Public Admin. Kings County v 240 North 10th St. Bldg. Corp.

2007 NY Slip Op 30910(U)

April 10, 2007

Supreme Court, Kings County

Docket Number: 0013504/2002

Judge: Herbert Kramer

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At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of April, 2007

P R E S E N T:

HON. HERBERT KRAMER,

JUDGE.

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PUBLIC ADMINISTRATOR KINGS COUNTY AS ADMINISTRATOR OF THE ESTATE OF MARIAN RUSEWICZ A/K/A MARIAN RUSIEWICZ,

Index No. 13504/02

Plaintiff,

- against -

240 NORTH 10TH STREET BUILDING CORPORATION,

Defendants.

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240 NORTH 10TH STREET BUILDING CORPORATION,

Index No.76075/04

Third-Party Plaintiff,

- against -

ALPHA EMPIRON BUILDING CORPORATION,

Third-Party Defendant.

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The following papers numbered 1 to 15 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5, 6-7
Opposing Affidavits (Affirmations)	8, 9, 10, 11, 12
Reply Affidavits (Affirmations)	13, 14, 15
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Public Administrator Kings County as Administrator of the Estate of Marian Rusewicz a/k/a Marian Rusiewicz (plaintiff) moves, pursuant to CPLR 3212, for partial summary judgment against defendant 240 North 10th Street Building Corporation (240 North) under its Labor Law § 240 (1) cause of action. 240 North cross-moves for summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claim and awarding it common-law and contractual indemnification against third-party defendant Alpha Empiron Building Corporation (Alpha). Alpha cross-moves for summary judgment dismissing plaintiff's complaint as well as 240 North's third-party complaint.

Background Facts and Procedural History

The instant action arises out of a September 20, 2000 scaffold accident in which plaintiff's decedent, Marian Rusewicz (decedent), sustained fatal injuries. The scaffold had previously been erected as part of a renovation/repair project involving a two-story commercial building owned by 240 North and located at 240 North 10th Street in Brooklyn, New York (the building or the premises). Prior to the accident, Alpha leased the building from 240 North and operated a cabinet manufacturing business at the premises.[1] Specifically, the first floor of the building contained a woodworking shop and the second floor of the building contained Alpha's offices. The renovation/repair project, which was carried out by Alpha employees, involved, among other things, replacing the beams in the building and applying stucco to the exterior of the premises.

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[1] 240 North and Alpha had the same principles, and both were owned by the non-party corporation, Global Technology Group.

On the day of the accident, decedent and a co-worker, Jan Zan, were dismantling the subject scaffold pursuant to their employment with Alpha. The scaffold consisted of metal pipes that supported three separate levels of wooden planks, each approximately six feet high.[2] At the time of the accident, decedent and Mr. Zan had already completed dismantling the top level and were in the process taking apart the middle level of the scaffold when decedent fell to the ground and sustained fatal injuries.[3] There were no witness to the accident and, consequently, there is no evidence before the court as to what specifically caused decedent to fall from the scaffold. However, it is undisputed that decedent was not wearing a safety harness when the accident occurred.

By summons and complaint dated March 26, 2002, plaintiff, as administrator of decedent's estate, commenced the instant action against 240 North alleging violations of Labor Law §§ 240 (1), 241 (6), 200, as well common-law negligence. Thereafter, 240 North commenced a third-party action against Alpha seeking common-law and contractual indemnification. In a decision dated May 29, 2002, Judge Leslie Lewkow of the New York State Workers' Compensation Board directed Alpha (as decedent's employer) and Alpha's insurance carrier to pay death benefits to decedent's spouse and child. On June 29, 2006, plaintiff, via mail, served 240 North and Alpha with a note of issue. On or about August 24, 2006, plaintiff served the instant summary judgment motion upon

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[2] Thus, the top level was approximately 18 feet above the ground, the middle level was approximately 12 feet above the ground, and the lower level was approximately six feet above the ground.

[3] Decedent was taken to Bellevue Hospital by ambulance where he was pronounced dead on arrival.

240 North and Alpha. On or about September 29, 2006, Alpha served its cross motion for summary judgment upon plaintiff and 240 North. On October 3, 2006, 240 North served its cross motion for summary judgment upon plaintiff and Alpha.

Timeliness Issue

As an initial matter, the court must address the issue of whether or not 240 North and Alpha's respective cross motions for summary judgment were made in a timely manner. In this regard, plaintiff maintains that the court may not consider these motions inasmuch as they were served more than 60 days after the note of issue was filed, in violation of Rule 13 of the Uniform Civil Term Rules of the Supreme Court, Kings County. In opposition to this argument, 240 North and Alpha have both submitted a copy of the court's published part rules, which provide that summary judgment motions must be made within 90 days of the filing of the note of issue. 240 North and Alpha also point out that, since the note of issue was served via mail, five days is added to the prescribed period by operation of CPLR 2103 (b)(2). Under the circumstances, 240 North and Alpha reason that their summary judgment motions are timely.

Under CPLR 3212 (a), a party "may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made." Courts may only entertain an untimely summary judgment motion when the movant demonstrates "good cause" for his or her delay, which the Court of Appeals has deemed to entail "a satisfactory explanation for the untimeliness-rather than simply permitting meritorious, nonprejudicial filings" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Miceli v State*

Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]). As noted above, under Rule 13 of the Uniform Civil Term Rules of the Supreme Court, Kings County, summary judgment motions are generally required to be made within 60 days of service the note of issue. Here, it is undisputed that 240 North and Alpha's cross motions were filed more than 60 days after they were served with the note of issue. However, 240 North and Alpha have provided a satisfactory explanation for their failure to move in a timely manner: namely their reliance upon the 90-day deadline set forth in the court's published part rules. Under the circumstances, the court will consider 240 North and Alpha's respective cross motions on their merits.

Plaintiff's Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment against 240 North under its Labor Law § 240 (1) claim. In support of its motion, plaintiff points to the undisputed fact that decedent fell a distance of 12 feet from a scaffold during the course of a renovation project on a building owned by 240 North. Plaintiff contends that the scaffold, which was in the process of being disassembled, was in a dangerous/hazardous condition inasmuch as some of its planks and guardrails had been removed before the accident. Plaintiff further maintains that, given the condition of the scaffold, 240 North's failure to provide decedent with adequate safety devices such as a safety harness constituted a prima facie violation of Labor Law § 240 (1). In this regard, plaintiff submits an affidavit by Marian Wawrzniak, in which he states that he was hired by Alpha in 1998 and was an Alpha employee at the time of the accident. According to Mr. Wawrzniak, Alpha never provided its workers (including

decedent) with safety harnesses and never directed its workers to wear safety harnesses while performing the renovation work.

In opposition to plaintiff's motion, 240 North maintains that there is a question of fact as to whether or not decedent was provided with a safety harness. In particular, 240 North notes that decedent's supervisor, Arthur Stolarczk, testified that Alpha provided plaintiff and his co-workers with safety harnesses to wear when working on scaffolds and that he had personally instructed decedent how to use the harness prior to the accident. Mr. Stolarczk also testified that the harnesses could be attached to a safety line running from the roof of the premises. According to Mr. Stolarczk, these harnesses were stored in a tool room on the second floor of the building and all Alpha workers had access to these devices. In addition, Mr. Stolarczk testified that he saw decedent on the day of the accident and noticed that his safety harness was on the roof and that decedent "didn't put [it] on yet." 240 North also points to the deposition testimony of decedent's co-worker Marian Kaminski, wherein he testified that Alpha provided its employees with safety harnesses which were kept in a tool room which was accessible to all Alpha employees. 240 North further notes that Mr. Zan signed a statement dated November 1, 2000, in which he states that "[o]ur employer provided safety harnesses as well as protective hard hats."

Given this evidence, 240 North argues that plaintiff is not entitled to summary judgment under Labor Law § 240 (1) since there is an issue of fact as to whether decedent's failure to wear an available safety harness while dismantling the scaffold constituted the sole proximate cause of the accident. In addition, 240 North argues that plaintiff's summary judgment motion must be

denied because plaintiff has failed to point to any specific defect in the scaffold that caused the accident.

Labor Law § 240(1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, 81 NY2d at 500). Furthermore, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]). However, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary

protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). Rather, only those accidents proximately caused by a Labor Law § 240 (1) violation will result in the imposition of liability under the statute (*Blake v Neighborhood Hous. Services of New York City*, 1 NY3d 280, 287 [2003]).

When a worker unjustifiably fails to use an available safety device that would have prevented an ensuing accident, there is no basis for Labor Law §§ 240 (1), 241 (6), or 200 liability since the worker's own actions are deemed to be the sole proximate cause of the accident (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555 [2006]; *Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]); *Leniar v Metropolitan Tr. Auth.*, 2007 NY Slip Op 01086 [2nd Dept, Feb. 6, 2007]). Thus, in *Robinson*, the Court of Appeals found that the actions of a worker who knew that he needed to use an eight-foot ladder to perform a job, and who acknowledged that such ladders were available "on the job site," but nevertheless chose to use a six-foot ladder from which he ultimately fell, were the sole proximate cause of the accident (*Robinson* at 554-555).

Here, there is evidence in the form of Mr. Stolarczk and Mr. Kaminski's deposition testimony, as well as Mr. Zan's signed statement, that: (1) a safety harness was available at the job site for decedent's use; (2) the harness could be attached to a safety line running from the roof of the building, (3) the decent had been directed to use the safety harness and had been given instruction on how to use the device; and (4) on prior occasions, decedent had worn the safety harness while working on the scaffold. Nevertheless, it is undisputed that decedent was not wearing this safety harness at the time of the accident. Under the circumstances, plaintiff is not entitled to

summary judgment under its Labor Law § 240 (1) claim as there is an issue of fact as to whether decedent's own actions were the sole proximate cause of the accident.

Plaintiff's motion for summary judgment under Labor Law § 240 (1) must also be denied inasmuch as plaintiff has failed to demonstrate that the accident was caused by a defect in the scaffold. In this regard, standing by itself, the mere fact that a worker fell from a scaffold does not, as a matter of law, establish a Labor Law § 240 (1) violation (*Tylman v School Constr. Auth.*, 3 AD3d 488, 489 [2004]; *Alva v City of New York*, 246 AD2d 614, 615 [1998]). A plaintiff moving for summary judgment under the statute must also establish that the scaffold was defective by, for example, pointing to evidence that the scaffold collapsed or shifted. Here, the accident was unwitnessed and there is no evidence that a defect in the scaffold caused decedent to fall. Accordingly, the trier of fact must determine whether or not decedent was provided with adequate safety devices for purposes of Labor Law § 240 (1).

Alpha's Cross Motion for Summary Judgment

In support of its cross motion for summary judgment dismissing plaintiff's complaint against 240 North, Alpha points to the same evidence submitted by 240 North in opposition to plaintiff's summary judgment motion regarding the availability of safety harnesses at the work site. In particular, Alpha contends that, not only is this evidence sufficient to raise a triable issue of fact as to whether decedent was the sole proximate cause of the accident, in fact, the evidence establishes that decedent's failure to use an available safety harness was the sole proximate cause of his death as a matter of law.

Alpha also argues that plaintiff's claims against 240 North are barred by the exclusive remedy provision set forth in Workers' Compensation Law § 11. In particular, Alpha argues that 240 North is an alter ego of decedent's employer (Alpha), and therefore, plaintiff's claims against 240 North must be dismissed. In support of this argument, Alpha points to the deposition testimony of Ellen Stewart, the secretary and treasurer of both 240 North and Alpha, in which she indicated that: 240 North and Alpha are controlled by the same individual, Simas Velonskis; 240 North and Alpha are located in the same building and 240 North hired Alpha to renovate the building; the work on the building was directed by Edwin Velonskis, vice president of both 240 North and Alpha; no written contract existed between the parties for the underlying work; and both 240 North and Alpha were owned by the same entity, Global Technology Group.

In opposition to Alpha's cross motion, plaintiff points to Mr. Wawrzniak's aforementioned affidavit, in which he indicates that Alpha did not provide its workers with safety harness and never directed its workers to wear safety harnesses while performing the renovation work. In addition, plaintiff contends that Alpha and 240 North were not alter egos of each other inasmuch as the two corporations were formed for entirely different purposes. Specifically, 240 North was a landlord while Alpha performed construction work and manufactured cabinetry. Plaintiff further notes that the Workers' Compensation Board has already ruled that decedent was employed by Alpha. According to plaintiff, this determination is binding on the court.

As noted above, there is evidence in the record from which a jury could conclude that decedent's own actions were the sole proximate cause of the accident. In particular, Mr. Stolarczk's

deposition testimony indicates that decedent was provided with a safety harness and was instructed on the use of this device but plaintiff failed to wear the harness at the time of the accident. However, there is admissible evidence contradicting Alpha's claims regarding decedent's failure to use an available safety harness. Specifically, Mr. Wawrzniak's affidavit indicates that Alpha never provided its workers (including decedent) with safety harness and never directed its workers to wear safety harnesses while performing the renovation work.[4] Given this affidavit, there are clearly factual issues regarding whether or not decedent was the sole proximate cause of the accident (*Florio v LLP Realty Corp.*, 2007 NY Slip Op 02698 [2nd Dept, Mar. 27, 2007]).

Alpha's argument that it and 240 North are alter egos, and therefore, plaintiff's claims against 240 North are precluded under Workers' Compensation Law § 11, is also without merit. "The [business] structure [Alpha and 240 North] created should not lightly be ignored at their behest, in order to shield one of the entities they created from . . . liability" (*Buchner v Pines Hotel*, 87 AD2d 691, 692 [1982], *affd* 58 NY2d 1019 [1983]). "Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes" (*Longshore v Paul Davis Sys. of the Capital Dist.*, 304 AD2d 964, 965 [2003]). Indeed, for purposes of the Workers' Compensation Law, multiple business entities will only be considered alter egos upon a showing that they "'completely ignored' the separate identities of the

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[4] Contrary to Alpha's claim, Mr. Wawrzniak's affidavit indicates that he had first-hand knowledge of the underlying renovation work, including the scaffold that decedent was using at the time of the accident and the types of safety devices that were available at the work site. Moreover, Alpha's self-generated, unverified employee list does not disprove Mr. Wawrzniak's claim that he was employed by Alpha at the time of the accident. Consequently, there is no basis for the court to disregard Mr. Wawrzniak's sworn affidavit.

others" (*Nelson v Shaner Cable, Inc.*, 2 AD3d 1371, 1372 [2003], quoting *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]).

Here, although Alpha and 240 North were owned by the same parent company and shared certain directors and officers, it cannot be said that they completely ignored their separate identities. In this regard, the two entities were incorporated on different dates and carried separate insurance policies. Moreover, 240 North leased Alpha space in the building pursuant to a formal lease agreement which required, among other things, that Alpha indemnify 240 North for accidents caused by Alpha's acts or omissions. In addition, Alpha and 240 North were formed for different purposes. Specifically, 240 North was a landlord[5] while Alpha was engaged in the business of construction work and cabinet making.

Under the circumstances, Alpha's cross motion for summary judgment dismissing plaintiff's complaint against 240 North is denied.

Plaintiff's Labor Law § 200/Common-Law Negligence Claim

240 North cross-moves for summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claim against it. In so moving, 240 North maintains that it did not control or supervise decedent's work, and was not responsible for maintaining the scaffold involved in the accident. In support of this argument, 240 North notes that Mr. Stolarczyk's deposition testimony indicates that decedent was supervised solely by Alpha personnel and that Alpha was solely responsible for performing the underlying work. In addition, 240 North points to the

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[5] 240 North leased space in the building to other tenants beside Alpha, specifically Prime Foods, Eastern Oceanic and Kelleran and Associates.

deposition testimony of its treasurer, Ellen Stewart. In particular, 240 North notes that Ms. Stewart testified that Alpha owned the scaffold used by decedent and that 240 North was merely the landlord of the building and did not have any employees.

Plaintiff has failed to submit any substantive opposition to that branch of 240 North's cross motion which seeks the dismissal of the Labor Law § 200/common-law negligence cause of action.[6] However, Alpha has submitted opposition papers in which it argues that there is an issue of fact regarding whether or not 240 North supervised the underlying renovation work. In support of this argument, Alpha notes that Mr. Stolarczyk, Ms. Stewart, and Mr. Kaminski all testified that Edwin Velonskis, 240 North's vice president, oversaw the renovation work on the building.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

Here, the evidence before the court demonstrates that decedent's work was supervised, directed, and controlled solely by Alpha personnel and that Alpha owned the subject scaffold.

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[6] Plaintiff does contend that the cross motion should be denied as untimely. However, the court has already determined that 240 North has shown good cause for its failure to cross-move within 60 days of service of the note of issue.

Furthermore, while it is true that 240 North's vice president, Edwin Velonskis, was in overall charge of the renovation work, Mr. Velonskis was also the vice president of Alpha. There is no evidence that Mr. Velonskis was acting in his capacity as 240 North's vice president when supervising the work. To the contrary, inasmuch as 240 North was merely a landlord, and all the workers on the project were employees of Alpha, it is clear that Mr. Velonskis directed the work pursuant to his authority as vice president of Alpha. Accordingly, plaintiff's Labor Law § 200/common-law negligence claim against 240 North must be dismissed.

Indemnification Issues

240 North cross-moves for common-law and contractual indemnification against Alpha. In support of its contractual indemnification claim, 240 North points to a clause in the lease agreement between the parties. Specifically, under the lease, Alpha agreed to make all repairs on the building and to "forever indemnify and save harmless [240 North] for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said [lease] term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of [Alpha] or of [its] employees." Here, inasmuch as decedent's accident arose out of the acts and omissions of Alpha and its employees, 240 North maintains that it is entitled to contractual indemnification under this clause.

240 North also contends that it is entitled to common-law indemnification against Alpha. In support of this contention, 240 North notes that any liability it faces in this action will be

vicarious in nature. 240 North also points out that decedent was employed by Alpha, supervised by Alpha personnel, and was using a scaffold owned by Alpha at the time of the accident.[7]

In opposition to this branch of 240 North's cross motion, Alpha notes that there was no written contract between it and 240 North for the performance of the underlying work. Accordingly, Alpha reasons that there is no basis for 240 North's contractual indemnification claim. Alpha also argues that there are factual issues as to whether 240 North supervised the renovation project, or was otherwise negligent. Under the circumstances, Alpha contends that 240 North is not entitled to common-law or contractual indemnification at this juncture.

With respect to 240 North's contractual indemnification claim, the court initially notes that, although there was no written contract between the parties for the renovation work, they nevertheless entered into a written lease agreement that contained an indemnification provision. Furthermore, the court has already determined that the accident was not caused by 240 North's negligence and that the underlying work was not controlled or supervised by 240 North. Consequently, 240 North will be entitled to conditional contractual indemnification against Alpha provided that the "specific language" of the lease agreement requires such indemnification under the facts of this case (*Moss v McDonald's Corp.*, 34 AD3d 656 [2006]). Here, the lease agreement states that Alpha must indemnify 240 North for any injuries during Alpha's tenancy provided such injuries are caused "in whole or in part by any act or acts, omission or omissions of [Alpha] or [its]

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[7] Inasmuch as decedent was killed in the accident, Workers' Compensation Law § 11 does not preclude 240 North from seeking common-law indemnification since decedent sustained a "grave injury" as defined under the statute.

employees." Here, decedent was employed by Alpha and supervised by Alpha personnel. Furthermore, the scaffold from which he fell was owned by Alpha. Finally, the evidence before the court indicates that decedent either failed to use an available safety harness, or Alpha failed to provide such a safety device. Under the circumstances, it is clear that the accident was caused, at least in part, by the acts and/or omissions of Alpha and its employees. Accordingly, 240 North is entitled to conditional contractual indemnification against Alpha.

Turning to 240 North's common-law indemnification claim against Alpha, "[i]n order to establish [its] claim for common-law indemnification, [240 North is] required to prove not only that [it was] not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2006]). Here, the court has already determined that 240 North was not negligent. Furthermore, it is undisputed that Alpha directed, supervised, and controlled the work that caused the accident. Accordingly, 240 North is entitled to common-law indemnification against Alpha.

Summary

In summary, the court rules as follows: (1) plaintiff's motion for partial summary judgment against 240 North under its Labor Law § 240 (1) claim is denied; (2) Alpha's cross motion for summary judgment dismissing plaintiff's complaint as well as 240 North's third-party complaint is denied; and (3) 240 North's cross motion for summary judgment dismissing plaintiff's Labor Law

§ 200/common-law negligence claim and awarding it conditional contractual and common-law indemnification against Alpha is granted.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. JUSTICE HERBERT KRAMER