SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

GIACOMO AGRUSA and MARIE AGRUSA, Plaintiffs, - against - ASSADOUR O. TAVITIAN, et al., Defendants.	INDEX NO. 12245/2005 MOTION DATE September 25, 2007 MOTION CAL. NO. 2 MOT. SEQ. NUMBER
ASSADOUR O. TAVITIAN, et al., Third-Party Plaintiff, - against - MICHAEL MAZZEO ELECTRIC CORP., et al., Third-Party Defendants	

The following papers numbered 1 to 24 read on this motion by the defendants/third-party plaintiffs Assadour O. Tavitian and Tishman Construction Corp. for, inter alia, summary judgement dismissing the plaintiff's complaint and for summary judgment against the third-party defendants on their claims for indemnification. The third-party defendant Michael Mazzeo Electric Corp. cross-moves for, inter alia, partial summary judgment dismissing the claims and cross claims for common law and contractual indemnification arising out of the plaintiff's July 8, 2002 accident and partial summary judgment dismissing the cause of action in the third-party complaint for indemnification based upon a failure to obtain insurance. The third-party defendant Donaldson Acoustics, Co., Inc. cross-moves for partial summary judgment dismissing only so much of the third-party complaint as concerns the plaintiff's November 20, 2002 accident.

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Upon the foregoing papers the motion and cross-motions are determined as follows:

The plaintiff brings this action to recover for injuries allegedly sustained as a result of two distinct accidents that occurred on a construction project he was permitted to work. The project at issue was a major renovation of a premises located at 4 East 79th Street, New York, New York. At the time of the accident, the owner of the premises was the defendant Assadour O. Tavitian ("Tavitian"). The plaintiff was a carpenter foremen for Bauerschmidt & Sons which was engaged to perform finish carpentry work on the project.

The first accident occurred on July 8, 2002 when the plaintiff tripped and fell on a partially constructed spiraling staircase in the premises. At the time of the accident, the stairway consisted of a metal substructure that was to be later covered in concrete and finished with marble. The treads of the stairway, when used by the plaintiff, were recessed pans that were temporarily filled with unsecured wood planks. There are conflicting accounts from the plaintiff, and a witness to the accident, as to whether the plaintiff was ascending or descending the stairs and which floors he was between when the accident occurred. Concerning what caused the accident, the plaintiff testified at his depositions that he fell because one of the unsecured wood planks constituting the stair tread came loose and dislodged from the metal pan.

The second accident occurred on November 20, 2007, while the plaintiff and a co-worker, Philemon Watson ("Watson") were preparing finish carpentry for one of the windows at the premises. In particular, the plaintiff and Watson were engaged in cutting a hole in a eighteen by forty inch piece of wood, that would ultimately form a window soffit, to accept a recessed lighting fixture. The wood stock was set on two saw horses that were approximately thirty-six inches apart. After a template was clamped to the piece of wood, the plaintiff held the wood down on the saw horses with both hands. Watson, utilizing an electric powered drill equipped with a hole saw, began to drill a hole in the wood. Almost immediately after activating the drill, the plaintiff avers that it "started to jump" or started "walking" and the hole saw cut the plaintiff's right hand. The plaintiff claims that the presence of construction debris at the location of the accident prevented Watson from having proper footing when he drilled and that caused the accident.

The branch of the motion to dismiss the plaintiffs' cause of action brought pursuant to Labor Law §240[1] is granted without opposition. Labor Law § 240[1] does not protect a worker from "any and all perils that may be connected in some tangential way with the effects of gravity," rather only from "specific gravity-related accidents as falling from a height or being struck by a falling object that was

improperly hoisted or inadequately secured . . ." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501). The harm must flow "directly . . . from the application of the force of gravity to an object or person" (Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501). Here, neither accident falls within the protections of Labor Law §240[1].

The branch of the motion by Tavitian to dismiss the plaintiff's cause of action pursuant to Labor Law §241[6] is denied. Tavitian argues that he may not be held liable under this section of the Labor Law since he falls within the statute's "homeowner exemption". Section 241 of the Labor Law provides that it does not apply to "owners of one and two-family dwellings who contract for but do not direct or control the work". An employee of Tavitian, Thomas Marchisotto ("Marchisotto"), testified that the premises at issue, 4 East 79th Street, New York, New York, is a "[s]ingle family house". However, Marchisotto did not testify, and there is no proof annexed to the moving papers via an affidavit from Tavitian, that he used or intended to use the premises for residential rather than commercial purposes (See, Uddin v Three Bros. Constr. Corp., 33 AD3d 691, 692; see also, Bartoo v Buell, 87 NY2d 362, 368; Khela v Neiger, 85 NY2d 333, 337-338; Morgan v Rosselli, 23 AD3d 356). Indeed, it should be noted that there is some proof in the record of a non-residential use at the premises, to wit Marchisotto averred that his duties included working for Tavitian's "charitable foundation" while at the premises at issue. The affidavit from Mr. Tavitian annexed to the defendants' reply papers in a belated attempt to establish a prima facie case is improper and may not be considered by the court (See, Canter v East Nassau Med. Group, 270 AD2d 381, 382; Fischer v Weiland, M.D., P.C., 241 AD2d 439).

Tavitian and Tishman also move to dismiss the plaintiff's Labor Law §200 causes of action with respect to both accidents. Labor Law §200 "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 NY2d 876, 877). Where the accident is the result of a dangerous or defective condition in the workplace, liability is predicated upon the party at issue either creating the condition or having actual or constructive notice of the condition (See, Gambino v Mass. Mut. Life Ins. Co., 8 AD3d 337; DeBlase v Herbert Constr. Co., 5 AD3d 624; Paladino v Soc'y of the N.Y. Hosp., 307 AD2d 343, 345). When the theory of liability is based upon the manner in which the plaintiff's work was being performed, liability will attach only if the party to be charged exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe practice causing the accident (See, Comes v New York State Electric and Gas Corporation, supra).

While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (See, e.g., Zuckerman v City of New York, 49 NY2d 557). As the July 8, 2002 accident arose out of an alleged

defective condition at the premises, specifically loose wood planks on the unfinished stairway, Tavitian was required to establish in the first instance that he lacked actual or constructive notice of the condition. However, since Tavitian failed to annex to the moving papers either an affidavit or deposition testimony of his own, there is no proof that demonstrates his lack of knowledge of the allegedly defective condition. Tishman also failed to demonstrate the existence of a prima facie case it its favor. Marchisotto, who worked for Tishman as its Project Manager at the time of the accident, testified at his deposition that the wood was probably placed in the metal pans by carpenters at "Tishman's direction". Moreover, Marchisotto acknowledged that the wood in the pans "shouldn't be moving around" and it would have been Tishman's responsibility to direct the trades to correct that condition. As such, contrary to Tishman's assertion, it has failed to show it did not create the alleged dangerous condition.

Turning to the November 20, 2007 accident, Tavitian and Tishman argue that the plaintiff failed to establish that either had notice of the debris condition at the accident situs. This assertion is unavailing as "a defendant moving for summary judgment does not carry its burden merely by citing gaps in the plaintiff's case" (Kucera v Waldbaums Supermarkets, 304 AD2d 531; See also, OLeary v Bravo Hylan, LLC, 8 AD3d 542; Nationwide Prop. Cas. v Nestor, 6 AD3d 409). Again, without an affidavit or deposition testimony properly submitted with the moving papers, Tavitian fails to make out a prima facie case. Tishman also does not demonstrate its entitlement to judgment as a matter of law. The only testimony offered on behalf of a representative of Tishman at the time of the accident was from Marchisotto who did not expressly disclaim knowledge of the presence of debris at the accident site. Indeed, Marchisotto admitted that it was Tishman's responsibility for waste removal at the site and he did not testify when the last time before the accident that area was cleaned.

Accordingly, the branch of the motion to dismiss the plaintiffs' Labor Law §200 causes of action arising out of both accidents is denied irrespective of the sufficiency of the plaintiff's opposing papers (See, Alvarez v Prospect Hospital, 68 NY2d 320, 325).

The defendants Tavitian and Tishman also move for summary judgment against the third-party defendants Michael Mazzeo Electric Corp. ("Mazzeo") and Donaldson based upon their claims for contractual and common law indemnification and defense as well as their claim for breach of contract based upon failure to procure insurance.

As to the claim based an alleged failure of Mazzeo and Donaldson to obtain liability insurance covering Tavitian and Tishman, the movants failed to establish prima facie entitlement to judgment as a matter of law since there is no proof annexed to the moving papers, by either affidavit or documentary evidence, that the requisite insurance was not acquired (See, Darowski v High Meadow Coop. No. 1, 239 AD2d 541; Keelan v Sivan, 234 AD2d 516).

The branch of the motion for partial summary judgment on the claims for contractual and common law indemnification against Mazzeo and Donaldson is denied. "In contractual indemnification, the one seeking indemnity 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 Mgmt., Inc., 259 AD2d 60, 65). One seeking common law indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident" (Id; see also, Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 685, citing Reilly v. D. Giacomo & Son, 261 AD2d 318). In the present case, since Tavitian and Tishman failed to demonstrate prima facie that they were free from any negligence in connection with either accident, the motion is premature. Moreover, the branch of Tavitian and Tishman's motion for partial summary judgment on its claims for a defense and costs in the action are denied since Mazzeo and Donaldson are not insurers and, therefore, their duty to defend is no broader than their duty to indemnify (See, Brasch v Yonkers Constr. Co., 306 AD2d 508, 511; Bermudez v NYCHA, 199 AD2d 356, 358).

The branch of Mazzeo's cross-motion to dismiss Tavitian and Tishman's cause of action for breach of contract based upon an alleged failure to obtain insurance is granted without opposition. Mazzeo established, prima facie, entitlement to judgment as a matter of law with the submission of the declarations sheets and policy of insurance indicating that, in accordance with the terms of its subcontract, Tavitian and Tishman were additional insureds on the policy of insurance it obtained (See e.g., New York City Hous. Auth. v. Merchs. Mut. Ins. Co., ____AD3d____, 2007 NY Slip Op 7996).

The branch of Mazzeo's cross-motion to dismiss Tavitian and Tishman's causes of action for contractual and common law indemnification, as well as all similar cross-claims, based upon the July 8, 2002 accident is granted. The record before the court establishes, in the first instance, Mazzeo's entitlement to judgment as a matter of law. Specifically, Marchisotto's testimony demonstrates that condition at issue, the planks of wood in the metal pans, was created by "carpenters" at the site at the direction of Tishman. In addition, the subcontract between Tishman and Donaldson, dated September 23, 1999, expressly states that Donaldson was "[f]or all steel stairs, [to] install and secure wood tread fillers to be placed in the open metal tread pans until concrete is installed". With respect to lighting on the temporary stairway, the plaintiff does not claim in his verified bill of particulars, dated February 23, 2006, that insufficient lighting was a cause of his July 8, 2002 accident. Although the plaintiff claims in his deposition that the light in the staircase on July 8, 2002 was "very poor", he acknowledged that he had no problems seeing at the time of the accident. Watson also testified that he did not have any problem with the staircase lighting prior to July 8, 2002.

In opposition, Tavitian, Tishman and Donaldson fail to address the issue of Mazzeo's alleged negligence in causing the plaintiff's July 8, 2002 accident at all in their opposition papers. Accordingly, Tavitian,

Tishman and Donaldson's claims for contractual and common law indemnification from Mazzeo arising out of the plaintiff's July 8, 2002 accident are dismissed.

The defendant Donaldson's cross-motion for partial summary judgment dismissing Tavitian and Tishman's causes of action for contractual and common law indemnification relating to the plaintiff's November 20, 2002 accident is denied. Donaldson was required, but failed, to demonstrate prima facie that it was not negligent or otherwise responsible for the plaintiff's November 20, 2002 accident (See, Correia v Professional Data Mgmt., Inc., supra; Perri v Gilbert Johnson Enterprises, Ltd., supra). Donaldson did not proffer any proof that it did not create or contribute to the debris condition the plaintiff claims is responsible for his November 20, 2002 accident. William Carlin, Donaldson's Project Manager on the site, testified that he could not remember whether he was even in the room where the accident occurred in November 2002. Additionally, Carlin averred that Donaldson had some responsibility for cleanup in at the site, namely that its workers were required to "pile" waste in the corner or center of a room. However, there is no testimony that when Donaldson employees were last in the room before the November 20, 2002 accident, they fulfilled their obligation to "pile" their work debris.

Dated: December 7, 2007

Peter J. Kelly, J.S.C.