles, the aquajack, and the cross bracing to "scaffold-frame shoring," Furthermore, the record shows

that the bracing system was not meant to be a permanent part of a building since it was erected, removed, and re-erected at a lower level as each floor is being demolished (cf., Dombrowski v Schwartz, 217 AD2d 914 [4th Dept 1995] [permanent stairway not the functional equivalent of a ladder or other safety device]).

Defendant Breeze, however, maintains that the pole which fell is not part of a scaffold which allows workers to go from the lower level to the higher floor but is instead part of a structural bracing system and the alleged failure of such a device is not a section 240 violation. Defendant Breeze relies on the Court of Appeals' holding which interprets the term "'braces' referred to in section 240(1) to cover those protective devices 'used to support elevated work sites, not braces designed to shore up or lend support to a completed structure'" (Misseritti v Mark IV Constr. Co., supra, 86 NY2d, at 491). For example a worker, who is injured by a falling brace, does not state a claim under section 240(1) of the Labor Law where "the brace that fell and hit him was an integral part of the ground-level structure that he was involved in demolishing" (Amato v State, 241 AD2d 400, 401 [1st Dept 1997], lv denied 91 NY2d 805 [1998]; see, Piccinich v New York Stock Exchange, 257 AD2d 438 [1st Dept 1999] [defective internal support not a brace within the meaning of section 240(1)]; cf. Olsen v Pyramid Crossgates Co., 291 AD2d 706 [3d Dept 2002] [collapse of platform used to support permanent duct work not a safety device and does not demonstrate violation of section 240(1)]).

It is unclear whether the pole and jack system described in

the Collins' testimony resembles the support brace used in a completed and permanent structure which is the basis for the holding in Misseritti v Mark IV Constr. Co. (supra, 86 NY2d, at 491) and Amato v State (supra, 241 AD2d, at 401). Clearly the pole system was not part of the building's integrated structure nor was the device meant to be permanent support since it was moved as the demolition process proceeded. Collins also fails to explain how a scaffold differs from "scaffold-frame shoring."

Even if this Court were to find that the system employed in this situation is a support device and not a scaffold, that would still not end the inquiry concerning the function of the device. Certain types of "shoring devices" come under the provision of section 240(1) of the Labor Law if they also serve an elevation protective function. The collapse of a shoring timber is inside the ambit of section 240(1) when the protective device is required due to an elevation differential (Tooher v Willets Point Contracting Corp. 213 AD2d 856, 857 [3d Dept 1995]).

In addition, an issue of fact still remains as to whether the poles were defectively installed since the parties dispute whether the bracing device employed actually contained the required cross bars.

That branch of plaintiffs' cross motion for summary judgment on their cause of action under section 240(1) of the Labor Law, is, therefore, denied.

Breeze's motion to dismiss the claim based on its remaining arguments is also denied. Breeze has not shown, as a matter of

law, that Mr. Tikunov is a recalcitrant worker and the present record contains no evidence that this plaintiff ignored safety instructions or refused to use supplied safety equipment (Haqins v State of New York, 81 NY2d 921, 922-923 [1993]). Plaintiffs maintain that Mr. Tikunov tried to avoid a problem by tightening the support poles. None of the defendants have presented any evidence that Mr. Tikunov's use of a hammer to set the poles in place was recklessly or in disregard of clear instructions. At present, the record contains no testimony which proves that Mr. Tikunov's actions were the sole proximate cause of the accident (see, Blake v Neighborhood Services of New York City, 1 NY3d 280, 290 [2003]).

2. Labor Law 241(6)

Section 241(6) of the Labor Law requires owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor and the provisions of the Industrial Code (Ross v Curtis-Palmer Hydro-Electric Co., supra, 81 NY2d, at 501-502).

Here, plaintiffs argue that the work is subject to the Industrial Code requirements for hand demolition (12 NYCRR 23-3.3 et seq) rather than those set for mechanical demolition (12 NYCRR 23-3.4 et seq). However, neither side presents an expert affidavit which explains whether the demolition used at the MOMA site qualifies as "hand" or "mechanical" demolition process.

Section 23-1.4(b)(16) of the Industrial Code defines

demolition work as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." There is no definition of "hand demolition" except for the statement in the Industrial Code which provides that the provisions of section 23-3.3 shall not apply to mechanical means of demolition (12 NYCRR 23-3.3[a]). In contrast, mechanical methods of demolition under the Industrial Code are specifically defined and include "[t]he use of a swinging weight attached to the line of a crane boom, clamshell bucket, power shovel, bulldozer or any other mechanical device or equipment for the purpose of demolishing a building or other structure or any remaining portion thereof ..." (12 NYCRR 23.3.4).

Although workers at the site used jack hammers attached to the arms of Bobcats, the work still does not fall under the Industrial Code provisions for "mechanical demolition." Section 23-3.4(6) of the Industrial Code also provides that "[t]he controls of any mechanical device or equipment used in demolition operations shall be located and operated a safe and reasonable distance from the point of demolition." Nothing in the record indicates that the machinery was operated by remote control. On the contrary, Mr. Tikunov testified that the Bobcat vehicles were being driven and operated by workers located on the floor being demolished (Tikunov 4/9/2003, EBT, at 24, lined 5-21). Other provisions in section 23-3.3 of the Industrial Code also indicate that the use of machinery does not automatically remove a method from the scope of

hand demolition work since the use of derricks to demolish structural steel falls under section 23-3.3(h) of the Industrial Code.

Other work practices at the site are consistent with the methods employed in hand demolition. Routine inspections are mandatory under section 23-3.3(c) of the Industrial Code. Such inspections are not mentioned in the code section governing mechanical demolitions. In addition, the record shows that the debris from the MOMA demolition was removed by means of chutes which is a method specifically described in the section covering hand demolition work (see, 12 NYCRR 23-3.3[e][1]).

Since a review of the provisions indicates that sections on hand demolition are more relevant to the work described, the court shall permit plaintiffs to proceed under the theory that the method employed at the MOMA site comes under the definition of "hand demolition."

Contrary to Breeze's argument, section 23-3.3(b)(3) (which requires support for structure), and section 23-3.3(c) (which requires continuing inspections), of the Industrial Code set forth concrete specifications regarding the protection to be provided to workers (Terry v Mutual Life Ins. Co. of New York, 265 AD2d 929 [4th Dept 1999] and Gawel v Consolidated Edison Co. of New York, Inc., 237 AD2d 138 [1st Dept 1997]).

In comparison, plaintiffs have not supported their claims that defendants MOMA and Amec violated subsections 23.1-5(c)(1), (2) and (3) of the Industrial Code. Plaintiffs do not allege that any

machinery was in an unsafe condition (12 NYCRR 23.1-5[c][1]). Plaintiffs do not state the nature of design defect in the "carrying equipment" (12 NYCRR 23.1-5[c][2]). Section 23.1-5(c)(3) which requires that all equipment be immediately repaired is very broad and is not specific enough to trigger liability under section 241(6) of the Labor Law.

Plaintiffs have submitted no evidence to show that the bracing device used in this action is a type governed by section 23.1-4(1) of the Industrial Code which only applies to platforms mounted on an exterior wall. Section 23-1.7(a) of the Industrial Code, which requires overhead planks to avoid falling debris, is also not applicable since plaintiff was not hit by construction debris but by a portion of the protective device which was put into place to protect workers.

Plaintiffs have also failed to state what protective gear defendants failed to provide Tikunov (12 NYCRR 23-1.8). In addition, plaintiffs' citation of sections 23-1.27 (d) and (e) is similarly misplaced since those sections apply only to mechanical, hydraulic and pneumatic jacks used to raise loads.

Accordingly, Breeze's cross motion to dismiss is granted to the extent of limiting plaintiffs' cause of action arising under section 241(6) of the Labor Law to violation of sections 23-3.3(b)(3) and 23-3.3(c) of the Industrial Code.

That branch of plaintiffs' cross motion for summary judgment on their cause of action for violation of section 241(6) of the Labor Law is denied. There is no expert testimony that the

vibrations of the jack hammer were responsible for the loosening of the loose of the support devices and the eventual collapse of one of the poles.

Having ruled that plaintiffs may proceed on the theory that Mr. Tikunov was engaged in hand demolition, and without expert testimony that the work method employed is also governed by the mechanical demolition, the request for leave to amend their bill of particulars to include violations of the Industrial Code which deal with standards for mechanical demolition is denied.

3. Labor Law § 200

Section 200 of the Labor Law is not a strict liability statute but a "negligence statute" codifying the owner's or general contractor's common-law duty to maintain a safe work place (Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993]). Unlike sections 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under section 200 of the Labor Law where the worker's injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition (Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 352 [1998]; Lombardi v Stout, 80 NY2d 290, 295 [1992]). Hence, a party's duty under section 200 of the Labor Law is contingent upon contractual or other actual authority to control the activity bringing about the injury (Nowak

v Smith & Mahoney, P.C., 110 AD2d 288, 289 [3d Dept 1985]) as well as proof that the defendant had actual or constructive notice of the alleged unsafe condition or location (Canning v Barney's New York, 289 AD2d 32 [1st Dept 2001]).

MOMA and Amec's retention of general supervisory control, presence at the worksite, or authority to enforce general safety standards is insufficient to establish the degree of control that is necessary to make a party liable under section 200 of the Labor Law (Soshinsky v Cornell University, 268 AD2d 947 [3d Dept 2000]; Riley v John W. Stickl Constr. Co., 242 AD2d 936, 937 [4th Dept 1997]).

Breeze's motion to dismiss those portions of plaintiff's compliant which allege violations of section 200 of the Labor Law and common-law negligence is granted because there is no evidence that defendants MOMA and Amec supervised or controlled the injured plaintiff's work (Aloi v Structure-Tone, Inc., 2 AD3d 375, 376 [2d Dept 2003], citing Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]).

4. Third-party Claims

a Common Law Indemnification and Contribution

Section 11 of the Workers' Compensation Law bars claim for common law contribution and indemnification against an employer when the worker did not suffer a grave injury as defined by that statute (Castro v United Container Machinery Group, Inc., 96 NY2d 398 [2001]; Smith v Xaverian High School , 270 AD2d 246, 248 [2d Dept 2000]). Plaintiffs' description of Mr. Tikunov's injuries in

their bill of particulars does not describe a "grave injury" as listed under section 11 of the Workers' Compensation Law. Accordingly, that portion of MOMA and Amec's third-party complaint which seeks common-law indemnification and contribution against Breeze is without merit (Bardouille v Structure Tone, Inc., 282 AD2d 635, 637 [2d Dept 2001]). MOMA and Amex may not bring a claim against Breeze under section 1401 of the Civil Practice Law and Rules which explicitly excludes contribution where section 11 of the Workers' Compensation Law applies (Smith v Xaverian High School, supra, 270 AD2d, at 248). Therefore, those branches of Amec and MOMA's motion for common law indemnification, and common law/ statutory contribution against Breeze are denied.

b. Contractual Indemnification and Duty to Procure Insurance

Article 9(A) of the amendments to Breeze's subcontract requires that each contractor shall indemnify the owner and the construction manger of all liability, damages, loss, claims demands and actions which are claimed "to arise out of or be connected with the performance of work by the Contractor, or any act or omission of Contractor." Accordingly, MOMA and Amec's motion for contractual indemnification is granted to the extent that Breeze must indemnify MOMA and Amec, in the event that they are held liable to plaintiffs' for injuries arising out of Breeze's work.

Breeze also agreed in Article 11 of its subcontract to procure insurance and to name MOMA and Amec as additional insureds. However, since no copies of insurance have been provided, the court is unable to determine whether Breeze complied with this

contractual duty. Even if it is eventually shown that Breeze failed to procure insurance in the specified amounts, that omission does not permit MOMA and Amec to recover the full amount of any judgment against them in plaintiffs' main action. It is well settled that "recovery for breach of a contract requiring the purchase of insurance is limited to the cost of procuring substitute coverage, irrespective of whether the contract specifically affords the option to obtain substitute coverage" or other out of pocket costs (Carnegie Hall Corp. v City University of New York, 286 AD2d 214, 215 [1st Dept 2001], citing Inchaustequi v 666th 5th Ave., 268 AD2d 121, 124 [1st Dept 2002], affd 96 NY2d 111 [2001]). Furthermore, movants have not submitted any proof of damages which have allegedly arisen from Breeze's purported failure to procure the proper insurance. Accordingly, this branch of MOMA and Amec's motion is also denied.

Remaining Third-party Claims

However, an issue remains as to whether Breeze breached its contractual duties towards MOMA and Amec and these parties' motion for summary judgment is denied.

Accordingly, it is

ORDERED that branch of MOMA and Amec's motion for contractual indemnification is granted to the extent that Breeze must indemnify MOMA and Amec in the event that these parties are held liable to

plaintiffs' for injuries arising out of Breeze work; and it is further

ORDERED that the branch of MOMA and Amec's motion for summary judgment on their remaining third-party claims against Breeze are denied for the reasons stated herein: and it is further

ORDERED that Breeze's cross motion for summary judgment is granted to the extent of dismissing all portions of the complaint against MOMA and Amec which allege a violation of the "falling object section of 240(1) of the Labor Law. These portions of the complaint are severed and dismissed; and it is further

ORDERED the branch of Breeze's cross motion to dismiss plaintiffs' cause of action arising under section 241(6) of the Labor Law is granted to the extent of dismissing all alleged Industrial Code violations, except sections 23-3.3(b)(3) and 23-3.3(c) which refer to hand demolition. All alleged Industrial Code violations claims, except those arising under 12 NYCRR 23-3.3(b)(3) and 12 NYCRR 23-3.3(c), are severed and dismissed; and it is further

ORDERED that Breeze's cross motion for summary judgment is granted to the extent of dismissing all portions of the complaint against MOMA and Amec which allege a violation of section 200 of the Labor Law and common-law negligence. These portions of the complaint are severed and dismissed; and it is further

ORDERED that plaintiffs' entire cross motion for summary judgment and for leave to amend their bill of particulars is denied for the reasons stated herein; and it is further

ORDERED that the remaining sections of the complaint arising under sections 240(1) and 241(6) of the Labor Law shall continue and it is further

ORDERED that the parties are directed to appear for a trial on December 2, 2004, at 10:a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: October 18, 2004

ENTER:

PAULA J. OMANSKY
J.S.C.