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

PRESENT: HON. LELAND DEGRASSE PART 25

Justice

Index Number : 115524/2004
KIELAR, WIOLETA
VS
METROPOLITAN MUSEUM OF ART
Sequence Number : 004
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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECISION IS DISCUSSED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

DEC 28 2007

Dated: _____

_____ J.S.C.

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

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

----------X

WIOLETA KIELAR, As Administratrix of the Estate of MARCIN KIELAR, Deceased, and WIOLETA KIELAR, INDIVIDUALLY,

Plaintiff,

-against-

Index No. 115524/04

THE METROPOLITAN MUSEUM OF ART, THE CITY OF NEW YORK and TOTAL SAFETY CONSULTING, L. L. C.,

Defendants.

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THE METROPOLITAN MUSEUM OF ART,

Third-Party Plaintiff,

-against-

R. SMITH RESTORATION, INC.,

Third-Party Defendant.

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DeGrasse, J.:

Motion sequences two, three and four are consolidated. Defendant Total Safety Consulting L. L. C., third-party defendant, R. Smith Restoration, Inc., defendant the City of New York and defendant / third-party plaintiff, Metropolitan Museum of Art move for summary judgment. Plaintiff cross-moves for the same relief. On September 17, 2004, Marcin Kielar, plaintiff's decedent, was killed in a fall through a tempered glass skylight at premises owned by the City and leased to the Museum. Kielar, a laborer, was employed by R. Smith. At the time of the accident, R. Smith was engaged in the recaulking of skylights and walls pursuant to a written

agreement with the Museum. Kielar fell as he walked on the frame of the skylight while carrying the counterweight of a scaffold. The complaint invokes Labor Law §§ 200, 240 (1) and 241 (6) as well as theories of common-law negligence.

Plaintiff seeks summary judgment on the Labor Law § 240 (1) cause of action. The Museum and the City oppose plaintiff's motion and seek a dismissal of the claim on the grounds that (1) the accident did not arise out of risk related to elevation within the contemplation of the statute and (2) Kielar's negligence was the sole proximate cause of his death. R. Smith asserts that there is a question of fact as to whether the accident is related to the risks of elevation. The argument that the accident is not elevation related is refuted by the case of *Gandley v Prestige Roofing & Siding Co.* (148 AD2d 666 [1989], *appeal dismissed* 74 NY2d 792 [1989]) in which it was held that the statute was implicated by a worker's fall through an unprotected skylight.

The Museum and the City argue under Point Two of their memorandum of law that Kielar's conduct was the sole proximate cause of the accident because he "was taking reckless short cuts by walking on the frames of the skylights as opposed to walking on the flat stable gutters or bays of the skylight roof while transporting the counterweights." In this regard, Christopher Ironside, Kielar's foreman, testified that it was his decision to carry the counterweights over the skylight frames. Ironside further testified that carrying the counterweights in the 18 inch wide area between the skylights and the edge of the building was too awkward because water was in that area. The Museum and the City also cite Kielar's failure to use an available safety kit as part of his alleged negligence. The argument is unavailing in light of Ironside's testimony that the safety tie line did not extend to the area where Kielar fell. Accordingly, plaintiff is entitled to summary judgment on the Labor Law § 240 (1) cause of action.

A claim under Labor Law § 241 (6) must be predicated on a failure to comply with the Industrial Code (*see Ross v Curtis Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]). The Museum and the City seek the dismissal of plaintiff's Labor Law § 241 (6) cause of action on the ground that she does not cite any section of the Industrial Code of the State of New York in her bill of particulars. Industrial Code § 23-1.7 (b)(1)(I) is however cited in the affidavit of Kathleen Hopkins, plaintiff's safety expert. Absent unfair surprise or prejudice, the omission may be rectified by amendment even where a note of issue has been filed (*Walker v Metro-N. Commuter R. R.*, 11 AD3d 339, 340-341 [2004]). In any event, neither plaintiff, the Museum nor the City is entitled to summary judgment on the Labor Law § 241 (6) cause of action as there is a triable issue of fact as to whether there was negligence. The Museum and the City are, however, entitled to a dismissal of the Labor Law § 200 and common-law negligence claims because there is no evidence that they controlled or supervised the work which gave rise to the accident (*see Dennis v City of New York*, 304 AD2d 611 [2003]).

R. Smith seeks a dismissal of the Museum's third-party action and the City's cross claims on citing the antisubrogation rule which precludes an insured from seeking contribution or indemnification from another insured under the same policy (*see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294-296 [1993]). R. Smith's trade agreement required that its general liability insurance policy provide coverage for the Museum and the City as additional insureds. Accordingly, the additional insured endorsement of R. Smith's policy with Admiral Insurance Company provides for such coverage for "all persons or organizations as required by written contract." Similarly, R. Smith's excess / umbrella liability policy with American International Speciality Lines Insurance Company (AISLIC) provides that an insured is any

person or organization other than the named insured, included as an additional insured under the scheduled underlying insurance. Copies of the trade agreement and policies are annexed to R. Smith's papers. In light of R. Smith's documentary proof, it does not avail the Museum and the City to simply assert that "[w]hile R. Smith may have purchased insurance from Admiral and AISLIC, R. Smith is not being covered by them for the instance case [sic]." This assertion lacks probative value because it is set forth in the affirmation of an attorney who has no personal knowledge of the facts (*see Quevedo v Fine,* 302 AD2d 990 [2003]).

Form number CG 00 01 10 01 of the Admiral policy and endorsement number 10 of the AISLIC policy exclude coverage for bodily injury to an employee of an insured arising out of and in the course of the employee's employment by the insured. The Admiral exclusion, however, does not apply to liability assumed by the insured under an "insured contract." The Admiral policy defines an insured contract as an agreement under which the insured assumes the tort liability of another party to pay for bodily injury or property damage to a third person. Thus, the Admiral policy's employee exclusion is inapplicable. The AISLIC policy presents a different story. R. Smith relies upon an amendment which provides that "Paragraphs, 1., 2. and 3 shall not apply to any liability arising out of Bodily Injury or Personal Injury and Advertising Injury if such coverage is provided by Scheduled Underlying Insurance." However, the provision thereby amended, entitled "Employees and Volunteers," excludes coverage for the liability *of* any employee or volunteer qualifying as an insured.. Hence, the AISLIC amendment R. Smith cites does not apply to the employee exclusion. The employee exclusion thereby precludes coverage under the AISLIC policy as to the Museum and the City, the additional insureds (*see e. g. Guachichulca v Tauber & Assoc., LLC,* 37 AD3d 760 [2007]; *Sixty Sutton Corp. v Illinois Union*

Ins. Co., 34 AD3d 386 [2006]).

Total Safety is a consulting firm which had been retained by R. Smith. It has shown that it did not act as the agent of an owner or contractor and did not control the workplace or Kielar's work.

For the foregoing reasons, Total Safety's motion is granted. The Clerk shall enter judgment dismissing the plaintiff's claims and all other claims asserted against Total Safety. The action is severed and continued with respect to the remaining parties. R. Smith's motion is granted only to the extent that the Museum's third-party claim and the City's cross claim against R. Smith are dismissed to the extent of coverage provided for them as additional insureds under the Admiral policy. The motion by the Museum and the City are granted to the extent that liability is determined in their favor with respect to their respective contractual indemnification third-party claim and cross claim against R. Smith only insofar as their additional insured coverage under the Admiral policy is exhausted. In addition, the Labor Law § 200 and common-law negligence causes of action are dismissed. Plaintiff's cross motion is granted to the extent that liability is determined in plaintiff's favor against the Museum and the City under the Labor Law 240 (1) cause of action. An assessment of damages shall be conducted at the time of trial.

Dated: December 28, 2008

J. S. C.

HON. LELAND DeGRASSE