Nasuro v PI Assoc., LLC
2006 NY Slip Op 30624(U)
October 11, 2006
Sup Ct, Queens County
Docket Number: 8242
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

WLODZIMIERZ NASURO, et al.,

Plaintiffs,

- against -

PI ASSOCIATES, LLC, et al.,

Defendants.

Index Number 8242 2004

Motion Dates July 5, 2006

Motion Cal. Numbers 13 & 14

The following papers numbered 1 to 73 read on in this motion by plaintiff for an order granting summary judgment on the issue of liability on the claim for a violation of Labor Law § 240(1) and setting the matter down for an immediate trial for damages. Defendant Maric Plumbing & Heating Inc. cross-moves for an order granting summary judgment dismissing the complaint and all cross motions. Defendant New York Pre-Cast Inc., cross-moves for an order dismissing the complaint and all cross claims. Defendant Structural Land Management separately moves for an order dismissing the complaint and all cross claims, and seeks summary judgment on its cross claim for indemnification. Defendants Pi Associates, LLC and PI Development, LLC cross-move for an order granting summary judgment on their claims for contractual indemnification against New York Pre-Cast Inc., Structural Land Management Inc., Maric Plumbing & Heating Inc. and New York Steel Fabricators Inc.

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Upon the foregoing papers it is ordered that these motions and cross motions are consolidated for the purpose of a single decision and are decided as follows:

Plaintiff Wlodzimierz Nasuro sustained personal injuries on February 19, 2004, when during the course of his employment he fell 15 feet, down an unguarded and open stairwell shaft, in the premises located at 136-21 Roosevelt Avenue, Flushing, New York. Plaintiff was working on a sprinkler valve in a dark area of the basement when he fell to the sub-basement. The premises, a new 12-story building, was under construction at the time of the accident. The real property is owned by Pi Associates, LLC, and all of the written construction contracts were entered into by defendant Pi Development, LLC, as the "owner." Pi Development, LLC and Pi Associates, LLC are both owned by James Pi, and it is apparent that Pi Development, LLC acted as the agent, or general contractor, for Pi Associates, LLC. Structural Land Management (SLM) entered into a contract dated December 4, 2002 with Pi Development, LLC, to act as the construction manager on this project. Pi Development, LLC entered into a separate written contract with Maric Plumbing & Heating, Inc. (Maric) for the performance of all plumbing work at the job site. Maric then entered into a sub-contract with plaintiff's employer, Kordon Construction, to perform certain plumbing work, including the installation of the sprinkler system. Defendant New York Pre-Cast, Inc. (New York) entered into a separate contract with Pi Development, LLC to build the entire poured concrete foundation from the sub-basement to the grade level, and it subcontracted the construction of the entire foundation to Special Treatment General Contracting. Defendant New York Steel Fabricators, Inc. entered into a separate written contract with

Pi Development, LLC to erect the building's 12-story steel super-structure above the grade level.

Plaintiff Wlodzimierz Nasuro testified that he was employed by Kordon Construction as a plumber's helper, and that he and a co-worker, Jacek Szymanowski, were standing in the valve room in the basement, where they were going to replace a valve. He stated that he had descended to the basement level by a ladder and that the area was in semi-darkness. Plaintiff stated that Mr. Szymanowski left to get an extension cord with a lamp, and that he then took a step backwards in order to get a better look at the valve and fell into an open stairway shaft, some 15 feet to the sub-basement. He stated that the opening was unguarded and unprotected, and that he later learned that a large section of the basement floor which appeared to be dark was in fact open to the sub-basement. These areas had been left open for the construction of the staircases.

Mr. Szymanowski has submitted an affidavit which states that it was translated into English from Polish before it was signed. Attached to this affidavit is a notarized affidavit from Angnieszka Machala, who states that she is fluent in English and Polish, and that she accurately translated Szymanowski's affidavit from English into Polish before he executed it. Ms. Machala, however, does not state that she is a translator and has not stated her qualifications as a translator. (See generally CPLR 2101[b]). Therefore, the court will not consider Mr. Szymanowski's affidavit.

Plaintiff has also submitted a notice of violation issued by the Department of Buildings on February 19, 2004, which recites that there were no guard rails throughout the building from the cellar level to the 12th floor, and that there were no guard rails on all entry floors and elevator shafts and all openings through the job site, in violation of section 27-1009(a) of the Building Code. The notice directed the owner to provide guard rails. A stop work order was issued as to the entire job site on February 20, 2004, and the owner was directed to make the site safe. At a hearing held on April 15, 2004 before the Environmental Control Board, the owner's representative admitted to the allegations and stated that the conditions had been corrected. The hearing officer sustained the violations and imposed a fine of $2,500.00.

Vlado Walter Maric, the president and sole stockholder of Maric, testified that Maric subcontracted out a portion of this work to Kordon Construction, pursuant to a written purchase order. Mr. Maric stated that he never informed anyone that he had subcontracted out any portion of the work. He testified that Kordon Construction installed piping and valves, using materials

supplied by, or paid for by, Maric. Mr. Maric testified that he was the only employee of Maric that was on the job site at any time, and that he was there perhaps once a week from January 2004 through February 19, 2004. He also stated that Kordon's principal, Ivan Turkalj (or Turkay), was an employee of both Maric and Kordon in January and February 2004, but ceased being Maric's employee prior to February 19, 2004. Mr. Maric stated that he had last visited the job site one week prior to the accident, at which time he did not see any protection on the staircase, that there were no stairs leading from the basement to the sub-basement, that the area was not roped off, that he told Ivan Turkay to make sure that he didn't go there, and that he also told Sam Spadina, SLM's principal, as well as other contractors, that the area should be protected. He stated that he was notified about plaintiff's accident and that when he arrived at the site the area where plaintiff fell was protected with wooden barriers, but that he did not know when this was erected.

Plaintiffs' motion for partial summary judgment against Pi Associates LLC and Pi Development for a violation of Labor Law § 240(1)

It is well settled that a party seeking summary judgment " must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

Labor Law § 240(1) creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). The " exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see Ross v Curtis-Palmer Hydro-Electric Co., supra at 501; Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]). The legislative purpose behind Section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers who are "scarcely in a position to protect themselves from accident" (see Rocovich v

Consolidated Edison, supra at 501). Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Tietz Center for Nursing Care, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (Ross v Curtis-Palmer Hydro-Electric Co., supra, at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see Bland v Manocherian, 66 NY2d 452 [1985]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]).

The evidence presented establishes that defendant Pi Associates, LLC is the owner of the subject real property, and that defendant Pi Development, LLC, acted as either its agent or general contractor, when it entered into the various contracts for the construction of the subject building. It is undisputed that plaintiff fell approximately 15 feet through an open stairway shaft. Moreover, the record reveals that there were no barriers or guard rails around the open shaft, nor was the opening covered at the time of the accident, and plaintiff was not provided with any safety devices whatsoever while working in close proximity to this opening. Accordingly, the court finds that plaintiff has made a prima facie showing that Labor Law § 240(1) was violated and that this violation was the proximate cause of his injuries (see Ross v Curtis-Palmer Hydro-Elec. Co., supra at 500-501; Zimmer v Chemung County Performing Arts, supra; Manns v Norstar Building Corp., 12 AD3d 1022 [2004]; Davidson v E.Q.K. Green Acres, LP., 298 AD2d 546 [2002]; Schneider v Hanover East Estates, 237 AD2d 274, 275 [1997]; Dawson v Pavarini Constr. Co., 228 AD2d 466 [1996]). Defendants Pi Associates, LLC and Pi Development, LLC have failed to submit evidence in admissible form that rebuts this prima facie showing (see, Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The deposition testimony of Thomas Auringer, an owner of co-defendant New York Pre-Cast Inc., which was submitted by the Pi defendants, does not reveal that Auringer had personal knowledge of the facts of the accident and merely recounts what another unidentified person had told him. Those statements constitute inadmissible hearsay (see, Eddy v Tops Friendly Mkts., 91 AD2d 1203 [1983], affirmed 59 NY2d 692 [1983]; Garcia v Prado, 15AD3d 347 [2005]; Bellafiore v L & K Holding Corp., 244 AD2d 443 [1997]; Agoglia v Sterling Foster, 237 AD2d 549 [1997]; Kruck v St. John's Episcopal Hosp., 228 AD2d 565 [1996]; Abbenante v Tyree Co., 228 AD2d 529 [1996]) and lack probative value (see, Halloran v Virginia Chems., 41 NY2d 386, 392 [1977]). In addition, although Mr. Auringer claimed that there was a barrier

in place some time prior to the accident, and that after the accident, he saw plywood and two by fours near the area where plaintiff fell, he did not witness the accident and was not able to identify any witness to the accident. Mr. Auringer's testimony, therefore, fails to raise any issue of fact regarding the condition of the area where plaintiff was working at the time of the accident.

The court further finds that at the ECB hearing Pi Associates, LLC admitted to the allegations that there were no guard rails or barriers throughout the building, including the floor entries, elevator shafts and openings. Pi Associates, LLC was represented at said hearing by a Mr. Chang, and Sam Spadina, SLM's principal, who was present at the construction site on the day of the accident. Pi Associates, LLC's representatives did not contest the evidence presented at the hearing. Inasmuch as the issue of the lack of guard rails was determined at the administrative hearing, Pi Associates, LLC is collaterally estopped from re-litigating this issue (see Ryan v NY Telephone Co., 62 NY2d 494 [1984]; Matter of Juan C. v Cortines, 89 NY2d 659 [1997]). In view of the foregoing, plaintiffs' motion for partial summary judgment on the claim of a violation of Labor Law § 240(1) against defendants Pi Associates, LLC, the owner of the building, and Pi Development, LLC, the agent of the owner, is granted.

Plaintiffs' motion for partial summary judgment against Maric for a violation of Labor Law § 240(1) and Maric's cross motion for summary judgment dismissing the complaint.

Maric's assertion that it was not an agent of the owner within the meaning of Labor Law § 240(1), as it was not delegated any responsibility to build the stairways or stairway openings, erect bannisters or provide temporary protection or barricades for such openings, and that it did not actually direct or control the plaintiff's work, or had the authority to do so, is without merit. A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor only if it has been "delegated the . . . work in which plaintiff was engaged at the time of his injury," and is therefore "responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (Russin v Picciano & Son, 54 NY2d 311, 318, [1981]). Maric's status as an agent under Labor Law § 240(1) is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right (see Russin v Picciano & Son, supra; Williams v Dover Home Improvement, Inc., 276 AD2d 626 [2000]; see also Coque v Wildflower Estates Developers, Inc., ___ AD3d ___, 818 NYS2d 546 [2006]). Here, the contract between Pi Development, LLC, and Maric provided that Maric was to perform

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all of the plumbing work, including the installation of the sprinkler system. Since the work which gave rise to the plaintiff's injuries was specifically delegated to Maric, it was an agent of the owner (see Russin v Picciano & Son, supra; Sog v G.S.E. Dynamics, Inc., 239 AD2d 489 [1997]; McGlynn v Brooklyn Hospital-Caledonian Hosp., 209 AD2d 486 [1994]; D'Amico v New York Racing Auth., 203 AD2d 509 [1994]). In addition, as Maric choose the party who actually did the work, and entered into a separate agreement with the subcontractor, it had the authority to exercise control over the work, even if it did not actually do so (see Williams v Dover Home Improvement, Inc., supra). Once an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity (see McGlynn v Brooklyn Hospital-Caledonian Hosp., supra; Sperber v Penn Cent. Corp., 150 AD2d 356 [1989]). The court, therefore, finds that plaintiffs are entitled to partial summary judgment against Maric on the Labor Law § 240(1) cause of action, and Maric's cross motion to dismiss this cause of action is denied.

That branch of Maric's cross motion which seeks to dismiss plaintiffs' causes of action for negligence and a violation of Labor Law § 200 is denied. In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had " authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Picciano & Son, 54 NY2d 311, 317 [1981]; see Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Singleton v Citnalta Constr. Corp., 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see LaRose v Resinick Eighth Ave. Assoc., LLC, 26 AD3d 470; [2006]; Gatto v Turano, 6 AD3d 390, 391 [2004]; Abayev v Jaypson Jewelry Manufacturing Corp., 2 AD3d 548 [2003]; Duncan v Perry, 307 AD2d 249 [2003]; Giambalvo v Chemical Bank, 260 AD2d 432 [1999]; Cuartas v Kourkoumelis, 265 AD2d 293 [1999]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see Loiacono v Lehrer McGovern Bovis, 270 AD2d 464, 465 [2000]). Here, there is evidence that Maric had actual notice of the open stairway shafts and the fact that they were unprotected. In addition, there is evidence that Maric warned its subcontractor about the dangerous condition, without undertaking to remedy it. The dismissal of this cause of

action, therefore, is not warranted.

That branch of Maric's cross motion which seeks to dismiss plaintiffs' cause of action for a violation of Labor Law § 241(6) is denied. In order for a contractor or an owner to be liable under Labor Law § 241(6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command (see Rizzuto v Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., supra; Vernieri v Empire Realty Co., 219 AD2d 593 [1995]). In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (see Thompson v Ludovico, 246 AD2d 642 [1998]; Vernieri v Empire Realty Co., supra). Plaintiffs in their complaint allege violations of 12 NYCRR §§ 23-1.7(b), 23-1.7(b)(1)(i)(ii)(iii), 23-1.15(a-e), 23-1.17(a), 23-1.30, 23-2.5(a-b), and 23-2.7(a)(b)(c).

12 NYCRR § 23-1.7(b) applies to "[e]very hazardous opening into which a person may step or fall," provided that the "' hazardous opening' ... [is] one of significant depth and size..." (D'Egidio v Frontier Ins. Co., 270 AD2d 763, 765 [2000]). The regulation requires hazardous openings to be "guarded by a substantial cover fastened in place or by a safety railing" (12 NYCRR 23-1.7[b][1][i]). Certain other forms of protection are needed when employees are required to work close to the edge of such an opening (see 12 NYCRR 23-1.7[b][1][iii]). Therefore, as it is undisputed that the stairway shaft was open and unguarded, the evidence presented is sufficient to allege a violation of 12 NYCRR 23-1.7(b)(1).

Defendant New York Pre-Cast Inc.'s cross motion for summary judgment dismissing the complaint.

Defendant New York Pre-Cast Inc.'s cross motion for an order granting summary judgment dismissing the complaint is denied. New York Pre-Cast Inc. entered into a written contract with Pi Development, LLC to perform the concrete work at the subject premises, and then subcontracted a portion of this work to Special Treatment General Contracting. Contrary to New York Pre-Cast's assertion, the evidence presented establishes that the manner in which plaintiff's accident occurred was well within the purview of Labor Law § 240(1) (see Ross v Curtis-Palmer Hydro-Elec. Co., supra at 500-501; Zimmer v Chemung County Performing Arts, supra; Manns v Norstar Building Corp., supra; Davidson v E.Q.K. Green Acres, LP., supra; Schneider v Hanover East Estates, supra; Dawson v Pavarini Constr. Co., supra). That branch of New York Pre-Cast Inc.'s cross motion which seeks to dismiss plaintiffs' claims under Labor Law § 240(1), therefore, is denied.

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That branch of New York Pre-Cast Inc.'s cross motion which seeks to dismiss plaintiffs' claims for negligence and for a violation of Labor Law § 200, is denied. Liability under Labor Law § 200 may be established either by proof that the defendant had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Picciano & Son, supra), or had actual or constructive notice of the defective condition causing the accident (see LaRose v Resinick Eighth Ave. Assoc., LLC, supra). Here, Thomas Auringer's deposition testimony presented evidence which supports plaintiffs' claim that New York Pre-Cast Inc. had actual knowledge of the alleged dangerous condition, to wit, the open and unguarded stairway shaft, which resulted in the accident.

To the extent that New York Pre-Cast seeks to dismiss a claim for a violation of Labor Law § 242, this request is denied as moot, as the plaintiffs do not allege a violation of this section of the Labor Law.

Defendant SLM's separate motion for an order dismissing the complaint.

SLM entered into an agreement with Pi Development, LLC, dated December 4, 2002, whereby it agreed to act as the construction manager for the subject construction project. SLM's contract with Pi Development, LLC specifically provided, in Article 2, section 2.3.12 of its terms and conditions that "[t]he Construction Manager shall review the safety programs developed with each of the Contractors for purposes of coordinating the safety programs with those of the other Contractors. The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager." In addition section 2.3.15 of the contract's terms and conditions provided that "[with] respect to each Contractor's own Work, the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's responsibility under the Contract for Construction. The Construction Manager shall not be responsible for Contractor's failure to carry out the work in accordance with the respective Contract Documents. The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees or any other persons performing portions of the work not directly employed by the Construction Manager."

Mr. Spadina, SLM's principal, testified that he was aware that the site safety manager Anton Rusin complained about safety violations and that it was the contractors' responsibility to comply with the safety rules and regulations. He stated that when he visited the job site there was a lot of ongoing work and that he was never able to tell whether an area was unprotected or whether the protection had been moved due to the fact that work was being performed in that area. He stated that he did not recall seeing unprotected areas when the workmen were not working, and that even if such a condition existed it was the site safety manager's responsibility to enforce safety standards. He stated that perhaps a week before the plaintiff's accident, he had a conversation with Mr. Rusin regarding complaints by the contractors--that they were each removing and not protecting the work areas, not storing materials in a proper manner and not keeping the site clean. He stated that he sent a letter to all of the contractors regarding these specific complaints and reminded them of their duty to comply with safety rules and regulations.

Liability for violations of Labor Law §§ 240[1] and 241[6] may be imposed against contractors and owners, as well as parties who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors (see Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]; Nienajadlo v Infomart NY, LLC, 19 AD3d 384 [2005]). A defendant may be vicariously liable as an agent of the property owner for injuries sustained under the Labor Law only where the defendant had supervisory control and authority over the work being done when the plaintiff was injured (see Walls v Turner Constr. Co., 4 NY3d 861 [2005]; Blake v Neighborhood Hous. Servs. of NY City, Inc., 1 NY3d 280, 293 [2003]). Here, although SLM was on site, there is no evidence that it had supervisory control or authority over the work being performed by the plaintiff, or that it had authority to stop any unsafe work practices. Rather, SLM's contract clearly provided that the construction manager was not given authority to direct and control the work of the prime contractors or subcontractors and that such authority was reserved to the contractors. The court therefore finds that SLM was not Pi Development, LLC's or Pi Associates, LLC's statutory agent under Labor Law §§ 240[1] or 241[6] (see Adair v BBL Constr. Serv., LLC, 25 AD3d 971 [2006]), and that it cannot be liable to the plaintiffs' under these sections of the Labor Law. Furthermore, as SLM did not have supervisory control over Plaintiff Nasuro, and as it neither created the dangerous condition that injured him, nor had actual or constructive notice of it, it cannot be liable for common-law negligence or a violation of Labor Law § 200 (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Lombardi v Stout, 80 NY2d 290,

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294-295 [1992]; Russin v Louis N. Picciano & Son, supra at 316-317). Accordingly, that branch of SLM's motion which seeks summary judgment dismissing the plaintiffs' complaint in its entirety is granted.

The individual contractors' agreements to hold harmless and indemnify Pi Development LLC.

Defendant New York Pre-Cast Inc. executed an indemnification and hold harmless agreement on January 24, 2003 which provides as follows:

> To the fullest extent permitted by law, the Contractor Shall Indemnify and Hold Harmless the owner, Pi Development, LLC and the architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to Attorney's fees, arising out of or resulting from the performance of the work, provided that any such claim damages, loss or expense (1) is attributable to bodily injury, to or sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting therefrom and (2) is caused in whole or part by any negligent act or omission of NY Pre-Cast, Inc any subcontractor, anyone directly or indirectly employed by any one for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder, such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.
>
> In any and all claims against the owner or the architect or any of their agents or employees by any employee of NY Pre-Cast Inc., any subcontractor, anyone directly or indirectly employed by any one for whose acts any of them may be liable, the indemnification obligation under this paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Pi Development, LLC, or any subcontractor under workers or workmen's compensation acts, disability benefit acts or other employee benefits acts.

Identical agreements which substituted the name of the indemnitor were executed in favor of Pi Development, LLC by an entity identified in the agreement as "SLMGI Construction Co.," on January 4, 2003; by New York Steel Fabricators Inc., on January 24, 2003; by Maric on April 21, 2003; and by Anton Rusin, the site safety manager, on May 19, 2003.

The individual contractors' agreements to procure insurance.

The individual construction contracts entered into by Pi Development, LLC, with Maric, New York Pre-Cast Inc., New York Steel Fabricators Inc., and Anton Rusin required each contractor to procure a "100% Performance and Payment Bond, 1-2 Million General Liability Insurance, 2 Million Excess/Umbrella Liability Insurance with per project aggregate and follow form, Workers Compensation- as required by law." The contract entered into by Pi Development with SLM required the construction manager to procure liability insurance of "1-2 Million General Liability Insurance, 9 Million Umbrella Liability Policy, 11 Million Total Liability Policy."

The cross claims interposed by the defendants.

Co-defendants Pi Associates, LLC and Pi Development, LLC have interposed cross claims against co-defendants Maric, SLM, New York Pre-Cast Inc., New York Steel Fabricators Inc., and Anton Rusin for common-law indemnification, contractual indemnification, and breach of contract based upon the failure to procure insurance.

Co-defendant SLM has interposed cross claims against Maric, New York Pre-Cast Inc., New York Steel Fabricators Inc. and Rusin for common-law contribution, and contractual indemnification based upon the hold harmless and indemnification agreement between the co-defendants and Pi Development LLC, and for breach of contract based upon the failure to procure insurance.

Co-defendant New York Steel Fabricators Inc., has interposed cross claims against Maric, Pi Associates, LLC, Pi Development, LLC, New York Pre-Cast Inc., SLM and New York Steel Fabricators Inc., for contractual indemnification based upon the hold harmless and indemnification agreement between the individual co-defendants and Pi Development, LLC.

Co-defendant Maric has interposed cross claims against Pi Associates, LLC, Pi Development, LLC, New York Pre-Cast Inc., SLM, New York Steel Fabricators Inc., and Rusin, for common-law indemnification and contractual indemnification based upon the hold harmless and indemnification agreement between the individual defendants and Pi Development, LLC.

Defendant Maric's cross motion to dismiss all cross claims; Defendant New York Pre-Cast Inc.'s cross motion to dismiss all cross claims; Defendant SLM's motion for summary judgment on its cross claims for common-law indemnification and its request for

summary judgment on its cross claims for contractual indemnification, including costs and attorney's fees; Defendants Pi Associates LLC's and Pi Development LLC's cross motion for summary judgment on its claim for contractual indemnification against co-defendants New York Pre-Cast Inc.,SLM, Maric and New York Steel Fabricators Inc.

Contractual indemnification:

The subject hold harmless and indemnification agreements executed in favor of "the owner, Pi Development LLC," the architect, and their agents and employees" do not define the term "agent." The general rule as to indemnification clauses is that " 'when a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed'" (Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490, [2004], quoting Hooper Assoc. v AGS Computers, 74 NY2d 487, 491, [1989]; Wrighten, v ZHN Contracting Corporation, ___ AD3d ___, 2006 NY Slip Op 6850; 2006 N.Y. App. Div. LEXIS 11435 [Appellate Division, Second Department, September 26, 2006]; Gilbert v Albany Med. Ctr., 21 AD3d 677, 678-679 [2005]). Here, the indemnification clause contains no reference to the construction manager, or to any of the other prime contractors. In addition, none of the prime contractors were in privity with one another. The language of the parties is not clear enough to enforce an obligation to indemnify unnamed entities, and the court will not rewrite the contract and supply a specific obligation the parties themselves did not spell out. If the parties intended to cover SLM, or any of the unnamed prime contractors, as a potential indemnitee, they had only to say so unambiguously (see Tonking v Port Auth., supra at 489-490). The court, therefore, finds that defendants SLM, New York Steel Fabricators Inc. and Maric may not maintain a cross claim for contractual indemnification against any of the co-defendants.

Accordingly, that branch of Maric's cross motion which seeks to dismiss the cross claims for contractual indemnification is granted to the extent that such cross claims asserted by co-defendants SLM and New York Steel Fabricators Inc., are dismissed. Maric's cross claims for contractual indemnification against the co-defendants, including Pi Associates, LLC and Pi Development, LLC, are also dismissed (see CPLR 3212[b]).

That branch of New York Pre-Cast's cross motion which seeks to dismiss the cross claims for contractual indemnification asserted by SLM, New York Steel Fabricators Inc., and Maric are dismissed.

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SLM's motion for summary judgment in its favor on its cross claims for contractual indemnification is denied, and this cross claim is dismissed as to all co-defendants (see CPLR 3212[b]).

Defendant Pi Associates, LLC's and Pi Development, LLC's cross motion for summary judgment on its claims for contractual indemnification is denied. In view of the fact that the Court has determined that Pi Associates, LLC, Pi Development, LLC and Maric are liable to the plaintiffs under Labor Law § 240, but has not made any determination as to whether these defendants are also personally, and not vicariously liable to the plaintiffs under the other causes of action, the request for contractual indemnification as to Maric is premature. Furthermore, as the Court has not made any determination as to the liability of New York Pre-Cast Inc., and New York Steel Fabricators Inc., the request for contractual indemnification as to these co-defendants is also premature. Finally, as the Court has determined that SLM is not liable to the plaintiffs, Pi Associates, LLC and Pi Development, LLC are not entitled to contractual indemnification from this defendant, regardless of whether the indemnification agreement was executed by SLM or another entity. This cross claim against SLM, therefore, is dismissed (see CPLR 3212[b]).

Common- Law Indemnification:

In order 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" (Correia v Professional Data Mgt., 259 AD2d 60, 65 [1999]; accord Priestly v Montefiore Med. Ctr., Einstein Med. Ctr., 10 AD3d 493, 495 [2004]) 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 " (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 [2003]; see also Kelly v City of New York, ___ AD3d ___, 2006 NY Slip Op 6558, 2006 N.Y. App. Div. LEXIS 10935 [Appellate Division, Second Department, September 19, 2006]; Coque v Wildflower Estates Developers, Inc., ___ AD3d ___, 818 NYS2d 546, [2006]; Perri v Gilbert Johnson Enters., 14 AD3d 681, 684-685 [2005]). Where more than one party might be responsible for the accident, summary judgment granting indemnification against one party is improper (see Freeman v National Audubon Soc'y, 243 AD2d 608, 609 [1997]). Here, defendants Pi Associates, LLC, Pi Development, LLC, and Maric have each been found liable to the plaintiffs for violations of Labor Law § 240(1). The Court, however, has made no determination as to whether these defendants may also be guilty of any negligence beyond the statutory liability, and has not dismissed plaintiffs' claims based on

common-law negligence and violations of Labor Law §§ 200 and 241. In addition, the Court has made no determination as to the liability of co-defendants New York Pre-Cast, New York Steel Fabricators, and Anton Rusin. Therefore, Maric's request to dismiss the cross claims for common-law indemnification asserted by Pi Associates LLC, and Pi Development LLC is denied, as premature. New York Pre-Cast Inc.'s request to dismiss the cross claims for common-law indemnification asserted by Pi Associates, LLC, Pi Development, LLC, and Maric, is also denied, as premature.

The court has determined that defendant SLM is not liable to the plaintiffs and has dismissed the complaint as to this defendant. Therefore, SLM cannot be liable to the plaintiffs' for damages and is not entitled to seek common-law indemnification in order to recover legal fees and litigation costs. It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule (see Chapel v Mitchell, 84 NY2d 345, 349 [1994], quoting Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]; U.S. Underwriters Ins. Co. v City Club Hotel, LLC, 3 NY3d 592, 597 [2004]; Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12, 21-22 [1979]). SLM has not established that it entered into a contract with any of the co-defendants for the payment of legal fees, and such payments are not authorized by any statute or court rule. Therefore, that branch of SLM's motion which seeks summary judgment in its favor against the co-defendants on its cross claim for common-law indemnification is denied. Maric's and New York Pre-Cast Inc.'s requests to dismiss SLM's cross claim for common-law indemnification is granted, and this cross claim is also dismissed as to all co-defendants (see CPLR 3212[b]).

The cross claims for breach of contract based upon the alleged failure to procure insurance:

The individual prime contractors, as well as SLM, entered into separate contracts with Pi Development, LLC which required each contracting party to procure their own insurance policies. None of these contracts required that the construction manager or the other prime contractors be named as an insured or an additional insured. None of the prime contractors and SLM were in privity with one another, and as each prime contractor and SLM were required to obtain their own insurance policies, none of these parties can be considered a third-party beneficiary of one another. Therefore, as SLM may not maintain a cross claim against the co-defendants for breach of contract based upon an alleged failure to obtain insurance, Maric's and New York Pre-Cast Inc.'s requests to dismiss SLM's cross claim for breach of contract is granted. This cross claim is also dismissed as to

all defendants (see CPLR 3212[b]).

Maric's and New York Pre-Cast Inc.'s requests to dismiss Pi Development, LLC and Pi Associates, LLC's cross claim for breach of contract is denied, as no evidence has been presented by any of the parties regarding the procurement of insurance.

Conclusion

In view of the foregoing, plaintiffs' motion for an order granting partial summary judgment on the claim of a violation of Labor Law § 240(1) against defendants Pi Associates, LLC, Pi Development, LLC, and Maric is granted.

Maric's cross motion for an order granting summary judgment dismissing the complaint is denied. That branch of Maric's cross motion which seeks to dismiss the cross claims for contractual indemnification is granted to the extent that such cross claims asserted by co-defendants SLM, and New York Steel Fabricators Inc. are dismissed. That branch of Maric's cross motion which seeks to dismiss SLM's cross claim for breach of contract is granted. Maric's cross claims for contractual indemnification against the co-defendants, including Pi Associates, LLC and Pi Development, LLC, are dismissed. That branch of Maric's cross motion which seeks to dismiss Pi Development, LLC's and Pi Associates, LLC's cross claim for breach of contract is denied.

Defendant New York Pre-Cast Inc.'s cross motion for an order granting summary judgment dismissing the complaint is denied. That branch of New York Pre-Cast Inc.'s cross motion which seeks to dismiss the cross claims for contractual indemnification asserted by SLM, New York Steel Fabricators Inc., and Maric is granted. That branch of New York Pre-Cast Inc.'s cross motion which seeks to dismiss SLM's cross claim for breach of contract is granted. That branch of New York Pre-Cast Inc.'s cross motion which seeks to dismiss Pi Development, LLC and Pi Associates, LLC 's cross claim for breach of contract is denied.

That branch of SLM's motion which seeks summary judgment dismissing the plaintiffs' complaint in its entirety is granted. That branch of SLM's motion which seeks summary judgment in its favor on its cross claims is denied. SLM's cross claims for contractual indemnification and for breach of contract based upon an alleged failure to obtain insurance is dismissed as to all co-defendants.

Defendant Pi Associates, LLC's and Pi Development, LLC's cross motion for summary judgment on their claims for contractual indemnification as to Maric, New York Pre-Cast Inc., and New York Steel Fabricators Inc., is denied. That branch of said cross

motion which seeks summary judgment on the claim for contractual indemnification against SLM is denied, and this cross claim is dismissed as to SLM.

Dated: October 11, 2006

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J.S.C.