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

PRESENT: HON. MARILYN SHAFER, JSC PART 36

Justice

0602549/2001

DUNNE, KEVIN

VS

BOVIS LEND LEASE

SEQ 1

DISMISS

INDEX NO. 0602549/01

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

.... his 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 is consolidated with seq 002 & 003 & decided pursuant to attached decision

FILED

SEP - 1 2005

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 8/29/05

HON. MARILYN SHAFER, JSC J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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KEVIN DUNNE,

Plaintiff,

-against-

Index No. 602549/01

BOVIS LEND LEASE INC. and YESHIVA UNIVERSITY,

Defendants.

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BOVIS LEND LEASE INC. and YESHIVA UNIVERSITY,

Third-Party Plaintiffs,

-against-

HENEGHAN CONTRACTING CORP. and TAGGART ASSOCIATES CORP.,

Third-Party Defendants.

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Marilyn Shafer, J.:

Motions with sequence numbers 001, 002, and 003 are consolidated for disposition.

In motion sequence number 001, third-party defendant Heneghan Contracting Corp. (HCC) moves, pursuant to CPLR 3212, (1) for summary judgment dismissing all common-law negligence claims asserted as against it; and (2) for a conditional summary judgment in its favor against co-third-party defendant Taggart Associates Corp. (Taggart).

In motion sequence number 002, defendants Bovis Lend

Lease Inc. (Bovis) and Yeshiva University (Yeshiva; together, defendants) move, pursuant to CPLR 3212, (1) for summary judgment dismissing the complaint; and (2) for summary judgment on their contractual and common-law indemnification claims against third-party defendants, requiring one or both of them to defend and indemnify defendants.

In motion sequence number 003, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on his Labor Law § 240 (1) claim, and for an order directing the Calendar Clerk to set this matter down for an assessment of damages against defendants.

BACKGROUND

On April 10, 2001, plaintiff, a construction laborer employed by HCC, was working on the ground floor of a construction site located at 1300 Morris Park Avenue in the Bronx. A three-story building, which would house laboratories, offices, and several MRI units, was being built there as part of the Albert Einstein College of Medicine. Yeshiva is the owner of the property. Yeshiva retained Bovis to be the construction manager for the project. HCC was retained by Bovis to do the excavation, masonry, concrete, and plastering work at the site, and Bovis hired Taggart to do the plumbing work there. On the day of the accident, April 10, 2001, Taggart employees were working on the roof of the building, trying to establish a level

line for the roof drains. To do this, Taggart's foreman on the job, Joseph Ciano, devised his own "system", never before used, whereby he attached three lead weights, each weighing between three and five pounds, to a 1/8-inch nylon string, and hung the weights over the edge of the roof. Plaintiff was working below, removing the plywood from forms of a slab, when the string broke, and the three weights fell three stories, hitting plaintiff on his head, injuring him despite the fact that he was wearing a hard hat.

THE PLEADINGS

Plaintiff's complaint consists of one cause of action, which alleges claims of common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff has since acknowledged that he has no Labor Law § 200 or common-law negligence claims against defendants (Motion Sequence Number 002, Downes 2/18/05 Affirm. in Opp., ¶ 10). Thus, the only remaining claims in the complaint are those alleging violations of Labor Law §§ 240 (1) and 241 (6).

Defendants' answer basically denies the allegations of the complaint.

In their third-party complaint, defendants/third-party plaintiffs allege six causes of action, asserting claims sounding in contractual indemnification, common-law indemnity or contribution, and breach of contract by failure to procure

insurance against HCC and Taggart respectively.

Taggart's answer to the third-party complaint asserts one cross claim against HCC, sounding in common-law indemnity or contribution, and one counterclaim against defendants, also sounding in common-law indemnity or contribution.

HCC's answer to the third-party complaint alleges four cross claims against Taggart: for contribution, common-law indemnification, contractual indemnification, and breach of contract by failure to procure insurance. HCC also asserts a counterclaim against defendants, demanding that defendants' liability be determined and apportioned as between themselves. In addition, HCC's seventh affirmative defense seeks dismissal of the third-party complaint, "or certain causes of action asserted therein" (HCC Answer to Third-Party Complaint, ¶ TWENTY-FIRST), on the ground that the Workers' Compensation Law precludes defendants' action against HCC, plaintiff's employer. Defendants concede that their common-law indemnification claim fails because of Workers' Compensation Law § 11 (Motion Sequence Number 002, Chaves 5/3/05 Reply Affirm., ¶ 11).

DISCUSSION

Defendants' Summary Judgment Motion (Motion Sequence Number 002) To Dismiss the Complaint

Defendants seek summary judgment dismissing the complaint on the following bases: (1) the weights that fell on

plaintiff were not being hoisted or secured; therefore, no Labor Law § 240 (1) claim lies; and (2) no Labor Law § 241 (6) claim lies because the Industrial Code sections on which plaintiff bases his claim are either inapplicable, or are insufficiently specific to support a section 241 (6) claim.

Labor Law § 240 (1)

> Labor Law § 240 (1) imposes absolute liability on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards. Breach of the statutory duty must be the proximate cause of the injury. The statute is to be interpreted liberally to accomplish its purpose

(*Striegel v Hillcrest Heights Development Corp.*, 100 NY2d 974, 977 [2003]). "[T]he purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves" (*Panek v County of Albany*, 99 NY2d 452, 456 [2003]).

Although this matter involves a falling object which injured plaintiff, "not every object that falls on a worker[] gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, 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 of the kind enumerated therein" (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]). In order to prevail on a "falling object" section 240

(1) case, "[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 [emphasis in original]) which "'would have been necessary or even expected'" (*ibid.*; quoted in *Roberts v General Electric Co.*, 97 NY2d 737, 738 [2002]). "'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"'" (*Perillo v Lehigh Construction Group*, 17 AD3d 1136, 1137 [4th Dept 2005] , quoting *Narducci*, 96 NY2d at 267-268; *see also Salinas v Barney Skanska Construction Co.*, 2 AD3d 619, 621 [2d Dept 2003]).

Here, it is clear that the nylon string/rope was intended to suspend the weights from the roof, as well as to secure them from falling. It is also clear that the possibility of the weights' falling because of their placement over the side of the roof posed a significant risk to workers below because of the elevation of the roof. Because of this significant risk, an adequate means of securing the weights from falling while they were suspended was both necessary and expected. The nylon string proved inadequate. The weights fell and injured plaintiff.

Plaintiff has stated a claim sounding in a violation of Labor Law § 240 (1) against defendants, and that part of defendants' motion which seeks dismissal of this claim is denied.

Labor Law § 241 (6)

"Labor Law § 241 (6) 'imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers'" (*Walker v Ekleco Co.*, 304 AD2d 752, 752 [2d Dept 2003], quoting *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876, 878 [1993]). In order "to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (*Walker v Metro-North Commuter Railroad*, 11 AD3d 339, 340 [1st Dept 2004]), as opposed to "those that establish general safety standards" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). The duty is prescribed upon owners, contractors, and their agents "regardless of the level of control or supervision" which the party exercises over the work (*Piccolo v St. John's Home for the Aging*, 11 AD3d 884, 886 [4th Dept 2004]).

In his bill of particulars, plaintiff alleges that defendants violated the following sections of the Industrial Code: 12 NYCRR §§ 23-1.7 (a) (1) and (2); 23-1.8 (c) (1); 23-1.33 (a) (1), (2), and (3); and 23-5.1 (j). Each of these subsections is either inapplicable or is not sufficiently specific to support a section 241 (6) claim : section 23-1.7 (a) (1) does not apply because plaintiff was not "normally exposed to falling objects" (*see e.g. Perillo v Lehigh Construction Group*, 17 AD3d 1136 [4th

Dept 2005]; *McLaughlin v Malone & Tate Builders*, 13 AD3d 859 [3d Dept 2004]; *Quinlan v City of New York*, 293 AD2d 262 [1st Dept 2002]); section 23-1.7 (a) (2) is inapplicable because plaintiff did have to work where he was working; section 23-1.8 (c) (1) does not apply because plaintiff was wearing a hard hat; section 23-1.33 is inapplicable because this section does not apply to workers at a construction site (*see Mancini v Pedra Construction*, 293 AD2d 453 [2d Dept 2002]), plus the section is not specific enough to support a section 241 (6) claim (*see e.g. Hill v Corning Inc.*, 237 AD2d 881 [4th Dept 1997]; *McMahon v Durst*, 224 AD2d 324 [1st Dept 1996]; *but see Ozzimo v H.E.S., Inc.*, 249 AD2d 912 [4th Dept 1998]); and section 23-5.1 (i) does not apply because no scaffold was involved in this accident.

Therefore, that part of defendants' motion which seeks summary judgment dismissing the section 241 (6) claim is granted.

For Summary Judgment on Their Contractual and Common-Law Indemnification Claims Against Third-Party Defendants HCC and Taggart

Common-Law Indemnification

> To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" [citations omitted] or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury"

> [citation omitted]. Where the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor "was either negligent or exclusively supervised and controlled plaintiff's work" [citations omitted]

(*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]; *see also Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 437 [1991]; *Salamone v Wincaf Properties*, 9 AD3d 127, 139 [1st Dept 2004]; *Aragon v 233 West 21st Street, Inc.*, 201 AD2d 353, 354 [1st Dept 1994]; *Seecharran v 100 West 33rd Street Realty Corp.*, 198 AD2d 121, 122 [1st Dept 1993]).

Here, plaintiff has acknowledged that he has no common-law negligence or Labor Law § 200 claim against defendants. Thus, the first prong of the test for entitlement of common-law indemnification is met. However, since defendants have conceded that their common-law indemnification claim against HCC must fail because of the provisions of Workers' Compensation Law § 11, defendants cannot recover common-law indemnification from HCC.

With respect to Taggart, it has not yet been determined whether Taggart was guilty of some negligence that contributed to the causation of the accident, but it is clear that only Taggart directed, supervised, and controlled the plumbing work that gave rise to plaintiff's injuries (*see* Toscano Depo., at 72). Thus, defendants are entitled to common-law indemnification from

Taggart.

Contractual Indemnification

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances [interior quotation marks and citations omitted]" (*Torres v Morse Diesel International*, 14 AD3d 401, 403 [1st Dept 2005]; *Masciotta v Morse-Diesel International*, 303 AD2d 309, 310 [1st Dept 2003]).

The indemnification provisions of the Bovis/HCC and Bovis/Taggart subcontracts are identical. Article 12 of the subcontracts provides, in relevant part:

> To the full extent permitted by law, Subcontractor [HCC/Taggart] agrees to defend, indemnify and save harmless Contractor [Bovis] and Owner [Yeshiva] ... from and against any claim, cost, expense, or liability (including attorneys' fees), attributable to bodily injury ... caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor ... whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Subcontractor's duty hereunder shall not arise if such injury ... is caused by the sole negligence of a party indemnified hereunder.

HCC maintains that this provision runs afoul of General Obligations Law (GOL) § 5-322.1, which "declares void any agreement purporting to indemnify contractors against liability

for injuries contributed to, caused by or resulting from their own negligence, whether such negligence be in whole or in part" (*Masciotta v Morse Diesel International*, 303 AD2d at 311). The statute is inapplicable, however, absent a finding of negligence on the part of the party seeking indemnification.

In construing an indemnification provision very like the one at issue here, the Appellate Division, First Department, has found that

> the clause calls for partial, not full, indemnification of the general contractor for personal injuries partially caused by its negligence, and is therefore enforceable. We reach this conclusion in view of the phrases limiting the subcontractor's obligation to that permitted by law and excluding liability created by the general contractor's sole and exclusive negligence

(*Dutton v Charles Pankow Builders, Ltd.*, 296 AD2d 321, 322 [1st Dept 2002]; *see also Landgraff v 1579 Bronx River Avenue, LLC*, 18 AD3d 385, 387 [1st Dept 2005] [citing *Dutton*]; *Mannino v J.A. Jones Construction Group, LLC*, 16 AD3d 235, 236 [1st Dept 2005] [citing *Dutton*]; *McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005] [citing *Dutton*]).

Thus, to the extent that the Bovis/HCC and Bovis/Taggart subcontracts provide for HCC and Taggart's partial indemnification of defendants, that part of defendants' motion which seeks summary judgment on this issue is granted.

Plaintiff's Motion for Partial Summary Judgment (Motion Sequence Number 003)

For the reasons stated above, plaintiff's motion is granted to the extent that plaintiff is granted partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1), and the motion is otherwise denied.

HCC's Motion for Summary Judgment (Motion Sequence Number 001)

To Dismiss All Common-Law Negligence Claims Asserted Against It

Neither defendants nor Taggart have alleged a claim for common-law negligence against HCC. Therefore, this part of HCC's motion for summary judgment is denied.

For Conditional Summary Judgment in Its Favor Against Taggart

HCC alleges four causes of action against Taggart, for contribution, common-law indemnification, contractual indemnification, and breach of contract by failure to procure insurance.

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *see also Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990]; *Rosado v Proctor & Schwartz*, 66 NY2d 21, 23-24 [1985]). Here, no claim for common-law negligence has been asserted against either HCC or Taggart; thus, no finding has been made with respect to whether one, both, or neither of the third-

party defendants was negligent or caused plaintiff's accident in any way. Although defendants were granted common-law indemnification as against Taggart, that determination was made on the basis of Taggart's direction, control, and supervision of the plumbing employees at the site, and not upon a finding of Taggart's negligence. Thus, that determination cannot form the basis of a claim for negligence against Taggart. In the absence of any proof that either third-party defendant was negligent, that part of HCC's motion which seeks summary judgment on its claim for contribution against Taggart is denied.

For the same reason, that HCC has not proven either that it was not negligent, or that Taggart was negligent in causing plaintiff's accident, that part of HCC's motion which seeks summary judgment on its common-law indemnification claim against Taggart is denied.

No indication that there was any contract between HCC and Taggart has been shown. Therefore, that part of HCC's motion which seeks contractual indemnification against Taggart is denied.

Because there has been no showing of any contract between HCC and Taggart, that part of HCC's motion which seeks breach of contract relief against Taggart is denied.

In sum, HCC's motion is denied.

CONCLUSION

Accordingly, it is

ORDERED that the part of the motion of defendants Bovis Lend Lease Inc. and Yeshiva University (motion sequence number 002) for summary judgment dismissing the complaint is granted with respect to plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims, but is denied with respect to plaintiff's Labor Law § 240 (1) claim; and it is further

ORDERED that the part of defendants Bovis Lend Lease Inc. and Yeshiva University's motion (motion sequence number 002) which seeks summary judgment on their common-law indemnification claims against third-party defendants Heneghan Contracting Corp. and Taggart Associates Corp. is granted with respect to Taggart Associates Corp., but is denied with respect to Heneghan Contracting Corp.; and it is further

ORDERED that the part of defendants Bovis Lend Lease Inc. and Yeshiva University's motion (motion sequence number 002) which seeks summary judgment on their contractual indemnification claims against third-party defendants Heneghan Contracting Corp. and Taggart Associates Corp. is granted to the extent that the Bovis Lend Lease Inc./Heneghan Contracting Corp. and Bovis Lend Lease Inc./Taggart Associates Corp. subcontracts provide for Heneghan Contracting Corp. and Taggart Associates Corp.'s partial indemnification of defendants, and is otherwise denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 003) is granted to the extent that partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is granted, and the motion is otherwise denied; and it is further

ORDERED that Heneghan Contracting Corp.'s motion for summary judgment (motion sequence number 001) is denied.

Dated: 8/29/05

ENTER:

HON. MARILYN SHAFER, JSC

J.S.C.