Mihelis v i. park Lake Success LLC
2007 NY Slip Op 33459(U)
October 15, 2007
Supreme Court, New York County
Docket Number: 0120857/2003
Judge: Doris Ling-Cohan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/24/2007

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan, Justice

PART 36

Index Number : 120857/2003
MIHELIS, CONSTANTINOS
vs
I.PARK LAKE SUCCESS
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

this motion to/for Summary judgment

1-4

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

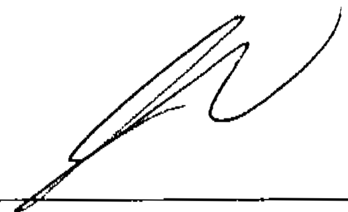
Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is decided in accordance with the attached memorandum decision.

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

HON. DORIS LING-COHAN

Dated:


J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

---X

CONSTANTINOS MIHELIS and CURTIS DRAKEFORD, as Administrator of the goods, chattels, and credits which were of CURTIS MOORE, a/k/a CURTIS DRAKEFORD,

Plaintiffs,

-against-

i. park LAKE SUCCESS LLC, BALL CONSTRUCTION, LP, TOTAL SAFETY CONSULTING, L.L.C., and L.A. FITNESS INTERNATIONAL, LLC,

Defendants.

---X

Mot Seq 003,004,005

Index No. 120857/03

i. park LAKE SUCCESS LLC and BALL CONSTRUCTION, LP,

Third-Party Plaintiffs,

-against-

PROFESSIONAL WATERPROOFING & RESTORATION, INC.,

Third-Party Defendant.

---X

Third-Party
Index No. 590346/05

PROFESSIONAL WATERPROOFING & RESTORATION, INC.,

Second Third-Party Plaintiff,

-against-

THE VSA GROUP,

Second Third-Party Defendant.

---X

Second Third-Party
Index No. 591282/05

LING-COHAN, J.:

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

On November 17, 2003, plaintiff Constantinos Mihelis was injured at a construction site when the concrete roof panel that he was standing on collapsed, sending him 20 feet to the ground below. Plaintiff now moves (seq. no. 003), pursuant to CPLR 3212, for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action.

Defendant/second third-party defendant The VSA Group (VSA) moves (seq. no. 004) for summary judgment dismissing the second amended complaint, the second third-party complaint, and any cross claims asserted against it.

Defendants/third-party plaintiffs i. park Lake Success, LLC (i. park) and Ball Construction, LP (Ball) move (seq. no. 005) for summary judgment on their third-party claim for contractual indemnification against third-party defendant Professional Waterproofing & Restoration, Inc. (PWR). i. park and Ball also seek summary judgment dismissing the second amended complaint.

BACKGROUND

This case arises from an accident that occurred at a construction site in Lake Success, New York. Plaintiff was employed as a roofer apprentice by third-party defendant PWR, which was performing demolition work at premises located at 1111 Marcus Avenue and owned by i. park. The premises consisted of both a main building and a south building. i. park hired Ball as the construction manager to demolish and replace the roof at the main and south buildings. Ball retained PWR as a subcontractor to install a new roofing system on the south building. i. park then hired VSA, a consulting engineering firm, which surveyed the roof system. VSA performed a pre-construction field survey which concluded that many of the concrete roof panels at the

south building had to be replaced.

Plaintiff testified that, on the date of his accident, he and his co-worker were instructed to demolish defective concrete roof panels at the south building that had been previously designated for removal. The defective concrete panels had round four-inch holes drilled at one end and were spray painted with orange neon paint. Plaintiff's foreman told him not to stand on the marked panels.

Plaintiff further testified that, while they were standing on a panel that had been determined to be sound, he heard a "boom" as the panel that they were standing on "snapped down the middle" (Plaintiff 8/15/05 EBT, at 97). At the time the panel collapsed, plaintiff was standing "on all fours," while his co-worker was standing upright (Plaintiff 8/15/05 EBT, at 98-99). Plaintiff and his co-worker fell to the ground. When plaintiff landed, he noticed that the upper part of his left arm was separated from the rest of his arm and felt a sharp pain in his right leg (Plaintiff 8/15/05 EBT, at 101-102). Plaintiff sustained injuries to his left wrist and right ankle in the process. His co-worker died as a result of the accident.

Plaintiff commenced this action, seeking recovery against defendants i. park and Ball pursuant to Labor Law §§ 200, 240(1), 241 (6) and common-law negligence. Subsequently, plaintiff amended his complaint to add a cause of action for punitive damages. Defendants i. park and Ball then impleaded plaintiff's employer, PWR, seeking indemnification and contribution. Third-party defendant PWR brought a second third-party action against VSA, i. park's roofing consultant on the job. Thereafter, plaintiff served a second amended complaint naming VSA as an additional defendant in the main action.

DISCUSSION

Standards for Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in its favor (CPLR 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (*id.*), by tendering proof in admissible form (*Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]). In order to defeat a motion for summary judgment, the party opposing the motion must demonstrate, also by proof in admissible form, the existence of a factual issue requiring a trial of the action (*see Forrest v Jewish Guild for Blind*, 309 AD2d 546, 553 [1st Dept 2003], *affd* 3 NY3d 295 [2004]).

Whether Plaintiff Was "Employed" Within the Meaning of the Labor Law

Defendants i. park and Ball argue that plaintiff was not "employed" within the meaning of the Labor Law, since they did not know of or consent to plaintiff's work in the area where the accident occurred, citing *Abbatiello v Lancaster Studio Assoc.* (3 NY3d 46 [2004]), and *Morton v State of New York* (13 AD3d 498 [2d Dept 2004], *lv dismissed* 5 NY3d 783 [2005]). i. park and Ball also point to the fact that the work that plaintiff was performing at the time of his injury was not scheduled in advance with Ball, as required by the subcontract between Ball and PWR.

The Labor Law defines an individual as "employed" when he or she is "permitted or suffered to work" (Labor Law § 2 [7]). To establish that the plaintiff is a member of the special class for whom Labor Law §§ 200, 240, and 241 were enacted, the plaintiff must establish (1)

that he was permitted or suffered to work on a structure; and (2) that he was hired by the owner, the general contractor or an agent of the owner or general contractor (*see Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]; *Ahmed v Momart Discount Store, Ltd.*, 31 AD3d 307 [1st Dept 2006]; *Brown v Christopher St. Owners Corp.*, 211 AD2d 441, 442 [1st Dept 1995], *affd on other grounds* 87 NY2d 938, *rearg denied* 88 NY2d 875 [1996]).

In *Abbatiello*, the plaintiff, a cable technician, was injured after falling from a ladder while responding to a tenant's complaint about cable service. The building owner neither consented nor knew of the work, although the plaintiff's presence on the owner's property was authorized by Public Service Law § 228 (1), which grants cable companies mandatory access to premises. There was also no nexus between the owner and the worker inasmuch as the owner had taken no action with respect to the cable company (*Abbatiello*, 3 NY3d at 51). Thus, the Court held that the owner could not be "charged with the duty of providing the safe working conditions contemplated by Labor Law § 240 (1) for cable television repair people of whom it is *wholly* unaware" (*id.* at 52 [emphasis supplied]). The Court additionally concluded that the owner did not have constructive notice that the cable company's employees would be coming onto its property to make repairs, because the owner was "powerless to determine which cable company [was] entitled to operate, repair or maintain the cable facilities on its property" (*id.*).

In *Morton*, the claimant's injuries arose while performing emergency repair work on a water main located beneath a state-owned highway. The claimant's employer failed to obtain a highway work permit in violation of state law. Following *Abbatiello*, the Appellate Division, Second Department, concluded that the State could not be liable to the plaintiff under Labor Law § 241 (6), since the claimant was performing the work without the State's permission or

knowledge, as he trespassed on the state's property, and thus was not "employed" at the work site within the meaning of the Labor Law (*Morton*, 13 AD3d at 500).

In the instant case, in contrast to *Abbatiello* and *Morton*, defendants cannot escape liability because they did not know that plaintiff was performing work in the south building. i. park was not "wholly unaware" of plaintiff's presence on the job site. Indeed, it expressly contracted for the work being performed by plaintiff, an employee of PWR, when he was injured (*see LoVerde v 8 Prince St. Assoc., LLC*, 35 AD3d 1224, 1225 [4th Dept 2006], *rearg denied* 38 AD3d 1370 [2007]). Unlike the construction worker in *Morton*, plaintiff was lawfully on the premises in the course of his work. In sum, because plaintiff was both "permitted or suffered to work on a building or structure and was . . . hired by someone, be it owner, contractor or their agent" (*Whelen*, 47 NY2d at 971), he was "employed" as that term has been defined under the Labor Law.

Finally, that plaintiff or PWR may have been performing unscheduled work may implicate a breach of contract claim, but does not relieve i. park of its duty under the Labor Law.

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (*Buckley v Columbia Grammar and Preparatory School*, – AD3d –, 2007 NY Slip Op 06452 [1st Dept 2007]), provides in relevant part that:

> 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.

The purpose of the statute is "to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]). Thus, the statute imposes a nondelegable duty and absolute liability on contractors and owners regardless of their negligence and whether they supervised or controlled the work (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

To impose liability under Labor Law § 240 (1), a plaintiff must establish that there was a violation of the statute (i.e., that the defendant failed to provide adequate safety devices), and that such violation proximately caused the plaintiff's injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.* 1 NY3d 280, 287 [2003]; *Williams v 520 Madison Partnership*, 38 AD3d 464, 464-465 [1st Dept 2007]; *Buckley*, 2007 WL 2324611, *2).

Since the statute applies to owners, contractors, and their agents, the plaintiff must show that a construction manager or other agent had the ability to control the activity that brought about the injury (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236 [1st Dept 2005]). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls*, 4 NY3d at 864 [internal quotation marks and citations omitted]). The label of "construction manager versus general contractor is not necessarily determinative" (*id.*).

Plaintiff contends that Ball, as the construction manager, may be held liable as an agent because it hired plaintiff's employer, PWR, and was responsible for job site safety and coordinated the work among contractors. Ball's project manager, James Galvin, testified that Ball's field superintendent ran the job, coordinated trade schedules, and walked the site. The project manager also walked the job, noted any safety violations, and had the authorization to stop work if any unsafe work conditions were observed (Galvin EBT, at 43-45, 175-179). Pursuant to the agreement between i. park and Ball, Ball "shall supervise and direct the Work, using the Contractor's best skill and attention" and "shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract" (Stevens Affirm., Exh. C., General Conditions, § 3.3.1). The contract also provides that Ball "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract" (*id.*, § 10.1.1), "shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to . . . employees on the Work and other persons who may be affected thereby" (*id.*, § 10.2.1), and "shall erect and maintain . . . reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards" (*id.*, § 10.2.3). Ball has not argued that it cannot be liable as a general contractor or statutory agent. However, the record discloses an issue of fact as to whether Ball may be liable as an agent. Plaintiff testified that no one outside of PWR ever instructed plaintiff in connection with the construction work (Plaintiff 4/3/06 EBT, at 73-74). Therefore, the court concludes that there is an unresolved factual question as to whether Ball may be liable under the Labor Law.

VSA has made a prima facie showing that it was not an agent of i. park, based on the record evidence that only PWR instructed plaintiff how to perform his work (Plaintiff 4/3/06 EBT, at 73-74; Stramandinoli Aff., ¶ 6; Barry Aff., ¶ 4), and that Ball was contractually required to supervise the work (Stevens Affirm., Exh. C., General Conditions, § 3.3.1). Plaintiff, PWR, i. park, and Ball have failed to raise an issue of fact as to VSA's agency, and thus, VSA cannot be liable under the Labor Law (*see Hutchinson v City of New York*, 18 AD3d 370, 371 [1st Dept 2005]; *Fox v Jenny Eng'g Corp.*, 122 AD2d 532, 533 [4th Dept 1986], *affd* 70 NY2d 761 [1987] [engineer that did not have authority to supervise and control work was not agent under the Labor Law]).

Plaintiff argues that he is entitled to judgment as a matter of law on his Scaffold Law claim against i. park and Ball because neither defendant provided any safety devices when he was performing his demolition work. i. park and Ball contend that plaintiff was a "recalcitrant worker" and the sole proximate cause of his injuries, since plaintiff failed to use safety devices that were available on the job site, including man lifts as provided for in Ball's safety plan. In reply, plaintiff contends that he never used man lifts at the site in this manner.

Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under the statute (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake*, 1 NY3d at 290). Such actions may include the failure to use or the misuse of an otherwise available safety device (*Robinson*, 6 NY3d at 554; *Miro v Plaza Constr. Corp.*, 38 AD3d 454, 455 [1st Dept 2007]). Nevertheless, "it is not enough to defeat liability to show 'the mere presence of alleged safety devices somewhere on the job site . . ., nor the mere fact that generalized safety instructions were given at some point

in the past'" (*Palacios v Lake Carmel Fire Dept., Inc.*, 15 AD3d 461, 463 [2d Dept 2005], quoting *Davis v Board of Trustees of Hicksville Pub. Lib. of Hicksville Union Free School Dist.*, 240 AD2d 461, 463 [2d Dept 1997]).

For instance, in *Cahill* (4 NY3d 35, *supra*), the plaintiff was injured while greasing rods at an elevation, but did not use safety lines, as he had been instructed to do several weeks earlier. Rather, he used another device that was not designed for his task. The Court of Appeals acknowledged that plaintiff fit the definition of "recalcitrant" in that he was given specific instructions to use a safety line while climbing, which he disregarded, but explained that "[t]he controlling question . . . [was] not whether the plaintiff was 'recalcitrant,' but whether a jury could have found that his own conduct . . . was the sole proximate cause of his accident" (*Cahill*, 4 NY3d at 39-40). Based upon the facts of that case, the Court reversed the Appellate Division, finding issues of fact as to whether the plaintiff was the sole cause of his injuries:

> Here, a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240 (1), and therefore summary judgment should not have been granted in plaintiff's favor.

(*id.* at 40).

Similarly, in *Robinson* (6 NY3d 550, *supra*), the plaintiff was injured when he used a six-foot ladder for a task that he knew required an eight-foot ladder. It was undisputed that there were eight-foot ladders available at the job site. The Court of Appeals held that "[p]laintiff's own negligent actions – choosing to use a six-foot ladder that he was knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work –

were, as a matter of law, the sole proximate cause of his injuries" (*Robinson*, 6 NY3d at 555). In so holding, the Court noted that "plaintiff also conceded that his foreman had not directed him to finish the piping in the office suite before undertaking other tasks, and testified that there was sufficient other work to occupy him for the rest of the workday" (*id.*).

The recalcitrant worker doctrine does not apply in this case, inasmuch as there is no evidence that plaintiff deliberately refused to use available safety devices after being instructed to use them (*see Miraglia v H & L Holding Corp.*, 36 AD3d 456, 457 [1st Dept 2007]; *Landgraff v 1579 Bronx River Ave., LLC*, 18 AD3d 385, 386 [1st Dept 2005]). The issue, thus, is whether plaintiff was the sole proximate cause of his injuries.

Plaintiff submits evidence indicating that he was never provided with any safety devices, such as a safety harness, safety clips or belts, and that he never observed any safety equipment anywhere on the job site (Plaintiff 8/15/05 EBT, at 34-36, 84, 145).[1] However, Ball's project manager, James Galvin, also testified that when he arrived at the accident scene, he observed an unused man lift on the side (Galvin EBT, at 306). Where a safety device is furnished, the question of whether the device furnished proper protection is an issue of fact for the jury (*Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2d Dept 2007]). Therefore, there are issues of fact as to whether plaintiff was provided with adequate safety devices, and whether plaintiff was the sole proximate cause of his injuries. Plaintiff's motion for summary judgment on this

[1] Other witnesses who arrived at the accident scene also testified that there was no safety equipment, such as body harnesses, lanyards, belts or nets, in the vicinity (Barry EBT, at 156-157; Stramandinoli EBT, at 110-111; Mullen EBT, at 82-86). In addition, a carpenter working for another subcontractor on the site, John Guinter, avers that there were no safety devices in place at the time of the accident, that he had never seen roofers using man lifts, and that there were no man lifts near where plaintiff's accident occurred (Guinter Aff., ¶ 4).

cause of action, and i. park and Ball's motion for dismissal of this cause of action, are denied.

Labor Law § 200 (1) and Common-Law Negligence

Labor Law § 200, a codification of the common-law duty imposed upon an owner and general contractor to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), requires that "[a]ll places to which [the Labor Law] applies" be "so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection" to employees (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). The party charged with that responsibility must have the authority to control the activity bringing about the injury, to enable it to prevent or remedy an unsafe condition (*Reilly v Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept], *lv denied* 100 NY2d 508 [2003]).

Contrary to i. park and Ball's contention, the alleged dangerous condition in this case arises not out of the means and methods of PWR's demolition work, but out of a hazardous condition in the south building. Where liability is based upon a hazardous condition on the premises, an owner or its agent may be liable only if it created or had actual or constructive notice of the condition (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Constructive notice "must be of the specific condition and of its specific location" (*Canning v Barney's New York*, 289 AD2d 32, 33 [1st Dept 2001]).

i. park and Ball have failed to establish that either did not have notice of the defective condition. They have not pointed to any evidence to establish the absence of notice as a matter

of law (*see Beltran v Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept 1999]). Accordingly, that part of the motion of i.park and Ball seeking summary judgment of dismissal of the section 200 (1) and common-law negligence claims is denied.

As noted above, VSA has established that it was not a statutory agent, and thus cannot be liable under the Labor Law. Thus, VSA's only potential liability is in negligence. A defendant stands liable in negligence only for breach of a duty of care owed to the plaintiff (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). The existence and scope of duty is an issue of law for the court (*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]).

VSA contends that it did not owe plaintiff a duty of care, since it did not supervise or control plaintiff's work. PWR and plaintiff argue in opposition that VSA assumed a duty of care by creating an unreasonable risk of harm in testing the concrete panels, or because plaintiff detrimentally relied on VSA's performance of its contract. As a general matter, a contractual obligation, standing alone, will not give rise to tort liability in favor of a non-contracting party (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). There are three circumstances under which a party who renders services assumes a duty of care: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, "launch[es] a force or instrument of harm"; (2) where the plaintiff detrimentally relies upon the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*id.* at 111-112 [internal quotation marks and citation omitted]).

A duty arises under the first exception where the defendant creates or exacerbates an allegedly dangerous condition (*see Baez v Jovin III, LLC*, 41 AD3d 751, 752 [2d Dept 2007]).

Here, plaintiff alleges that VSA was negligent in testing and inspecting the concrete panels where plaintiff's accident occurred, i.e., permitted a defective concrete panel to remain in place. However, there is no evidence that VSA's inspection of the concrete panel made it any less safe.[2] Therefore, the first exception does not apply (*see Stiver v Good & Fair Carting & Moving, Inc.*, 32 AD3d 1209, 1210 [4th Dept], *rearg denied* 35 AD3d 1295 [2006], *lv granted* 8 NY3d 809 [2007] [company that inspected automobile before automobile accident did not make automobile any less safe, and thus did not "launch a force or instrument of harm"]).

As for the second exception, a defendant may owe a duty under this exception where "performance of contractual obligations has induced detrimental reliance on continued performance and the defendant's failure to perform those obligations "positively or actively works an injury upon the plaintiff" (*Espinal v Melville Snow Contrs. Inc.,* 98 NY2d 136, 140 [2002] [internal quotation marks and citation omitted]). The nexus between the noncontracting plaintiff's reliance and injury must be "direct and demonstrable, not incidental or merely collateral" (*Cresvale Intl. v Reuters Am. Inc.*, 257 AD2d 502, 504 [1st Dept 1999] [internal quotation marks omitted]). Plaintiff testified that he and his co-worker were standing on an unmarked panel while performing their work. He also testified that he observed the engineers inspecting the panels and applying paint to the defective panels. Plaintiff was also told that the engineers punched a hole in the defective panels so that the roofers would know "the ones you stay away from" (Plaintiff 4/3/06 EBT, at 28-30, 34-35, 89). Thus, there are issues of fact as to whether plaintiff relied upon VSA's performance of its contract (*see e.g. Hopper v Regional*

[2] Although plaintiff argues that VSA created a dangerous condition, he points to no evidence indicating that it did so.

Scaffolding & Hoisting Co., Inc., 21 AD3d 262, 263 [1st Dept 2005], *lv dismissed* 6 NY3d 806 [2006] [hoist subcontractor owed duty to plaintiff where plaintiff, who was hired to operate hoist, detrimentally relied on its continued performance of its contractual duties]; *Lincoln v Landvest, Inc.*, 202 AD2d 933, 934 [3d Dept 1994] [plaintiff claimed that forest management company improperly marked tree for removal; issues of fact as to plaintiff's reliance where plaintiff relied on markings in performing his work]; *cf. Stiver*, 32 AD3d at 1211 [plaintiff could not rely on exception given that there was no evidence that plaintiff knew that vehicle had been inspected]).

Accordingly, the Labor Law § 200 claim as against VSA is dismissed, and the defendants' motions for summary dismissal of the negligence claims are denied.

Labor Law § 241 (6)

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide "reasonable and adequate protection and safety" without regard to supervision or control (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To prevail on a Labor Law § 241 (6) claim, a plaintiff must demonstrate that certain "concrete specifications" of the Industrial Code were violated as opposed to a general reiteration of common-law principles (*id.* at 504-505). In addition, a plaintiff must establish that the violation was a proximate cause of the injury (*Padilla v Frances Schervier Hous. Dev. Fund Corp.*, 303 AD2d 194, 196 [1st Dept 2003]).

Plaintiff's bill of particulars alleges that i. park and Ball violated the following provisions of the New York State Industrial Code: 23-1.2; 23-1.3; 23-1.4; 23-1.5; 23-1.15; 23-1.16; 23-1.17; 23-1.24; and 23-5, *et seq*. In addition, plaintiff alleges that these defendants violated numerous OSHA rules, to wit, 29 CFR §§ 1926.10, 1926.21, 1926.104, 1926.105, 1926.200, 1926.201,

1926.202, 1926.203, 1926.451, 1926.452, 1926.500, and 1926.502.

Sections 23-1.2, 23-1.3, and 23-1.4 do not constitute "concrete specifications" that could result in either i. park or Ball's liability under this statute (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]; *Gordineer v County of Orange*, 205 AD2d 584 [2d Dept 1994]; *Williams v White Haven Mem. Park*, 227 AD2d 923 [4th Dept 1996]). Nor does section 23-1.5, since it only describes an employer's general responsibility for safety (*see Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]; *Boyd v Mammoet W., Inc.*, 32 AD3d 1257, 1258 [4th Dept 2006]).

The remaining Code sections are not applicable to these facts. 12 NYCRR 23-1.15, 23-1.16, and 23-1.17 all contain rules for situations when safety railings, safety belts, harnesses, tail lines, lifelines, and life nets are provided. Because plaintiff was not provided with any such devices, these regulations do not apply (*see Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 337-338 [1st Dept 2006]; *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 108 [1st Dept 2002]). Section 23-1.24 (a) and (b), which govern the use of safety devices on roofs having a slope steeper than one in four inches, also are not applicable (*see D'Acunti*, 300 AD2d at 107; *Amirr v Calcagno Constr. Co.*, 257 AD2d 585 [2d Dept 1999]). Finally, subpart 23-5, entitled "Scaffolding," does not apply because plaintiff was not working on a scaffold at the time of his injury.

Additionally, the violation of an OSHA rule does not provide a predicate for liability under Labor Law § 241 (6) (*see Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2d Dept 2005]; *Schiulaz v Arnell Constr. Corp.*, 261 AD2d at 248).

Though plaintiff also alleges that VSA violated Labor Law § 241 (6), VSA has

established that it cannot be liable as an agent under this statute.

Accordingly, plaintiff's Labor Law § 241 (6) claim is dismissed.

Punitive Damages

i. park and Ball also move for dismissal of plaintiff's request for punitive damages. The purpose of punitive damages is not to compensate the injured party, but to punish the tortfeasor and deter the wrongdoing (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]; *Walker v Sheldon*, 10 NY2d 401, 404 [1961]). Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Ross*, 8 NY3d at 489). Here, there is no evidence of willful or wanton negligence or recklessness on defendants' part (*Wilson v City of New York*, 7 AD3d 266, 267 [1st Dept 2004]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23 [1st Dept 2003]; *Hale v Odd Fellow & Rebekah Health Care Facility*, 302 AD2d 948, 949 [4th Dept 2003]). Therefore, the request for punitive damages is dismissed.

Indemnification and Contribution

i. park and Ball move for summary judgment on their third-party claim for contractual indemnification against PWR. The subcontract between Ball and PWR provides as follows:

> Notwithstanding anything to the contrary herein, or in any of the Contract Documents, *to the fullest extent permitted by law*, the Subcontractor hereby agrees to defend and indemnify Contractor, Owner, Consultant, Owner's Lender, . . . against, and hold each of them harmless from, and pay the full amount of, all loss, liability, obligation, damage, delay, penalty, judgment, charge, tax of every kind ("Loss and Expense") whenever asserted or occurring, which any Indemnitee may suffer, incur, or pay out, or which may be asserted against any Indemnitee in whole

or in part, by reason of, or arising out of or in connection with the following:

(a) any bodily injury, sickness, disease or death of any person, or any damage to or destruction of any property, occurring *in connection with, or arising out of, or resulting from the acts or omissions or the breach of obligations under this Agreement or failure to comply with laws by the Subcontractor or its employees.*

(O'Connor Cornell Affirm., Exh., N., ¶ 8.4 [emphasis supplied]).

General Obligations Law § 5-322.1 prohibits indemnifying a party for its own negligence. Because the indemnification agreement authorizes indemnification "to the fullest extent permitted by law," it does not violate the General Obligations Law as a matter of law (*see Landgraff*, 18 AD3d at 387; *Dutton v Charles Pankow Bldrs*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Thus, to establish its right to contractual indemnification, the indemnitor "need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). As noted above, i. park and Ball have failed to establish that they had no notice of the allegedly hazardous condition of the concrete roof panels. Therefore, that part of their motion seeking contractual indemnification is premature and is denied.

VSA also moves for dismissal of the cross claims and third-party claims for indemnification and contribution asserted against it. In view of the factual issues as to VSA's negligence, the court denies that part of VSA's motion seeking dismissal of the claims for common-law indemnification and contribution (*see Rivera v St. Regis Hotel Joint Venture*, 240 AD2d 332, 333 [1st Dept 1997]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (seq. no. 003) by plaintiff Constantinos A. Mihelis for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim is denied; and it is further

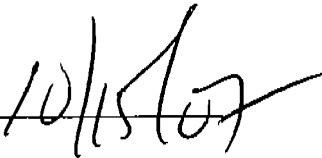
ORDERED that the motion (seq. no. 004) by defendant/second third-party defendant The VSA Group for summary judgment dismissing the second amended complaint, the second third-party complaint and any cross claims against it is granted to the extent that the Labor Law §§ 200, 240 and 241 (6) claims against it are dismissed, and is otherwise denied; and it is further

ORDERED that the motion (seq. no. 005) by defendants/third-party plaintiffs i. park Lake Success, LLC and Ball Construction, LP for summary judgment is granted to the extent of dismissing the Labor Law § 241 (6) claim and the request for punitive damages, and is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

ORDERED that the remainder of the action shall continue.

FILED
OCT 24 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: 

Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Summary Judgment\MihelisvIParkLakeSuccess.wpd