

Romero v Park Slope Fifth Ave NY LLC

2008 NY Slip Op 31599(U)

June 10, 2008

Supreme Court, Kings County

Docket Number: 0005080/2003

Judge: Lawrence S. Knipel

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of June, 2008.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

CARLOS ROMERO,

Plaintiff,

Index No. 5080/03

- against -

PARK SLOPE FIFTH AVE NY LLC, ASTORIA
FEDERAL SAVINGS, C. ROMANDO & SONS, AND
PLANNED SYSTEM INTEGRATION, LTD.,

Defendant.

-----X

PARK SLOPE FIFTH AVE NY LLC, ASTORIA
FEDERAL SAVINGS, C. ROMANDO & SONS.,

Third-Party Plaintiff,

Index No. 75246/04

- against -

MIDTOWN CONTRACTING CORP.,

Third-Party Defendant.

-----X

The following papers numbered 1 to 15 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Papers Numbered

1-6, 9-12

Opposing Affidavits (Affirmations) _____

7, 14

Reply Affidavits (Affirmations) _____

8, 13, 15

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, plaintiff Carlos Romero moves for an order, pursuant to CPLR 3212, seeking partial summary judgment on his Labor Law §§240 (1) and 241-a claims as asserted against defendants Park Slope Fifth Ave NY LLC (Park Slope), C. Raimondo & Sons (Raimondo) s/h/a C. Romarido & Sons, and Planned System Integration, Ltd., (PSI). Defendants/third-party plaintiffs Park Slope and Raimondo¹ move for: (i) summary judgment dismissing plaintiff's complaint insofar as asserted against them; (ii) an order directing that these defendants are entitled to defense and indemnity from third-party defendant Midtown Contracting Corp. (Midtown); (iii) an order denying plaintiff's summary judgment motion; and (iv) an order pursuant to CPLR 3126, compelling Midtown to produce the insurance policy, declaration page and certificate of insurance relevant to the construction project at issue. PSI cross-moves for an order pursuant to CPLR 3212 dismissing plaintiff's Labor Law §§240 (1) and 241-a claims. PSI moves for an order, pursuant to CPLR 3212, dismissing plaintiff's Labor Law §241 (6) claim. PSI also cross-moves for an order dismissing all claims and cross claims asserted against it.

Background

The record reveals that plaintiff was employed by Midtown as a concrete and masonry laborer. On August 2, 2001, he was working at a building located at 447/455 Fifth Avenue in Brooklyn. The building was owned by Park Slope, and Raimondo was the general contractor overseeing a renovation of the space. Raimondo subcontracted with Midtown for

¹ By order dated February 27, 2008, all claims asserted against Astoria Federal Savings were dismissed.

the provision of concrete work. Midtown had an oral agreement with PSI to perform carpentry work and to be Midtown's "eyes and ears" at the construction site. On that date, plaintiff was responsible for mixing cement for the bricklayers and carrying the buckets to them as they were putting in a new elevator. The elevator pit had been dug out and cinder block walls were being constructed. The excavation opening, which was approximately twelve feet long was protected by planking that had been put down by PSI carpenter Tom Clarke. Plaintiff walked over the planking to bring the cinder blocks and cement to the bricklayers. He had done this approximately twenty times on this date without incident, but on this occasion the planking collapsed, causing plaintiff to fall into the excavation pit and sustain various injuries.

Plaintiff's Motion

Plaintiff moves for partial summary judgment on his Labor Law §§240 (1) and 241-a claims as asserted against Park Slope, Raimondo and PSI.

Labor Law §240 (1)

Plaintiff argues that Labor Law §240 (1) was violated and said violation was the proximate cause of his injuries.

Labor Law § 240 (1) affords protection to construction site workers who are exposed to elevation-related hazards (*see generally, Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 287-290 [2003]). Specifically, § 240 (1) provides, in pertinent part, that:

“All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

Section 240(1) requires owners and contractors to provide workers with appropriate safety devices to protect against such 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 [1993]; *Public Adm'r of Kings County v 8 B.W., LLC*, 40 AD3d 834 [2007]). “Not every worker who falls at a construction site, and 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” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; see *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]). Furthermore, the statute envisions extraordinary elevation risks (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841), and was not intended to protect against an injury caused by an object falling from a minuscule height (see *Phillips v City of New York*, 228 AD2d 570 [1996]; *Abreu v Manhattan Plaza Assocs.*, 214 AD2d 526 [1995]; *Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657 [1994]).

Plaintiff contends that he was engaged in a covered activity, and was caused to fall from a height because no safety device was provided to him except for the planking that had been placed over the elevator pit which collapsed.² He claims that the defective planking and the lack of any other safety devices were the proximate cause of his injuries.

Defendants Park Slope and Raimondo and PSI not only oppose the foregoing, but have, in turn, requested that this court grant them summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as asserted against each of them. Park Slope and Raimondo argue that plaintiff's fall from ground level into a pit that was somewhere between three and twelve feet deep does not constitute a height related accident envisioned by Labor Law §240 (1). They point to cases in which the court has found no Labor Law §240 (1) violation where a plaintiff who was performing work at ground level fell into a trench (*see Rojas v County of Nassau*, 210 AD2d 390 [1994]; *see also Magnuson v Syossett Community Hosp.*, 283 AD2d 404 [2001] [dismissing Labor Law § 240 (1) claim where plaintiff fell into a three foot deep hole].

However, the court notes that in a case similar to the one at bar, the court in *Grigoropoulos v Moshopoulos*, (44 AD3d 1003 [2007]) found that Labor Law §240 (1) was applicable and had been violated where, as here, “[t]he evidence demonstrates that the plaintiff was required to stand upon a makeshift plywood platform in order to perform his work, and that he was injured when the plywood gave way under him and he fell into the

² Plaintiff maintains that he fell 12 feet into the pit. However, the court notes that there has been testimony that the depth of the pit was actually between three and four feet.

basement below” (see also *Godoy v Baisley Lbr. Corp.*, 40 AD3d 920 [2007]; *Figueiredo v New Palace Painters Supply Co.*, 39 AD3d 363 [2007]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693 [2006]; *John v Baharestani*, 281 AD2d 114 [2001]; *Becerra v City of New York*, 261 AD2d 188 [1999]; *Ciancio v Woodlawn Cemetery Assn.*, 249 AD2d 86 [1998]; *Tooher v Willets Point Contr. Corp.*, 213 AD2d 856 [1995]).

Accordingly, the court finds that Labor Law §240 (1) is applicable to the facts of the instant case where plaintiff was required to work on planking placed over a 12 foot by 12 foot hole in the ground that collapsed causing him to fall at least three feet into an excavation pit (see *Miller v Weeden*, 7 AD3d 684, 685-686 [2004] [court imposed Labor Law § 240 (1) liability where plaintiff fell from the ground floor to the basement through an uncovered opening and that no safety device was in place to protect him from the uncovered opening and that this violation was the proximate cause of the injuries he allegedly sustained]; *Brandl v Ram Builders, Inc.*, 7 AD3d 655, 655-656 [2004]; see *Peter v Niselli Realty Co.*, 300 AD2d 239 [2002]; *Carpio v Tishman Constr. Corp.*, 240 AD2d 234, 236 [1997] [court held that Labor Law §240 (1) applied where “plaintiff did not trip on a pothole, as the dissent suggests, but fell into a hole with a three-foot elevation differential, and such a risk would fall within the statute even if it existed at ground level”]; *DeLong v State St. Assocs.*, 211 AD2d 891 [1995]; *Nichols v Deer Run Investors*, 204 AD2d 929 [1994]). Accordingly, the court finds that plaintiff has met his burden of establishing that Labor Law §240 (1) applied

and was violated. The burden now shifts to the opposing defendants to raise a question of fact.

In support of their cross motion, Park Slope and Raimondo argue that plaintiff was the sole proximate cause of his accident. They maintain that the wooden planking afforded him proper protection but that he had overloaded it with the cinder blocks that he was carrying to other workers. They point to the deposition testimony of Ronald Sancho, PSI's majority owner who testified that Tom Clarke told him "that Romero loaded up – overloaded these planks, he told me, and the plank collapsed." PSI also maintain that plaintiff's own actions were the sole proximate cause of the accident and point to the deposition testimony of Tom Clarke, an employee of PSI at the time of plaintiff's accident. Mr. Clarke testified that he did not witness the accident but he was told by a bricklayer named Mickey that "the plank broke and Carlos fell. I said what happened. He said, I think he put too much weight on at one time."

In reply, plaintiff correctly points out that these hearsay statement allegedly made by the injured plaintiff's coworker can not be used to raise a triable issue of fact (*see Oddo v Edo Marine Air*, 34AD3d 774 [2006]; *Joseph v Hemlok Realty Corp.*, 6 AD3d 392 [2004]; *Allstate Ins. Co. v Keil*, 268 AD2d 545 [2000]). Accordingly, the court finds that defendants have failed to raise a triable issue of fact regarding the applicability and violation of Labor Law §240 (1).

Having determined that Labor Law § 240 (1) was violated, the court notes that the statute places the responsibility for work-site safety practices upon the owner and general contractor, and imposes strict liability for their failure to provide the safety devices necessary to provide "proper protection" to the worker against the hazards of his work (*Bland v Manocherian*, 66 NY2d 452 [1985]). Liability is imposed regardless of whether the owner or general contractor may have exercised any degree of control (*Haimes v New York Telephone*, 46 NY2d 132, 136-37 [1978]). Here, the record is clear that the building was owned by Park Slope and Raimondo was the general contractor overseeing the renovation of the space. Accordingly, both will be held statutorily liable under Labor Law §240 (1). Thus, that branch of plaintiff's motion seeking summary judgment in his favor on his Labor Law §240 (1) claim as asserted against defendants Park Slope and Raimondo is granted.

The court now turns to that branch of plaintiff's motion which seeks summary judgment under Labor Law §240 (1) against PSI. PSI was a subcontractor that performed carpentry work at the site including the installation of the plank that failed. "[T]he 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, Inc.*, 31 AD3d 484, 488 [2008]; see *Kwoksze Wong v New York Times Co.*, 297 AD2d 544 [2002]; *Sabato v New York Life Ins. Co.*, 259 AD2d 535 [1999]; *Velez v Tishman Foley Partners*, 245 AD2d 155 [1997]; *D'Amico v New York Racing Assn.*, 203 AD2d 509 [1994]).

Plaintiff testified at his deposition that he received his instructions regarding what work to perform from Tommy Clarke of PSI. Plaintiff specifically testified that Clarke “supervised the laborers and the brick work.” In direct contradiction, Clarke testified that he had no role in the direction, supervision or control of the bricklayers as they worked for Midtown. He further testified that neither he, nor anyone else from PSI, had the authority to insist that the bricklayers perform their job in a safer or different way. Clarke also testified that Raimondo was the entity giving direction on the project saying “this has to go. This is what we need done from you today.” Clarke further stated that Raimondo had the authority to stop the work that was being performed at the site if it was necessary to stop.

A contractor may be deemed liable under Labor Law §240 (1) where it exercises substantial authority to control and supervise the work. Where a contractor exercises only general supervision, and does not have authority to stop the work in the event that an unsafe condition or work practice comes to light, such authority is insufficient to impose liability. (See *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005], see also *Borbeck v Hercules Constr. Corp.*, 48 AD3d 498 [2008]; *Delahaye v Saint Anns School*, 40 AD3d 679 [2007]; *Linkowski v City of New York*, 33 AD3d 971 [2006]).

Based upon the foregoing, the court finds that PSI has established that it did not possess the requisite authority for the imposition of liability under Labor Law §240 (1). Accordingly, that branch of plaintiff’s motion seeking partial summary judgment on his

Labor Law §240 (1) claim as asserted against PSI is denied. That branch of PSI's cross motion seeking dismissal of this claim as asserted against PSI is granted.

Labor Law §241-a

Plaintiff also seeks partial summary judgment in his favor on his Labor Law §241-a claim. This statute provides as follows:

“Any men working in or at elevator shaft ways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board.”

Plaintiff argues that defendants failed to provide sound planking as required by the statute and that his fall into an elevator shaft due to unsound planking entitles him to summary judgment on this claim. In opposition, defendants argue that this statute is not applicable to the site at which plaintiff was injured as the purpose of the statute is to protect workers from falling more than one story through a shaft. They contend that since plaintiff was already at basement level, the shaft he fell into was no more than one story below the level at which he was working and, thus, the statute is not applicable.

The court agrees that § 241-a does not apply where, as here, the worker falls only one story (*Riley v John W. Stickl Constr. Co.*, 242 AD2d 936 [1997]; see *Marcellino v Nigro*, 149 AD2d 775, 777 [1989]; *Lancella v Genovesi & Sons*, 162 Misc 2d 117, 118-119 [1989]). Accordingly, that branch of plaintiff's motion seeking partial summary judgment on his

Labor Law §241-a claim is denied. Those branches of PSI and Park Slope and Raimondo's cross motions seeking summary judgment dismissing plaintiff's Labor Law §241-a claim as asserted against them is granted.

Park Slope and Raimondo's Cross Motion

Park Slope and Raimondo cross move for: (i) summary judgment dismissing plaintiff's complaint as asserted against them; (ii) an order directing that these defendants are entitled to defense and indemnity from Midtown; (iii) an order denying plaintiff's summary judgment motion; and (iv) an order pursuant to CPLR 3126 compelling Midtown to produce the insurance policy, declaration page and certificate of Insurance relevant to the construction project at issue.

The court will first address that branch of Park Slope and Raimondo's cross motion seeking summary judgment dismissing plaintiff's complaint. Having granted plaintiff's motion based upon Labor Law §240 (1) as against these defendants, the Court sees no need to consider defendants' argument that they are entitled to summary judgment dismissing the claims based upon the violation of Labor Law § 241(6) and § 200, and common law negligence. It is clear from the record that plaintiff's damages are the same regardless of the theory of liability, and plaintiff can only recover these damages once. As such, defendants' argument concerning the lack of merit of the other theories of liability contained in the complaint are moot (*see Torino v KLM Const. Co. Inc.*, 257 AD2d 541 [1999]; *Covey v Iroquois Gas Transmission Sys*, 218 AD2d 197 [1996]).

Indemnification

The court now turns to that branch of Park Slope and Raimondo's cross motion which seeks an order directing that these defendants are entitled to defense and indemnity from Midtown and an order, pursuant to CPLR 3126, compelling Midtown to produce the insurance policy, declaration page and certificate of Insurance relevant to the construction project at issue.

These defendants argue that the contractual agreement between Raimondo and Midtown contains a clear and unequivocal indemnification provision requiring Midtown, not only to hold Raimondo harmless and indemnify, but also to defend both Park Slope and Raimondo against all personal injury suits arising out of their work. In opposition, Midtown argues that Raimondo is not entitled to indemnification since it has failed to establish (i) that the planking work at issue fell within Midtown's duties; (ii) that Raimondo retained no supervision and control over the planking work; or (iii) that it was free from negligence that caused or contributed to plaintiff's injuries. In support of its position, Midtown points to the deposition testimony of Tom Clarke in which he states that Raimondo was the entity giving direction on the project saying "this has to go. This is what we need done from you today." Clarke also indicated that Raimondo had the authority to stop the work that was being performed at the site if it was necessary to stop.

The indemnification clause contained in section 5 of Rider D to the contract between Midtown and Raimondo states as follows:

“Midtown Contracting Corp., (Subcontractor), shall indemnify, defend and hold harmless, C. Raimondo & Sons Construction Co., Inc., (“Raimondo), its subsidiaries, its affiliates, its officers, servants against any and all claims and demands of any nature whatsoever including, without limiting the generality of the foregoing, claims for consequential damages, loss of profits and damage to property of Raimondo including costs, litigation expenses, counsel fees and liabilities incurred in connection therewith, arising out of injury or death of, any person whatsoever or damage to property of any kind by whomever owned, caused in whole or in part by the acts or omissions of Midtown Contracting Corp., any subcontracts vendor, materialman, or any other person directly or indirectly employed by the Subcontractor, or any of them while engaged in the performance of the Work or any activity associated therewith or relative thereto.”

Park Slope and Raimondo have met their initial burden of demonstrating, prima facie, their entitlement to indemnification as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]) by introducing its contract with Midtown, which includes express indemnification clauses in favor of Raimondo (*see Naranjo v Star Corrugated Box Co.*, 11 AD3d 436, 437-438 [2004]). However, Midtown, in turn, submits sufficient evidence to raise a triable issue of fact through the testimony of Tom Clarke regarding the extent to which Raimondo exercised direction, supervision, and control over the work, so as to preclude summary judgment on both the contractual and common-law indemnification causes of action (*see* General Obligations Law § 5-322.1; *Farduchi v United Artists Theatre Circuit, Inc.*, 23 AD3d 613 [2005]; *Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2005]; *Perri v Gilbert Johnson Enters. Ltd.*, 14 AD3d 681, 684-685 [2005]; *Valenti v New*

York City Tr. Auth., 5 AD3d 473 [2004]; *Kennelty v Darlind Constr.*, 260 AD2d 443, 446 [1999]; *Canka v Coalition for the Homeless*, 240 AD2d 355, 356-357 [1997]). Accordingly, that branch of Park Slope and Raimondo's cross motion seeking summary judgment in their favor on their claim for indemnification is denied.

Procurement of Insurance

Raimondo and Park Slope also maintain that Midtown failed to procure insurance naming them as additional insureds as required under the contract entered into between these parties. An agreement to procure insurance coverage "is clearly distinct from and treated differently from the agreement to indemnify" (*McGill v Polytechnic Univ.*, 235 AD2d 400, 401-402 [1997]; see also *Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]; *Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [1999]; *Mathew v Crow Constr. Co.*, 220 AD2d 490, 491 [1995]; *Roblee v Corning Community College*, 134 AD2d 803, 804 [1987], *lv denied* 72 NY2d 803 [1988]). A determination of a party's liability for failure to procure insurance as required by a contract "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*McGill*, 235 AD2d at 402; see also *Kennelty*, 260 AD2d at 445; *Mathew*, 220 AD2d at 491).

Raimondo and Park Slope argue that Midtown failed to procure insurance naming them as additional insureds and should be held liable for damages arising out of that dereliction of duty. In opposition, Midtown argues that Raimondo has failed to indicate a specific provision providing for the procurement of insurance nor has it demonstrated how

such provision was not complied with. Moreover, Midtown contends that the amount of damages that would be available would be limited to the cost of purchasing substitute insurance.

However, the court notes that section six of Rider D to the subcontract between Midtown and Raimondo states that “[t]he interests of the contractor and owner shall be added as an ‘additional insured’ to the general liability, automobile and umbrella liability policies issued to the subcontractor.” As such, the record establishes that Midtown was contractually obligated to procure insurance naming Raimond and Park Slope as additional insureds.

In its opposition, Midtown has failed to offer any proof that it obtained the insurance coverage required by the contract specifically naming these defendants as additional insureds (*cf. e.g. Kennelty*, 260 AD2d at 445 [submission of certificate of insurance not sufficient to show that party purchased the required insurance]; *McGill*, 235 AD2d at 402 [same]; *Horn Maintenance Corp. v Aetna Cas. & Surety Co.*, 225 A.D.2d 443, 444 [1996] [“A certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure”]). Further, when such a certificate of liability insurance contains language to the effect that it is for informational purposes and confers no rights, as in the instant case, the certificate has been held to be insufficient to establish that a party is an additional insured (*Moleon v Kreisler Borg Florman General Constr. Co.*, 304 AD2d 337, 339 [2003]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420, 423 [1998]).

Accordingly, that part of Park Slope and Raimondo's cross motion seeking damages related to their claim that Midtown breached its agreement to procure general liability insurance in their favor is granted. However, movants do not address whether they are covered by any other insurance policy, which would bear upon the measure of damages (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]; see *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 116 [2001]; *Keelan v Sivan*, 234 AD2d 516, 517 [1996]; *DiMuro v Town of Babylon*, 210 AD2d 373, 374 [1994]; *Morel v City of New York*, 192 AD2d 428, 429 [1993]). Therefore, no finding of the amount of damages due Park Slope and Raimondo is made at this time.

Finally, Park Slope and Raimondo move for an order, pursuant to CPLR 3126, compelling Midtown to produce the insurance policy, declaration page and certificate of insurance relevant to the construction project at issue. In response, Midtown contends that it has attached to its opposition papers a copy of its complete insurance policy. Accordingly, this branch of the cross motion is moot as said policy is attached to the copy submitted to the court.

PSI's Motion and Cross Motion

PSI has interposed different motions and cross motions as follows. PSI cross moves for summary judgment dismissing plaintiff's Labor Law §§240 (1) and 241-a claims. PSI moves for an order pursuant to CPLR 3212 dismissing plaintiff's Labor Law §241 (6) claim. PSI cross-moves for an order dismissing all claims and cross claims asserted against it.

In opposition, plaintiff argues that denial of PSI's motion is mandated as it is not entitled to make successive applications for summary judgment where the motion is based upon grounds and factual assertions which could have been raised on the first motion (*Selletti v Liotti*, 45 AD3d 669 [2007]; *Williams v City of White Plains*, 6 AD3d 609 [2004]; *Baron v Charles Azzue Inc.*, 240 AD2d 447 [1997]; *Taylor v Brooklyn Hosp.*, 187 AD2d 714[1992]).

In reply, PSI argues that its motion to dismiss plaintiff's Labor Law §241 (6) claim does not violate the rule against successive motions because it addresses issues separate and apart from those addressed in plaintiff's motion and PSI's cross motion to that motion. Specifically, PSI notes that plaintiff's motion sought partial summary judgment in his favor on his Labor Law §§240 (1) and 241-a claims and PSI's first cross motion sought summary judgment dismissing those claims as asserted against PSI.

The court notes that CPLR 2215 provides in pertinent part that:

“[a]t least three days prior to the time at which the motion is noticed to be heard, or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214, a party may serve upon the moving party a notice of cross-motion demanding relief . . . [r]elief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party.”

Accordingly, PSI could have made one cross motion seeking all of the relief it requested in the three separate motions it interposed. However, its failure to do so and to instead make three separate motions does not, as plaintiff claims, violate the proscription against

successive summary judgment motions. The court notes that in the cases cited by plaintiff in support of this premise, the successive motions were made after a decision had already been rendered by the court on the initial summary judgment motion. Here the court had not rendered any decision on any motions at the point that PSI interposed its successive motions. Accordingly, the court will consider all of PSI's motions

As discussed above, in relation to plaintiff's motion, PSI's cross motion seeking summary judgment dismissing plaintiff's Labor Law §§240 (1) and 241-a claims as asserted against PSI is granted.

PSI moves for summary judgment dismissing plaintiff's Labor Law §241 (6) claim. Labor Law § 241 (6) provides in pertinent part that:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.”

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the New York State Industrial Code (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Accordingly, in order to support a cause of

action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

It is well settled that Labor Law §241(6) only apply to owners, general contractors and their agents (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; *Sabato v New York Life Ins. Co.*, 259 AD2d 535, 537 [1999]). In the instant case, it is undisputed that PSI was neither an owner nor a general contractor on this project. Accordingly, Labor Law §241(6) liability will attach against it under the statute "only if it is evinced that it was a statutory 'agent' of the owner or general contractor" (*D'Amico v New York Racing Assoc.*, 203 AD2d 509, 511 [1994], *citing Russin*, 54 NY2d at 318). In order for a party to be deemed a statutory agent under the statute, there must be evidence that such entity had the authority to control the activity which led to the plaintiff's injury (*Russin*, 54 NY2d at 318; *Lopes v Interstate Concrete, Inc.*, 293 AD2d 579 [2002]). As discussed above in relation to plaintiff's Labor Law §240 (1) claim, the court has determined that PSI's role on the project did not rise to the level of supervision and control needed in order to deem it a statutory agent of the owner or general contractor. As such, Labor Law §241 (6) liability cannot be imposed upon PSI. Accordingly, PSI's motion seeking summary judgment dismissing plaintiff's Labor Law §241 (6) claim is granted and said claim is dismissed as against PSI.

Finally PSI cross-moves for an order dismissing all claims and cross claims asserted against it. The only remaining claim asserted by plaintiff relates to Labor Law 200 and common law negligence. Labor Law § 200 is a codification of the common-law duty to provide workers with a safe work environment (*see Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442 [2001]). “An implicit precondition to this duty . . . is that the party charged with that responsibility have the authority to control the activity bringing about the injury” (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). “General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200” (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 683 [2005] quoting *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2004], *lv denied*, 4 NY3d 702 [2004]). Thus, § 200 applies only to owners and contractors who actually exercise control or supervision over the work and had actual or constructive notice of an unsafe condition (*see Singh v Black Diamonds LLC*, 24 AD3d 138 [2005]; *Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [1999]).

In support of their cross motion, PSI argues that neither Tom Clarke, nor any other PSI employee was delegated the specific authority or the particular task of supervising the plaintiff’s erection of the elevator shaft walls at the time of the accident. PSI points out that plaintiff and his coworkers were performing masonry work and the only PSI employee on the site, Clarke, was a carpenter who performed carpentry work on his own. Thus, PSI

contends it was not a statutory agent of the owner or general contractor nor was it actively engaged in the direction, supervision or control of plaintiff's work at the time of the accident and, thus, cannot be held liable under Labor Law §200.

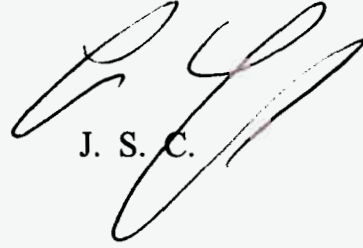
The court agrees that nothing in the record establishes that PSI exercised the requisite degree of supervision or control over plaintiff's work so that liability can be imposed upon it under Labor Law §200. Therefore, PSI's cross motion seeking summary judgment dismissing plaintiff's Labor § Law 200 and common law negligence claims is granted.

Conclusion

That branch of plaintiff's motion seeking partial summary judgment in his favor on his Labor Law §240 (1) is granted as against Park Slope and Raimondo but denied as against PSI. That branch of plaintiff's motion seeking summary judgment on his Labor Law 241-a claim is denied in its entirety. That branch of PSI and Park Slope and Raimondo's cross motions seeking summary judgment dismissing plaintiff's Labor Law 241-a claim is granted and said claim is hereby dismissed. Those branches of Park Slope and Raimondo's cross motion seeking summary judgment in their favor on their claim for indemnification and an order to produce the insurance policy is denied while that branch seeking damages related to Midtown's failure to procure insurance naming Park Slope and Raimondo as additional insureds is granted. PSI's cross motion and motions seeking summary judgment dismissing plaintiff's Labor Law §§240 (1), 241-a, 241 (6) and 200 claims are granted in their entirety.

The foregoing constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, consisting of several loops and flourishes, positioned above the text 'J. S. C.'.

J. S. C.