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

PRESENT: BARBARA R. KAPNICK PART 12

Index Number : 100377/2004

LELEK, ANTONI

VS

VERIZON NEW YORK

Sequence Number : 004

DISMISS

INDEX NO. 100377/04

MOTION DATE

MOTION SEQ. NO. 004

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 the accompanying memorandum decision

FILED
JUN 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/31/07

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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ANTONI LELEK,

Plaintiff,

-against-

VERIZON NEW YORK, INC., SLATTERY SKANSKA, INC., and A Joint Venture Among Two or More of the Following Entities, PERINI CORPORATION, JOHN J. SLATTERY ASSOCIATES, INC., KOCH SKANSKA, INC., KARL KOCH ERECTING CO., INC., SLATTERY SKANSKA, INC., SKANSKA USA, INC. and AIR RAIL CONSTRUCTION JOINT VENTURE, a Joint Venture composed of SLATTERY SKANSKA, INC., PERINI CORPORATION, KOCH SKANSKA, INC. and SKANSKA (USA) INC.,

Defendants.

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DECISION/ORDER
Index No. 100377/04
Motions Seq. Nos.
004 and 005

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VERIZON NEW YORK, INC.,

Third-Party Plaintiff,

-against-

LVI SERVICES, INC.

Third-Party Defendant.

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Third-Party Index
No. 590736/04

BARBARA R. KAPNICK, J.:

Motions sequence numbers 004 and 005 are consolidated for disposition.

This is an action pursuant to Labor Law §§ 240(1), 241(6) and 200 and for common law negligence.

The third-party action seeks common law indemnification, contractual indemnification and contribution.

Defendant/third-party plaintiff Verizon New York, Inc. ("Verizon") now moves (under motion sequence number 004) for an order: (i) granting it summary judgment dismissing plaintiff's Complaint and all cross-claims against it; or, in the alternative, (ii) granting it summary judgment on its cross-claims against the co-defendants for common law indemnification; and (iii) granting it summary judgment on its third-party claim against third-party defendant LVI Services, Inc. ("LVI Services") for contractual indemnification.

Plaintiff Antoni Lelek moves (under motion sequence number 005) for partial summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1).

Defendants Slattery Skanska, Inc., Perini Corporation, John J. Slattery Associates, Inc., Koch Skanska, Inc. s/h/a Koch Skanska, Inc. and Karl Koch Erecting Co., Inc., Skanska USA, Inc. and Air Rail Construction Joint Venture (collectively, "the Joint Venture defendants") cross-move for summary judgment dismissing plaintiff's Complaint.

Third-party defendant LVI Services cross-moves for summary judgment dismissing defendant/third-party plaintiff Verizon's third-party Complaint and all cross-claims against it.[1]

The Joint Venture defendants cross-move (by a second Notice of Cross-Motion) for an order dismissing third-party defendant LVI Services' 'cross-claims' against them for contribution and indemnification.

Background

In this action, plaintiff seeks to recover damages for personal injuries he sustained on April 11, 2003 while working as an asbestos handler at a construction project at the Foch Boulevard overpass to the Van Wyck Expressway in Jamaica, Queens.

The overpass was owned by the Port Authority of New York and New Jersey, but the conduit situated within the concrete of the overpass was owned by defendant/third-party plaintiff Verizon.

Verizon retained third-party defendant LVI Services and/or non-party LVI Environmental Services, Inc. ("LVI Environmental"), a wholly-owned subsidiary of LVI Services, to remove asbestos from

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[1] Plaintiff has taken no position with respect to LVI Services' cross-motion.

the conduit. Plaintiff was employed by one of the LVI entities.[2] Plaintiff's accident occurred during LVI's first day of work on the job site.

At the time of the accident, plaintiff and a co-worker were carrying a plywood panel from an LVI vehicle parked on the adjacent service road, to be used in the construction of an asbestos decontamination chamber. Below the roadway was an exposed steel structural "I" beam, and below the beam was a wooden deck (or platform) used to catch construction debris.

As plaintiff was attempting to step down from the roadway onto the steel "I" beam, he became entangled and tripped on a protruding rebar and fell down to the wood catch platform below.

The demolition and replacement of the Foch Boulevard overpass was part of a larger project relating to the construction of the Air Train from Jamaica to Kennedy International Airport ("Air Train project"), which was a joint venture named AirRail Construction Joint Venture ("the Joint Venture"). The Joint Venture was comprised of "the Joint Venture defendants", i.e., Slattery

[2] Both plaintiff and third-party defendant LVI Services claim that plaintiff was employed by LVI Environmental. Defendant/third-party plaintiff and the Joint Venture defendants claim that plaintiff was employed by third-party defendant LVI Services.

Skanska, Inc., Perini Corporation, Koch Skanska, Inc. and Skanska (USA), Inc.

Plaintiff contends that the Joint Venture served as the general contractor of the overall Air Train project and performed the demolition work at the overpass, including cutting the rebar, prior to plaintiff's accident. The Joint Venture defendants, however, deny that they had any obligation to supervise or control the asbestos abatement work which they characterize as independent in time and nature from the work performed by the Joint Venture.

Discussion

Labor Law § 240(1)

Defendant/third-party plaintiff Verizon argues that plaintiff's claim pursuant to Labor Law § 240(1) should be dismissed on the grounds that: (i) it was not the 'owner' or 'general contractor' of the construction site -- i.e., Verizon merely owned the conduit and did not supervise or control the worksite - - and thus cannot be subject to absolute liability under the statute (see, Albanese v. City of New York, 5 N.Y.3d 217 [2005]); (ii) the accident did not result from a gravity-related risk; and (iii) plaintiff was provided with 'proper protection' from falling to the ground (i.e., the wooden deck below the "I" beam).

Plaintiff opposes this portion of the motion and separately moves for partial summary judgment on the issue of liability on his cause of action pursuant to Labor Law § 240(1) arguing that Verizon cannot escape liability due to its status as a non-titleholder of the worksite itself since there is no dispute that it owned the conduit and contracted with plaintiff's employer for the asbestos removal work being performed.

This Court agrees that Verizon may be held liable pursuant to Labor Law § 240(1) since it was the "owner" of the structure at issue.[3]

Plaintiff further argues that the trench-like recess was at least three feet deep and thus constituted a gravity-related risk within the scope of section 240(1).

It is well settled that in determining whether Labor Law § 240(1) applies, the Court must determine whether there is "a significant risk inherent in the particular task because of the

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[3] This case is readily distinguishable from Albanese v. City of New York, supra, where it was held that the City of New York could not be subject to absolute liability pursuant to Labor Law § 240(1) even though it owned the roadway where construction was taking place as part of a New York State-initiated project, since the City "had no say as to which contractor or consultants were hired" and its "role was largely confined to its regulatory responsibilities arising out of its work permits." (supra at 221).

relative elevation at which the task must be performed or at which materials or loads must be positioned or secured." Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514 (1991). See also, Dilluvio v. City of New York, 264 A.D.2d 115, 118 (1st Dep't 2000), aff'd, 95 N.Y.2d 928 (2000).

According to plaintiff, the distance between the roadway to the beam was 36 to 39 inches. Plaintiff's supervisor, Crzbieca (Elzbieta) Ciborowska, on the other hand, testified that it was at most a foot and a half from the top of the beam to the bottom of the beam, and that the wooden deck was erected a few inches below the "I" beam, which prevented plaintiff from falling to the ground.

Thus, there is some discrepancy in the papers submitted regarding the extent of the height differential.

Moreover, "the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk" (Rocovich v. Consolidated Edison Co., supra at 514) where, as here, a steel beam was being used as the functional equivalent of a temporary stairway to facilitate plaintiff's access to a different elevation level (see, Megna v. Tishman Construction Corp., 306 A.D.2d 163 [1st Dep't 2003]).

Accordingly, based on the papers submitted and the oral argument held on the record on May 3, 2006, this Court finds that there are outstanding issues of fact as to whether plaintiff was exposed to an elevation-related risk within the meaning of Labor Law § 240(1) and as to whether plaintiff was provided with proper protection against said risk which preclude the granting of either those portions of the motion and cross-motions seeking to dismiss plaintiff's claim pursuant to Labor Law § 240(1) or plaintiff's motion for summary judgment on said claim.

Labor Law § 241(6)

Defendant/third-party plaintiff Verizon and the Joint Venture defendants argue that plaintiff's claim pursuant to Labor Law § 241(6) should also be dismissed because the Industrial Code sections relied upon by plaintiff, as set forth in his Verified Bill of Particulars, either do not apply or are not specific enough to implicate liability.

Plaintiff argues that there are issues of fact as to whether there were violations of 12 NYCRR 23-1.7(e) (1) and (2) which preclude granting summary judgment dismissing his claim pursuant to Labor Law § 241(6).

Section 23-1.7(e) (Tripping and other hazards) provides as follows:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

The Joint Venture defendants argue that: (i) section 23-1.7(e)(1) does not apply because plaintiff was not working in a 'passageway' and did not trip on "accumulations of dirt and debris" or "any other obstructions or conditions which could cause tripping"; and (ii) section 23-1.7(e)(2) does not apply because plaintiff did not trip on "accumulations of dirt and debris" or "scattered tools and materials" or "sharp projections."

While plaintiff continues to contend that these sections apply to the facts of this case,[4] plaintiff alternatively argues that

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[4] Plaintiff argues, inter alia, that there is at least an issue of fact as to whether or not the area constituted a "passageway" since plaintiff was required to pass through that area in order to transport plywood, and that the rebar qualified as a "sharp projection".

there are issues of fact as to whether there were violations of 12 NYCRR 23-1.7(f) and 23-4.3.[5]

Section 23-1.7(f) (Vertical passage) provides as follows:

> Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Section 23-4.3 (Access to excavations) provides as follows:

> Ladders, stairways or ramps constructed in compliance with this Part (rule) shall be provided in every excavation more than three feet in depth for safe access and egress. Such ladders, stairways or ramps shall be installed in sufficient number and in such locations as to be readily accessible to any person wishing to enter or leave such excavation without more than 25 feet of lateral travel.

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[5] The rule set forth in CPLR § 3025(b) that leave to amend pleadings shall be freely given, has been applied to the amendment of bills of particulars, in the absence of prejudice or surprise. See, Sahdala v. New York City Health & Hospitals Corp., 251 A.D.2d 70 (1st Dep't 1998). Thus, although defendants correctly note that plaintiff's original Bill of Particulars failed to allege a violation of section 23-4.3 of the Industrial Code, plaintiff is granted leave to amend his Bill of Particulars in the form of Plaintiff's Supplemental Bill of Particulars, which is annexed as an Exhibit to plaintiff's "Reply Affirmation and Affirmation in Opposition to Defendant Verizon's Motion for Summary Judgment and Affirmation in Opposition to Slattery Skanska, Inc.'s Cross-Motion for Summary Judgment".

This Court agrees that there are issues of fact as to whether these sections of the Industrial Code were violated and whether said violations caused plaintiff's accident.

The Joint Venture defendants alternatively argue that they may not be held liable pursuant to Labor Law § 241(6) because they did not possess the authority to oversee the asbestos abatement work on the conduit.

However, there is no dispute that the Joint Venture served as the general contractor of the Air Train project, and Richard Curran, who was produced by defendant Slattery Skanska, Inc., a member of the Joint Venture, testified that there was no other general contractor at the site on the date of plaintiff's accident and that the overall safety of the site set up at the Foch Bridge was the responsibility of the Joint Venture.

Therefore, those portions of the motion and cross-motions seeking to dismiss plaintiff's claim pursuant to Labor Law § 241(6) are denied.

Labor Law § 200/common law negligence

Verizon argues that plaintiff's claim against it pursuant to Labor Law § 200 and for common law negligence should be dismissed

because Verizon did not direct, supervise or control plaintiff's work. Plaintiff has not presented any evidence to the contrary. Accordingly, plaintiff's claims against Verizon pursuant to Labor Law § 200 and for common law negligence are dismissed.

The Joint Venture defendants cross-move to dismiss plaintiff's Labor Law § 200/negligence claim against them on the grounds that: (i) there is nothing in the record to suggest that they did anything but exercise a general supervisory role at the construction site; and (ii) the exposed rebar was merely an on-site usual condition and does not constitute a breach of their duty to provide a safe work site.

Plaintiff, however, argues that the Joint Venture defendants cannot escape liability pursuant to Labor Law § 200 because they created the defect by demolishing the bridge decking without removing the protruding rebar.

Ms. Ciborowska testified that the metal bars were "sticking out" of the concrete between ten and twelve inches.

Mr. Curran, a construction superintendent employed by defendant Slattery Skanska, Inc., a member of the Joint Venture, testified as follows:

Q. When you cut the rebar, is the procedure to cut the rebar dead flush with the edges of the concrete or do some portions of the rebar remain protruding?

* * *

A. Oh, yeah. There would probably be some sticking out an inch or two.

Q. And is that the standard for what's proper?

A. Yes.

Q. That an inch or two should be sticking out?

A. Yes.

* * *

Q. Why wouldn't more be left protruding?

A. It would be in the way. You cut the rebar with a saw. You hold the saw and cut it. The lazy man cut it right next to the -- well, maybe the word is not lazy but it is human nature to cut it. Why would you cut it three or four? It doesn't make any sense.

Based on this testimony, this Court finds that there are issues of fact with respect to the Joint Venture defendants' negligence which preclude the granting of that portion of their cross-motion seeking to dismiss plaintiff's claims against them pursuant to Labor Law § 200 and for common law negligence.

The Joint Venture defendants alternatively argue that plaintiff's claims against defendant Slattery Skanska, Inc. as an

entity distinct from the Joint Venture, must be dismissed since any work done by Slattery Skanska at the site was performed solely through its role as part of the Joint Venture.

However, it is well settled that "[t]he legal consequences of a joint venture are almost identical with that of a partnership" (Pedersen v. Manitowoc Co., 25 N.Y.2d 412, 419 [1969]; see also, Gramercy Equities Corp. v. Dumont, 72 N.Y.2d 560 [1988]; Sagus Marine Corp. v. Donald G. Rynne & Co., Inc., 207 A.D.2d 701 [1st Dep't 1994]). Thus, an action may be brought against "all or any of" the members of a joint venture in their individual capacities. Pedersen v. Manitowoc Co., supra at 419. Therefore, there is no basis to dismiss plaintiff's Complaint against defendant Slattery Skanska, Inc.[6]

However, there appears to be no reason for the caption to name "A Joint Venture Among Two or More of the Following Entities, Perini Corporation, John J. Slattery Associates, Inc., Koch Skanska, Inc, Karl Koch Erecting Co., Inc., Slattery Skanska, Inc. and Skanska USA Inc.", since plaintiff filed a Second Amended

[6] Defendant Slattery Skanska, Inc.'s argument in connection with that portion of defendant Verizon's motion for summary judgment on its cross-claim for common law indemnification that it had no duty to the plaintiff or to Verizon at the site, since the Joint Venture (not Slattery Skanska, Inc.) was the general contractor of the project is similarly rejected.

Supplemental Verified Complaint in order to specifically (and more accurately) name "AirRail Construction Joint Venture, a Joint Venture composed of Slattery Skanska, Inc., Perini Corporation, Koch Skanska, Inc., and Skanska (USA), Inc." as a party defendant.

Therefore, plaintiff's Complaint is dismissed against "A Joint Venture Among Two or More of the Following Entities, Perini Corporation, John J. Slattery Associates, Inc., Koch Skanska, Inc, Karl Koch Erecting Co., Inc., Slattery Skanska, Inc. and Skanska USA Inc.", and the caption is amended accordingly.

Common law indemnification

Verizon argues that it is entitled to summary judgment on its cross-claims against the co-defendants for common law indemnification.

The Joint Venture defendants argue that Verizon is not entitled to common law indemnification because there is no dispute that Verizon owned the conduit and that Verizon contracted with plaintiff's employer to perform the asbestos abatement work.[7]

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[7] The Joint Venture defendants further argue that Verizon maintained a right to stop the work pursuant to paragraph 4.3 of its contract with LVI Services, although, as discussed more fully below, there is an unresolved factual dispute as to whether or not the work was performed pursuant to that agreement.

However, this Court has already determined that Verizon did not exercise any direct supervision or control over the work at the site. Accordingly, this branch of Verizon's motion is granted to the extent of granting summary judgment in favor of Verizon on its cross-claim against the Joint Venture defendants for common law indemnification.

Third-party action

Defendant/third-party defendant Verizon argues that it is entitled to summary judgment on its third-party claim against third-party defendant LVI Services, Inc. for contractual indemnification based on the Agreement for the Purchase of Abatement Services, which Verizon entered into with LVI Services ("Contractor") on or about October 14, 2002.

The Agreement provides, in relevant part, as follows:

> 17.1 Indemnification. CONTRACTOR agrees to indemnify, defend and hold VERIZON and VERIZON Affiliates harmless against any losses, damages, liabilities, claims or demands (including all costs, expenses and reasonable attorneys' fees on account thereof or in connection with any investigation or preparation related thereto or the enforcement of the indemnification provisions of this Agreement)(collectively, the "Indemnified Amounts") that may be made as a result of CONTRACTOR's actual or alleged acts or omissions including, but not limited to, claims made: ... (ii) by anyone for injuries (including death) to persons ... resulting from CONTRACTOR's acts or omissions or those of persons furnished by CONTRACTOR while performing work for VERIZON pursuant to this

> Agreement or in connection with materials furnished by CONTRACTOR pursuant to this Agreement;...

Third-party defendant LVI Services opposes this branch of Verizon's motion and cross-moves for summary judgment dismissing Verizon's third-party Complaint and all cross-claims against it.

LVI Services contends that the above-referenced Agreement contemplated future contracts in the form of work authorizations and did not pertain to any particular work at any specific site.

LVI Services denies that it performed any work at the site or had any connection to the plaintiff's accident, and annexes an affidavit from Peter Demeropoulos, a Vice President of LVI Environmental, who represents that he was employed by LVI Environmental on the date of the accident as a project manager.

According to Mr. Demeropoulos, "LVI Environmental [as opposed to LVI Services] entered into two separate contracts to perform asbestos-abatement of certain asbestos-containing pipes at the Foch Boulevard overpass"; i.e., LVI Environmental contracted with the Joint Venture on or about July 9, 2002, and 'contracted' with Verizon by work authorization dated April 11, 2003.

Mr. Demeropoulos claims that LVI Services "had no involvement with any work that was performed by LVI Environmental (or any other contractor or subcontractor) on or around April 11, 2003 at the site. LVI Services employed no persons at the site and did not contract to perform any work at the site."[8]

However, third-party defendant's own witness, Crzbieca Ciborowska, testified at her deposition as follows:

Q By whom are you employed?

A LVI.

Q Is that LVI Services Inc.?

A Yes.

* * *

Q Okay. Now, back on April 11th of 2003, were you on the job site?

A Yes.

Q Were you there as a supervisor that day for LVI?

A Yes.

Ms. Ciborowska has since provided an affidavit in which she claims that she "incorrectly agreed upon questioning" at her

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[8] The third-party defendant has also submitted an affidavit from Joseph Annarumma, the Treasuer of LVI Services, who makes the same representation.

deposition that she was employed by LVI Services. She now represents that

> [a]t the time of my deposition, I was in fact employed by LVI Environmental Services, Inc. ("LVI Environmental"), not LVI Services, and had been employed by LVI Environmental for the past six years. I have never been employed by LVI Services.

Ms. Ciborowska further represents that on the date of plaintiff's accident, she "was employed by LVI Environmental at the site as a supervisor and was supervising other LVI Environmental employees including Antoni Lelek."

However, a "Supervisor's Incident Report" regarding plaintiff's accident, dated April 11, 2003 and signed by Ms. Ciborowska, is written on a "LVI Services" form, without any reference to LVI Environmental.

Accordingly, this Court finds that there are outstanding issues of fact as to whether or not plaintiff was working on behalf of LVI Services and/or LVI Environmental, and as to which agreement governed the work performed at the site, which preclude the granting of both that portion of Verizon's motion seeking summary judgment on its third-party claim against LVI Services, Inc. for contractual indemnification and LVI Services' cross-motion for summary judgment dismissing Verizon's third-party Complaint and all cross-claims against it.

Common Law indemnification

The cross-motion by the Joint Venture defendants for an order dismissing LVI Services' cross-claims against them, is, likewise, denied as premature.

A pre-trial settlement conference shall be held in IA Part 12, 60 Centre Street, Room 341 on June 27, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: May 31, 2007

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.