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

PRESENT: WALTER B. TOLUB PART 45

Index Number : 600282/2006

SPATOLA, GINO

VS.

ONE BRYANT PARK

SEQUENCE NUMBER : 002

DISMISS ACTION

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/31/08

J.S.C.

WALTER B. TOLUB

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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GINO SPATOLA and FRANCISCA SPATOLA,

Plaintiffs,

Index No. 600282/06

-against-

Mtn. Seq. 002

ONE BRYANT PARK, LLC, TISHMAN CONSTRUCTION CORP. and CORNELL CO., INC. and JOHN F. EBERTH ASSOCIATES, INC.,

Defendants.

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ONE BRYANT PARK, LLC, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and CORNELL & COMPANY, INC.,

Third-Party Plaintiffs,

Third-Party Index No. 590275/06

-against-

JOHN F. EBERTH ASSOCIATES, INC.,

Third-Party Defendants.

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WALTER B. TOLUB, J.:

In this action to recover monetary damages for injuries sustained by plaintiffs as the result of Gino Spatola's (Spatola) September 26, 2005 workplace accident, defendants One Bryant Park, LLC (Bryant), Tishman Construction Corp. (Tishman), and Cornell Co. Inc. (Cornell) move for summary judgment dismissing plaintiffs' complaint in its entirety, as well as move for an

order of entitlement to conditional contractual indemnification against co-defendant/third-party defendant John F. Eberth Associates, Inc. (Eberth) for Bryant and Cornell. Additionally, plaintiffs cross-move to amend their Bill of Particulars to add a violation of Industrial Code section 12 NYCRR 23-5.18 (h). Finally, defendant/third-party defendant Eberth cross-moves for summary judgment dismissing all of plaintiffs' Labor Law claims as against it.

For the reasons stated below, defendant Bryant, Tishman, and Cornell's motion is granted, only to the extent of: (1) dismissing plaintiffs' common-law negligence and Labor Law § 200 claims as against Cornell; (2) dismissing plaintiffs' Labor Law § 241 (6) claim against all defendants; and (3) granting conditional contractual indemnification to Cornell as against Eberth, and is otherwise denied. Additionally, plaintiffs' cross motion is denied. Further, defendant/third-party defendant Eberth's cross motion is granted, only to the extent of dismissing plaintiffs' Labor Law § 241 (6) claims against it, and is otherwise denied.

Background

Plaintiffs allege that, on September 26, 2005, Spatola, an employee of non-party Civetta Cousins (Civetta), was working as a carpenter on a construction site when he was injured by a scaffold that toppled over onto him. At the time, Spatola was constructing the foundation of a commercial office building,

located at 42nd and 43rd Streets, between Broadway and the Avenue of the Americas, New York, New York.

Civetta had been hired by Tishman, the construction manager on the site, to perform the foundation work for the building (See Dean Essen (Essen) Examination Before Trial (EBT), at 7, 10). As part of that work, Civetta had previously set up at least one scaffold along one of the foundation walls and constructed many holes in the concrete foundation, which would later be filled with the steel columns that would support the building (See Spatola EBT, at 50, 68-71).

Cornell was the subcontractor retained to erect such steel columns, and Eberth was hired by Cornell to perform the surveying duties for it. It was when one of Civetta's scaffolds was in the way of George Castegner's (Castegner) surveying, and he tried to move the scaffold further toward the wall, that the accident in question occurred. Although Castegner admitted that he saw the open hole in the foundation floor near the scaffold before he pushed it, he nevertheless did push the scaffold, however slightly, causing it to topple and hit Spatola (See Castegner EBT, at 61-66).

Plaintiffs allege that, as a result of the scaffold hitting Spatola, he suffered injuries to his head, back, left shoulder, and arm. As the result, plaintiffs seek monetary recovery against defendants under common-law negligence theory, as well as

for violations of Labor Law §§ 200 and 241 (6). (In their May 19, 2006 Amended Bill of Particulars, plaintiffs seek to predicate their Labor Law § 241 [6] claim upon violations of 12 NYCRR 23-1.7 [b] and 12 NYCRR 23-1.15.[1])

Bryant, the ground lessee of the site,[2] Tishman, and Cornell commenced a third-party action, seeking an order that they are entitled to common-law indemnification, contribution, and contractual indemnification from Eberth, as well as a claim of failure to procure insurance.

Discussion

Amendment of Bill of Particulars

Plaintiffs seek leave to amend their Bill of Particulars to include an alleged violation of 12 NYCRR 23-5.18 (h). Such an amendment is allowed once as of right prior to the filing of the Note of Issue (See CPLR 3042 [b]). The plaintiffs have already filed an Amended Bill of Particulars on May 19, 2006 (see Plaintiffs' Cross Motion, Exh. D), and a Note of Issue and Certificate of Readiness on June 27, 2007 (See Notice of Motion, Exh. I).

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[1] As stated above, in their instant cross motion, plaintiffs are seeking leave to file an amended Bill of Particulars adding alleged violation of 12 NYCRR 23-5.18 (h).

[2] The land is owned by the Empire State Development Corp.

Plaintiffs seek to add another alleged violation of the Industrial Code to amend their Bill of Particulars. In the absence of unfair surprise or prejudice, plaintiffs may do so, even after the Note of Issue and Certificate of Readiness has been filed (See Walker v Metro-North Commuter R.R., 11 AD3d 339 [1st Dept 2004]; see also Zuluaga v P.P.C. Constr., LLC, 45 AD3d 479 [1st Dept 2007]). However, although no new factual allegations have been made, and the addition of the section of the Industrial Code is applicable to the facts of this action,[3] plaintiffs have, in error, failed to include their proposed Amended Bill of Particulars within their papers. Such failure requires this court to deny plaintiffs' motion, without prejudice, with leave to renew upon the submission of proper papers.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law (See Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy

[3] Section 23-5.18 (h) of the Industrial Code provides regulations for the movement of manually-propelled mobile scaffolds.

that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable (See Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Common-Law Negligence and Labor Law § 200 Claims

All defendants seek to dismiss plaintiffs' Labor Law claims, and Bryant, Tishman, and Cornell additionally seek to dismiss plaintiffs' common-law negligence claim.

To establish a prima facie case of common-law negligence, a plaintiff must show that a defendant had either created or had notice (actual or constructive) of an alleged dangerous or defective condition, and (2) the alleged dangerous condition was the proximate cause of the plaintiff's injury (See Gonzalez v City of New York, 304 AD2d 709 [2d Dept 2003]).

An owner and a general contractor's duty to maintain a safe workplace under the common law is codified in Labor Law § 200 (see Gasper v Ford Motor Co., 13 NY2d 104 [1963]), and in the context of a Labor Law case, if a defective condition is alleged to be the cause of a worker's injuries, that worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it (See Higgins v 1790 Broadway Assocs., 261 AD2d 223 1st Dept 1999]; see also Balaj v Equitable Life Assur. Socy. of U.S., 211 AD2d 487 [1st

Dept], lv denied 85 NY2d 811 [1995]).[4]

If the accident is the result of the worker's methods, however, to be held liable, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). Supervision and control of the injured worker's methods by an owner or general contractor are prerequisites to any such liability (See Hughes v Tishman Constr. Corp., 40 AD3d 305 [1st Dept 2007]; see also Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993]; Candela v City of New York, 8 AD3d 45 [1st Dept 2004]).

In the current action, it is first contended that the hole in the foundation next to the scaffold caused the scaffold to topple. It is undisputed that Spatola and his Civetta colleagues created the holes, several feet across and approximately 18 inches deep, in the foundation floor (see Spatola EBT, at 55; see also Essen EBT, at 51-54; Castegner EBT, at 78; Thomas W. Jankiewicz (Jankiewicz) EBT, at 10). However, there is conflicting testimony as to whether or not once these holes existed, Civetta employees were supposed to cover them until any

[4] Supervision and control of the injured worker is not required to show that a claim that a defective condition existed (See Murphy v Columbia University, 4 AD3d 200 [1st Dept 2004]; see also Griffin v New York City Transit Authority, 16 AD3d 202 [1st Dept 2005]).

such hole was to be used by Cornell, the steel contractor (See Spatola EBT at 56-61; see also Essen EBT at 52-53).

The issue of which entity, if any, is liable for common-law negligence and/or Labor Law § 200 is further complicated by the fact that Castegner stated that when he pushed the scaffold out of the way, part of it *might* have fallen into a hole that Civetta employees created prior to its toppling over and hitting Spatola.[5] Castegner also admitted that he was aware of the presence of the hole prior to his trying to push the scaffold toward the wall, and that, although he was trying to control the scaffold and not push it into the hole, he lost control and the scaffold might have fallen in (See Castegner EBT, at 52, 62).

It is clear that neither Tishman nor Bryant supervised or in any way controlled Castegner's work.[6] Additionally, although Castegner performed whatever tasks Cornell needed (see Castegner EBT, at 28-30), there is no evidence that Cornell controlled his

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[5] Castegner was not even certain that the scaffold fell into the hole (See Castegner EBT, at 65).

[6] Although, pursuant to the September 1, 2003 Construction Management Agreement, Tishman assumed the supervision of the work at the site, such that it "shall supervise and direct the work and shall be responsible for all construction, construction scheduling, sequencing of Contractors, and for coordinating all portions of the work" (see, ¶ 2.05), for the purposes of the Labor Law, such contractual duties do not rise to the level of sufficient supervision and control to be held liable under Labor Law § 200.

or any other Eberth employee's manner or methods.[7] Although this would normally be the end of such inquiry on summary judgment, according to Spatola, the hole in question had been created approximately three weeks previously by Civetta workers (See Spatola EBT, at 51).

This gap in time raises questions of fact as to whether the hole became a dangerous condition, and whether Tishman, Bryant or Cornell had actual or constructive notice of the hole in question. Tishman, the construction manager, had a superintendent, Essen, on-site daily (see Essen EBT, at 40), who was talking to the Civetta foreman on the site at the time the accident occurred (Id. at 18). There are questions of fact whether or not he was aware of the dangerous condition prior to Spatola's accident. There are also questions as to whether the owner, Bryant, had notice of the dangerous condition. According to the testimony of Louise B. Baccari (Baccari), Vice President and General Counsel of the Durst Organization, Inc. (Durst),[8] who testified on behalf of Bryant, it had one employee on-site daily who served as a company representative, as well as four or five

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[7] According to Thomas J. Jankiewicz (Jankiewicz), Cornell's superintendent of New York operations, as respects Eberth on the Bryant jobsite, he was to "talk to them, to find out if we had any problems with the anchor bolts, or if there were any problems in general with the control of the building." (See Jankiewicz EBT, at 15).

[8] Durst is an affiliated entity under the Durst Umbrella (See Baccari EBT, at 5).

other persons at the job (See Baccari EBT, at 5-7).

Finally, as respects Cornell, a defendant that is a subcontractor can only be charged with liability under the Labor Law, if there is a showing of "the authority to control the activity which led to the plaintiff's injury. A prerequisite for liability under Labor Law § 200 is that the party charged with the responsibility to provide a safe work place also have the authority to control the activity producing the injury (citations omitted)." (Lopes v Interstate Concrete, Inc., 293 AD2d 579, 579-580 [2d Dept 2002]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311).

Thus, that portion of Bryant, Tishman and Cornell's motion that seeks to dismiss plaintiffs' common-law negligence and Labor Law § 200 claims is granted, only to the extent of dismissing plaintiffs' common-law negligence and Labor Law § 200 claims against Cornell, and is otherwise denied.

Further, Eberth asserts that it is entitled to dismissal of all Labor Law § 200 claims as against it, because that section of the Labor Law does not apply to subcontractors who are not in control of the work of an injured party. However, Eberth, a sub-subcontractor on the site, i.e., a subcontractor of Cornell, was an agent of the general contractor, having control over the area that was involved in the accident. Cornell engaged Eberth to perform surveying of the site for Cornell, and Eberth was in

control of Castegner's work. Therefore, Eberth is considered a statutory agent of the general contractor within the meaning of the Labor Law (See Piazza v Frank L. Ciminelli Constr. Co., Inc., 12 AD3d 1059 [4th Dept 2004]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311; Kehoe v Segal, 272 AD2d 583 [2d Dept 2000]).

It was Eberth's employee who admitted to pushing the scaffold that toppled and hit Spatola. Whether Eberth supervised Spatola is irrelevant to the Labor Law § 200 claim - what is relevant is whether or not Eberth had control of the activity that caused Spatola's injuries (Accord Vieira v Tishman Constr. Corp., 255 AD2d 235 [1st Dept 1998]). Therefore, that portion of Eberth's cross motion that seeks to dismiss plaintiff's Labor Law § 200 claim as against Eberth is denied.

Labor Law § 241 (6) Claim

All defendants seek summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim. Labor Law § 241 (6) provides that "[a]ll 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 the persons employed therein or lawfully frequenting such places."

The section requires owners and contractors at a construction site to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety

rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993]).

In their complaint, plaintiffs seek to recover monetary damages for violations of Industrial Code sections 23-1.7 (b) and 23-1.15.

As respects section 23-1.7 (b), entitled "Falling Hazards," it is sufficiently specific to support a Labor Law § 241 (6) claim (see O'Connor v Lincoln Metrocenter Partners, L.P., 266 AD2d 60 [1st Dept 1999]); however, that Industrial Code section is inapplicable to the accident that is at issue in this action, in that Spatola's injury did not result from a hazard from which he fell.

Plaintiffs additionally seek to predicate their Labor Law § 241 (6) claim on section 23-1.15, which provides regulations for "Safety Railings." Although also sufficiently specific to support a Labor Law § 241 (6) claim (see Donohue v CJAM Associates, LLC, 22 AD3d 710 [2d Dept 2005]; see also Skudlarek v Bethlehem Steel Corp., 251 AD2d 973 [4th Dept 1998]), it is not applicable to this action in that no safety railings are at issue. See Ferluckaj v Goldman Sachs & Co., ___ AD3d ____, 2008 WL 2727259 (1st Dept 2008).

Because plaintiffs have not supported their Labor Law § 241 (6) claims with allegations of specific violations of the

Industrial Code, plaintiffs' Labor Law § 241 (6) claims are dismissed as against all defendants.

Contractual Indemnification

Bryant and Cornell seek summary judgment on that portion of their third-party complaint that seeks an order of entitlement to contractual indemnification as against Eberth.

Paragraph 6 of Cornell's purchase order with Eberth (see Notice of Motion, Exh. S) requires Eberth to "indemnify and hold harmless PURCHASER and OWNER against all claims for damages and expenses arising out of patent controversy and litigation, damages to person and property caused by [Eberth's] negligence or other fault, and damages to person or property arising out of delivery, installation, service, repair, and replacement, in connection with the work in this Purchase Order." Such language clearly holds Cornell harmless and provides indemnity from Eberth upon a finding that Eberth was negligent. As it does not provide for indemnification should Cornell be found negligent, it is not violative of General Obligations Law § 5-322.1, which was enacted "to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others." (Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 794 [1997]; see also Padro v Bertelsman Music Group, 278 AD2d 61 [1st Dept 2000]).

However, as there has not yet been a finding that Eberth was

negligent in any way, any such entitlement by Cornell to contractual indemnification from Eberth is conditioned upon such finding.

Additionally, because paragraph 6 the Purchase Order does not define who the "OWNER" is that is entitled to indemnification under its terms, there are questions of fact to be resolved prior to any such order.

Therefore, that portion of Bryant, Tishman, and Cornell's motion that seeks an order of contractual indemnification from Eberth is granted, only to the extent of granting conditional contractual indemnification to Cornell, and is otherwise denied.

Order

Accordingly, it is hereby

ORDERED that defendant One Bryant Park, LLC, Tishman Construction Corp, and Cornell Co., Inc.'s motion is granted, only to the extent of: (2) dismissing plaintiffs' common-law negligence and Labor Law § 200 claim as against Cornell Co., Inc.; (2) dismissing plaintiffs' Labor Law § 241 (6) claim against all movants; and (3) granting conditional contractual indemnification to Cornell Co., Inc. as against John F. Eberth Associates, Inc., and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is denied; and it is further

ORDERED that defendant/third-party defendant John F. Eberth Associates, Inc.'s cross motion is granted, only to the extent of dismissing plaintiffs' Labor Law § 241 (6) claims against it, and is otherwise denied.

Counsel for the parties are directed to appear as previously scheduled for a pre-trial conference on August 8, 2008 at 11:00AM in room 335 at 60 Centre Street.

Dated: 7/31/08

ENTER:

WALTER B. TOLUB J.S.C.