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SHORT FORM ORDER

INDEX No. 02-25730
CAL. No. 07-00012-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-5-07
ADJ. DATE 3-16-07
Mot. Seq. # 001 - MotD
002 - XMotD
003 - XMG

EDWARD GILHOOLY,

Plaintiff,

- against -

THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, and J.M. DENNIS CONSTRUCTION COMPANY CORP.,

Defendants.

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THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, and J.M. DENNIS CONSTRUCTION COMPANY CORP.,

Third-Party Plaintiffs,

- against -

BESKIN CORP.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 25 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9 - 15; 16 - 21 ; Answering Affidavits and supporting papers 22 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by third-party defendant, Beskin Corp., for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint as well as the third party complaint is granted to the extent that plaintiff's Labor Law §§ 200 and 241(6) and common-law negligence causes of action, as well as the third-party plaintiffs' claim for common-law indemnification, are dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#002) by defendants The Dormitory Authority of the State of New York and J.M. Dennis Construction Co, for an Order granting them summary judgment dismissing plaintiff's complaint and summary judgment on their third-party complaint, is granted to the extent that plaintiff's Labor Law §§ 200 and 241(6) and common-law negligence causes of action are dismissed and defendants are granted summary judgment on their third-party claim for contractual indemnification, and is otherwise denied; and it is further

ORDERED that the cross motion (#003) by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment as to defendants' liability pursuant to Labor Law § 240(1) is granted.

Injured plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence for injuries he allegedly sustained in a fall at a construction site on July 11, 2001. Plaintiff, a journeyman carpenter, was employed by third-party defendant Beskin Corp., the drywall and ceiling subcontractor employed by J.M. Dennis Construction Company Corp. (hereafter J.M. Dennis), the general contractor for The Dormitory Authority of the State of New York (hereafter The Dormitory Authority). Plaintiff had been working for a few months at the construction site of a new dormitory at the State University of New York at Stony Brook.

Plaintiff testified at his deposition that he and a fellow journeyman were installing sheet rock in a hallway at the new dorm on the day of his accident. He was using a four-foot, aluminum, A-frame, ladder and an electric screw gun, which he had retrieved that morning from Beskin's tool shed. It was his decision to use a this particular ladder. He set in up and locked it in its open position for each section of sheet rock. His coworker would hold up the sheet rock panel as plaintiff installed the first three to four screws in the top of the panel and then his coworker would get another panel. While his coworker retrieved the next panel, plaintiff would finish installing the screws in the first panel. He did not notice any problem with the aluminum ladder, although he preferred a more sturdy ladder. Plaintiff testified that he was standing on the second rung from the top of the ladder, installing the screws necessary to hold a particular panel of sheet rock in place. As he was using the screw gun, the ladder became unstable, twisted, and kicked out, and plaintiff fell to the floor allegedly sustaining the injuries complained of herein. Plaintiff also testified that no one witnessed his fall.

Labor Law § 240(1), commonly known as the "scaffold law," 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 they had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, 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" (***Klein v City of New York,*** 89 NY2d 833, 834, 652 NYS2d 723 [1996]). The legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.,*** 78 NY2d 509, 577 NYS2d 219 [1991]). 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 (***Bland v Manocherian,*** 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.,*** 240 AD2d 392, 658 NYS2d 97 [1997]). An injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240(1) (***Raquet v Braun,*** 90 NY2d 177,

184, 659 NYS2d 237 [1997]). Conversely, a defendant is not liable under § 240 (1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (***Robinson v East Med. Ctr.***, 6 NY3d 550, 814 NYS2d 589 [2006]; ***Blake v Neighborhood Hous. Servs. of N.Y. City,*** 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

Where, as here, the ladder collapses, slips or otherwise fails to perform its function of safely supporting the worker and his material, a statutory violation, and thus prima facie entitlement to summary judgment, has been established (***Morin v Machnick Bldrs., Ltd.,*** 4 AD3d 668, 669-670, 772 NYS2d 388 [2004]; ***O'Connor v Enright Marble & Tile Corp.,*** 22 AD3d 548, 802 NYS2d 506 [2005]). "Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra* at 289; ***Squires v Robert Marini Bldrs.***, 293 AD2d 808, 809, 739 NYS2d 777 [2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). Here, while defendants speculate that plaintiff's actions were the sole proximate cause of his fall, they have not offered what action of his allegedly caused the accident and there is no view of the evidence which would support their speculation (***Hart v Turner Constr. Co.,*** 30 AD3d 213, 818 NYS2d 499 [2006]). Further, there is no evidence that plaintiff intentionally misused the ladder (*compare*, ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*) or was recalcitrant and ignored instructions not to use the ladder (***Cahill v Triborough Bridge & Tunnel Authority,*** 4 NY3d 35, 790 NYS2d 740 [2004]). Accordingly, plaintiff is granted summary judgment as to defendants' liability pursuant to Labor Law § 240(1).

Labor Law § 241(6) requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240(1), the duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra;* ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.,*** 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra*; ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff's opposition asserts violations of 12 NYCRR §§ 23-1.21(b)(1), and (b)(3)(iv). As to 23-1.21(b) General Requirements, it provides at subsection (1), that: "Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be place thereon." Here, there is no allegation of any breakage, dislodgment or loosening of any component. Plaintiff testified that he saw the ladder after his fall but did not take notice of any broken parts. Therefore, (b)(1) is an insufficient predicate for Labor Law § 241(6) liability. Subsection (b)(3), entitled "Maintenance and replacement," states that "[a]ll ladders shall be maintained in good condition. A ladder shall not be used in any of the following conditions exist": (iv) "If it has any flaw or defect of material that may cause ladder failure." However, here there is no allegation that the ladder was not maintained properly. Plaintiff testified that he did not notice any

problem with the ladder. His testimony is that it was not sturdy enough, it twisted, became unstable and kicked out. Therefore, this section is also insufficient to establish § 241(6) liability. Plaintiff did not address the remaining code violations listed in his bill of particulars. Moreover, they are either too general or inapplicable to the instant scenario. Accordingly, summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action is granted to defendants.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]) It applies to owners, contractors, or their agents (*see*, ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]) Where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the owner and general contractor exercised no supervision or control over the injured plaintiff's work, no liability attaches under the common law or Labor Law § 200 (***Comes v New York State Elec. & Gas Corp.,*** 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Therefore, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action is granted to defendants.

As a general rule, an owner or general contractor held vicariously liable for a plaintiff's injuries pursuant to Labor Law § 240(1) is be entitled to full common-law indemnification from the "actor who caused the accident" (***Chapel v Mitchell,*** 84 NY2d 345, 618 NYS2d 626 [1994]; ***Rivera v D'Alessandro,*** 248 AD2d 522, 669 NYS2d 877 [1998]; ***Werner v East Meadow Union Free School Dist.,*** 245 AD2d 367, 667 NYS2d 386 [1997]). However, pursuant to the amendment to Worker's Compensation Law §11, the Omnibus Worker's Compensation Reform Act (L. 1996, c. 635, §2), plaintiff's employer is exempt from claims for contribution or indemnity in the absence of plaintiff's "grave injury" (*see also*, ***Majewski v Broadalbin-Perth Centr. School Dist.,*** 91 NY2d 577, 673 NYS2d 966 [1998]) unless there is a specific contractual obligation for such. Here, there does not appear to be a dispute that plaintiff did not suffer a grave injury. Therefore, any claims for indemnification from Beskin will depend on its contractual obligation. Accordingly, so much of Beskin's motion for summary judgment which seeks to dismiss the third-party claims for common-law indemnification, is granted (***Martelle v City of N.Y.,*** 31 AD3d 400, 817 NYS2d 504 [2006]).

Defendant J.M. Dennis contracted with Beskin pursuant to a purchase order dated April 4, 2001, which contained certain terms and conditions. It provided, at paragraph 10, that Beskin would hold J.M. Dennis harmless against any and all claims and liability for injury to or death of any person resulting from any breach of its obligations. It also provided, at paragraph 12, that Beskin would obtain insurance naming J.M Dennis as an additional insured, including comprehensive general liability insurance which included the "hold harmless" obligation. It further provides, at paragraph 17, that Beskin would defend any and all legal actions brought against the owner or the general contractor in connection with the order, including attorneys' fees and expenses.

Although a claim for indemnification "does not generally accrue until payment is made by the party seeking" indemnification (***Bay Ridge Air Rights v State of New York,*** 44 NY2d 49,53, 404 NYS2d 73 [1978]), "a conditional judgment may be entered where indemnification is based upon an express contract to indemnify against loss" (***Martinez v Fiore,*** 90 AD2d 483, 454 NYS2d 475 [1982]). Moreover, there is no need to condition summary judgment on a finding of actual liability where, as here, the plaintiff has been granted partial summary judgment as to the moving defendants' vicarious

liability under Labor Law § 240(1) (***Boshnakov v Higgins-Kieffer, Inc.,*** 255 AD2d 983, 680 NYS2d 337 [1998]). Therefore, defendants established their entitlement to contractual indemnification, including reasonable attorney's fees and expenses, from Beskin (***Perez v Spring Creek Assoc.***, 283 AD2d 626, 725 NYS2d 875 [2001]; ***Werner v East Meadow Union Free School Dist.,*** *supra*). Beskin's opposition relies upon GOL § 5-322.1, which does not permit indemnification where the party being indemnified is also at fault (*see also,* ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.,*** 89 NY2d 786, 658 NYS2d 903 [1997]). Here however, defendants' liability is not based upon fault but is vicarious and imposed by statute and Beskin supervised and controlled plaintiff's work (***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.,*** 10 AD3d 493, 781 NYS2d 506 [2004]; ***Santos v BRE/Swiss, LLC,*** 9 AD3d 303, 780 NYS2d 585 [2004]). Accordingly, defendants are granted summary judgment on their third-party claim for contractual indemnification.

As a general rule an agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify (***Kinney v G.W. Lisk Co.***, 76 NY2d 215, 557 NYS2d 283 [1990] ***Turner Constr. Co. v Pace Plumbing Corp.,*** 298 AD2d 146, 748 NYS2d 356 [2002]). Here, Beskin was obligated to name J.M. Dennis as an additional insured pursuant their agreement. Defendants have annexed a copy of a certificate of insurance from Beskin's carriers which is some evidence that defendants were named as additional insureds under the policy, although it appears that the carrier has declined coverage. Therefore, despite Beskin's lack of opposition on this issue, defendants have not established, as a matter of law, that Beskin failed to procure insurance adding them as additional insured[1] (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

Upon service of a copy of this order with notice of entry the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part for the next available trial date.

Dated: MAY 14 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

[1] Moreover, the Court notes that the appropriate action as to Beskin's carrier's refusal to defend would be a plenary declaratory judgment cause of action against the carrier (***Mortillaro v Public Service Mutual Ins. Co.,*** 285 AD2d 586, 728 NYS2d 185 [2001]).