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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART ~~Part 5~~

Index Number : 110749/2001
DOMINGUEZ, FABIO
VS
HEALTH AND HOSPITALS
Sequence Number : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits X MOTION + OPP	3, 4, 5, 6
Replying Affidavits	7, 8

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
JUL 12 2007
COUNTY CLERK'S OFFICE

Dated: 6/25/07

EILEEN A. RAKOWER J.S.C.

Check one: [ ] FINAL DISPOSITION [X] 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 5

----------X

FABIO DOMINGUEZ and ARGENTINA DOMINGUEZ,

Plaintiffs,

Index No.
110749/01
Seq. 002 and 003

- against -

Decision and
Order

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE CITY OF NEW YORK, C.D.E. AIR CONDITIONING CO., INC., and CREST CONTRACTING, INC.

Defendants.

----------X

C.D.E. AIR CONDITIONING CO., INC. and TRANSCONTINENTAL INSURANCE COMPANY,

Third-Party Plaintiffs,

- against -

UNITED TOWER MAINTENANCE, INC., ROSENWACH TANK CO., INC. and ROYAL SUN ALLIANCE,

Third-Party Defendants.

----------X

HON. EILEEN A. RAKOWER

Fabio Dominguez ("plaintiff") brings this action for personal injuries allegedly sustained while he was working as a welder's helper on an air conditioning cooling tower atop Bellevue Hospital on May 19, 2000. Argentina Dominguez, plaintiff's

wife, brings a derivative action. Plaintiffs move for partial summary judgment for a finding of liability pursuant to CPLR 3212 as against defendant The City of New York ("City") and defendant C.D.E. Air Conditioning Co., Inc. ("CDE"). Plaintiffs claim that the City, the owner of the premises, and CDE, the general contractor present at the work site, are both strictly liable pursuant to New York Labor Laws §240(1) and §241(6). Both City and CDE oppose plaintiffs' motion. Defendant City makes a cross motion generally seeking dismissal of all claims as against it, and for indemnification from each of the defendants, CDE and Crest Contracting Inc. ("Crest"). It claims that CDE and Crest each entered into a contract with City wherein each promised to indemnify and hold City harmless from all claims for personal injury. Both Crest and CDE oppose the cross motion. Crest also makes a separate motion for summary judgment under motion sequence 3, which plaintiff and CDE oppose. City does not oppose Crest's motion. Third-party plaintiffs Transcontinental Insurance Company and third-party defendants United Tower Maintenance, Inc., Rosenwatch Tank Co., Inc. and Royal & Sun Alliance do not submit any papers.

Defendant City is the owner of Bellevue Hospital Center ("Bellevue"), site of plaintiff's accident. City hired CDE through a bidding process as a mechanical contractor responsible for renovation and repair of two air conditioning cooling towers which were located on the roof of Bellevue Hospital. CDE hired United Tower Maintenance, Inc.("United"), a third party defendant in this action, to perform work on Bellevue's cooling towers. City also hired Crest, a Structural Contractor , who was responsible for fabricating and installing metal clips or "angles" to support the concrete facade, perform masonry repairs, make repairs/replacements to the catwalk and ladders, and perform scraping and painting.

Plaintiff, a United employee, was on the job site on May 19, 2000 with four other United employees. Plaintiff's job on the site was to "install deflectors." Deflectors were additional steel pieces welded along the inside of the tower to keep water out. On the day of the accident it began raining, and plaintiff was told by a United foreman to come inside because it was dangerous to weld in the rain. As plaintiff descended from the tower he stepped onto a catwalk 3-4 feet wide, situated in between the two towers and providing the only access to the area. The catwalk was made up of heavy metal grates laid on "I-Beams." The grates were not welded or otherwise secured to the beams. Plaintiff testified that as he stepped onto the catwalk, the entire piece of grating moved, falling to the roof below, and plaintiff fell

approximately 10-11 feet through the resulting gap.

Plaintiff, in support of his motion, argues that the catwalk functioned as a "scaffold" for the purposes of Labor Law §240(1). Also, pursuant to Labor Law §241(6), the grates should have been fastened in place. Further, plaintiff claims, if they were to be opened through which "work in progress" could be accomplished, the Industrial Code requires that openings be guarded by a substantial cover fastened into place.

Labor Law §240(1) states, 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...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 §241(6) states, in relevant part:

> 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.

In order to prevail under a §241(6) claim, plaintiff must first establish that there has been a violation of a specific Industrial Code section which calls for a particular standard of conduct. Here, plaintiffs allege that City and CDE violated 12 NYCRR §23-1.7(b). The Code states, in relevant part:

> (b) Falling hazards.
>
> (1) Hazardous openings.

> (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with the Part(rule).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part(rule) shall guard such an opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.

Plaintiff provides the testimony of Mr. Andrew Sears, construction manager for the Bellevue Hospital Center. Mr. Sears was on the site on a daily basis. He explains that the grates in the catwalk are removable in order for materials to be brought up to the tower.

> Q: At any of the times prior to the day of the accident, that you had been up in the west cooling tower, had you ever seen any part of the grate on the catwalk missing or raised?
> A: Yes. They would have to do that to bring up their material.
> (Sears Deposition, Page 48)

The catwalk in question constituted a permanent scaffold, whose purpose was to afford access to the cooling towers so as to permit normal maintenance and repairs to be carried out. (*Brennan v. RCP Associates*, 257 A.D.2d 389 [1st Dept. 1999]). Labor Law §240(1) imposes a nondelegable duty upon owners and general contractors to provide proper safety devices and protection to workers facing an elevation related risk. That the gratings were not affixed or protected, rendered the scaffold unsafe. City and CDE are similarly liable pursuant to Labor Law §241(6).

City seeks indemnification from CDE and from Crest. City provides a copy of the August 1998 agreement City entered into with Crest for work to the cooling tower at Bellevue Hospital Center("Bellevue"). The indemnification clause states, in relevant part:

> The contractor agrees to indemnify and hold harmless the City of New York, the New York City Health and Hospitals Corporation and each officer, agent and employee of the corporation and the City of New York from all claims against any of them for personal injury or wrongful death...*arising out of the negligent performance or negligent act of the contractor* (emphasis added) or anyone directly or indirectly employed by the contractor, including subcontractors...

CDE agreed to the identical clause in its contract with the City.

City and CDE point to Crest, and urge that since Crest was hired to repair and replace missing sections of the catwalk, so it follows that it was Crest's negligence that caused the accident. According to Addendum 12 of the contract, part of Crest's job was to "repair and replace all damaged, corroded and missing sections of the catwalk around the cooling towers." Mr. Sears states that Crest was obligated to scrape and paint the I-beams around the cooling tower which would include the catwalk. Crest would have to remove the grating sections from the I-beams in order to paint. (Sears Deposition Page 92).

Crest submits the deposition testimony of David A. Gray, Project Manager for CDE. Mr. Gray testifies that on the day of the accident he was told that a piece of grating gave out from the floor of the catwalk and plaintiff fell. He saw the grate and stated that it did not look rusty or damaged:

> Q: Did you see the grate they referred to that you said did not fall on him?
> A: Yes. The workers left it where it fell. That's where I saw it.
> Q: Can you describe the condition of that particular plate?
> ...
> A: It is made out of galvanized metal and looked silver like galvanized metal. It didn't look rusty.
> Q: Was it damaged in any way?
> A: I don't remember it being damaged.

Crest does not concede that it was working at the site at the time of plaintiff's accident. It argues that Mr. Sears visually inspected its work after it was finished in December of 1999 and that the work was acceptable to him. Crest submits a letter

from Mr. Sears to this affect which states that the contract work is "substantially complete" as of February 21, 2000, several months before plaintiff's accident.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *(Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 [1970]).

A decision whether to grant summary judgment based on an indemnification clause can properly be conditioned upon a finding of negligence of the party who is responsible under the clause. *(Crimi v. Neves Associates*, 306 A.D.2d 152 [1st Dept. 2003]). If issues of fact exist as to the negligence of the party responsible for indemnification, summary judgment must be denied. *(Zeigler-Bonds v. Structure Tone, Inc.*, 245 A.D.2d 80 [1st Dept. 1997]). The right to contractual indemnification depends upon the specific language of the contract. *(Moss v. Mcdonald's Corp.*, 34 A.D.3d 656 [2nd Dept. 2006]).

CDE argues that the City's indemnification clause calls for indemnification only if injuries arise "out of the negligent performance or negligent act of the contractor..." Until there has been a finding of negligence on the part of CDE, summary judgment is premature. Indeed, City provides no proof in admissible form to establish negligence on the part of CDE or Crest.

Crest moves for summary judgment dismissing all claims and cross claims as against it. Crest argues that it was not negligent in failing to secure the plates comprising the floor of the catwalk or warn workers of the dangers involved with the catwalk. Mr. Sears testified that occasionally contractors would have to remove portions of the grating to bring up bulky materials. Other than that he had never seen portions of the catwalk grating missing:

Q: ...Prior to the accident, had you ever gone up into the cooling tower and walked on the catwalk at a time when people were not working on the cooling towers?
A: Yes.
Q: On those occasions, did you ever see any part of the catwalk grating missing?
A: No.
Q: On those occasions, when you were walking on the catwalk when no work was being done in the cooling tower, had you ever seen parts of the grating raised or out of position?
A: No.
Q: At times when people were doing work in the cooling tower, and you went up to do your walk through, at those times, did you ever see parts of the catwalk plating raised in anyway?
A: Yes. (Sears Deposition Pages 49-50).

Plaintiff attempts to establish an issue of fact requiring a trial asserting that Crest was negligent in failing to weld or bolt the grating. The affidavit of expert engineer, Scott Silberman, P.E. states that he observed and measured the catwalk and found that the grates were in danger of falling. Mr. Silberman bases his opinion on the fact that the width of the "I-Beam Flange" is twelve inches and the "leg of the shelf angle(s) are two and a half inches in depth." Thus, if the grate is pushed up against the face of the tower, there is a ten and a half inch gap from the end of the grate to the concrete wall in which the grates could fall. Mr. Silberman opines that the grates did not meet industry standard because they were not welded or bolted down. (Silberman Aff. Paragraphs 4,5, & 6).

Evidence of a generally accepted practice, custom or usage within a particular trade or industry is admissible as tending to establish a standard of care, and proof of a departure may constitute evidence of negligence. *(Trimarco v. Klein*, 56 N.Y.2d 98, 105-107[1982]). However, plaintiff, in his bill of particulars states that he does not know who originally built the catwalk (Bill of Particulars, Paragraph 32) and Addendum 12 of the contract between Crest and the City did not charge Crest with bringing the catwalk up to industry standards. Rather, Crest was required only to "repair or replace all damaged, corroded and missing sections of cat walk." Mr. Gray testified that the fallen grate did not look rusty or damaged. Indeed, City approved the work and was aware that the grates remained unattached to the I beam. Further, City

did not note that any grates were missing.

Wherefore it is hereby

ORDERED that plaintiffs' motion for partial summary judgment as to liability is granted as against defendants the City of New York and C.D.E. Air Conditioning Company, Inc.; and it is further

ORDERED that defendant the City of New York's cross motions for summary judgment finding it is entitled to indemnification by defendants Crest Contracting, Inc. and C.D.E. Air Conditioning are denied; and it is further

ORDERED that defendant Crest Contracting, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that an assessment of damages as against City of New York and C.D.E. Air Conditioning shall be held at the time of trial of the remainder of the action or as scheduled within the discretion of the trial judge.

This constitutes the decision and order of the Court.

DATED: JUNE 25, 2007

EILEEN A. RAKOWER, J.S.C