Barrett v Museum of Am. Folk Art
2007 NY Slip Op 31156(U)
May 4, 2007
Supreme Court, New York County
Docket Number: 0116795/2002
Judge: Emily Jane Goodman
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SCANNED ON 5/10/2007

[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 116795/2002

BARRETT, MICHAEL

VS

MUSEUM OF AMERICAN FOLK ART

Sequence Number : 002

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 and cross motion are decided in accordance with attached decision

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

FILED
MAY 10 2007
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/4/07

EMILY JANE GOODMAN 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 17

---x

MICHAEL BARRETT, Index No.: 116795/02

Plaintiff,

-against-

MUSEUM OF AMERICAN FOLK ART and
PAVARINI CONSTRUCTION CO., INC.,

Defendants.

---x

MUSEUM OF AMERICAN FOLK ART and
PAVARINI CONSTRUCTION CO., INC., Index No.: 590613/03

Third-Party Plaintiffs,

-against-

CUSTOM METAL CRAFTERS & ERECTORS CORP.,

Third-Party Defendant.

---x

FILED
MAY 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

Emily Jane Goodman, J.S.C.:

This is an action to recover damages for personal injuries sustained by a worker when he was struck by a falling ladder while working on the roof of a museum.

In motion sequence number 002, defendants Museum of American Folk Art (the museum) and Pavarini Construction Company, Inc. (Pavarini) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against them, as well as for summary judgment, in their favor, on their third-party complaint against third-party defendant Custom Metal Crafters & Erectors Corporation (Custom) for defense and indemnification. Plaintiff

cross-moves, pursuant to CPLR 3212, for summary judgment on the Labor Law § 240 (1) cause of action, on the ground that he was struck by a falling ladder that required securing and/or was improperly secured, as required by the statute.

In motion sequence number 003, third-party defendant Custom moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against main defendants Museum and Pavarini, and the third-party action by operation of law, on the ground that plaintiff has failed to set forth a prima facie case of negligence or of statutory violations against these defendants.

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

FACTS RELEVANT TO PLAINTIFF'S LABOR LAW CLAIMS

On the morning of August 14, 2001, while plaintiff was installing trim on the bottom of a skylight on one of the roof levels at the Museum of American Folk Art, located at 45 West 53rd Street in New York, New York, a folded 20-foot extension ladder fell about 25 feet from a higher portion of the roof, striking plaintiff's left hand and wrist, and causing him to sustain personal injuries.

At the time of the alleged accident, plaintiff was employed as an ornamental iron worker by Custom, a subcontractor hired by the general contractor, Pavarini, to perform work at the museum. The men working on the elevated portion of the roof, from which the ladder fell, were Custom employees specializing in glass work.

Plaintiff testified that the ladder at issue belonged to Custom. He also testified that Mr. Robert Shevlin (Shevlin), the foreman of Custom, gave plaintiff, as well as all of the Custom employees, their work assignments. Plaintiff noted that no one from Pavarini ever personally told him how to perform his work. Plaintiff testified that at the time of the accident he did not

know that any workers were on the roof, but that he concluded the ladder fell from the roof because "when I got the whack, I could see guys up on the top of the roof, so it came from there." (Defendants' Notice of Motion, Michael Barrett EBT, Exhibit C, at 25 and 28).

Stephen Rosner, president of Custom, testified that the ladder belonged to Custom. He testified that a Custom employee named Ira Richardson (Richardson) had been working in an area directed by plaintiff, immediately prior to the alleged accident. Rosner stated that Richardson told him that he was "coming off the ladder, the ladder fell and struck Mr. Barrett" (Defendants' Notice of Motion, Stephen Rosner EBT, Exhibit D, at 22). Rosner also stated that it is Custom's policy that, "[i]f there is a ladder, then it should be tied back somehow so the ladder can't fall" (id. at 32). In addition, if the work is being done in an area where it is not possible to tie back the ladder, then the men do not work below that area or they have another person hold the ladder (id. at 42). Rosner also noted that if Richardson had failed to tie off the ladder, he violated Custom safety practices (id. at 39).

In the same vein, Rosner testified that it would be a violation of safety practice to work underneath someone else as "a man can drop a tool, he can drop a fastener, a piece of whatever he is installing" (id. at 40). Although Rosner noted that "[s]tandard rules are you never work under somebody else," he could not state whether Richardson had attempted to (or could) tie off the ladder, or whether plaintiff had been aware that anyone was working above him at the time of his alleged accident (id. at 40-41).

Rosner also described the chain of command for Custom employees. Custom employees are supposed to take their orders and direction from the Custom foreman at the site, and each crew had a designated leader. It was Custom's policy that the foreman review the basic safety

procedures with his workers.

In opposition to defendants' motion for summary judgment, plaintiff submits the affidavit of Nicholas Bellizzi (Bellizzi), a civil engineer and consultant in the area of construction accidents. In his affidavit, Bellizzi asserts that, after reviewing various documents, he was able to state that there was a "clear violation of Labor Law Sections 200 and 241 (6)" in this case (Plaintiff's Notice of Cross Motion, Exhibit 1, at 2-3). Specifically, Bellizzi noted violations of various subsections of Industrial Code (12 NYCRR Part 23): 23-1.7, (a) Overhead Hazards; 23-1.19, Catch Platforms; 23-1.21, Ladders and Ladderways; and 23-2.1 Maintenance and Housekeeping, without which plaintiff's alleged accident would not have occurred.[1]

DISCUSSION

"'The 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 eliminate any material issues of fact'" (Wolff v New York City Transit Authority, 21 AD3d 956, 956 [2d Dept 2005], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

LABOR LAW § 240 (1)

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[1]The Court does not rely on this conclusory affidavit in rendering this Decision.

Labor Law § 240 (1) is referred to as the Scaffold Law (Ryan v Morse Diesel, Inc., 98 AD2d 615, 615 [1st Dept 1983]). Labor Law § 240 (1) provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing 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) imposes absolute liability upon an owner or general contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 523 [1985]; Correia v Professional Data Management, Inc., 259 AD2d 60, 63 [1st Dept 1999]). 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 they actually supervised or controlled the work (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d at 500).

In order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Felker v Corning Inc., 90 NY2d 219, 224-225 [1997][worker injured by fall from elevated work site must generally prove that the absence of safety device was the proximate cause of his or her injuries to prevail on scaffolding law claim]).

Defendants and Custom argue that plaintiff cannot prove that the statute was violated because the ladder was not being hoisted or secured when it fell, citing among other cases,

Narducci v Manhasset Bay Assoc. (96 NY2d 259 [2001]). Plaintiff maintains that the falling object need not be in the process of being hoisted or secured in order for the accident to be covered under the Labor Law, citing Outar v City of New York, 286 AD2d 671, 673 [2d Dept 2001] affd 5 NY3d 731 [2005][Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly stored on top of a bench wall because "the dolly was an object that required securing for the purposes of the undertaking"]; Thompson v St. Charles Condominiums, 303 AD2d 152 [1st Dept 2003] ["whether employee was on or under scaffold when it collapsed" is irrelevant]; Aguello v 20166 Tenant's Corp., 251 AD2d 44 [1st Dept 1988] [accident covered by Labor Law "since the falling pulley assembly had not been properly secured"]; and Bush v Gregory/Madison Ave. LLC, 308 AD2d 360 [1st Dept 2003] [issue of fact as to whether a security device would have been necessary to shield worker from falling iron angle that was inadequately secured]).

Subsequent to submission of the motion, the Appellate Division, First Department further clarified the law in this area (see Boyle v 42nd Street Dev. Project, Inc., 2007 NY Slip Op 02595 [March 27, 2007]). In that case, the Court, citing Outar, held that plaintiff was covered by the Labor Law when threaded rods, which were not being hoisted or secured, fell from a height hitting plaintiff. The Court reversed the trial court, which dismissed the Labor Law claims on the basis that the rods were not in the process of being hoisted or secured (id.). In concluding that defendants misread Narducci, the Court stated that [n]either Narducci nor Roberts[2] stands for the proposition that an object must fall at the precise moment of being secured" (id.). The Court

[2]In Roberts v General Electric Co. (97 NY2d 737 [2002]), the object was deliberately dropped. This case, cited by Custom, is inapposite because there is no evidence that the ladder was deliberately dropped from the roof.

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further noted that in Narducci, the object that fell (glass) was actually a part of the pre-existing building structure, and therefore, "not an integral part of the renovation/construction work undertaken by plaintiff that involved the hoisting or securing of objects" (id.). The Court also noted that "the standard way of completing the job was to leave the nuts untightened until the placement of the stringers, threads and risers; at which point the nuts would be tightened, and thus the threaded rod would be firmly secured" (id.). Thus, the Court reasoned "if the nuts were not finally tightened, then the rods which the nuts were securing were not completely 'secured' within the meaning of §240 (1). Pursuant to the provisions of §240 (1) they should have been completely 'secured' or some safety device should have been used in the meantime to prevent the 'special hazard' of a gravity-related accident such as 'being struck by a falling object that was improperly hoisted or secured'" (id. [internal citations omitted]); see also Bornschein v Shuman, 7 AD3d 476 [2004] [plaintiff was covered by Labor Law when unsecured beam fell and struck him from a height where "[n]o equipment was used to secure the beam that injured plaintiff, despite the fact that the beam was not bolted to the . . . walls]).

Similarly here, it is of no import the object did not fall during the course of being hoisted or secured, because the ladder should have been secured. In Boyle, the Court noted that the standard way of completing the job involved tightening the nuts on the threaded rod. Here, the standard way of completing the job, based on Custom's own testimony, was to tie off the ladder or have other men hold the ladder because of the foreseeable hazard of the ladder falling on workers below. Accordingly, like the dolly in Outar, the ladder was "an object that required securing for the purposes of the undertaking." Accordingly, Plaintiff is entitled to partial summary judgment on the issue of liability on the section 240 (1) cause of action.

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in relevant part, as follows:

> All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation and demolition work (see Ross v Curtis Palmer Hydro-Electric Co., 81 NY2d at 501-502). Pursuant thereto, the Commissioner of Labor promulgated Industrial Code regulations, which if violated, are some evidence of negligence (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]). If a violation of a regulation is proven, and it determined that the violation constitutes negligence, the owner or general contractor is vicariously liable without regard to his or her fault (Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 350 [1998]; Zimmer v Chemung County Performing Arts, Inc., 65 NY2d at 521-522). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation, rather than a provision containing only generalized requirements for worker safety (id. at 349; Ross v Curtis Palmer Hydro-Electric Co., 81 NY2d at

501-502).

Industrial Code provisions which invoke such general, non-specific terms are defined under 12 NYCRR 23-1.4 (a) as "adequate, effective, equal, equivalent, firm, necessary, proper, safe, secure, substantial, sufficient, [and] suitable [internal quotation marks omitted]" (Ross v Curtis Palmer Hydro-Electric Co., 81 NY2d at 502 [emphasis in original]). However, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (Thompson v Ludovico, 246 AD2d 642, 644 [2d Dept 1998]).

Initially, it should be noted that, with the exception of the alleged Industrial Code violations considered below, plaintiff has failed to put forth any evidence, whatsoever, in support of his contention that defendants violated the many Industrial Code rules listed in his bill of particulars, so as to defeat defendants' motion for summary judgment on these claims. In addition, plaintiff raises still other alleged Industrial Code violations now, for the first time, in his affirmation in opposition of defendants' motion for summary judgment. In any event, those alleged Industrial Code violations need not be considered by this court, as they are either not applicable to the facts of the instant case, or they do not sufficiently set forth a specific standard of conduct so as to qualify as a predicate for a cause of action under Labor Law § 241 (6) (see Quinlan v City of New York, 293 AD2d 262, 263 [1st Dept 2002]).

Plaintiff asserts that a question of fact exists as to whether defendants violated the provisions of 12 NYCRR 23-1.7 (a), when they failed to provide overhead protection while he was working below the portion of the roof from which the ladder fell. The provisions of 12 NYCRR 23-1.7 (a) (1) state, in pertinent part, as follows:

(a) Overhead Hazards.
(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection.

Initially, the provisions of 12 NYCRR 23-1.7 (a) contain concrete specifications enough to satisfy Labor Law § 241 (6) (Amato v State of New York, 241 AD2d 400, 402 [1st Dept 1997]).

Defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim which is predicated on defendants' alleged violation of 12 NYCRR 23-1.7 (a) (1). Testimony in the record reveals that the area where plaintiff was working was located underneath a higher portion of the roof where other Custom employees were also working, and, defendants have not demonstrated that the area of the roof where plaintiff was working was not of the kind that is normally exposed to the risk of falling material or objects (see Bush v Gregory/Madison Avenue, LLC, 308 AD2d 360, 361 [1st Dept 2003][triable issue of fact existed as to whether defendants complied with 12 NYCRR 23-1.7 (a) where an injured ironworker was struck by an improperly secured angle iron that fell from above]).

Plaintiff also asserts that he has a viable claim under 12 NYCRR 23-2.1 which requires that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform, or scaffold as to endanger any person beneath such edge" (23-2.1 [a] [2]). The provisions of 12 NYCRR 23-2.1 (a) (2) are sufficiently set forth a specific standard of conduct as required for Labor Law § 241 (6) (McCombs v Cimato Enterprises, Inc., 20 AD3d 883, 884 [4th Dept 2005]). Defendants have not meet their burden to demonstrate that the ladder was not placed too close to the edge of the roof so as to endanger a person beneath the edge, especially in light of the reasonable inference that, because the ladder fell from the roof, it was placed too

close to the edge.

Finally, plaintiff asserts that he has a viable claim under 12 NYCRR 23-1.19, which refers to the proper construction of catch platforms. However, the plain language of 12 NYCRR 23-2.6, which sets forth when catch platforms are required, states that catch platforms are necessary "during the construction of exterior masonry walls of any building or structure, except chimneys." Thus, as the alleged accident occurred while performing roof work, the requirement of catch platforms does not apply to the facts of this case.

LABOR LAW § 200

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work [citation omitted]'" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY2d at 317).

"'Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 [internal quotation marks and citation omitted]'" (Cruz v Toscano, 269 AD2d at 123 [the duty to provide a safe workplace not breached where plaintiff's alleged injuries arose out of an alleged defect in his employer's tools and methods]; see also Fresco v 157 East 72nd Street Condominium, 2 AD3d 326, 328 [1st Dept 2003][plaintiff submitted no evidence that defendant had the right to control his work, or in fact

controlled the injury-producing activity]).

Here, plaintiff testified that the foreman of Custom gave plaintiff, as well as the other Custom employees, their assignments. Plaintiff also noted that no one from Pavarini ever instructed him as to how to perform his work. In addition, Rosner testified that Richardson told him that Richardson was working on the higher portion of the roof at plaintiff's direction. Further, Rosner stated that Custom employees are supposed to take their orders and direction from Custom's chain of command.

As plaintiff has submitted no evidence that defendants had the right to control Custom's work, or in fact controlled the injury-producing activity in this case, nor submitted any evidence that defendants had actual or constructive notice of the unsecured ladder, defendants are entitled to summary judgment on plaintiff's Labor Law § 200 claim. In addition, as Labor Law § 200 is a codification of the common law, the defendants are entitled to summary judgment on plaintiff's common-law negligence claims, as well.

FACTS RELEVANT TO DEFENDANTS' CLAIMS FOR DEFENSE AND INDEMNITY

The purchase order between Pavarini and Custom (purchase order) requires that Custom furnish all of the labor, materials, supervision and items required for the proper completion of the work on the museum. The purchase order also requires that Custom obtain comprehensive general liability insurance naming Pavarini as an additional insured (id.). In addition, Custom must "defend and bear all costs of defending any actions or proceedings brought against Pavarini and/or Owner ... arising in whole or in part out of any such acts, omission, breach or default" (id.).

The purchase order also incorporated by reference "[t]he insurance and indemnification

provisions ... set forth in the separate Blanket Insurance/Indemnity Agreement signed by subcontractor" (Defendants' Notice of Motion, Purchase Order, Exhibit E). According to the purchase order, in the event that there is no separate blanket insurance/indemnity agreement, the provisions regarding defense, indemnification and insurance procurement set forth in the purchase order will apply. These provisions include holding harmless Pavarini and the owner museum "from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor" (id.)

Pavarini and Custom did, in fact, enter into a Blanket Insurance/Indemnity Agreement (the indemnity agreement), dated March 29, 2000, which applies to all work performed by Custom for Pavarini. The agreement requires that Custom procure comprehensive general liability insurance to cover any injuries which might occur on the job. In addition, the coverage must include an endorsement naming Pavarini as a named additional insured and "endorsement of specified owners and other [a]dditional [i]nsureds as may be required from time to time" (Defendants' Notice of Motion, Blanket Insurance/Indemnity Agreement, Exhibit F).

In addition, the indemnity agreement states, in pertinent part, the following:

> To the fullest extent permitted by law, subcontractor will indemnify and hold harmless Pavarini Construction Co., Inc. (PCC) and Owner ... from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all costs and liability ...arising in while or in part and in any manner from injury and/or death of any person ... resulting from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by or for subcontractor pursuant to any Purchase Order (id.).

DISCUSSION

A contractor can shift its burden to a subcontractor by contracting for the safe performance of work, as well as indemnity (Morel v City of New York, 192 AD2d 428, 429 [1st Dept 1993]). Where a subcontractor enters into an agreement with the general contractor stating that the subcontractor will indemnify and hold harmless the owner, the subcontractor is liable to the owner for resulting damages to the plaintiff (Kinney v G.W. Lisk Company, Inc., 76 NY2d 215, 219 [1990]; Keena v Gucci Shops, Inc., 300 AD2d 82, 82 [1st Dept 2002]). "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 [internal quotation marks and citations omitted]" (Drzewinski v Atlantic Scaffold & Ladder Company, Inc., 70 NY2d 774, 777 [1987]). "Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment" (American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st 1999]).

"[A] conditional judgment may be entered where indemnification is based upon an express contract to indemnify against loss" (Martinez v Fiore, 90 AD2d 483, 483 [2d Dept 1982]; see also Bay Ridge Air Rights, Inc. v State of New York, 44 NY2d 49, 54 [1978][a party seeking indemnification need not await the ripening of the claim to protect his right to proceed against a third party]).

Here, the clear and unambiguous language of both the purchase order and the indemnity agreement requires that Custom indemnify Pavarini and the museum in the event of any injury resulting from Custom's negligence in connection with its work. Further, Custom submits no

opposition to defendants claim for contractual indemnification against it, relying solely upon arguments to dismiss plaintiff's Labor Law claims. Accordingly, defendants are entitled to defense and indemnification from Custom. Because defendants are entitled to indemnification, the Court need to reach the issue of Custom's alleged failure to procure insurance.

CUSTOM'S THIRD-PARTY CROSS MOTION FOR SUMMARY JUDGMENT

Custom cross-moves for summary judgment dismissing plaintiff's complaint against the main defendants in this case, on the ground that plaintiff has failed to set forth a prima facie case of negligence or statutory violation as against them. Custom asserts that, once the plaintiff's claims against the main defendants are dismissed, then the third-party action brought by defendants against Custom for defense and indemnification must fail by operation of law.

However, as plaintiff has prevailed on his cross motion for partial summary judgment on the issue of liability as against defendants on the Labor Law § 240 (1) cause of action, Custom's cross motion is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Michael Barrett's cross motion for partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action is granted, with the amount of such damages to be determined at trial; and it is further

ORDERED that the branch of defendants Museum of American Folk Art and Pavarini Construction Company, Inc.'s motion for summary judgment, dismissing the common law negligence and Labor Law § 200 causes of action, as well as the Labor Law § 241 (6) claims, is granted, and this portion of the complaint is dismissed, except as to the Labor Law §241 (6)

claim based on a violation of 12 NYCRR 23-1.7 (a) and 12 NYCRR 23-2.1 (a) (2); and it is further

ORDERED that the branch of defendants Museum of American Folk Art and Pavarini Construction Company, Inc.'s motion for summary judgment on their third-party complaint against third-party defendant Custom Metal Crafters & Erectors Corporation for defense and indemnification, is conditionally granted; and it is further

ORDERED that third-party defendant Custom Metal Crafters & Erectors Corporation's cross motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: May 4, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED
MAY 10 2007
NEW YORK
COUNTY CLERK'S OFFICE