

Orellana v 1740 Broadway Assoc., L.P.
2008 NY Slip Op 31171(U)
April 15, 2008
Supreme Court, New York County
Docket Number: 0100115/2006
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 100115/2006

ORELLANA, MIGGUEL

vs
1740 BROADWAY ASSOCIATES

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

7

8, 9, 10, 11

Cross-Motion: ⁽²⁾ Yes No

3, 4, 5, 6

Upon the foregoing papers, it is ordered that this motion & cross-motions for summary judgment are decided in accordance with the attached memorandum decision.

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

FILED

APR 23 2008

NEW YORK COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 4/15/08

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X

MIGUEL ORELLANA,

Plaintiff,

Motion Seq. #003

-against-

1740 BROADWAY ASSOCIATES, L.P., and MENDIK
REALTY COMPANY, INC. & ADVANCED
CONTRACTING CORP.,

Index No. 100115/06

Defendants.

-----X

1740 BROADWAY ASSOCIATES, L.P., and MENDIK
REALTY COMPANY, INC.,

Third-Party Plaintiffs,

Index No. 591078/06

-against-

ADVANCED CONTRACTING CORP.,

Third-Party Defendant.

-----X

1740 BROADWAY ASSOCIATES, L.P. and MENDIK
REALTY COMPANY, INC.,

Second Third-Party Plaintiffs,

Index No. 590313/07

-against-

POLO ELECTRIC CORP.,

Second Third-Party Defendant.

-----X

Doris Ling-Cohan, J.:

In this action arising from a construction site
accident, defendants 1740 Broadway Associates, L.P. (1740
Broadway) and Mendik Realty Company, Inc. (Mendik; together, B&M)
move, pursuant to CPLR 3212, for summary judgment dismissing the

complaint as against them, or, in the alternative, for indemnification against Advanced Contracting Corp. (ACC) and Polo Electric Corp. (Polo). Second third-party defendant Polo cross-moves for summary judgment dismissing all claims against it. Defendant/third-party defendant ACC also cross-moves for summary judgment dismissing all claims and cross claims against it.

BACKGROUND

On June 8, 2005, plaintiff, then a laborer employed by non-party Seasons Industrial Contracting (Seasons), was standing five feet up on a six-foot ladder,¹ performing demolition of a wall on the seventh floor of premises located at 1740 Broadway, in Manhattan. He was using a sledge hammer to break the wall apart, when a large piece of sheet rock with metal attached at its ends came down on plaintiff, severely lacerating his left upper arm, and causing him to fall off the ladder. The premises were owned by 1740 Broadway and Mendik was 1740 Broadway's managing agent for the property. B&M retained ACC to perform interior demolition and carting away of the debris on several floors of the premises. In turn, ACC hired Seasons to carry out the demolition part of its contract. Polo challenges the allegation that it was hired by B&M to provide the temporary lighting required for the demolition to take place.

¹This statement is according to plaintiff's Supplemental Bill of Particulars, dated August 11, 2006, ¶ 8. However, in his deposition testimony, plaintiff asserts that he was on the eighth rung of a 12-foot ladder, approximately 10 feet from the floor when he was struck (Plaintiff's Depo., at 30).

Plaintiff's complaint alleges two causes of action: (1) for negligence, and (2) for violations of Labor Law §§ 200, 240, 241, and "other pertinent sections of the Labor Law." In his Supplemental Bill of Particulars, dated January 15, 2007, plaintiff further alleges violations of Labor Law §§ 213 and 242. B&M's two third-party actions assert claims for common-law and contractual indemnification, contribution, and breach of contract against ACC and Polo. ACC and Polo bring counterclaims against B&M for common-law indemnification or contribution; in addition, ACC asserts a counterclaim against B&M for contractual indemnification.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-*

Stephenson, 39 AD3d at 306, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

ACC

As an initial matter, ACC contends that it cannot be held liable under the Labor Law because it was neither the owner of the site nor the general contractor for the work. ACC maintains that it was hired solely to perform demolition on particular floors and to cart the debris away, in effect, that it was a prime contractor at the site. It then subcontracted out the demolition work on the seventh floor to Seasons, so, according to ACC, it no longer had any authority to control or supervise the demolition work. B&M argues that ACC had the authority to control the demolition, such that it would be responsible to avoid or correct unsafe conditions, by reason of its contract with B&M. According to B&M, ACC's hiring of a subcontractor did not obviate its own authority to control the work that it had contracted to do.

It is not disputed that the contract between B&M and ACC consists of three documents: (1) a May 31, 2005 proposal wherein ACC proposed "to supply all labor, materials, equipment

and insurance" for the enumerated work, which included both demolition and carting away of debris; (2) a June 6, 2005 purchase order by which ACC agreed to provide "Prep and demo on part of 2nd. Fl. And floors 6 thru 11 and 18 as per attached proposal dated 5/31/05"; and (3) an invoice dated June 23, 2005, which billed B&M specifically and solely for demolition and carting away of debris on the seventh floor. On the purchase order, someone has written in figures deducting the amount charged for the work on the seventh floor from the total cost for the entire job, leaving the remainder as the "bal due." [Exh. G, ACC's Cross-Motion].

According to Eugene Skowronski, ACC's former president, ACC was hired by Vornado² to perform the demolition and carting for particular floors at the site, and that because Vornado required union labor for the job, ACC subcontracted out the demolition portion of the contract to a union shop, Seasons (Skowronski 8/1/07 Aff., ¶¶ 3-4). Skowronski attests that Seasons provided all of the labor, materials and equipment to perform the demolition, and that ACC performed only the carting activities, supplying the containers and trucks for debris removal (*id.*, ¶¶ 5-6). Further, Skowronski states:

[ACC] was not the general contractor on site.
[ACC] did not have any supervisory personnel
on site. It did not supervise the demolition

²"It has been explained to me that Vornado manages the property on behalf of the named, Defendant/Third-party Plaintiff 1740 Broadway Associates, L.P." (Skowronski 8/1/07 Aff., ¶ 3).

activities on the 1740 Broadway site, nor did it supervise the work performed by the plaintiff.

(*id.*, ¶ 7).

Although B&M identifies ACC as the general contractor for the project (see Sofer 6/28/07 Affirm., ¶ 15), this claim is completely unsubstantiated. Ordinarily, a general contractor is "responsible for the supervision, maintenance or overall control of the work" (*Blechman v I.J. Peiser's & Sons*, 186 AD2d 50, 51 [1st Dept 1992]).

Here, instead, as stated above, it appears that ACC was the prime contractor on the site. Prime contractors are those contractors which enter into a contract with an owner for only particular portions of the overall work (see *Gadani v Dormitory Authority of State of New York*, 43 AD3d 1218, 1218 [3d Dept 2007] [prime contractors responsible "for individual aspects of the project"]; *Aversano v JWH Contracting, LLC*, 37 AD3d 745, 747 [2d Dept 2007] [prime contractors "responsible for different portions of the renovation"])). As a prime contractor, ACC would be liable under the Labor Law "only if [it was] acting as the agent[] of the owner or general contractor by virtue of the fact that [it] had been given the authority to supervise and *control* the work being performed at the time of the injury [internal quotation marks and citations omitted]" (*Musselman v Charles A. Gaetano Construction Corp.*, 285 AD2d 868, 869 [3d Dept 2001]).

A prime contractor hired for a specific

project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor only if it has been "delegated the ... work in which plaintiff was engaged at the time of his injury," and is therefore "responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). ... However, the nondelegable liability imposed by Labor Law § 240 (1) attaches only to a contractor that has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of his injury

(*Coque v Wildflower Estates Developers*, 31 AD3d 484, 488 [2d Dept 2006]). "[L]iability under Labor Law §§ 240 and 241 does not attach 'to prime contractors having no authority to supervise or control the work being performed at the time of injury' [citation omitted]" (*Soskin v Scharff*, 309 AD2d 1102 1104 [3d Dept 2003]).

Once a party has been found to be a prime contractor, it may, or may not be found to be liable under the Labor Law as an "agent" of the owner or general contractor (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] [prime contractors not agents because never delegated work that plaintiff was doing]; *Coque*, 31 AD3d at 488 [prime contractor not liable because had no authority to supervise or control the work]; *Musselman*, 285 AD2d at 869-870 [prime contractor's contract did not require it to control and coordinate work of its subcontractors]).

Based upon the submitted papers, it is clear that ACC was a prime contractor at the site. Nonetheless, the submitted facts fail to establish that ACC retained authority to "supervise

and control" Seasons' demolition work (see *Musselman* 285 AD2d at 869-870). The B&M/ACC contractual documents fail to indicate that ACC agreed to provide supervision and control over the demolition work, and the testimony of Skowronski verifies that ACC was hired by Vornado and was not in a supervisory role at the time of Orellana's injury. This is unrefuted by plaintiff. In fact, plaintiff indicates that only Seasons' employees were present at the accident site (Plaintiff's Deposition at 37-38, 101-102). Liability only attaches to prime contractors who retain authority to supervise and control the work being performed and, thus, ACC's summary judgment motion is granted (see *Musselman*, 285 AD2d at 869-70).

Plaintiff's Complaint

Labor Law § 240 (1)

Labor Law § 240 (1) imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). "Labor Law § 240 (1) is directed solely at elevation-related hazards, and is not applicable where the injury sustained resulted from other types of hazards 'even if proximately caused by the absence of an adequate scaffold or

other required safety device' [citing *Ross*, 81 NY2d at 500, and other citations]" (*Georgopoulos v Gertz Plaza*, 13 AD3d 478, 479 [2d Dept 2004]). If an accident was the result of a general hazard of the workplace, it does not fall within the intendment of Labor Law § 240 (1) (see e.g. *Sahota v Celaj*, 11 AD3d 308, 309 [1st Dept 2004]).

In this case, plaintiff was struck by a falling object. In such cases, the Court of Appeals decision in *Narducci v Manhasset Bay Associates* (96 NY2d 259 [2001]) sets the standard. In *Narducci*, plaintiff was working on a window frame when he saw a large piece of glass from an adjacent window frame falling toward him. He was able to prevent himself from being hit in the face, but he was severely cut on his right arm. In determining that Labor Law § 240 (1) was inapplicable in his case, the *Narducci* Court found that

not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein [citation omitted]. . . . Labor Law § 240 (1) applies to both "falling worker" and "falling object" cases. With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to "a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, *supra*, 78 NY2d at 514). Thus, for section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A

plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute [citations omitted]. . . . Absolute liability for falling objects under Labor Law § 240 (1) arises only when there is a failure to use necessary and adequate hoisting or securing devices. . . . The fact that gravity worked upon [the] object which caused plaintiff's injury is insufficient to support a section 240 (1) claim [citations omitted]

(*Narducci*, 96 NY2d at 267, 267-268, 268, 270). The Court reiterated the standard in *Roberts v General Electric Company* (97 NY2d 737 [2002]), a case where the plaintiff was injured by a falling piece of asbestos which had been cut and deliberately dropped from approximately 12 feet above ground. In *Roberts*, the Court found that:

"the asbestos 'that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell and thus Labor Law § 240 (1) does not apply. . . . This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected'".

(*Roberts*, 97 NY2d at 738, quoting *Narducci*, 96 NY2d at 268).

Here, there is no evidence that plaintiff's injuries resulted from his fall off the ladder; the evidence indicates instead that he was injured only by the falling of the sheetrock and metal on his arm, resulting from plaintiff's hammering on the sheetrock when he was demolishing the wall. Neither the sheetrock, nor the metal, was material that was being hoisted or that required securing for the purposes of the plaintiff's work,

and no safety device such as those enumerated in the statute was either mandated or even expected in the performance of the job.

Plaintiff's accident resulted from an ordinary hazard of the workplace, and thus, the accident does not fall within the protections of Labor Law § 240 (1). Therefore, the parts of B&M's and ACC's motions for summary judgment dismissing this cause of action are granted.

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200, the codification of the common law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (see e.g. *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 [2d Dept 2007]). Here, the dangerous condition of falling sheetrock and metal resulted from plaintiff's hammering on the sheetrock, demolishing the wall. "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 [internal

quotation marks and citations omitted]" (*Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 525 [2d Dept 2007]). Further, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires *actual supervisory control or input into how the work is performed* [emphasis added]" (*Hughes v Tishman Construction Corp.*, 40 AD3d 305, 311 [1st Dept 2007]).

Both B&M and ACC have demonstrated that they did not actually supervise Seasons' work. B&M retained ACC to perform interior demolition and carting work, and ACC subcontracted the demolition work to Seasons. There is no evidence that either B&M or ACC had any involvement with the work that plaintiff was doing. In fact, plaintiff himself testified that only his Seasons supervisor, Miguel Mendez, provided him with instructions and supervision (Plaintiff's Depo., at 37-38, 102), and ACC's ex-president specifically avers that ACC did not supervise Seasons' demolition activities (Skowronski 8/1/07 Aff., ¶ 7).

Therefore, the parts of B&M's and ACC's motions which seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims are granted.

Labor Law § 241 (6)

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to persons employed in construction, excavation, or demolition work, regardless of the absence of

control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]).

To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*Buckley v Columbia Grammar & Preparatory*, 44 AD3d at 271).

In his complaint and various bills of particulars, plaintiff has asserted violations of no less than 26 provisions of the Industrial Code (12 NYCRR Part 23), at least three of which do not even exist (§§ 23[2e]; 23[e2]; 23-18.1). Such a scattershot approach is disfavored, and should be avoided.

Of the extant provisions alleged, some are insufficient to support a section 241 (6) claim: § 23-1.2 (*Doyne v Barry, Bette & Led Duke Inc.*, 246 AD2d 756, 759 n 2 [3d Dept 1998]); § 23-1.5 (a), (b), (c) (2) and (3) (*Meslin v New York Post*, 30 AD3d 309 [1st Dept 2006]; *Hassett v Celtic Holdings, LLC*, 7 AD3d 364 [1st Dept 2004]; *Sihly v New York City Transit Authority*, 282 AD2d 337 [1st Dept 2001]).

Other provisions are inapplicable to the facts of this case: § 23-1.19 (catch platforms); § 23-2.6 (catch platforms for construction of exterior masonry walls); § 23-3.3 (b) (5) (demolition of exterior walls by hand); 12 NYCRR 59-1.11

(concerning workplace safety and loss prevention consultants).

Still others are both insufficient and inapplicable: § 23-1.6 (*Lawyer v Rotterdam Ventures*, 204 AD2d 878 [3d Dept 1994]) (no evidence that plaintiff failed to comply with the provision's safety requirements); § 23-1.10 (a) (no evidence that plaintiff's hammer was defective, and provision itself does not constitute a specific, positive command); § 23-1.33 (*McMahon v Durst*, 224 AD2d 324 [1st Dept 1996]) (plaintiff was not a person passing by the construction site); § 23-2.1 (b) (*Gonzalez v Glenwood Mason Supply Co*, 41 AD3d 338 [1st Dept 2007]) (no evidence that the debris was disposed of improperly); § 23-6.1 (b) (*id.*), (c) (*Sharrow v Dick Corp.*, 233 AD2d 858, 861 [4th Dept 1996]), and (j) (§ 23-6.1 pertains to general requirements for material hoisting).

Some of plaintiff's alleged provisions are sufficiently specific, but inapplicable. Section 23-1.7 (a) (1) is specific enough to support a section 241 (6) claim (*Portillo v Roby Anne Development, LLC*, 32 AD3d 421, 422 [2d Dept 2006]), but cannot apply in this matter because the required overhead protection would have made plaintiff's work impossible. Section 23-1.7 (b) suffices to support a section 241 (6) claim (*Bell v Bengomo Realty*, 36 AD3d 479 [1st Dept 2007]), but is inapplicable because plaintiff was not injured by a fall through a hazardous opening or from bridge or highway overpass construction. Section 23-2.1 (a), while specific enough (*Flihan v Cornell University*, 280 AD2d

994 [4th Dept 2001]), is inapplicable because plaintiff was not injured by stored material or equipment. Section 23-3.3 (b) (6) is sufficient to support a claim, but is inapplicable because there is no evidence that the provision was violated, i.e., that any wall that was being demolished was left standing more than 15 feet above the uppermost floor on which persons were working. Section 23-3.3 (b) (3) is specific (*Perillo v Lehigh Construction Group*, 17 AD3d 1136 [4th Dept 2005]), but inapplicable because plaintiff was not injured by an "unguarded" wall.

Section 23-3.3 (c) is specific enough to support a section 241 (6) claim (*Gawel v Consolidated Edison Co. of New York*, 237 AD2d 138 [1st Dept 1997]). However, it is not clear whether the actions by plaintiff's supervisor, Miguel Mendez, on the seventh floor that day were tantamount to performing the inspections mandated by this provision. While plaintiff testified that Mendez was on the seventh floor "the whole time," "the entire time" (Plaintiff's Depo., at 37, 102, 119), he also testified that Mendez was not on the floor when the accident happened (*id.* at 14). In answer to the question of what Mendez did when he supervised, plaintiff responded, "Checking how the tools were, how the construction was, checking the personnel" (*id.* at 37). Whether checking "how the construction was" constitutes an "inspection" is a question of fact. Thus, the part of B&M's motion which seeks summary judgment on plaintiff's Labor Law § 241 (6) claim, on the basis of Industrial Code § 23-

3.3 (c), is denied.

The final Industrial Code provision alleged is 12 NYCRR 23-1.30, which provides:

Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

Section 23-1.30 is sufficiently specific to support a Labor Law § 241 (6) claim (*Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347 [1st Dept 2006]). Here, whether the lighting present at the time of plaintiff's accident was sufficient to comply with this provision is a question of fact. Plaintiff's accident occurred on June 8, 2005, at approximately 8-8:30 P.M. (Plaintiff's Depo., at 12 [8 P.M.]; Plaintiff's 5/6/06 Bill of Particulars, ¶ 1 [8:30 P.M.]; Plaintiff's 1/3/07 Bill of Particulars, ¶ 3 [8:30 P.M.]). At his deposition, plaintiff testified that "[t]here was a lot of light" (Plaintiff's Depo., at 15) which was coming from two temporary lights located 25-30 feet from where he was working (*ibid.*), but he could not see what he was doing very well or very clearly (*id.* at 15-16). He also testified that he was only able to see approximately five feet around him because "[t]here wasn't a lot of light" (*id.* at 16-17). He had asked "[t]he electrician" (*id.* at 16) for more

light, but "[t]hey did not have any more" (*ibid.*). He had also complained to his supervisor, Mendez, "[w]hen the light was missing" (*id.* at 103).

Because the issue of whether the lighting at plaintiff's workplace was up to Code cannot be resolved on this motion, the parts of B&M's motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, based on Industrial Code § 23-1.30, must be denied.

Labor Law §§ 213 and 242

In his January 15, 2007 bill of particulars, plaintiff improperly pleads violations of Labor Law §§ 213 (a penal statute) and 242 (Commissioner of Labor has exclusive authority to enforce Article 10 of the Labor Law), neither of which can state a cause of action in this matter. Thus, the parts of B&M's and ACC's motions which seek summary judgment dismissing plaintiff's Labor Law §§ 213 and 242 causes of action are granted.

The Third-Party Actions

Contribution

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; see also *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 594 [2005] ["A claim

for contribution rises and falls based on the existence of separate tortfeasors"]).

"Labor Law §§ 240 and 241 impose absolute liability on '[a]ll contractors and owners and their agents' for any breach of a statutory duty to provide safety measures that proximately cause injury (see Labor Law 240 [1]; § 241)" (*Albanese v City of New York*, 5 NY3d 217, 219 [2005]). Such liability is not tantamount to a finding of negligence, however (see *Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990] [referring to Labor Law § 240 (1)]).

There is no evidence that B&M was negligent in failing to maintain proper lighting pursuant to section 241 (6). No claim against B&M lies under Labor Law § 240 (1), and the fact that questions of fact exist with respect to its possible statutory liability under section 241 (6) is not a hindrance to dismissing its contribution claims against ACC and Polo. Since B&M is not a co-tortfeasor, its claims for contribution cannot lie, and the parts of ACC's and Polo's cross motions seeking summary judgment dismissing B&M's contribution claims are granted.

Common-Law Indemnification

"Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine' [citation

omitted]" (*Edge Management Consulting v Blank*, 25 AD3d 364, 367 [1st Dept 2006]; see also *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2d Dept 2007]). "To establish a claim for common-law indemnification, 'the one seeking indemnity 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 causation of the accident' [citations omitted]" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]; see also *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999] [same]).

There is no evidence in the submitted papers of negligence by B&M, and ACC has also established that it was not negligent in this matter. Thus, B&M's cause of action for common-law indemnification as against ACC fails, and that part of ACC's cross motion which seeks summary judgment dismissing this claim is granted. The part of B&M's motion which seeks summary judgment on this claim as against ACC is denied.

Polo, however, has not established a lack of negligence on its part. While Polo protests that it was not the electrician responsible for the temporary lighting at the site, having been brought into this case post-note of issue, it has not yet had the opportunity to establish its lack of negligence through discovery. Because questions of fact remain concerning whether Polo was involved in the accident, summary judgment in its favor

dismissing B&M's common-law indemnification claim as against it is denied. Because B&M has not established that Polo was negligent as a matter of law, summary judgment in B&M's favor on its common-law indemnification claim is denied.

B&M's "Breach of Contract By Failing to Provide a Safe Place to Work" Causes of Action

These claims asserted against ACC and Polo merely duplicate B&M's claims for common-law indemnification and contribution. Thus, summary judgment dismissing these claims is granted.

Contractual Indemnification

The Vornado/ACC contract documents and the Vornado/Polo purchase order do not contain any contractual indemnification language. Thus, the parts of ACC's and Polo's cross motions which seek summary judgment dismissing B&M's contractual indemnification claims are granted, and the part of B&M's motion which seeks summary judgment on its contractual indemnification claims is denied.

Breach of Contract by Failure to Procure Insurance Naming B&M as an Additional Insured

While the Vornado/ACC proposal letter states that ACC would supply "all labor, materials, equipment and insurance" for the enumerated work, there is nothing in the contract documents which requires ACC to name B&M as an additional insured on ACC's policy. Therefore, summary judgment in ACC's favor dismissing this claim is granted.

The Vornado/Polo purchase order does not contain any insurance language at all. Therefore, summary judgment in Polo's favor dismissing this claim is also granted.

CONCLUSION

Accordingly, it is

ORDERED that the parts of 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s motion which seek summary judgment dismissing plaintiff's Labor Law §§ 200, 213, 240 (1), and 242 claims, as well as his common-law negligence claim are granted; and it is further

ORDERED that the part of 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted, except to the extent that this claim is based on Industrial Code §§ 23-1.30 and 23-3.3 (c), which part of the motion is denied; and it is further

ORDERED that the part of 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s motion which seeks summary judgment in its favor on its indemnification claims against Advanced Contracting Corp. and Polo Electric Corp. is denied; and it is further

ORDERED that the parts of Advanced Contracting Corp.'s cross motion which seek summary judgment dismissing plaintiff's Labor Law §§ 200, 213, 240 (1), 240 (6), and 242 claims, as well as his common-law negligence claim are granted; and it is further

ORDERED that the part of Advanced Contracting Corp.'s cross motion which seeks summary judgment dismissing 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s third-party complaint is granted, and the third-party complaint is dismissed with costs and disbursements to Advanced Contracting Corp. as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the part of Polo Electric Corp.'s cross motion which seeks summary judgment dismissing 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s contribution, contractual indemnification, and breach of contract claims is granted; and it is further

ORDERED that the part of Polo Electric Corp.'s cross motion which seeks summary judgment dismissing 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc.'s common-law indemnification claim is denied; and it is further

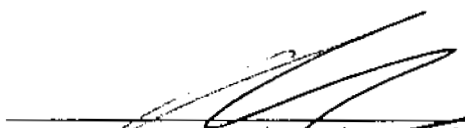
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendants 1740 Broadway Associates, L.P. and Mendik Realty Company, Inc., shall serve a copy of this order upon all parties with notice of entry.

Dated: April 15, 2008

FILED
APR 23 2008

NEW YORK
COUNTY CLERK'S OFFICE


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

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