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

PRESENT: York Justice

PART 2

103244/2004

Index Number : 103244/2004
WILLIAMS, ROBERT
vs
731 LIMITED PARTNERSHIP
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. [redacted]

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

Is 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
DEC 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated:

LOUIS B. YORK 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: IAS PART 2

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ROBERT WILLIAMS,

Plaintiff,

Index No. 103244/04

-against-

7-31 LIMITED PARTNERSHIP, BOVIS LEND LEASE LMB, INC., and INDEPENDENT AERIAL EQUIPMENT,

Defendants.

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INDEPENDENT AERIAL EQUIPMENT,

Third-party Plaintiff,

TP Index No. 590477/04

-against-

ENCLOS CORP.,

Third-party Defendant.

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York, J.S.C.:

Motion sequence numbers 4 and 5 are consolidated for disposition and resolved as follows:

According to the Complaint, plaintiff, then 47 years old, sustained neck injuries on January 28, 2004 while operating a scissor lift at 731 Lexington Avenue. Plaintiff was an ironworker employed by third party defendant Enclos Corporation ("Enclos"). He alleges that the lift malfunctioned, rising rapidly toward the stationary duct above so that his hard hat struck the duct, causing his injuries. However, because of the rapidity with which the accident occurred, he says, he does not know the precise nature of the malfunction.

Plaintiff sued Independent Aerial Equipment ("Independent"), which owns the lift in question; Bovis Lend Lease LMB ("Bovis"), the general contractor; and 7-31 Limited Partnership ("7-31"), which owns the site where the accident occurred. Independent, in turn, commenced a third-party action against Enclos. The Note of Issue was filed on July 18, 2006. Before the Court are a variety of motions and cross-motions. The Court addresses the issues separately, below.

I. Independent's Motion for Summary Judgment

Independent moves for summary judgment dismissing plaintiff's claims as asserted against it. Although plaintiff's papers are hard to follow, it appears that plaintiff concedes that the Labor Law §§ 240 and 241 claims he asserted have no merit as against Independent. He does not oppose Independent's contention that these claims should be dismissed. Moreover, in his opposition papers he states simply that there is a triable issue of fact against Independent as to common law negligence. See Aff. in Opp. at ¶ 14. Accordingly, the Court grants Independent's motion as it relates to the Labor Law §§ 240(1) and 241(6), and addresses only the question of whether Labor Law § 200 and common law negligence causes of action exist against Independent.

The basis of plaintiff's claim against Independent appears to be that it provided a defective scissor lift to plaintiff's employer. Independent argues that the scissor lift Independent provided for the work in question was not defective. It asserts that there had been no prior problems with the lift; that there were no subsequent problems for the week-and-a-half following the accident that the equipment was still in use; and that, on the date of the accident, plaintiff was the only person who operated the equipment. Independent annexes a copy of the lease, which specifies the precise scissor lift it

supplied, by identification number; various inspection reports from 2003, prior to plaintiff's alleged accident on January 28, 2004; and deposition testimony from plaintiff's employer's superintendent and from its own manager, indicating that there had been no prior problems. Independent also submits evidence supporting its contention that a subsequent inspection of the lift revealed no defects or problems; and, it includes an expert affidavit and a number of other exhibits in support of its contention.

In opposition, plaintiff states that the results of the inspection conducted after the accident are irrelevant. This is because, according to plaintiff, the switch box was replaced between the time of the accident and the time of inspection. His discussion is somewhat hard to follow,[1] but essentially plaintiff appears to state, based on exhibits and various expert testimony, that plaintiff operated a control box that had a separate toggle switch, and that the switch on the inspected scissor lift was different and also was located on the joy stick. Plaintiff also states that his "off the cuff" comments about problems with the machine provided notice of the problem.

After reviewing the materials on both sides, the Court denies summary judgment as to the Labor Law § 200 and common law negligence claims. Because of the conflicting statements regarding notice and questions about whether any parts of the scissor lift were replaced following the accident, issues of fact remain.

Plaintiff's counsel also makes several comments relating to the credibility of Independent's witness which the Court finds altogether unpersuasive. The bias of the

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[1] The court requests that in the future the parties are more concise in their presentations and their papers are more clearly written. Various problems with the parties' papers made it much harder for the court to decide these motion.

witness on behalf of his employer is no greater than the bias of plaintiff or any other party. Therefore, this fact alone does not render his detailed testimony unbelievable. The fact that the witness has enjoyed success in his career suggests that he has done well in his job – not that he lied under oath or was bribed with a promotion, which appears to be counsel's insinuation.

II. Bovis and 731's Joint Motion for Summary Judgment

Bovis and 731 (jointly, "Bovis") also move to dismiss the claims against it. Initially, plaintiff concedes that he has no Labor Law § 240(1) claim on the facts of this case. Therefore, the Court dismisses this claim without discussion.

The Labor Law § 200 claim should also be dismissed. Plaintiff notes that a Bovis inspector was on the site regularly and he had the right to inspect the premises to ensure there were no safety violations. Moreover, plaintiff states, Bovis retained stop work authority. According to plaintiff, Bovis retained sufficient supervisory control to impose liability, precluding summary judgment on the Labor Law 200 claim against Bovis. Plaintiff cites numerous cases in support of his contention. However, because of more recent case law which is binding on this Court, plaintiff is incorrect in his assertion. In O'Sullivan v. IDI Construction Co., Inc., 28 A.D.3d 225, 226-27, 813 N.Y.S.2d 373, 375-76 (1st Dept. 2006), which the Court of Appeals affirmed, 7 N.Y.3d 805, 822 N.Y.S.2d 745 (2006), the First Department held that there was no cause of action against a general contractor under Labor Law § 200 even though, in that case, the general contractor had an on-site safety manager responsible for the safety of the subcontractors' work and the power to stop work. Subsequent cases have followed this rule. E.g., Burkoski v. Structure Tone, Inc., 40 A.D.3d 378, 381, 836 N.Y.S.2d 130, 134

(1st Dept. 2007); Chuqui v. Church of St. Mary Margaret, 39 A.D.3d 397, 397, 835 N.Y.S.2d 74, 76 (1st Dept. 2007). The earlier cases on which plaintiff relies, therefore, no longer constitute good law. See also Hughes v. Tishman Const. Corp., 40 A.D.3d 305, 309, 836 N.Y.S.2d 86, 91 (1st Dept. 2007) (acknowledging the inconsistency in First Department precedent, but concluding that "the overarching principle that liability under Labor Law § 200 or for common-law negligence may only be imposed on a general contractor or construction manager who controls the manner in which the plaintiff performed his or her work" and, accordingly, finding that retention of safety inspector on site is insufficient to impose liability).

Next, to support his Labor Law § 241(6) claim, plaintiff must assert a specific Industrial Code violation. Earlier in the litigation, plaintiff set forth the following provisions as applicable to the case at hand: Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.21, 23-1.29, 23-2, 23-5, 23-6, 23-7, 23-8, and 23-9. It appears that at this point in the litigation, plaintiff relies solely on 12 NYCRR §§ 23-9.2(a) and 23-9.6(a)(2)(3) and withdraws those allegations relating to the other Code provisions. Therefore, the Court limits its discussion of Labor Law 241(6) claim to 12 NYCRR §§ 23-9.2(a) and 23-9.6(a)(2)(3).

Industrial Code 12 NYCRR § 23-9.2 does not support a Labor Law § 241(6) claim "because it merely sets forth a general safety standard." Modeste v. Mega Contracting, Inc., 40 A.D.3d 255, 256, 835 N.Y.S.2d 156, 158 (1st Dept. 2007). Plaintiff urges this court to adopt the contrary determination of other departments. However, in light of the fact that there are binding decisions in the First Department, the Court has no discretion as to this issue.

Next, the Court turns to the second allegedly applicable provision, 12 NYCRR § 23-9.6(a)(2)(3). In pertinent part, this section states that aerial basket controls "shall be tested to make sure that they are in proper working order"; and that "a record of such inspection and testing which may affect the safe operation of the aerial basket shall be corrected before [the basket] is placed in operation." According to plaintiff, his underlying claim is, in pertinent part, that the scissor lift did not have a lift enable switch and that this comprised an unsafe condition for which Bovis is liable. Plaintiff contends that pursuant to 12 NYCRR § 23-9.6(a)(2)(3) plaintiff's employer should have tested the scissor lift, discovered the defect, and returned the control box and/or the lift itself to Independent Aerial in exchange for a safe model. Plaintiff also argues there also was no record of inspection and testing, as required. Bovis, however, argues that the guidelines relating to aerial baskets do not apply here, with respect to the scissor lift. In support, Bovis points to the affidavit of its expert, who summarily states that the provision in question applies to a number of items which he lists, including aerial baskets, and that a scissor lift clearly is not among the listed items. Bovis further notes, correctly, that plaintiff has provided no contrary expert or other evidence.

Based on the above, Bovis has carried its burden of proof on this point by way of the expert affidavit. Plaintiff has not refuted it except by conclusory statements regarding the toggle switch. Unfortunately, however, the Court knows nothing about the types of machinery in question, and all arguments on this issue are relatively conclusory. Therefore, although the Court dismisses this claim, plaintiff may decide to reargue this prong of the motion, making a focused, clear presentation of the issue, including an adequate explanation of the equipment and of his challenge, and providing

adequate evidentiary proof.

Indemnification motion and cross motion

In addition, Enclos and Independent have moved for summary judgment on Independent's demand for indemnification.[2] In general, when there are triable issues as to whether the party seeking indemnification is guilty of negligence, summary judgment on this claim is also premature. See Robinson v. City of New York, 22 A.D.2d 293, 294, 802 N.Y.S.2d 48, 50 (1st Dept. 2005). Under General Obligations Law ("GOL") § 5-322.1, however, an agreement is void if it attempts to indemnify a party against liability for damages which that party's own negligence has caused in whole or in part. Robinson v. City of New York, 8 Misc. 3d 1012 (A), 801 N.Y.S.2d 781 (Index No. 8537/01, July 11, 2005) (avail at 2005 WL 1618087, at *5), aff'd, 22 A.D.2d 293, 802 N.Y.S.2d 48 (1st Dept. 2005). Though the case law in this area is not consistent, a recent First Department case suggests that an agreement is voided by operation of GOL § 5-322.1 unless it contains "the requisite language limiting the subcontractor's obligation to that permitted by law." Jackson v. City of New York, 38 A.D.3d 324, 831 N.Y.S.2d 176 (1st Dept. 2007). Under Jackson, the indemnification provision at issue is void because it does not contain this limiting language. Of the cases Independent cites, only Dutton v. Charles Pankow Builders, 296 A.D.2d 321, 745 N.Y.S.2d 521 (1st Dept. 2002), lv denied, 99 N.Y.2d 511, 760 N.Y.S.2d 102 (2003), applies to a case of the type at hand. Though it would have supported Independent's position, Enclos points out that later cases have modified the ruling in Dutton, mandating dismissal.

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[2] Independent made one summary judgment motion, including its requests for this relief as against plaintiff and as against Enclos.

Finally, as the Court has granted Bovis' motion on substantive grounds, it does not reach the issue of discovery sanctions.

Conclusion

Accordingly, it is

It is

ORDERED that Independent's motion for summary judgment as against plaintiff is granted to the extent of severing and dismissing the Labor Law §§ 240 and 241 claims and is otherwise denied; and it is further

ORDERED that Bovis and 731's motion for summary judgment is granted and the claims against these parties are severed and dismissed; and it is further

ORDERED that the portion of Independent's motion seeking summary judgment as against Enclos is denied and Enclos' cross motion seeking dismissal of Independent's claim against it is granted and the third party action is severed and dismissed; and it is further

ORDERED that sanctions are denied.

ENTER:

Dated: 12/21/07

LOUIS B. YORK J.S.C.