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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 114196/2002

WAITKUS, GERALD

VS

METROPOLITAN HOUSING PARTNERS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED

JAN 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

motion(s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: DEC 18 2006

HON. JUDITH J. GISCHE 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: PART 10

----------x

GERALD WAITKUS,

Plaintiff,

-against-

METROPOLITAN HOUSING PARTNERS and CARLISLE SOHO EAST TRUST,

Defendants.

----------x

CARLISLE SOHO EAST TRUST,

Third-Party Plaintiff,

-against-

SYMMETRY PRODUCTS GROUP and EXTERIOR ERECTING SYSTEMS, INC.,

Third-Party Defendants.

----------x

Decision/Order
Index No.: 114196/02
Seq. No. : 003

Present:
Hon. Judith J. Gische
J.S.C.

Index No.: 590652/03

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def/ 3rd-Pty Pltf Carlisle motion [sj] w/KBD affirm in support, exhs	1
3rd-Pty Def Exterior x-motion w/SRS affirm in support, exhs	2
3rd-Pty Def Exterior affirm in partial opp (SRS)	3
Def/ 3rd-Pty Pltf affirm in opp and in reply (KBD) w/exh	4
Pltf's x-motion w/MD affirm of good faith, affirm in support and in opp (MD), exh	5
Def/ 3rd-Pty Pltf Carlisle affirm in opp and in reply (KBD)	6
3rd-Pty Def Exterior affirm in further support (SRS)	7
Pltf's affirm in reply and in opp (MD)	8

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action under the labor law. Plaintiff seeks damages for personal injuries he claims he sustained while working at a construction site.

Issue was joined, discovery proceeded and the note of issue was filed March 24, 2006. Defendant Carlisle Soho East Trust (hereinafter "Carlyle[1]") brought a timely motion for summary judgment, and 3rd party defendant Exterior Erecting Systems Inc brought a timely cross motion for summary judgment ("EES"), dismissing the 3rd party complaint against it for contractual indemnification. Plaintiff's cross motion for summary judgment, is untimely. It was brought 167 days after the note of issue was filed. At the time, Carlyle's and EES's motions were not yet *sub judice*, and papers were in the process of being collected in the motion submission part.

Plaintiff's late cross motion is made in response to, and involves exactly the same issues framed in Carlyle's motion, and to some extent, EES's cross motion, for summary judgment. The court will consider plaintiff's motion, even though it was late because in the course of deciding Carlyle's motion, it may search the record and grant summary judgment to the non-moving party (plaintiff), if he is entitled to such relief. Filannino v. Triborough Bridge and Tunnel Authority, 2006 N.Y. Slip Op. 08169, NYLJ 11/16/06 (*nor*). The moving defendants have waived any objections as to the timeliness of the motion; moreover plaintiff has provided an affirmation of good faith attesting to his unsuccessful efforts to resolve the issue of liability raised in the motions, and a reason for the delay.

Plaintiff has withdrawn his claims under Labor Law 240 § (1) in his cross motion; he previously discontinued the complaint against Metropolitan Housing Partners ("Metropolitan"). Carlyle has discontinued its 3rd party action as against Symmetry

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[1]The complaint has misspelled the corporate name. The court will use it in this decision as it appears on the construction contract and as spelled by the defendant Carlyle.

Products Group ("Symmetry") and withdrawn its common law indemnification claims against EES. Therefore the remaining issues for the court to decide are whether either plaintiff or Carlyle are entitled to summary judgment on plaintiff's Labor Law § 200 (common law negligence) and § 241 (6) (violations of the industrial code) claims, and the 3rd party claims by Carlyle for contractual indemnification against EES.

The motion and two cross motion are hereby consolidated for consideration and disposition in a single decision/order because of the common issues and arguments raised.

Background

Plaintiff is a carpenter employed by EES. Carlyle is the owner/contractor[2] of the project that was under construction at 199 Bowery Street in New York County (the "construction site") in December 2001. York Hunter was originally the general contractor on the project, but it was no longer involved with the project at the time of plaintiff's accident.

Plaintiff claims he was injured when a drivit wall panel comprised of stucco and other materials fell on him. The panel was an estimated 250 pounds and 2 feet wide by 8 or 9 feet tall. It was propped against the mechanical room on the top floor on its short end projecting upwards when it toppled. The top floor (also referred to as the 12th floor) was open to the elements. There is testimony (addressed at greater length below) that a strong gust of wind caught hold of the panel, toppling it onto plaintiff, striking his upper

[2]Carlyle had a contract with York Hunter, a general contractor. York Hunter left the project and Carlyle assumed its responsibilities, therefor Carlyle is both the owner and contractor of this project. York Hunter was not involved with this project at the time of plaintiff's injuries.

body, and pinning him to the floor. He claims he sustained injuries to his upper torso.

Since Carlyle and plaintiff each claim they are entitled to summary judgment on the claims in the complaint, each has the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle them to judgment in their favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once that burden is satisfied, it shifts to the party opposing the grant of summary judgment to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

Plaintiff contends that it has satisfied these requirements and he is entitled to judgment on his Labor Law §§ 200 and 241 (6) claims against Carlyle. Alternatively, he argues that even if he does not prevail on his own cross motion, there are issues that must be tried, and summary judgment should be denied to Carlyle.

First, affirmatively states that he was not negligent, nor did he contribute to the occurrence of the accident in any way. Plaintiff also argues that Carlyle is not claiming any negligence on plaintiff's part. Plaintiff has testified, as did his foreman, Mr. Zilli (who was also employed by EES at the time of the accident), that he was kneeling down, performing his tasks, with this back to the panel that fell on him. Thus, plaintiff claims liability should be apportioned to defendant Carlyle 100% on his negligence claim.

Plaintiff argues that Carlyle breached its common law duty to maintain a safe construction site because it had the authority and duty to supervise and control the work being performed on the top floor, but it failed to do so. Rizzuto v L.A. Wenger Contr.

Co., 91 NY2d 343, 348 (1998); Bond v. York Hunter Construction, Inc., 95 NY2d 883 (2000). In support of these claims, plaintiff relies upon the deposition testimony of Mr. Warfel, Carlyle's project manager at the time of the accident. Mr. Warfel testified at his EBT that he and two other Carlyle employees (Messrs Douso and Mitchell) "walked" the construction site daily, and that he personally walked it more than once a day. Mr. Warfel testified that any one of them were authorized to stop work at the site if they observed anything unsafe at their visits.

Plaintiff argues alternatively that regardless of whether Carlyle exercised any supervision or control over the work and how it was being performed, Carlyle had actual, or at least constructive, notice that high gusts of wind were commonplace or could be expected on the roof, and that it was foreseeable that an unsecured panel could be knocked over by such gusts, causing injury to any worker on that floor. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1st dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 aff'd 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., 91 NY2d 343 (1998); Gonzalez v. United Parcel Serv., 249 AD2d 210 (1st dept. 1998).

Mr. Warfel has testified that that he was present when some of the panels were being hoisted to the roof. He testified that he personally observed how some of them, after being hoisted, were then set to lean against the mechanical room. He did not remain during the entire process, but attended to other matters. He testified that he ws not directing - nor expected to direct - the process of hoisting, delivering, and welding the 20 panels, but that this was being handled by Mr. Zilli, the EES foreman. When asked at his EBT whether this was a safe thing to do, Mr. Warfel indicated it all

depended on how long the panels would remain that way. Mr. Warfel testified the hoisting and installation of the panels took two days.

Plaintiff contends that the testimony of these individuals, when coupled with the factual allegations in the complaint, also support his Labor Law § 241 (6) claims. He contends that there were violations of Industrial Code sections 23-2.1(a)(1) and 23-1.7(e)(2) because the panels were being "stored" on the roof, which could be considered a "passageway" or walkway [23-2.1(a)(1)]; or because they were scattered about the roof and unstable because they were unsecured [23-1.7(e)(2)]. Section 23-1.7(e)(2) states as follows:

> "(e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Section 23-2.1 which encompasses the other section of the code relied upon provides as follows:

> "Maintenance and housekeeping.
> (a) Storage of material or equipment.
>
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Finally, in support of all of his claims, plaintiff offers the sworn affidavit of a civil

engineer (Mr. Bellizzi) who contends that as per the industrial code, the panels should have been secured while awaiting installation, and Carlyle should be held liable for the violations of these code.

Carlyle argues, in support of its own motion, and in opposition to plaintiff's cross motion, that it did not have authority or control over the activity causing the injury, thus enabling it to avoid or correct any unsafe condition. O'Sullivan v. IDI Construction Co., Inc., *supra*; Rizzuto v. L.A. Wenger Contracting Co., *supra*. Carlyle claims that the allegedly dangerous condition here (propping the panels against the mechanical room where they could be blown over) was created by the subcontractor's (EES) own methods of performing its work, and that Carlyle did not supervise, control or direct the performance of plaintiff's job or the methods his employer used. O'Sullivan v. IDI Construction Co., Inc., *supra*.

Relying upon the testimony of Mr. Warfel, Carlyle contends that although it maintained a general presence at the site, and it held coordination meetings, this level of general supervision is insufficient, as a matter of law, to support a finding of supervision and control under Labor Law § 200. Dalanna v. City of New York, 308 AD2d 190 (1st dept 2003); De La Rosa v. Philip Morris Mgt Corp., 303 AD2d 190 (1st dept 2003).

Carlyle contends that it did not have either actual or constructive notice of a dangerous condition either because Mr. Warfel did not stay for the entire process of having the panels delivered, but had other tasks to attend to. Carlyle also relies upon Mr. Zilli's testimony on behalf of EES that he held daily "gang box" meetings with EES employees and at these meetings he instructed the workers on what to do. He testified

that he was the "boss" or top man on the project, and he could not recall any of Carlyle's employees (Messrs Warfel, Douso, or Mitchell), or even remember their names, if he had met them. He testified that there was only panel leaning against the mechanical room when plaintiff was injured. He could not remember how long it had been there, but did recall that it was leaned on the particular site because that is where is was about to be installed.

EES has cross moved for summary judgment dismissing Carlyle's 3rd party complaint against it for contractual indemnification on the basis that it never agreed to indemnify Carlyle. Alternatively, EES contends that even if certain language in its contract with Carlyle could be construed to obligate it to indemnify Carlyle, it would only be to the extent

Discussion and Analysis

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., *supra*. Liability can be imposed only if the defendant has actually been negligent. A *prima facie* case requires that plaintiff prove the defendant exercised supervisory and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition. Sheridan v. Beaver Tower Inc., 229 AD2d 302 (1st dept. 1996) *lv den* 89 NY2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 *aff'd* 7 NY3d 805 (2006); Rizzuto v. L.A. Wenger Contracting Co., 91 NY2d 343 (1998); Gonzalez v. United Parcel Serv., 249 AD2d 210 (1st dept. 1998).

Plaintiff has established that Carlyle provided general instructions on what needed to be done at the construction site, and that it monitored the timing and quality of the work being performed by having its staff do daily walk throughs. Carlyle's staff (Mr. Warfel) was even present while some of the panels were being hoisted and either leaned against the mechanical or installed. Plaintiff has also proved that Carlyle had the general duty to ensure compliance with safety regulations, and even the authority to stop work for safety reasons. Plaintiff has failed to prove, however, that Carlyle supervised, directed, or controlled the manner in which he performed his job, or the activity that brought about his injuries. Russin v. Picciano & Son, 54 NY2d 311 (1981); Comes v. New York State Gas Corp., 82 NY2d 876 (1993); O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 (1st dept 2006); Dalanna v. City of New York, 308 AD2d 400 (1st dept 2003).

Defendant Carlyle, has proved, on the other hand, that the activity resulting in plaintiff's injuries was under the direct control and sole supervision of EES's foreman, Mr. Zilli. Plaintiff, Mr. Zilli and Mr. Warfel each testified that Mr. Zilli gave orders to his workers, and they followed them. They received no orders, or instructions from Carlyle. No one (Messrs Waitkus or Zilli) could recall names of Carlyle's personnel at the site, and they did not recall receiving any instructions from them, or even any extensive interaction with them.

It was Mr. Zilli who oversaw, directed, controlled, and supervised the project of hoisting panels to the roof and installing them, although Symmetry delivered them to the site. The crane used for the hoisting of the panels was rented by EES; it was not owned or rented or operated by Crane.

Carlyle has proved that the panel that toppled over onto plaintiff was propped against the mechanical room. It was placed there at the express direction of EES's foreman because that was the place it was going to be installed. Although Mr. Warfel was generally aware of what was going on, and even personally observed part of the hoisting process, he did not direct any EES (or Symmetry) employees on what had to be done, or how to do it. Mr. Zilli and Mr. Warfel have each testified that the employees on the roof were supervised and instructed by Mr. Zilli, and no one else.

The court also has considered plaintiff's separate claim that even if Carlyle did not exercise supervision or control over the work being performed, it was nonetheless negligent because it had constructive or actual notice of a dangerous condition. This argument, however, fails as a matter of law. This argument is largely based upon Mr. Warfel's testimony, that he observed some of the panels being hoisted then leaned against the mechanical room after they were delivered to the roof. Thus, plaintiff contends that Mr. Warfel should have anticipated, or it was foreseeable that, a gust of wind could knock one of these panels over because the top floor was windy and mostly exposed. This argument is speculative and presents nothing more than a "shadowy semblance" of an issue, but not a real dispute that has to be decided by a jury. S.J. Capelin v. Globe, 34 NY2d 338 (1974).

These were heavy panels weighing (by plaintiff's estimate) 250 pounds apiece. No one knows exactly why the panel fell over. Plaintiff testified that someone told him the wind had toppled it over, but he does not know who it was. Not only is this hearsay, when questioned about the conditions on the roof, Mr. Zilli could not recall if it was windy that day, or the day before, or even how long the panel had been on the roof.

There is no climatological proof offered by plaintiff in admissible form to support his claims about the weather conditions. *Compare*: Griffin v. New York City Transit Authority, 6/16/03 NYLJ p. 23 c. 2 (Lippman, J. Supreme Ct., N.Y. Co.) Thus, plaintiff's claim that Mr. Warfel should have said something about how the heavy panels were being stored, because they could have been blown over, does not raise a factual dispute for trial as to whether Carlyle had notice of a dangerous condition.

Defendant Carlyle has proved it is entitled to summary judgment dismissing plaintiff's Labor Law § 200 (common law negligence) claim and its motion is hereby granted dismissing that cause of action. Plaintiff's cross motion for summary judgment on that claim is, therefore, 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. . ." Comes v. New York State Electric & Gas Co., *supra*; NY2d 876 (1993); Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (1993); Dickson v. Fantis Foods, 235 AD2d 452 (1997). In order to state a claim under § 241(6), a plaintiff must identify a specific, applicable, Industrial Code provision that has been violated. Ross v. Curtis-Palmer Hydro-Elec. Co., supra.

The sections of the Industrial Code that plaintiff has cited as having been violated do not support his Labor Law § 241 (6) claim for a number of reasons. Section 23-2.1(a)(1) pertains to the storage of materials and it requires that all building materials "be stored in a safe and orderly manner. Material piles shall be stable under all

conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare . . ."

The panel that fell on plaintiff was not being "stored" on the roof, but was in the process of being "used" or about to be installed when it fell. The accident did not involve a "material pile" but rather a single, panel. Finally, the roof where the accident occurred was not a "passageway, walkway, stairway or other thoroughfare." Castillo v. Starrett City, Inc., 4 AD3d 320 (2nd dept 2004); *See*: Roppolo v. Mitsubishi Motor Sales of America, Inc., 278 AD2d 149 (1st dept 2000) (different section of the code, but court concluded roof is not a "passageway"). In any event, the instability of the panel did not cause it to obstruct a passageway, rather it toppled over and struck the plaintiff.

Section 23-1.7(e)(2) is also inapplicable because this code section pertains to "tripping and other hazards" where a plaintiff trips, missteps, stumbles, or loses his footing due to some accumulation of dirt, debris, scattered tools or materials or other things afoot at the work site. O'Sullivan v. IDI Construction Co., Inc, *supra*. Here, the panel was not afoot, but propped up; it then toppled down onto the plaintiff. Therefore this provision is not applicable to the facts of this case, and cannot serve as a predicate for plaintiff's Labor Law § 241 (6) claim either. Randazzo v. Consolidated Edison Company of New York, 271 AD2d 667 (2nd dept 2000).

Since the court has decided, as a matter of law, that the cited provisions of the Industrial Code plaintiff relies upon to support his Labor Law §241 (6) claim have no application to the facts of this case, the affidavit of plaintiff's expert fails to raise an issue of fact as to whether there was a violation of either provision. It is therefore rendered academic by the inapplicability of the Industrial Code. Garcia v. Renaissance

Gardens Associates, 242 AD2d 463 (1st dept 1997).

For these reasons, Carlyle's motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted, and plaintiff's cross motion for summary judgment on this cause of action is denied. The Labor Law § 241 (6) must be dismissed.

3rd Party Action - Indemnification

Carlyle asks that the court still consider its motion for summary judgment on its 3rd party complaint against EES, even if the plaintiff's complaint is dismissed. The third party action is for indemnity and the costs it has incurred in the defense of this action. Carlyle contends that under the contract that Symmetry (the provider of the exterior panels) had with the former general contractor (York Hunter), Symmetry and York Hunter had agreed to indemnify and provide/pay for York Hunter's defense costs. Carlyle further contends that in Symmetry's subcontract with EES for the installation of the panels, EES expressly agreed and undertook to satisfy the indemnification and insurance obligations set forth in the prime contract between Symmetry and York-Hunter. In support of these claims, Carlyle does not offer its own contract with York Hunter, but only the subcontract EES has with Symmetry. This undated contract provides as follows:

> "Scope of Work:
> EES agrees to install exterior panel systems as per Symmetry letter of 03-27-01 including EES revisions of April 6th 2001.
>
> EES agrees to all provisions in Symmetry's contract with York Hunter as revised including EES changes.
>
> /s/ Earl Ferguson
> Foam Technology/Symmetry Products
>
> /s/ Bob Dunlap

Exterior Erecting Services, Inc."

The April 6, 2001 letter signed by Mr. Dunlap, EES's president, provides as follows:

> "Enclosed please find above referenced [York Hunter Contract - Bowery Street] contract, I have made a few notations and changes, please make said changes and send back for signature . . ."

The March 27, 2001 letter provides in relevant part as follows:

> "Please review the attached contract [York Hunter Standard Subcontract]. It is our intention to have [EES] sign a simple AIA contract with Foam Tech that binds [EES] to York Hunter's contract with [Foam Tech]. We are currently reviewing the York Hunter contract and are preparing our response to issues that are unacceptable. We need [EES] to do the same and get back to us as soon as possible."

EES first argues, with little success, that because York-Hunter defaulted under its contract with Carlyle in the summer of 2001, and it left the project, the prime contract is no longer in force, and therefore there is no enforceable indemnification agreement for Carlyle to rely upon. A breached contract, however, does not render it invalidated or unenforceable. Moreover, Carlyle notified Symmetry that "we are going forward with the project" and "we will be working with you to pick up your subcontracts." Consequently Carlyle elected to treat the York-Hunter as a valid, albeit breached, contract, continuing to perform its own obligations thereunder. Inter-Power of New York Inc. v. Niagara Mohawk Power Corp., 259 AD2d 932 lv den 23 NY2d 812 (1999). This is, therefore, an ineffective argument against Carlyle's motion for summary judgment, and not a basis to deny it.

A far stronger argument, and the reason EES prevails on this motion, is that

under New York law a clause in a construction subcontract that incorporates the clauses of a prime contract by reference binds a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor. Bussanich v. 310 East 55th Street Tenants, 282 AD2d 243 (1st dept 2001). Provisions other than scope, quality, character and manner of work must be specifically incorporated to be effective against the subcontractor. Coopervision, Inc. v. Intek Integration Technologies, Inc., 7 Misc3d 592 (Sup Ct., Monroe Co. 2005) (internal citations omitted).

The language in the Symmetry/ EES subcontract and the two letters that it refers to, is consistent with this legal principle. The subcontract is identified as, and for, the "scope of work." Neither the March 27, 2001 nor April 6, 2001 letters address or refer to the issue of indemnification. The proposed subcontract attached to the March 27, 2001 letter is an offer to sign a revised contract ("It is our intention to have [EES] sign a simple AIA contract with Foam Tech that binds [EES] to York Hunter's contract with [Foam Tech]"). The April 6, 2001 letter from EES contains instructions about sending back a revised contract for signature ("please make said changes and send back for signature . . .") The undated subcontract is not unlimited but, by its very designation, pertains to the "scope of the work."

Based upon the four corners of the subcontract, there is no basis upon which to impose upon EES the responsibility to indemnify Carlyle. The language in the subcontract, "EES agrees to all provisions in Symmetry's contract with York Hunter as revised including EES changes" does not make this contract distinguishable from other incorporation contracts, or require the court to look beyond appellate authority directly on point. Bussanich v. 310 East 55th Street Tenants, supra.

Finally, the court has also considered that an owner can "bring a third-party action against an injured worker's employer in only two circumstances: where the injured worker has suffered a "grave injury" or the employer has entered into a written contract to indemnify the owner." Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363, 365 (2005). Plaintiff's injuries were to his upper torso. They consist of a head injury, herniations of the lower back and neck, and contusions. Although plaintiff has taken no position on EES's cross motion, he has not alleged he sustained a "grave injury," within the meaning of section 11 of the Workers' Compensation law. Rubeis v. Acqua Club, Inc., 3 NY3d 408 (2004) (discussing what a grave injury is). Nor is Carlyle making the argument that argument in connection with its indemnification claim.

Since there is no indemnification agreement, and there is no claim by Carlyle that plaintiff sustained grave injuries, within the meaning of the statute, Carlyle has no cause of action against EES, as a matter of law, and this 3rd party action against EES must be dismissed.

Conclusion

To recapitulate, Carlyle's motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241 (6) claims is granted and plaintiff's cross motion for summary judgment in its favor is denied. Since plaintiff previously withdrew his Labor Law § 240 (1) claim, and he has no remaining claims, plaintiff's complaint is dismissed.

Carlyle's motion for summary judgment on its indemnification claims against EES is denied and EES's cross motion for summary judgment dismissing the 3rd party action is granted. Since there is no other relief sought in the 3rd party complaint, and the other named 3rd party defendant has been discontinued, the 3rd party action is dismissed.

Accordingly, it is hereby

Ordered that the clerk shall enter judgment in favor of defendant Carlyle Soho East Trust s/h/a Carlisle Soho East Trust, dismissing the complaint of plaintiff Gerald Waitkus; and it is further

Ordered that the clerk shall enter judgment in favor of 3rd party defendant Exterior Erecting Systems Inc., dismissing the 3rd party complaint of 3rd party plaintiff Carlyle Soho East Trust s/h/a Carlisle Soho East Trust; and it is further

Ordered that the clerk shall dismiss this case altogether and mark it disposed; and it is further

Ordered that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

Ordered that this shall constitute the decision and order of the Court.

Dated: New York, New York
December 18, 2006

So Ordered:

Hon. Judith J. Gische, J.S.C.