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

PRESENT: Kornreich Justice PART 54

0119952/2001

BUCKLEY, SCOTT
vs
COLUMBIA GRAMMAR & PREPARATORY

SEQ 1

SUMMARY JUDGMENT

INDEX NO. 119952/01

MOTION DATE 1/13/05

MOTION SEQ. NO. 1

MOTION CAL. NO.

...papers, numbered 1 to 12 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6, 7
Replying Affidavits	8, 9, 10, 11, 12

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

FILED
JUN 23 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/15/05

SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SCOTT BUCKLEY and DINA BUCKLEY

Plaintiffs,

Index No.: 119952/01

DECISION and ORDER

-against-

COLUMBIA GRAMMAR and PREPARATORY and KALIKOW CONSTRUCTION, INC.,

Defendants,

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KALIKOW CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

KONE INC. d/b/a MONTGOMERY COHEN ELEVATOR CO.

Third-Party Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for work-related injury allegedly sustained by plaintiff while he was working on a construction site at Columbia Grammar School at 3 West 92nd Street in New York City. Plaintiff's complaint, dated October 22, 2001, alleges that while performing elevator construction work on the site on July 21, 2001, he was struck by a falling object in the elevator shaftway. The complaint asserts causes of action for negligence and violation of Labor Law §§ 200, 240 and 241(6), against Columbia Grammar and Preparatory ("Columbia"), the premises owner, and Kalikow Construction Co. ("Kalikow"), the general contractor and/or

construction manager.

Defendant Kalikow commenced a third-party action against plaintiff's employer, Kone Inc. d/b/a Montgomery Cohen Elevator Co. ("Kone"), a subcontractor performing elevator installation work on the site. The third-party complaint alleges that Kone is contractually obligated to defend and indemnify Kalikow for losses arising out of plaintiff's accident, and that Kone breached its contractual duty to procure liability insurance in favor of Kalikow as an additional insured.

Factual Background

Kalikow, the general contractor, sub-contracted the elevator construction work to Kone.

The contract for Kone's construction of the elevator provides as follows:

> For the project known as the Upper School Expansion for Columbia Grammar and Preparatory School at 3 West 92nd Street, Kone, Inc. is to provide all labor , all material, and all supervisory services to furnish and install the full scope of equipment and accessories for an Ecosystem 'Monospace' AC Gearless Traction Passenger Elevator to provide service from the cellar level through to and including the roof, for a total of nine stops and as otherwise configured in accordance with the architectural drawings, details, and specifications as prepared by Williasm Leggio Architects...

Affirmation of K. Sacks, Exhibit B.

In connection with the sub-contract, Kone agreed to the terms and conditions of Kalikow, which provide, in pertinent part:

> You shall indemnify and save us harmless against liability, loss or expense incurred by us because of bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons, or on account of damage to property arising out

> of or in consequence of the negligent[1] performance of this order, whether such injuries to persons or damages to property are due or claimed to be due to any negligence of yours.

Sacks Aff., Ex. B.

Plaintiff and his co-worker Glen Birnbaum were working together on the elevator installation. Plaintiff took instruction from Birnbaum, who generally took instruction from a Kone foreman, though none was there on the day of the accident. Birnbaum did not take instruction from any Kalikow or Columbia employee.

The design of the elevator system being installed featured a platform, cab and counterweight frame. The cab (the elevator car) would sit on the platform, which would ride up and down the shaftway on rails affixed to the shaftway walls. The counterweight frame would be mounted on a separate set of rails. Several counterweights weighing more than 50 pounds each would be mounted to the counterweight frame. The counterweight frame would be connected to the platform/cab assembly by cables. As the platform ascended, the counterweight frame would descend, and *vice versa.*

On the day of the accident, the elevator cab had yet to be installed in the shaftway, but the platform had been assembled and installed. EBT of S. Buckley, pp. 27, 34. Under Birnbaum's supervision, plaintiff mounted the counterweights onto the counterweight frame. The counterweights were mounted on "notches" in the frame, as per a written instruction "booklet" provided to Birnbaum by Kone.[2] Birnbaum inspected the counterweights, and found them to be

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[1]The word "negligent" appears to have been inscribed by hand as an additional term. Sacks Aff., Ex. B.

[2]The instruction booklet is not part of the record before the Court.

properly installed in the frame.

Before the accident, plaintiff and Birnbaum had raised the platform to the roof level at the top of the nine-stop shaftway. They then set about lowering the platform through the shaftway, using a hand-held control device, called a "pendant unit," that was connected to the platform by a cable. Plaintiff held the pendant unit; Birnbaum gave verbal instructions. In this way, they lowered the platform to the basement level, the penultimate level before the sub-basement. Correspondingly, the counterweight frame traveled from the bottom of the shaftway, crossed paths with the platform on its way up, and now sat near the top of the shaft.

Plaintiff was standing on the basement floor, at the shaftway opening. Birnbaum instructed him to lower the platform to the sub-basement level. When plaintiff did so, Birnbaum heard a "scraping" noise from above. Birnbaum told plaintiff to halt the platform, and then move it back up, in order to determine whether the scraping sound would recur. When the platform had reached a level just a few inches below the level where plaintiff was standing, Birnbaum saw several counterweights falling down the shaftway. He yelled to warn plaintiff. Plaintiff was struck by several of the counterweights, sustaining injury to the right side of his body.

After the accident, Birnbaum went up to the eighth floor to inspect the counterweight frame. He saw "more counterweights hanging out of the frame that didn't make it down yet." 105. Birnbaum could not reach the frame from the shaftway opening, so he "planked out that floor so he could get those weights back in the frame." *Id.* Standing on the planking, Birnbaum observed a steel spike "sticking into the frame" preventing him from returning the weights into their normal position. *Id.* The spike, about one-quarter inch thick, protruded approximately 5 or 6 inches out from the wall, and appeared to have been "poured into the concrete forms." *Id.* at

106. Birnbaum "beat down" the spike so he could get the weights to "slide back into the frame." *Id.* at 107. Birnbaum opined that the accident was caused when the counterweights were dislodged by the spike. *Id.* at 107.

Birnbaum testified that other elevator designs he had worked on featured a rod that would be threaded through the counterweights in order to stabilize them. However, the instant elevator had no such feature. After the accident, Birnbaum stabilized the counterweights by installing "rail bugs" a "clamp" device that "sat on top of the counterweights." *Id.* at 112. Had he seen the spike before the accident, he would have removed it. *Id.* at 170. Birnbaum stated that the lighting in the shaft, which was provided by Kalikow, was "dim" or "dismal." *Id.* at 55, 172.

Kalikow testified, by its employee Brian Principe, that it had constructed barricades at each floor to prevent workers from falling in shaft. EBT of B. Principe, p. 48. According to Principe, other than the concrete subcontractor that made the shaft, no other subcontractor worked in the elevator shaft before or during Kone's work. *Id.* at 66.

Motions

Kalikow now moves for summary judgment dismissing the complaint as against it. Kalikow submits the affirmation of its attorney; copies of pleadings; deposition testimony of plaintiff, his co-worker, and a Kalikow employee; and a copy of an elevator construction drawing. Plaintiffs oppose Kalikow's motion.

Plaintiffs cross-move for partial summary judgment on their Labor Law § 240(1) claim. Plaintiffs submit their attorney's affirmation, together with pleadings and deposition transcripts; and a copy of the Kalikow-Kone contract. Kalikow and Columbia oppose plaintiffs' cross-motion.

Columbia cross-moves for summary judgment dismissing the complaint as against it, and for common law indemnification from Kalikow. Columbia submits the affirmation of its attorney; the affidavit of its CFO Peter B. Reynolds; and a copy of certain Industrial Code section. Plaintiff opposes the cross-motion; Kalikow opposes the portion of the cross-motion seeking indemnification.

Kone has submitted the affirmation of its attorney in response to the motions of Kalikow and Columbia.

III. Conclusions of Law

A. Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. *See In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845 (3rd Dept. 1999) citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup.Ct. Oswego County 1968) (Aronson, J.).

B. Liability Under Labor Law §§ 200, 240 and 241(6)

1. Labor Law § 200

Labor Law section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site. *See Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343 (1998); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993). An

implicit precondition to this duty is that the party to be charged with that obligation "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Rizzuto, supra* quoting *Russin v. Louis N. Picciano & Son,* 54 N.Y.2d 311 (1981). Accordingly, to impose liability under either common law negligence or Labor Law §200, it is necessary to establish supervisory control over the work site. *See Ross, supra.* "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." *Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d 876, 877 (1993) citing *Lombardi v. Stout,* 80 N.Y.2d 290, 295 (1992). Here, there is no evidence that either Kalikow or Columbia had any control over the injury-producing work. *See Serpe v. Eyris Productions, Inc.* 243 A.D.2d 375 (1st Dept. 1997); *Velez v. Tishman Foley,* 245 A.D.2d 155, (1st Dept. 1997); *Terranova v. City of New York,* 197 A.D.2d 402 (1st Dept. 1993) (issue of supervisory control turns on whether defendants had authority over or control of work being done at accident site and authority to insist that proper safety practices be followed). Indeed, plaintiff and Birnbaum testified that Kone had exclusive control over its work. This is consistent with the contract between Kalikow and Kone, under which Kone was required to provide "all material and supervisory services" for the elevator installation. Nor is there any evidence that either Kalikow or Columbia supervised the work of the non-party concrete subcontractor, which, according to Mr. Birnbaum, was responsible for the steel spike that may have caused plaintiff's accident. Thus, summary judgment is granted to defendants as to plaintiffs' negligence and Section 200 causes of action.

2. Labor Law § 240

Labor Law § 240 (1) requires owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, clearing or pointing of a building or structure" to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." *Id.* Section 240 imposes strict liability on owners, contractors and their agents, for any breach of the duty imposed therein which proximately causes an injury. *Falsitta v. Metropolitan Life Ins. Co.,* 279 A.D.2d 879, 880-881 (1st Dept. 2001) (citations omitted). To recover under Labor Law § 240, an injured worker must show that the injury was caused by a "contemplated hazard ... related to the effects of gravity, which required protective devices because of either a difference between the elevation level of the required work and a lower level or the difference between the elevation level of materials and a lower level where a worker was present." *Becerra v. City of New York,* 261 A.D.2d 188, 190 (1st Dept. 1999).

Although Section 240 applies to falling objects as well as falling workers, it is well settled that not every falling object injury that occurs on a construction site gives rise to a Section 240 claim. *See Narducci v. Manhasset Bas Assocs.,* 96 N.Y.2d 259 (2001). "[A] 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. *Id.* at 268 (citations omitted). The First Department, applying *Narducci,* has clearly held that the protection of the statute is only available where the object falls *while* being hoisted or secured. See *Doucoure v. Atl. Dev.*

Group, LLC, 12 A.D.3d 252 (1st Dept. 2004); *see also Gambino v. Mass. Mut. Life Ins. Co.,* 8 A.D.3d 337, 338 (2nd Dept. 2004).

Here, the counterweights were neither being hoisted nor secured at the time of the accident. Nor was the elevator a statutory safety device being used to transport building materials from one level to another, such that the dismemberment and fall of an elevator component would be covered by the Labor Law. *Cf. Jiron v. China Buddhist Ass'n,* 266 A.D.2d 347, 349 (2nd Dept. 1999) (Section 240 applied where plaintiff was struck by part of *materials hoist* which detached from hoist while hoist was being used to transport building materials from ground level to higher level). Neither was the fall of the counterweight caused by the failure or improper use of a statutorily enumerated protective device. *Cf. Sharp v. Scandic Wall Ltd. P'ship,* 306 A.D.2d 39, 40 (1st Dept. 2003) (plaintiff was protected by Section 240 where defective elevator he was hoisting down shaft fell because *hoist he was using was improperly removed* prior to stabilizing elevator at bottom of shaft). Thus, summary judgment dismissing plaintiff's Labor Law § 240(1) claim is granted to defendants, and plaintiff's cross-motion for partial summary judgment on said cause of action is denied.

3. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty on owners, contractors and their agents to provide "reasonable and adequate protection and safety to the persons employed" on construction work sites. In order to establish liability under Labor Law § 241(6), a plaintiff must allege violation of an Industrial Code violation which contains a "specific command." *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494 (1993). Plaintiff alleges violation of Industrial

Code sections 23-1.7, 2.1, and 2.5, *inter alia*.[3] The record does not support the claimed violations.

Industrial Code Section 23-1.7(a) provides protection from "overhead hazards." In order to prove a violation of Section 23-1.7(a), plaintiff must show that he was working in an area "normally exposed to falling material or objects." *Quinlan v. City of New York,* 293 A.D.2d 262, 263 (1st Dept. 2002) citing *Daly v. City of New York,* 254 A.D.2d 214 (1st Dept. 1998). Here, plaintiff was standing on the basement floor, near the shaftway opening, controlling the elevator with the handheld pendant unit. There is no evidence that the basement floor was normally exposed to falling objects or materials. Thus, plaintiffs' claim must be dismissed insofar as it alleges violation of Industrial Code Section 23-1.7(a).

Industrial Code Section 23-2.1 provides that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Here, the counterweights that struck plaintiff allegedly fell from their installed location on the counterweight frame, and were not being "stored." Nor is it alleged that the counterweights fell from the edge of a floor, platform or scaffold. Thus, Section 23-2.1 is not a viable basis for plaintiff's Labor Law claims. *See Flihan v. Cornell Univ.,* 280 A.D.2d 994 (4th Dept. 2001) (Section 23-2.1 did not apply where plaintiff was injured by gang box, which fell off back of truck, where gang box was in use and not in storage).

Plaintiffs' claim of violation of Industrial Code Section 23-2.5 must also be dismissed.

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[3]Although plaintiffs, in their bill of particulars, assert violations of other Industrial Code sections, plaintiffs' attorney only references the above-mentioned three in his affirmation in support of plaintiff's cross-motion for summary judgment. The Court will, therefore, confine its consideration to these three sections.

Section 23-2.5 requires that a person working in an elevator shaft, during "installation, repair or replacement" of an elevator, be protected from "falling objects or material" by "a tight platform consisting of planks ... ." Although plaintiffs cite no case holding that a Labor Law Section 241(6) claim may be grounded upon a violation of Industrial Code Section 23-2.5, the First Department, apparently, leaves open the possibility. *See Nevins v. Essex Owners Corp.,* 276 A.D.2d 315, 317 (1st Dept. 2000) (violation of 12 NYCRR 23-2.5 (b)(4), requiring protection from falling objects for workers in elevator shafts, could support Section 241(6) falling object claim). Nevertheless, it is clear that plaintiff was not working *in* the shaft at the time of the accident. As discussed above, he was standing on the basement floor, outside of the shaftway. While Section 241(6) must be construed liberally to accomplish the legislative purpose underlying the Labor Law, its language "should not be strained to encompass accidents which the Legislature did not intend to include." *See Perchinsky v. State*, 232 A.D.2d 34, 37-38 (3d Dept. 1997) (citation omitted); *Cf. Jennings v. Lefcon Pshp.,* 250 A.D.2d 388, 389 (1st Dept. 1998) (plaintiff was injured in open area between two high-rises under construction, "*not in* the sort of passageway, walkway and/or working area contemplated by 12 NYCRR 23-1.7 (d) and (e)"); *but cf. Ciancio v. Woodlawn Cemetery Ass'n,* 249 A.D.2d 86, 88 (1st Dept. 1998) (applying liberal construction to find that "[a] grave is an 'excavation' within the purview of the statute, requiring adequate safety measures to be implemented.") citing *Mosher v. State of New York,* 80 N.Y.2d 286, 288 (1992) ("the scope of subdivision (6) is not limited to building sites")). Only a strained construction of the term "in" would extend protection to plaintiff here, who was standing near, *but not in,* the shaft. Moreover, because the elevator had already been installed and was being run up and down the shaftway, protective planking would not have been feasible. Thus,

plaintiff's claim under Section 241(6) must fail.

C. Indemnification

A party seeking common-law indemnity must establish both its non-negligence and "proof of some negligence ... [of the] ... proposed indemnitor." *Priestly v. Montefiore Med. Center,* 10 A.D.3d 493, 495 (1st Dept. 2004) citing *Correia v. Professional Data Management,* 259 A.D.2d 60, 65, (1st Dept. 1999). Here, there is no evidence that Columbia exercised any supervision or control over the worksite. Thus, Columbia can establish its non-negligence. However, the record is unclear as to whether Kalikow, the proposed indemnitor, was negligent *vis a vis* plaintiff's accident. It is undisputed that Kalikow did not supervise or instruct Kone's employees, and thus, was not negligent as regards the installation work. However, the record does not foreclose the possibility that Kalikow supervised the work of the concrete subcontractor, which, according to Mr. Birnbaum's testimony, resulted in the protrusion of a steel spike from the concrete forms in the shaft, ultimately causing the accident. If such were to be established, it is possible that Kalikow could be held responsible to indemnify Columbia. Upon the present record, however, the Court must deny Columbia's motion for common-law indemnification.[4] Accordingly, it is

ORDERED that the motion of defendant Kalikow Construction, Inc., for summary judgment dismissing plaintiffs' complaint as against it is granted, and the complaint is dismissed as against said defendant, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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[4]The Court rejects Kalikow's argument that Columbia's cross-motion is fatally defective under *Brill v. The City of New York,* 2 N.Y.3d 648 (2004). The cross-motion was served within 120 days of the filing of the note of issue.

ORDERED that the cross-motion of defendant Columbia Grammar and Preparatory for summary judgment dismissing plaintiffs' complaint as against it is granted, and the complaint is dismissed as against said defendant, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross-motion of plaintiffs for partial summary judgment on their claim under Labor Law Section 240(1) is denied; and it is further

ORDERED that the cross-motion of defendant Columbia Grammar and Preparatory for summary judgment against co-defendant Kalikow Construction, Inc. for common-law indemnification is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: June 15, 2005
New York, New York

SHIRLEY WERNER KORNREICH