SHORT FORM ORDER

COPY

INDEX No. 04-26703
CAL. No. 08-00140-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 3-12-08 (004 & 005)
MOTION DATE 5-7-08 (006, 007 & 008)
ADJ. DATE 8-12-08
Mot. Seq. # 004 - MotD
005 - XMotD
006 - MotD
007 - XMotD
008 - XMD

STEVEN D. UZZI, Plaintiff, - against - SACHEM CENTRAL SCHOOL DISTRICT, AURORA CONTRACTORS, INC., ARA PLUMBING & HEATING CORP., CORD CONTRACTING CO., INC. and SCHOOL CONSTRUCTION CONSULTANTS, INC., Defendants.	ROSENBERG & GLUCK, L.L.P. Attorney for Plaintiff 1176 Portion Road Holtsville, New York 11742 RUSSO, KEANE & TONER, LLP Attorney for Defendants Sachem Central School District & ARA Plumbing & Heating Corp. 26 Broadway, 28th Floor New York, New York 10004 JEFFREY S. SHEIN & ASSOCIATES, P.C. Attorney for Defendant/Third-Party Plaintiff Aurora Contractors, Inc. 575 Underhill Boulevard, Suite 112 Syosset, New York 11791
AURORA CONTRACTORS, INC., Third-Party Plaintiff, - against - CORD CONTRACTING CO., INC., Third-Party Defendant.	CHARLES R. PIERCE, JR., P.C. Attorney for Defendant School Construction Consultants, Inc. 64 East Main Street Huntington, New York 11743 McMAHON, MARTINE & GALLAGHER, LLP Attorney for Defendant/Third-Party Defendant Cord Contracting Co., Inc. 55 Washington Street, 7th Floor Brooklyn, New York 11201

Upon the following papers numbered 1 to 109 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 27 - 44 ; Notice of Cross Motion and supporting papers 21 - 26; 45 - 49; 50 - 65 ; Answering Affidavits and supporting papers 66 - 67; 68 - 70; 71 - 72; 73 - 74; 75 - 77; 78 - 79; 80 - 81; 82 - 83; 84 - 85; 86 - 88; 89 - 90; 91 - 92 ; Replying Affidavits and supporting papers 93 - 94; 95 - 96; 97 - 98; 99 - 100; 101 - 102; 103 - 105 ; Other sur-reply 106 - 107; 108 - 109 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#004) by defendant Aurora Contractors, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, as well as all cross claims and counterclaims asserted against it, or, alternatively, summary judgment on its third-party complaint seeking contractual indemnification over and against Cord Contracting Co., Inc., is granted to the extent that the plaintiff's Labor Law § 241(6) claim is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#005) by defendants Sachem Central School District and ARA Plumbing & Heating Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, as well as all cross claims and counterclaims asserted against them, or, alternatively, summary judgment on Sachem Central School District's cross claim for contractual indemnification over and against Aurora Contractors, Inc., is granted to the extent that the plaintiff's complaint is dismissed as against Sachem Central School District and the plaintiff's Labor Law § 241(6) claim is dismissed as against ARA Plumbing & Heating Corp., and is otherwise denied; and it is further

ORDERED that the motion (#006) by defendant School Construction Consultants, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint, as well as all cross claims asserted against it, and/or summary judgment on its cross claims for a defense and contractual indemnification over and against Aurora Contractors, Inc. and ARA Plumbing & Heating Corp., is granted to the extent that the plaintiff's Labor Law § 241(6) claim is dismissed; and it is further

ORDERED that the cross motion (#007) by defendant/third-party defendant Cord Contracting Co., Inc. for an order granting summary judgment dismissing the plaintiff's complaint, or, alternatively, summary judgment dismissing the third-party complaint, is granted to the extent that the plaintiff's Labor Law § 241(6) claim is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#008) by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability, is denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200 and 241(6), and for common-law negligence, for injuries he allegedly suffered when he was compressed between a ceiling beam and the bucket of a motorized lift he in which he was working. The defendant Sachem Central School District (School District) contracted with several prime contractors to build a new high school. The defendant School Construction Consultants, Inc. (Consultants) was hired to act as the construction manager. The defendant/third-party plaintiff Aurora Contractors, Inc. (Aurora) was the prime contractor hired to perform general construction. Aurora subcontracted the drywall and carpentry

work to defendant/third-party defendant Cord Contracting Co., Inc. (Cord). The defendant ARA Plumbing & Heating Corp. (ARA), was the prime contractor hired to perform the plumbing and heating work. ARA subcontracted installation of the fire sprinklers to nonparty Federal Fire Sprinkler (Federal), the plaintiff's employer.

The plaintiff testified at his deposition that he was a journeyman steamfitter and that the only person who directed or controlled his work was his supervisor from Federal, Mr. Patton. On the day of his accident, the plaintiff and his partner, Robert Vollmer, were installing pipes for sprinklers in the ceiling of the new auditorium. The ceiling was approximately 40 feet high and the floor sloped up from the stage. To install the pipes through the ceiling beams, it was necessary to use a motorized lift which had a bucket or basket which could be extended up to the ceiling, as well as turned or tilted as needed.[1] The lift had two sets of controls: one set on the bucket console and one on the base. The base had four wheels, which were also mechanized, permitting it to be moved from one location to another. The plaintiff testified that the floor of the auditorium was strewn with construction debris, including drywall, metal studs, and spackle buckets. Some of the debris was in piles, some was not, and the plaintiff complained to Mr. Patton about the debris. To maneuver the lift, it was necessary to push some of the debris out of the way or to go around it. The plaintiff testified that he drove the lift to a place that he thought would give him access to the correct ceiling area. Mr. Vollmer handed him a 20-foot length of pipe, which he rested on the bucket, and he extended the arm up, close to the ceiling. It appears that the bucket could be moved or rotated only when the controls to move the base were not engaged. The plaintiff stated that he was moving the bucket, and the base, in small increments to reach the beam. Just before he lost consciousness, he believes that he felt the lift move upward. When he regained consciousness, he was being lowered to the floor. In an accident report made within a few days of the accident, the plaintiff stated that the lift had to be driven over debris, causing it to jump up and pinning him between the beam and the controls for the lift.

Mr. Vollmer testified at his deposition that he handed the plaintiff the first pipe, that the plaintiff was moving upwards in the bucket, and that he had turned around to get the next pipe when the first pipe fell down to the floor. His back was to the plaintiff when he heard someone yell that the plaintiff was stuck, and when he looked up he saw that the plaintiff was pinned between the ceiling and the bucket. Therefore, Mr. Vollmer did not see the accident. Mr. Vollmer also testified that when he turned to get the next pipe, the base was not moving but, rather, the bucket was moving up to the ceiling. Mr. Vollmer stated that they had been working in the auditorium for a couple of days, and that there were piles of trash around the auditorium which he had to push out of the way or maneuver around. When asked if these piles or pieces of trash had anything to do with the plaintiff's accident, Mr. Vollmer stated that he did not know.

The defendants argue that the plaintiff's theory–that the lift "jumped" or moved up because it went

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[1] This particular lift had been delivered the morning, of plaintiff's accident, the plaintiff and Vollmer had used a different lift to install the sprinkler pipes above the stage. It appears that this was the first pipe that the plaintiff was installing in the ceiling above the seating area of the auditorium and ,therefore, it was the plaintiff's first trip up to the ceiling in the new lift.

over debris on the floor–is only speculation and that neither the plaintiff nor Mr. Vollmer knows what happened. However, it is well settled that on a motion for summary judgment, the movant has the initial burden of setting forth evidentiary facts sufficient to establish its entitlement to judgment as a matter of law (Zuckerman v City of New York, 49 NY2d 557 [1980]; Fabbricatore v Lindenhurst Union Free School Dist., 259 AD2d 659 [1999]). Moreover, it is not the Court's function to resolve issues of credibility on motions for summary judgment (Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]; Conciatori v Port Auth. of N.Y. & N.J., 46 AD3d 501 [2007]).

Labor Law § 241(6) requires owners and contractors, or their agents, 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. The duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 502, [1993]; Long v Forest-Fehlhaber, 55 NY2d 154, [1982]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not one that "merely reiterates the common law standard of negligence" (Ross v Curtis-Palmer Hydro-Elec. Co., *supra* at 503-504) need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]). Further, the regulation must be applicable to the facts and must be the proximate cause of the plaintiff's injury.

The plaintiff's cross motion for summary judgment is confined to defendants' alleged violations of 12 NYCRR §§ 23-1.7 (e) (2) and 23-2.1 (a).[2] Section 23-1.7 (e) entitled, "Tripping and other hazards," provides:

> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Here, even if the plaintiff can establish that his accident was caused by the lift riding over debris on the floor, a reading of the subdivisions under section 1.7 makes it clear that the regulations are directed to tripping and other hazards encountered by "persons." The plaintiff did not trip or stumble or fall (*cf.*, Sergio v Benjolo N.V., 168 AD2d 235 [1990]), rather, his claim is based upon being pinned against a beam by the lift he was operating.[3] Accordingly, this section is not applicable to the plaintiff's accident and is dismissed.

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[2] Although the plaintiff's bill of particulars also alleges violation of section 23-1.5, this section merely sets forth an employer's general responsibility for health and safety in the workplace and is insufficiently specific to support a Labor Law § 241 (6) claim (Carty v Port Auth. of N.Y. & N.J., 32 AD3d 732 [2006]; Sajid v Tribeca N. Assoc., 20 AD3d 301 [2005]).

[3] The man lift is a safety device akin to a ladder or scaffold. Safety devices are regulated by their own sections of the Industrial Code (*see,* for example, section 23-5.18, which governs manually-propelled scaffolds). The safe operation of power equipment is regulated by subpart 23-9 (including, section 23-9.6, which governs aerial baskets).

Section 23-2.1 entitled "Maintenance and housekeeping," provides, in relevant part:

(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Since the plaintiff has consistently claimed that his accident happened because the floor of the auditorium was strewn with debris created by the other contractors, his claim is not based upon a failure to store building material in a safe and orderly manner. Rather, his claim is based upon a failure to properly maintain the work area free of debris. Therefore, section 23-2.1 (a) is inapplicable to the facts herein. Further, while section 23-2.1 (b) entitled "Disposal of debris," provides that "debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area," this section has been held to be too general to form a predicate for a Labor Law § 241(6) claim (Salinas v Barney Skanska Constr. Co., 2 AD3d 619, [2003]; Canning v Barneys N. Y., 289 AD2d 32, 33-34 [2001]). Therefore, this section would also be insufficient to support the plaintiff's § 241(6) claim. Since neither section 23-1.7 (e) (2) nor section 23-2.1 (a) is a sufficient predicate, the plaintiff's claim based upon the defendants' alleged violation of Labor Law § 241(6) is dismissed as against all defendants.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (Jock v Fien, 80 NY2d 965 [1992]). It applies to owners, contractors, or their agents (Russin v Louis N. Picciano & Son, 54 NY2d 311 [1981]) who exercise control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (Lombardi v Stout, 80 NY2d 290 [1992]; Yong Ju Kim v Herbert Constr. Co., 275 AD2d 709 [2000]). Where the plaintiff alleges that a proximate cause of his injuries can be attributed to an allegedly dangerous condition at the work site, a defendant may be liable under Labor Law § 200 and for common-law negligence if it had control over the place where the injury occurred and had actual or constructive notice of the dangerous condition (Nasuro v PI Assoc., 49 AD3d 829, 830 [2008]; Payne v 100 Motor Parkway Assoc., 45 AD3d 550 [2007]; Gadani v Dormitory Auth. of State of N.Y., 43 AD3d 1218 [2007]).

Here, there is no real dispute that some of the debris on the floor of the auditorium was created by the carpenters employed by Cord, the subcontractor hired by Aurora; that it was Cord's responsibility to place its debris in piles; and that it was the laborers employed by Aurora who had the responsibility to remove the piles of debris. Both the plaintiff and Aurora's project manager testified that the debris was created throughout the day and that the laborers removed it throughout the day. While it will be the plaintiff's burden at trial to establish that the debris on the floor was a cause of his accident, it is now defendant's burden to establish, as a matter of law, that they had no authority or control over this area of the work site, and that they neither created nor had actual or constructive notice of the hazardous condition (Weinberg v Alpine Improvements, 48 AD3d 915, 917-918, [2008]; Gadani v Dormitory Auth. of State of N.Y., *supra* at 1220-1221; Wolfe v KLR Mech., 35 AD3d 916, [2006]). The Court finds that

Aurora and Cord did not eliminate all triable issues of fact as to whether they had notice of, or created, the hazardous condition on the floor which the plaintiff alleges caused his accident (Nasuro v PI Assoc., *supra* at 831; Farduchi v United Artists Theatre Circuit, 23 AD3d 610, 612 [2005]). Accordingly, summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence cause of action is denied to Aurora and Cord.

As to the School District, it established that it lacked the requisite control or supervision over the construction site and had no notice of the condition of the floor, and the plaintiff failed to rebut this with admissible evidence to the contrary. Accordingly, summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence causes of action is granted to the School District. However, ARA, as the prime contractor which hired Federal to install the fire sprinklers, failed to establish that it lacked the authority to direct or control the plaintiff's work[4] (Farduchi v United Artists Theatre Circuit, *supra*) and lacked notice of the condition. Therefore, summary judgment as to these claims is denied to ARA. The plaintiff has not established his entitlement to summary judgment and his motion is denied.

Labor Law § 200 applies to owners, contractors, or their agents (Russin v Louis N. Picciano & Son, *supra*) and it will be the plaintiff's burden to establish Consultants' liability for the hazardous condition on the property (Wolfe v KLR Mech., *supra*; Jurgens v Whiteface Resort on Lake Placid, 293 AD2d 924 [2002]). However, Consultants also had the initial burden to establish, *prima facie*, had no authority or control and that it did not create nor have actual or constructive notice of the dangerous condition alleged (*see*, Wolfe v KLR Mech., *supra* at 919; Bonse v Katrine Apt. Assoc., 28 AD3d 990, 991, [2006]). In support of Consultants' motion for summary judgment, it annexed, *inter alia*, the general conditions of the contract for construction, the contract between Consultants and the School District, and the affidavit of its vice president, Mr. Recce. The contracts submitted make it clear that each prime contractor agreed to have responsibility and control over its own means, methods, techniques, and procedures. Nevertheless, Mr. Recce testified at his deposition that Consultants had the authority to bring general safety concerns to the attention of the prime contractors, and it is at least arguable that the condition of the floor was a hazardous condition on the property. Mr. Recce also testified that he was seldom present at the site but that Consultants had personnel who were present and walked around the site daily. Therefore, while Mr. Recce's affidavit stated that, to his knowledge, Consultants was not aware of and did not receive notice of any dangerous condition, it is not clear that he was the person who would receive such complaints or that a search for a record of any such complaint was made. Accordingly, the Court finds that Consultants failed to establish, *prima facie*, that it was without authority and that it had no notice of the condition that the plaintiff alleges caused the accident (Nasuro v PI Assoc., *supra*; Payne v 100 Motor Parkway Assoc., *supra*; Gadani v Dormitory Auth. of State of N.Y., *supra*) and summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims is denied.

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[4] The defendants have raised some questions about whether the plaintiff's lack of training or experience on this type of lift, or Federal's alleged lack of adequate manpower, were factors in the accident. Further, Mr. Mulhall, Aurora's representative, testified at his deposition that requests to clean an area in preparation for Federal's work were made to both Aurora's foreman and ARA's foreman.

Indemnification Claims

The School District seeks summary judgment on its cross claim for contractual indemnification over and against Aurora. It is well settled that "the right to contractual indemnification depends upon the specific language of the contract" (Kader v City of N.Y. Hous. Preserv. & Dev., 16 AD3d 461 [2005], quoting Gillmore v Duke/Fluor Daniel, 221 AD2d 938, 939 [1995]). The indemnification provision at issue here requires the Contractor (Aurora) to indemnify the School District and Consultants to the fullest extent permitted by law, from and against "claims, damages, losses and expenses . . . arising out of or resulting from the performance of its work. . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, Subcontractor, or anyone employed by them." Here, since it has not been determined whether the plaintiff's injuries were caused by any act or omission of Aurora or its subcontractor, Cord, an award of summary judgment would be premature (D'Angelo v Builders Group, 45 AD3d 522, 524-525 [2007]). Accordingly, summary judgment is denied to the School District.

Consultants seeks summary judgment on its cross claims for contractual indemnification and a defense over and against Aurora and ARA, and relies on the identical indemnification provision. Since the issue of whether the plaintiff's injuries were caused by any act or omission of Aurora, or its subcontractor Cord, or ARA, or its subcontractor Federal, remains unresolved, an award of summary judgment for indemnification is likewise premature. The contract provision which obligates the Contractor to defend is dependent upon liability for violation of any laws or regulations, which is also unresolved Accordingly, summary judgment is denied to Consultants.

Aurora's motion seeks summary judgment in its favor on its third-party complaint seeking contractual indemnification over and against Cord and Cord's cross motion seeks to dismiss the third-party complaint. However, neither Aurora nor Cord annexed a copy of the third-party complaint to their moving papers. Accordingly, so much of these motions which seeks summary judgment on the third-party complaint, is denied with leave to renew (CPLR 3212 [b]).

The Labor Law § 241(6) claim dismissed herein is severed and the plaintiff's remaining claims shall continue.

Dated: Jan 5, 2008

Ralph J. Costello
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION