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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 108145/2003
MORAN, JAMES R., JR.
VS
400 EAST 51ST STREET LLC.
Sequence Number : 005
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 is decided in accordance with the accompanying decision.

FILED
MAR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3-7-07

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JAMES MORAN, JR., SUZANNE MORAN and ERNST ZIEGER,

Plaintiffs,

-against- Index No. 108145/03

400 EAST 51st STREET, LLC, c/o ALEXIO MANAGEMENT GROUP, INC., and HRH CONSTRUCTION,

Defendants.

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400 EAST 51st STREET, LLC, c/o ALEXIO MANAGEMENT GROUP, INC., and HRH CONSTRUCTION,

Third-Party Plaintiffs,

-against-

PHOENIX MECHANICAL CORP.,

Third-Party Defendant.

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Lewis B. York, J.:

Motions with sequence numbers 005 and 006 are consolidated for disposition.

In motion sequence number 005, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants' liability under Labor Law § 240.

In motion sequence number 006, third-party defendant Phoenix Mechanical Corp. (PM) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all

cross claims.[1]

BACKGROUND

On the date of plaintiffs James Moran, Jr. (Moran) and Ernst Zieger (Zieger)'s accident, April 8, 2003, 400 East 51st Street, LLC (400) was the owner, and Alexio Management Group, Inc. (AM) the manager, of premises being constructed at 51st Street and First Avenue in Manhattan. HRH Construction (HRH), the construction manager for the project, retained non-party Mo-Car Contracting (Mo-Car) to perform HVAC work there, and Mo-Car, in turn, hired plaintiffs' employer, PM, to perform the work. Plaintiffs were steamfitters working on the roof, attempting to install a five-foot long, eight-inch wide black iron pipe to the cooling tower there. The pipe was approximately seven feet above the roof, and weighed over 100 pounds. The weather that day was very cold, and it is uncontested that the roof was wet and icy, and that a mixture of rain, sleet and snow was falling. Moran ascended a six-foot A-frame ladder to install the pipe, while Zieger stood on the roof one to three feet behind him, with his arms raised, helping Moran to align the pipe with the elbow to which it was being connected. The ladder kicked out and toppled over, Moran fell, and the pipe hit both Moran and Zieger.

THE PLEADINGS

Plaintiffs' complaint asserts three causes of action:

[1]There are no cross claims asserted against PM.

the first and third by Moran and Zieger, for common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6); and the second by Moran's wife, for loss of consortium. Defendants' answer raises 11 affirmative defenses.

The third-party complaint alleges four causes of action, for common-law indemnification, contribution, contractual indemnification (based on the Mo-Car/PM contract), and breach of contract by failure to procure insurance.

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' [citations omitted]" (*Nissan Motor Acceptance Corp. v Conn*, 33 AD3d 900, 900 [2d Dept 2006]). "Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*St. Claire v Empire General Contracting & Painting Corp.*, 33 AD3d 611, 611 [2d Dept 2006]).

Plaintiffs' Motion (Motion Sequence No. 005)

"Labor Law § 240 (1) protects workers from elevation-related hazards when they are injured while involved in certain enumerated work activities," including the erection of a building

(*Panek v County of Albany*, 99 NY2d 452, 455 [2003]). The statute requires owners, contractors, and their agents to provide workers with safety devices which will give "proper protection" from injury. Section 240 (1) "is intended to protect against risks caused by 'the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured' [citation omitted]" (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 153 [1st Dept 2003]). If the statute is violated, and that violation is the proximate cause of a plaintiff's injuries, "absolute liability [is imposed] on owners, contractors and [their] agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards" (*Striegel v Hillcrest Heights Development Corp.*, 100 NY2d 974, 977 [2003]).

"In order to establish prima facie entitlement to judgment as a matter of law on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of his or her injuries" (*Woszczyna v BJW Associates*, 31 AD3d 754, 755 [2d Dept 2006]). Plaintiffs here allege that the placement of the ladder on the icy conditions on the roof constituted an improper placement of the ladder which caused Moran's injuries. Defendants counter that Moran was the "fitter in charge" of the other PM workers on the roof the day of the

accident (McMorrow Depo., at 48), and that, as such, Moran was the one with the ultimate responsibility of deciding whether it was safe or unsafe to work at a particular location (*id.* at 84-85). Therefore, defendants contend, Moran was the sole proximate cause of the plaintiffs working on the roof in such bad weather and roof conditions, and therefore, that he was the sole proximate cause of their injuries. In addition, defendants maintain that, with respect to Zieger, section 240 (1) does not apply because there was no elevation-related hazard present.

Moran

> Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker. "[T]he legislative history of the Labor Law, particularly sections 240 and 241, makes clear the Legislature's intent to achieve the purpose of protecting workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor'" [citation omitted]

(*Klein v City of New York*, 89 NY2d 833, 834 [1996]). In *Klein*, the ladder had slipped out from under the plaintiff, and the Court found that the plaintiff had established a prima facie showing that the defendant had violated section 240 (1) "by failing to ensure the proper placement of the ladder due to the condition of the floor" (*ibid.*; *see also Alligood v Hospitality West, LLC*, 8 AD3d 1102 [4th Dept 2004] [ladder slipped on ice on which it had been placed; "Plaintiffs met their burden of

establishing that the ladder was not 'so ... placed ... as to give proper protection to' plaintiff" [citing *Klein*]).

Here, plaintiffs make the same assertion, that the ladder slipped out from under Moran because it had been improperly placed on the roof which was slippery, icy, and wet. Moran testified that the weather was "[v]ery cold, very cold" that day, "the coldest April day that [he] ever remembered" with "a mixture of rain, sleet [and] snow" (Moran Depo., at 80, 114-115). With respect to the roof, "[i]t was damp. The rooftop was wet. There was ice patches. There was snow. It was a mixture of everything" (*id.* at 115). Defendants themselves do not dispute the hazardous condition of the roof's surface. Thus, plaintiffs have established their entitlement to summary judgment under Labor Law § 240 (1) with respect to Moran.

Sole Proximate Cause

Defendants raise the defense of sole proximate cause, claiming that plaintiff caused his own injuries by choosing to work on the roof in such conditions. "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability [under Labor Law § 240 (1)]" (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). However, the Court of Appeals has determined that it is "conceptually impossible" for a defendant's statutory violation to occupy the same ground as a plaintiff's sole proximate cause of an injury

(*see Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 290 [2003]). At most, Moran's decision to work on the roof on that day may have constituted comparative negligence, which is not a defense to a section 240 (1) claim (*see e.g. Miraglia v H & L Holding Corp.*, ___ AD3d ___, 2007 WL 45982 *1, 2007 NY Slip Op 00093 [1st Dept 2007] ["the doctrine of comparative negligence is not available to diminish a defendant's liability under Labor Law § 240 (1)"]; *Pearl v Sam Greco Construction*, 31 AD3d 996, 997 [3d Dept 2006] ["plaintiff's comparative fault is neither a defense nor can it be the *sole* proximate cause of his injury (emphasis in original)" (citing *Blake*)]).

Unfortunately, it is not unusual for workers to have to work in inclement weather and hazardous conditions. As has been held many times by the courts of this state, Labor Law § 240 (1) was enacted precisely to protect workers in such circumstances. This court has found that Moran has established his claim under section 240 (1). Therefore, defendants' defense of Moran being the sole proximate cause of his injury must fail, and plaintiffs' motion, with respect to Moran, is granted.

Zieger

The "exceptional protection" afforded by section 240 (1) is not intended to "encompass *any* and *all* perils that may be connected in some tangential way with the effects of gravity

[emphasis in original]" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). Rather, the Legislature intended the statute "to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured'" (*id.* at 500-501, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

> [N]ot 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 [citation omitted]. ... [F]or section 240 (1) to apply, ... [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 [citations omitted; emphasis in original]

(*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267, 268 [2001]).

Zieger is not entitled to the protections of section 240 (1) because, among other things, the pipe he was helping to guide was not being either hoisted or secured. In addition, there was no "'significant risk inherent in the particular task because of the relative elevation at which the task [had to] be performed or at which materials or loads [were] positioned or secured'" (*Brooks v City of New York*, 212 AD2d 435, 436 [1st Dept 1995], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d at 514

[in *Brooks*, to complete the task, plaintiff, at most, had to reach 10 ½ inches above his head]).

Conclusion

Accordingly, plaintiffs' motion is granted with respect to Moran, but is denied with respect to Zieger.

Third-Party Defendant PM's Motion (Motion Sequence No. 006)

PM, plaintiffs' employer, seeks summary judgment dismissing the third-party complaint which alleges claims for common-law and contractual indemnification, contribution, and breach of contract by failure to procure insurance.

> Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a "grave injury," or the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered"

(*Rodrigues v N & S Building Contractors*, 5 NY3d 427, 429-430 [2005]).

Moran

Contribution and Common-Law Indemnification

Moran attests that his hand was "crushed" during the accident (Moran 1/10/06 Aff., ¶ 5), and that he is unable to use it any more. The contested issue with respect to this injury is whether it constitutes a "grave injury" within the meaning of

Workers' Compensation Law § 11. "Grave injury is a statutorily-defined threshold for catastrophic injuries, and includes only those injuries which are listed in the statute and determined to be permanent" (*Blackburn v Wysong and Miles Co.*, 11 AD3d 421, 422 [2d Dept 2004]). Workers Compensation Law § 11 defines "grave injury" as, among other things, "permanent and total loss of use ... of [a] ... hand ... ." "By statute, 'grave injury' is 'both narrowly and completely described' [citation omitted]" (*Spiegler v Gerken Building Corp.*, 35 AD3d 715, 826 NYS2d 674, 675 [2d Dept 2006]).

Here, third-party plaintiffs assert that Moran retains only passive use of his hand, which constitutes a total loss of its use, and thus, that their tort claims against PM are not barred (*see e.g. Millard v Alliance Laundry Systems, LLC*, 28 AD3d 1145, 1147 [4th Dept 2006] ["Where ... a plaintiff retains only 'passive movement' of the hand or arm, that may qualify as a total loss of use of the hand or arm"]; *Balaskonis v HRH Construction Corp.*, 1 AD3d 120 [1st Dept 2003] [retaining only passive movement was permanent, total loss of use of hand and arm]). However, PM counters that Moran's loss of use of his hand is not total because Moran himself stated at his deposition that he "could probably pick this [half-filled pint of water] up" (Moran Depo., at 159), and thus, that it is entitled to dismissal of the tort claims (*see e.g. Kraker v Consolidated Edison Co.*, 23

AD3d 531 [2d Dept 2005]; *Trimble v Hawker Dayton Corp.*, 307 AD2d 452 [3d Dept 2003]; *Aguirre v Castle American Construction, LLC*, 307 AD2d 901 [2d Dept 2003]). While that quotation from Moran's deposition comes from within a litany of things that he cannot do with his hand (*see* Moran Depo., at 154-160), PM's position is buttressed by the report of Dr. Joel Grad, who attests several times that Moran has "restricted mobility" in his left hand, but that

> [g]iven his age and motivational status, consideration should be given to vocational re-training as currently he is restricted to essentially one-handed, right hand dominant activities, using the left upper extremity as an assistive, helping hand. Based upon today's review, there are no medical contraindications to any activities of daily living or vocational pursuits within Mr. Moran's tolerances and physical capabilities.

If Moran's use of his hand is only passive, he has sustained a "grave injury." However, whether Moran retains only passive use of his left hand is a question of fact. Therefore, that part of PM's motion which seeks summary judgment dismissing third-party plaintiffs' tort claims with respect to Moran is denied.

Zieger

It is uncontested that Zieger sustained a broken wrist, which does not constitute a "grave injury." Therefore, that part of PM's motion which seeks summary judgment dismissing third-party plaintiffs' tort claims with respect to Zieger is granted.

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]).

As set forth above, a third-party plaintiff can bring a contractual indemnification claim against a plaintiff's employer when the claim is "'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to ... indemnification'" (*Rodrigues v N & S Building Contractors*, 5 NY3d at 430). No one disputes that the work which Mo-Car engaged PM to do was done pursuant to an oral agreement, and that no written contract was entered into until after the accident and after this litigation had been commenced. However, the court cannot determine whether the parties intended the written contract, and its indemnification language, to be effective "as of" a date prior to the accident because the first three pages of the copy of the contract supplied to the court are missing, and no date appears on the copy provided to the court. Therefore, PM has failed to demonstrate its entitlement to summary judgment dismissing the

third-party plaintiffs' contractual indemnification claim.

Breach of Contract by Failure to Procure Insurance

PM's attempt to have the breach of contract claim dismissed is denied. PM has not discussed this claim in its motion papers, and thus, it has failed to show its entitlement to summary judgment dismissing it.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is granted with respect to James Moran, Jr., with the amount of damages to await determination at trial; and it is further

ORDERED that plaintiffs' motion is denied with respect to Ernst Zieger; and it is further

ORDERED that that part of Phoenix Mechanical Corp.'s motion which seeks summary judgment dismissing third-party plaintiffs' tort claims with respect to James Moran, Jr. is denied, but with respect to Ernst Zieger is granted, and the tort claims as against Ernst Zieger are dismissed; and it is further

ORDERED that the part of Phoenix Mechanical Corp.'s motion which seeks summary judgment dismissing the third-party complaint's contractual indemnification and breach of contract

claims is denied.

Dated: 3/7/07

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.