HON. ROLANDO T. ACOSTA

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

PART 61

Index Number : 111355/2003

MCCARTHY, DENIS

VS.

BARNEY SKANSKA INC.

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	See attached
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 10/15/07

SO ORDERED

ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Denis McCarthy and Bridget McCarthy,

Plaintiffs,

– against –

Barney Skanska Construction, Fleet Building Management Inc., Zwicker Electric Co., Inc., George Breslaw & Sons, Inc., Centrifugal Mechanical Associates, The Beneson Capital Company,

Defendants.

DECISION/ORDER

Index No. 111355/03

Seq. No. 3

Present:

Rolando T. Acosta
Supreme Court Justice

Skanska USA Building, i/s/h/a Barney Skanska Construction,

Third-Party Plaintiff,

– against –

Rael Automatic Sprinkler Co., Inc.,

Third-Party Defendant.

Third-Party Index No. 591017/06

The following documents were considered in reviewing defendant/third-party plaintiff Skanska USA Building ("Skanska")'s motion for an order pursuant to CPLR 3212 dismissing the complaint, granting it summary judgement on its cross-claims against defendant Centrifugal Mechanical Associates ("Centrifugal") for contractual indemnification, including attorneys fees, cost and disbursements, and granting it summary judgment on its third-party claim against Rael Automatic Sprinkler Co ("Rael") for contractual indemnification, including attorneys fees, cost and disbursements; Centrifugal's cross-motion for an order pursuant to CPLR 3212 dismissing the complaint against it; and, plaintiff's cross-claim for an order pursuant to CPLR 3025(b) granting it leave to amend the complaint to allege specific industrial code violations and denying Skanska's motion to dismiss:

Papers	Numbered
Skanska's Notice of Motion & Affirmation	1 (Exhibits A-T)
Centrifugal's Affirmation in Partial Opposition	2
Rael's Affirmation in Partial Opposition	3
Centrifugal's Notice of Cross-Motion & Affirmation	4
Plaintiff's Notice of Cross-Motion & Affirmation	5
Centrifugal's Affirmation in Opposition to Plaintiff's Cross-Motion	6
Zwicker Electric's Affirmation in Opposition to Plaintiff's Cross-Motion	7
Skanska's Reply Affirmations & Opposition to Plaintiff's Cross Motion	8-10

Background

Plaintiff Denis McCarthy was employed by Sotheby's as a stationary engineer (the person responsible for operating the HVAC and mechanical equipment in the building). Part of his duties as a stationary engineer was to check the various equipment rooms located on all floors of the ten story building. When he worked the day shift, he would occasionally accompany representatives of the construction personnel to go over punch list items. On June 23, 2000 plaintiff was working the night shift from 10:00p.m. to 6:00 a.m. At approximately 11:15 p.m., after checking the equipment room in the basement, plaintiff slipped in the stairwell leading to the sub-basement, where he was heading to check the sub-basement equipment room, and sustained injuries.

After he fell, plaintiff noticed that there was rock and debris from lose concrete or cinderblock on the steps, which was not present the night before. He testified that the rubble was created when holes were punched through the wall located above the landing for installation of either steam or sprinkler lines. He also observed black pipe running through the holes, but he did not know who performed the work.

The Sotheby's building was undergoing renovations, and Skanska was the construction manager for the project, which consisted of adding six floors and renovating the

lower floors. According to Ray McDonald, Skanska's project manager, Centrifugal, who performed mechanical piping, and Rael, who performed core and shell fire protection (which included installing sprinkler lines), both had worked on the accident site in June 2000, and were the only sub-contractors to use black pipe.

Significantly, Skanska's daily reports for June 7 through June 23, the day of the accident, were missing. Centrifugal acknowledged that it installed the black pipe over the subject stairwell, but its foreman Dominick Vendetto had no recollection as to when it was done nor could he provide records reflecting when he was on the site. Rael's president, Norman Isreal, testified that he believed that Rael installed black pipe in the basement/sub-basement area, but he was not certain.

According to McDonald, since Centrifugal and Rael were required to make wall penetrations, their sub-contracts required that they center pile debris in a safe location. Then laborers from Fleet Building Maintenance ("Fleet") would remove the center piled debris from areas under construction.

In his complaint, plaintiff alleged negligence and Labor Law §§ 200, 240(1), and 241(6) violations. With respect to his Labor Law § 241(6) claim, however, he did not identify any specific industrial code violation. Skanska cross-claimed against Centrifugal for contractual indemnification and filed a third party complaint against Rael for contractual indemnification as well.

Analysis

Skanska moves for summary judgment dismissing plaintiff complaint and for contractual indemnification, including attorneys fees, cost and disbursements from Centrifugal and Rael. That portion of the motion which seeks to dismiss the complaint is granted to the extent that plaintiff's Labor Law §§ 240(1) and 241(6) claims are dismissed inasmuch as plaintiff was not within the class of person protected by these sections. See Nagel v D & R Realty Corp., 99 N.Y.2d 98 (2002); Lynch v. Abax, Inc. 268 A.D.2d 366 (1st Dept. 2000)(plaintiff, employed by building undergoing renovation, work was injured while performing routine maintenance check of the building's steam equipment and, thus, Labor Law 241(6) not applicable because he was not engaged in construction); Agli v. Turner Construction Company, 246 A.D.2d 16 (1st Dept. 1998)(plaintiff, an operating engineer, injured while performing routine maintenance check not covered under Labor Law 240(1) or 241(6) since not working on building's renovation or employed to carry out any repairs). Indeed, plaintiff concedes that it has no Labor Law § 240(1) claim. See Plaintiff's Affirmation in Suppport of Cross-Motion at ¶ 10.

Skanska's request for an order dismissing of plaintiff's Labor Law § 200 and common law negligence claims, however, is denied. "It is settled that section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (Comes v New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 [1993]; Reilly v Newireen Assoc., 303 AD2d 214, 219 [1st Dept. 2003], lv denied 100 N.Y.2d 508 [2003]). In order to prevail on such a claim, plaintiff must demonstrate that defendant had the authority to "control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Rizzuto v L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352 [1998] [internal quotation marks omitted]). Accordingly, liability can only be imposed if defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition (Giovengo v P&L Mech., 286 AD2d 306 [1st Dept. 2001]; Jehle v Adams Hotel Assoc., 264 AD2d 354, 355 [1st Dept. 1999])." Singh v. Black Diamonds LLC, 24 A.D.3d 139, 139-40 (1st Dept. 2005).

Labor Law § 200 is not limited to construction work. Jock v. Fein, 80 N.Y.2d 965, 967 (1992). Rather, Section 200(1) provides that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety *of all persons employed therein* or lawfully frequenting such places."(emphasis added). See also, Mordkofsky v. V.C.V. Development Corp., 76 N.Y.2d 573, 576-77 (1990)(in order to invoke the protection of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work in a building or structure and that he was hired by someone whether owner, contractor or their agent).

Here, since plaintiff was employed at the building undergoing renovations, Skanska owed him a duty to provide a safe place to work. Moreover, Skanska failed to establish its prima facie entitlement to summary judgment because it failed to show that it did not control Fleet's work. Indeed, according to McDonald, the general laborer foreman or a project superintendent would determine whether Fleet would clean up a certain area. Sknaska also failed to establish that it did not have constructive notice of the debris. As the construction manager, it probably should have known that pipes were being fitted near the stairwell landing at issue on the date of the accident, that holes would have been drilled into the concrete, and that the work would have created debris. But, even if it had established its prima facie right to summary judgment, plaintiff has raised triable issues of fact, especially with respect to control and notice. Accordingly, this portion of the motion is denied.

That portion of Skanska's motion which seeks contractual indemnification from Centrifugal and Rael is also denied inasmuch as there are issues of fact as to whether it was negligent. Crespo v. City of New York, 303 A.D.2d 166, 166-67 (1st Dept. 2003)(where a

question of fact exist as to a general contractor's negligence, summary judgment on a contractual indemnity claim should be denied as premature).

Skanska, however, is entitled to defense cost since "it is well settled that an insurer's "duty to defend [its insured] is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage' " (Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137, 818 N.Y.S.2d 176, 850 N.E.2d 1152 [2006] [citation omitted]). "The duty to defend [an] insured[ ] ... is derived from the allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (Technicon Elecs. Corp. v. American Home Assur. Co., 74 N.Y.2d 66, 73, 544 N.Y.S.2d 531, 542 N.E.2d 1048 [1989])." BP Air Conditioning Corp. v. One Beacon Insurance Group, 8 N.Y.3d 708, 714 (2007)("The merits of the complaint are irrelevant and, [a]n insured's right to be accorded legal representation is a contractual right and consideration upon which [a person's] premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured." . . . An "insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract"). Here, the indemnification provision in Centrifugal's and Rael's sub-contracts with Skanska are remarkably similar to the clause in BP Air Conditioning Corp. Compare Indemnification provision in present case, Skanska's Affirmation in Support at ¶ 40 with provision at issue in BP Air Conditioning Corp. v. One Beacon Insurance Group, supra, 8 N.Y.3d at 711-12. Defense costs will also be determined after trial.

Centrifugal's cross-motion for an order dismissing the complaint is granted to the extent of dismissing the Labor Law §§ 200, 240(1) & 241(6) claims against it for the reasons stated above, and with respect to Labor Law § 200, because there is no indication in the record that Centrifugal controlled plaintiff's work. Giovengo v P&L Mech., 286 AD2d 306 (1st Dept. 2001). Centrifugal, however, has failed to establish that it was free of common law negligence. Its claim that plaintiff has been unable to establish which subcontractor created the debris is unavailing. The only reason plaintiff can not pin it on a particular subcontractor is because Skanska is missing daily logs which would help narrow it down and both Centrifugal and Rael can't seem to remember whether they worked in the subject area on the day of the incident. Accordingly, plaintiff's Labor Law §200 and common law negligence claims survive summary judgment.

Plaintiff's cross-motion for an order pursuant to CPLR 3025(b) granting it leave to amend the complaint to allege specific industrial code violations is denied since, as noted

above, plaintiff was not within the class of person protected by Labor Law § 241(6). See Lynch v. Abax, Inc. 268 A.D.2d 366 (1st Dept. 2000). Accordingly, it is

ORDERED that Defendant/Third-Party plaintiff Skanska USA Building's motion for an order pursuant to CPLR 3212 dismissing the complaint, granting it summary judgement on its cross-claims against defendant Centrifugal Mechanical Associates for contractual indemnification, including attorneys fees, cost and disbursements, and granting it summary judgment on its third-party claim against Rael Automatic Sprinkler Co for contractual indemnification is granted solely to the extent that plaintiff's Labor Law 240(1) and 241(6) causes of action ore dismissed; and it is further

ORDERED that Centrifugal Mechanical Associates's cross-motion for an order pursuant to CPLR 3212 dismissing the complaint against it is granted solely to the extent that plaintiff's Labor Law §§ 200, 240(1) and 241(6) causes of action are dismissed against it; and it is further

ORDERED that plaintiff's cross-claim for an order pursuant to CPLR 3025(b) granting it leave to amend the complaint to allege specific industrial code violations is denied.

This constitutes the Decision, Judgment and Order of the Court.

Dated: October 15, 2007

ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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