SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

GERARD FENTY,

Plaintiff,

-against-

THE CITY OF NEW YORK et al.,

Defendants.

And Related Third-Party Action.

INDEX NO. 100908/05

MOTION SEQ. NO. 003

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 003, 004 and 005 are hereby consolidated for disposition.

Background

This is a personal injury action arising out of a construction-related accident which occurred on February 9, 2004 when the plaintiff was burned by steam and then jumped to safety while painting a pipe at the New York City Department of Transportation Maintenance and Repair Facility, located on West 158th Street in Manhattan.

The defendant City of New York was the owner of the facility. The site, which was used as a repair depot for various city vehicles, was in the process of undergoing extensive renovation. One of the City's agencies, the Department of Design and Construction, entered into contracts with four prime contractors. These prime contractors consisted of defendant Morris Park Contracting Corp, hired to perform general construction work, defendant CDE Air Conditioning, hired to perform heating, ventilation and air conditioning ("HVAC") work, defendant Lafata-Corallo Plumbing-Heating, Inc., hired to perform plumbing work, and non-party Community Electrical, hired to perform electrical work. Morris Park subcontracted the painting to be performed under its contract with the City to plaintiff's employer, third-party defendant Hilltop Construction and General Contracting, Inc. CDE subcontracted a portion of its work to third-party defendant Grand Piping Corp. Defendant The Liro Group was the construction manager for the project, coordinating all of the various trades that performed work at the premises.

At his deposition, plaintiff testified that on the date of the accident, at the direction of his employer, Hilltop, he was preparing to paint a pipe that held a sprinkler head. In order to reach the sprinkler pipe, plaintiff utilized a type of lift called a JGL machine. Plaintiff explained that the JGL had four wheels and an arm with a large basket at the end in which he was to stand while working. The arm raised and lowered the basket via controls located inside the basket. The basket was girded by mesh, metal bars, metal framing and a railing which, according to the plaintiff, was as high as his belt. Plaintiff testified that after he had risen approximately 30 feet in the JGL, he felt himself being scalded by steam and that, as a result, he was forced to exit the basket as fast as possible and did so by jumping from the basket to an air-conditioning duct located 10 to 12 feet below, thereby sustaining his injuries. Plaintiff maintained that he did not observe a steam pipe or presence of any steam before his accident and that he did not know exactly where the steam originated from, although he saw it was coming from below and behind him. Plaintiff also claimed that the JGL did not come into contact with anything prior to his accident and that there was nothing in the area that the JGL could have hit. However, there is evidence in the record that the basket

hit and broke a steam pipe as plaintiff was ascending in the JGL machine.

John McGee, CDE's project manager, testified that CDE hired Grand Piping to install the hot water pipes and boilers for the hot water closed system at the facility and that this work was completed approximately one year prior to the plaintiff's accident. McGee also testified that Lafata, the subcontractor hired to perform plumbing work at the site, installed the pipe that brought city water into the boiler room within 10 feet of CDE's connection and that Grand Piping then connected this cold water pipe to the heating system. According to McGee, CDE inspected and approved all of Grand Piping's work. This testimony was corroborated by Robert Marovic, Grand Piping's project manager, who testified at his deposition that before Grand Piping left the site, it tested the hot water system and found it fully and properly operational, with no leaks and with all pipes and couplings intact. McGee's testimony was also corroborated at the deposition of Vincenzo Chiofalo, Lafata's president, who also stated that although Lafata did install one hot water heater, it did not interface with the heating system.

The Claims Asserted Herein and the Parties' Dispositive Motions

The complaint asserts causes of action against the defendants under Labor Law §§ 200, 240(1) and 241(6), as well as under the principles of common law negligence. Following service of the complaint, the City and Morris Park brought a third-party action against Hilltop for common law and contractual indemnification. CDE brought a third-party action against Grand Piping.

In motion sequence number 003, Grand Piping moves for summary judgment dismissing CDE's third-party complaint, as well as all cross claims against it. In motion sequence number 004, Hilltop moves for summary judgment dismissing the third-party complaint of the City and Morris Park, as well as all cross claims against it. In motion sequence number 005, Lafata moves for summary judgment dismissing the complaint as against it, as well as all cross claims against it. Liro cross-moves for summary judgment dismissing plaintiff's complaint as against , as well as all cross claims against it. The City and Morris Park have cross-moved for the same relief with respect to all claims asserted against them. CDE cross-moves for summary judgment dismissing plaintiff's complaint against it. Finally, plaintiff cross-moves for partial summary judgment against the City, Morris Park, Liro, Lafata and CDE on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims.

Discussion

A. Plaintiff's Labor Law § 240(1) Claim - - Labor Law § 240(1) requires that all contractors and owners engaged in the renovation of a building or other structure "furnish 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." The statute contemplates protecting workers from the special hazards which arise when a work site is either elevated or positioned below the level where materials are hoisted or secured. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-02 (1993). To prevail on a section 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the his injuries. *See Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 (2003); *Felker v Corning Inc.*, 90 NY2d 219, 224-225 (1997); *Torres v Monroe College*, 12 AD3d 261, 262 (1st Dept 2004). "The statute's protections, however, 'extend only to a narrow class of special hazards' and 'do not encompass any and all perils that may be connected in some tangential way with the effects of gravity' [internal citations omitted]." *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 (1st Dept 2007). *See also Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d 625, 626-627 (2nd Dept 2007); *Meslin v New York Post*, 30 AD3d 309, 310 (1st Dept 2006).

Here, plaintiff's burn injuries were not proximately caused by the failure or absence of any safety equipment required under Labor Law § 240 (1) to protect him from an elevation-related hazard. Rather,

they were caused by the fact that he was being scalded by steam which entered the basket and that he decided that the fastest way to escape was to immediately jump from the basket to the duct below. "'Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists'[citations omitted]." *Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d at 627. *See also Balladares v. Southgate Owners Corp.*, 40 AD3d 667, 669 (2nd Dept 2007); *Aquilino v. E.W. Howell Co., Inc.*, 7 AD3d 739, 740 (2nd Dept 2004). Indeed, plaintiff's injuries were the result of his intentional action in jumping from the JGL basket to the air-conditioning duct below "rather than from any defective piece of equipment designed to prevent injuries from elevation related risks." *George v State of New York*, 251 AD2d 541, 542 (2nd Dept 1998). Contrary to plaintiff's assertions, the doctrine of "danger invites rescue" is inapplicable since the danger in which the plaintiff was placed was not caused by a violation of section 240(1).

Plaintiff also argues that although the JGL was not defective, defendants nevertheless violated Labor Law §240(1) by not providing him with a hard hat, safety harness or safety line. However, plaintiff has not sufficiently established how these devices would have protected him from injury in escaping the steam. In fact, as defendants assert, it is more likely that a safety harness or safety line in this case would have caused plaintiff even more harm, as such devices would have kept plaintiff hanging in mid-air while still in proximity to the steam. Moreover, as already noted, the JGL basket provided the plaintiff with adequate protection from falling in the form of mesh, metal bars, metal framing and a waist-high railing. Since the presence of steam which would force plaintiff to jump from the basket was not foreseeable, the defendants could not have anticipated that a hard hat, safety harness or safety line would be necessary in order to protect plaintiff from injury. *See Buckley v Columbia Grammar and Preparatory*, 44 AD3d at 267; *Cruz v Turner Construction Co.*, 279 AD2d 322, 322-323 (1st Dept 2001). Under the circumstances, the defendants are entitled to summary judgment dismissing the plaintiff's Labor Law § 240(1) claim.

B. Plaintiff's Labor Law § 241(6) Claim - - As to plaintiff's Labor Law § 241(6) claim, to prevail under this statute, he is required to establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 504-05 (1993). Although plaintiff alleges in his bill of particulars that numerous Industrial Code provisions have been violated, the only Industrial Code provision he addresses in his moving papers is 12 NYCRR § 23-3.2(a)(2). He is therefore deemed to have abandoned his reliance on any Industrial Code provision other than section 23-3.2(a)(2). *See Genovese v. Gambino*, 309 AD2d 832, 833 (2nd Dept 2003).

Section 23-3.2(a)(2) provides, in pertinent part, that "[B]efore demolition is started, all ... water, steam and other supply lines shall be shut off and capped or otherwise sealed." Demolition work is defined under the Industrial Code as "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." 12 NYCRR § 23-1.4(b)(16).

Initially, the court notes that this provision has been found to be specific enough to serve as a predicate for a Labor Law § 241(6) claim. *See Pino v Robert Martin Co.*, 22 AD3d 549, 552 (2nd Dept 2005). Nevertheless, the provision is inapplicable to the plaintiff's claims herein since there is no evidence to suggest that the building where plaintiff's accident occurred was being demolished. His section 241(6) claim must therefore be dismissed.

C. Plaintiff's Labor Law § 200 and Common Law Negligence Claims - - As to plaintiff's claims of negligence, liability under Labor Law § 200 generally requires a showing that the owner or general contractor of the work site had the authority to control the activity bringing about the injury. *See Russin v. Picciano & Son*, 54 NY2d 311, 317 (1981). In addition, the proponent of a Labor Law § 200 claim must also demonstrate that the defendant had actual or constructive notice of the condition that caused the accident. As the First Department has stated, the "notice must call attention to the specific

defect or hazardous condition and its specific location, sufficient for corrective action to be taken." *Mitchell v. New York Univ.*, 12 AD3d 200, 201 (1st Dept 2004).

Here, the court need not address the issue of control or supervision since there is no evidence in the record that any of the defendants had actual or constructive notice of the steam which caused plaintiff to jump from the JGL basket. On the contrary, plaintiff testified at his deposition that he did not observe any steam pipe in the area before his accident and that he did not know from where the steam originated. In addition, the plaintiff has not submitted any evidence which disputes the contention of Grand Piping that before it left the site, it tested the hot water system and found it fully and properly operational, with no leaks and with all pipes and couplings intact. Moreover, as previously discussed, there is evidence that CDE inspected and approved Grand Piping's work. Under the circumstances, plaintiff's common law negligence and Labor Law § 200 claims must be dismissed. Thus, all causes of action asserted in the complaint are dismissed herein.

D. The City and Morris Park's Third-Party Action Against Hilltop - - In their third-party action against Hilltop, the City and Morris Park allege that Hilltop (1) has breached its contractual obligation to procure an insurance policy naming them as additional insureds and (2) is contractually obligated to defend and indemnify them in this action.

As to procuring an insurance policy, a review of the subcontract between Morris Park and Hilltop clearly shows that Hilltop was obligated to obtain additional insured coverage for Morris only, and not the City. Thus, rider number 3 to the contract required that Hilltop maintain a commercial general liability insurance and only specified that Morris Park be listed as an additional insured. The City was not mentioned. The City, however, argues that it is nevertheless entitled to additional insured coverage because section 2 of the contract incorporates by reference the agreement between the City and Morris Park. Section 2 states that all of the documents which form the contract between the City and Morris Park are a part of the agreement between Morris Park and Hilltop. The Morris Park/Hilltop agreement requires that all contractors obtain insurance naming the City as an additional insured. However, it is well settled that "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insurance coverage unless such a requirement is expressly and specifically stated." *Tripani v. 10 Arial Way Assocs.*, 301 AD2d 644, 647 (2nd Dept 2003); *Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 (1st Dept 2004). As such, the mere reference to the City/Morris agreement in the Morris/Hilltop contract did not obligate Hilltop to provide additional insured coverage for the benefit of the City. Since Hilltop obtained a commercial general liability policy from the Scottsdale Insurance Company which contained a blanket additional insured endorsement covering any person or organization which Hilltop was required to add as additional insured under a written contract, it is clear that Hilltop satisfied its contractual obligation to procure insurance.

As to Hilltop's contractual obligation to defend and indemnify the City and Morris Park, the contract between Morris Park and Hilltop provides that Hilltop agrees to defend, indemnify and hold harmless the owner, contractor and their officers and employees from any liability, costs and fees on account of injuries to "persons or property" arising out of Hilltop's work. On its motion, Hilltop argues that the clause is inapplicable to Mr. Fenty's claim against the City and Morris Park since it does not specify that it applies to Hilltop employees such as Mr. Fenty, but only broadly refers to "persons or property." The court agrees. It is well settled that where an indemnification clause does not specify that it covers injuries to the indemnitor's employees and there is otherwise nothing in the language and purpose of the entire agreement and the surrounding circumstances which imply such coverage, *see Rodrigues v. N&S Building Contractors, Inc.*, 5 NY3d 427, 433 (2005), the clause will not be applied to such employee claims since it cannot be said held that such indemnification reflects "the unmistakable intent of the parties." *Vigliarolo v Sea Crest Construction*, 16 AD3d 409, 410 (2nd Dept 2005. *See also Sumba v Clermont Park Assocs., LLC*, 45 AD3d 671, 672 (2nd Dept 2007); *Solomon v City of New York*, 111 AD2d

383, 388 (2nd Dept 1985), *aff'd*, 70 NY2d 675 (1987). As the Second Department stated in *Vigliarolo v Sea Crest Construction*, 16 AD3d at 410, "[A] contract assuming an obligation of indemnification must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *See also Sumba v Clermont Park Assocs., LLC*, 45 AD3d at 672. Here, not only does the clause amorphously refer only to its coverage of injured "persons," but there is nothing otherwise in the record which even suggests an intention to include Hilltop's employees. Under the circumstances, the court is persuaded that Hilltop does not have a contractual duty to indemnify Morris and the City for the claims which were asserted against them by Mr. Fenty. Since their only remaining claim against Hilltop, for common law indemnification, is barred by Workers' Compensation Law § 11, the third-party complaint of the City and Morris Park must therefore be dismissed.

E. CDE's Third-Party Action Against Grand Piping - - As already noted, Grand Piping has moved for summary judgment dismissing all claims against it, including the third-party complaint brought by CDE. CDE has not opposed the motion and has not even suggested that its third-party claims against Grand Piping should survive an order dismissing the underlying action. Thus, as a necessary consequence of the dismissal of plaintiff's complaint in its entirety, CDE's third-party complaint should be dismissed. *See Turchioe v AT&T Communications, Inc.*, 256 AD2d 245, 246 (1st Dept 1998).

Accordingly, in motion sequence number 003, Grand Piping's motion for summary judgment is granted and CDE's third-party complaint, as well as all cross claims asserted against it, are hereby dismissed. In motion sequence number 004, Hilltop's motion for summary judgment is granted and the third-party complaint of the City and Morris Park, as well as all cross claims against it, are hereby dismissed. In motion sequence number 005, Lafata's motion for summary judgment is granted and the complaint as against it, as well as all cross claims against it, are hereby dismissed. Liro's cross-motion for summary judgment is granted and plaintiff's complaint as against it, as well as all cross claims against it, are hereby dismissed. The cross-motion for summary judgment by the City and Morris Park is granted and plaintiff's complaint as against them, as well as all cross claims against them, are hereby dismissed. CDE's cross-motion is granted and plaintiff's complaint as against it is hereby dismissed. Finally, plaintiff's cross-motion for partial summary judgment against the City, Morris, Liro, Lafata and [redacted] the issue of liability on his Labor Law §§ 240(1) and 241(6) claims is hereby denied.

The Clerk Shall Enter Judgment Herein

Dated: 6-30-08

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION