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

STEVE HEBERT,

Plaintiff,

- v -

BOVIS LEND LEASE LMB, INC. et al.,

Defendants.

And Third, Fourth and Fifth-Party Actions

INDEX NO. 102788/05

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.



Cross-Motion: [X ] Yes [ ] No

**Upon the foregoing papers, it is ordered that:** Motion sequence numbers 006 and 007 are consolidated herein for decision. This is a personal injury action arising out of an accident which occurred on August 9, 2004 while the plaintiff was working at a construction site located at the southeast corner of First Avenue and East 92nd Street in Manhattan. The company which the plaintiff owns (Action Chutes, Inc.) had been hired by the general contractor (Bovis Lend Lease LMC, Inc.) to furnish and install trash chutes at the building under construction. At the time of the accident, the plaintiff was unloading boiler flues while standing on a flatbed truck parked at a loading dock. He was struck by wet cement which had fallen from the 29th floor of the building. The cement had just been poured into a column form by employees of the defendant Century Maxim Construction Corp. and fell after the bottom of the form became separated from the main body. It appears that a nail or cleat which fastened the bottom to the form came loose. The wet concrete allegedly struck the plaintiff on his right foot, buttocks, left hip, ribs and elbow. This action was brought against the owner (92nd & First Residential Tower, LLC), the project developer (The John Buck Company), Bovis Lend Lease and Century Maxim, as well as two other parties which have not been identified in the papers before the court (Madison 92nd Street Associates, LLC and Wincaf Properties, Inc.). The plaintiff has asserted causes of action under Labor Law §§ 200, 240(1) and 241(6), as well as under the common law. In turn, seeking indemnification and/or contribution, 92nd and First and Bovis brought a third-party action against Action Chutes, which then brought a fourth-party action against Century Maxim. In addition, 92nd & First, along with Bovis and John Buck, brought a fifth-party action against the company (Nets That Work Co., Inc.) which Century Maxim hired to install netting around the building to capture any falling cement or debris.

In motion sequence number 006, the plaintiff has now moved for partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6). In motion sequence number 007, 92nd & First, John Buck and Bovis have moved for summary judgment and an order from the court declaring that Action Chutes is required to defend and indemnify them for all claims asserted against them by the plaintiff. Nets That Work ("NTW") has cross-moved for summary judgment dismissing the fifth-party complaint or, in the alternative, declaring that it is entitled to contractual indemnification from Century Maxim.

**Discussion**

**A. Plaintiff's Motion for Summary Judgment**

**1. Labor Law § 240(1)** – Labor Law § 240(1) requires that all contractors and owners engaged in the alteration or repair 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 either itself is elevated or is positioned below the level where materials are hoisted or secured. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-02 (1993). The statute imposes absolute liability for a breach which has proximately caused an injury.

Here, there was no safety device which adequately secured and prevented the wet concrete from falling and striking the plaintiff 29 floors below. Clearly, the accident was gravity-related. In opposing the plaintiff's motion, the defendants, however, point out that not every object which falls on a worker gives rise to the protections afforded under Labor Law § 240(1). Rather, citing *Narducci v. Manhasset Bay Assocs.*, 96 NY2d 259 (2001), they argue that where there has been a falling object, section 240(1) is triggered only where a hoisting or securing mechanism required under the statute has failed. *See also Buckley v. Columbia and Grammar Preparatory*, 44 AD3d 263 (1st Dept 2007). Equating the concrete which fell on the plaintiff to the window pane which fell out of its frame and onto the plaintiff in *Narducci*, the defendants contend that a hoisting or securing mechanism was not required and that section 240(1) does not apply to a box or form which gives way and releases its contents after a nail on the bottom comes loose. This argument is without merit.

In *Buckley v. Columbia and Grammar Preparatory*, 44 AD3d at 267, the First Department emphasized that in order for section 240(1) to apply, there must be "a significant, inherent risk attributable to an elevation differential" and the injury must be "the foreseeable consequence of a failure to provide proper protective devices" for items which "required securing within the contemplation of the statute." *Id.* at 269. Here, there is ample evidence in the record which establishes that the process of pouring cement into a column mold on the edge of a building posed a significant risk to persons below and that the risk could have been prevented by a protective device which shielded such persons from falling cement. Indeed, representatives of Bovis, Century Maxim and NTW testified about the need to properly nail the bottom of the column to the main body in order to prevent it from coming loose. They recognized that nails sometimes come loose and that the bottom drops away. In fact, the NTW representative, Richard Reese, testified that he had seen a number of such blowouts over the years.

Thus, there was a distinct possibility that the bottom of the column form would detach from the main body, releasing a large volume of wet concrete down onto whomever may be standing or walking below. The situation is not analogous to the window pane in *Narducci* falling from its frame. Rather, it is analogous to a window pane falling onto the street below while being installed into the frame. The material required proper securing. *See Outar v. City of New York*, 5 NY2d 731, 732 (2004); *Boyle v. 42nd Street Development Project*, 38 AD3d 404 (1st Dept 2007). Since the bottom of the column failed to secure the cement and since there was no other protective device such as netting which prevented the wet cement from falling onto the plaintiff, the court is persuaded that plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim.

**2. Labor Law § 241(6)** – It is well settled that in order to prevail on a claim brought under Labor Law § 241(6), a plaintiff is required to establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 504-05. Here, the plaintiff relies on four Industrial Code provisions, 12 NYCRR 23-2.2(a) and (b), 12 NYCRR 23-1.5 and 12 NYCRR 23-1.7(a)(1). Although he also relies on two OSHA regulations, plaintiff's counsel should know that it is well established that violations of OSHA do not support a section 241(6) claim. *See Rizzuto v. L.A. Wenger Contr. Co.*, 343, 348 (1998); *Lin v. Holy Family Monuments*, 18 AD3d 800, 801-802 (2005).

As to the Industrial Code provisions, plaintiff's reliance on 12 NYCRR 23-1.5, which concerns load-carrying equipment, is misplaced since the courts have repeatedly found that this provision is not sufficiently specific so as to support a section 241(6) claim. *See Dann v. City of Syracuse*, 231 AD2d 855, 856 (4th Dept 1996); *Vernieri v. Empire Realty Co.*, 219 AD2d 593, 598 (2nd Dept 1995).

12 NYCRR 23-1.7(a)(1), which concerns protection from overhead hazards, provides that "[E]very place where persons are required to work or pass that is normally exposed to falling materials or objects shall be provided with suitable overhead protection." Although this provisions has been found to be sufficiently specific, *see Zervos v. City of New York*, 8 AD3d 477 (2nd Dept 2004) and *Murtha v. Integral Constr. Corp.*, 253 AD2d 637, 639 (1st Dept 1998), the plaintiff has nevertheless failed to address, much less establish, that the area where he was injured is an area which is normally exposed to falling materials. *See Portillo v. Roby Anne Development*, 32 AD3d 421 (2nd Dept 2006).

12 NYCRR 23-2.2(a) and (b) concern concrete work. Subdivision (a) provides that forms "shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." Subdivision (b) provides that [D]esignated persons shall inspect the stability of all forms.... during the placing of concrete....Any unsafe condition shall be remedied immediately." Both of these provisions set forth a sufficient standard of conduct so as to support a section 242(6) claim. *See Morris v. Pavarini Const.*, 9 NY3d 47 (2007). Moreover, they clearly apply to columns forms, such as here, whose construction has been completed. *Id.* at 47. *See also Giordano v. Forest City Ratner Cos.*, 43 AD3d 1106 (2nd Dept 2007).

Although there is a question of fact as to whether, in satisfaction of subdivision (b), a Bovis foreman regularly inspected the column form, there is no question but that the form was not "properly braced," as required under subdivision (a). Despite the defendants' assertion that there is a question of fact as to whether the collapse of the bottom of the form was due to someone's negligence, they have not cited any evidence which suggests that the failure was attributable to anything other than an inadequate job of nailing the bottom to the main body of the column.

Pointing out that unlike a Labor Law § 240(1) claim, comparative negligence constitutes a valid defense to a Labor Law § 241(6) claim, *see Edwards v. C&D Unlimited, Inc.*, 295 AD2d 310, 311 (2nd Dept. 2002), the defendants also argue that plaintiff's motion for summary judgment on his Labor Law § 241(6) claim must be denied since he negligently failed to wear a hard hat at the time of the accident. The problem with this argument is that any such negligence was not a proximate cause of the plaintiff's injuries since he has not claimed to have been struck on his head by any of the wet cement which fell. Rather, as already noted, he only claims to have been struck on the right foot, buttocks, left hip, ribs and elbow. Under the circumstances, summary judgment is appropriate on plaintiff's section 241(6) claim insofar as it is based on a violation of 12 NYCRR 23-2.2(a). *See Harris v. Arnell Const. Corp.*, 47 AD3d 768 (2nd Dept 2008); *Zuluaga v. P.P.C. Const.*, 45 AD3d 479 (1st Dept 2007); *Uluturk v. City of New York*, 298 AD2d 233 (1st Dept 2002).

**B. Third-Party Plaintiffs' Motion for Summary Judgment Against Action Chutes** – Defendants/third-party plaintiffs Bovis and 92nd & First have moved for summary judgment on their third-party claim against Action Chutes for contractual indemnification. Although it is not a party to the third-party action, John Buck has joined on the motion and somehow seeks the same relief.

As a threshold matter, in opposing the motion, Action Chutes argues that the motion is untimely because it was not made within sixty days of the filing of the note of issue, as required by the court's preliminary conference order of November 17, 2005. Action Chutes is correct. Although the note of issue was filed on January 18, 2008, the third-party plaintiffs' summary judgment motion was not served until on or about May 15, 2008, almost 120 days later.

It is well settled that statutory and court-ordered time frames in which to make a summary judgment motion are requirements which may be excused only by a showing of good cause for the delay. *See Miceli v. State Farm Mutual Automobile Ins. Co.*, 3 NY3d 725 (2004); *Cabibel v. XYZ Assocs.*, 36 AD3d 498 (1st Dept 2007). *See also Brill v. City of New York*, 2 NY3d 648 (2004). Here, the third-party plaintiffs' counsel contends that the delay was due to the fact that it was not retained by them until February, 2008, the month after the note of issue was filed, was not aware of the preliminary conference order and, after reviewing Part 48's individual rules, proceeded under the assumption that, pursuant to CPLR 3212(a), it had 120 days to bring a summary judgment motion after the note of issue was filed. Notably, this argument is made in a memorandum of law and not in an affirmation attested to by an attorney who claims personal knowledge of the matter. In any event, the third-party plaintiffs' proffered excuse does not establish good cause for the delay. First, counsel's failure to familiarize itself within a month of its retention with all prior court orders is hardly excusable. Second, since counsel is based in Manhattan, it should have been aware that the rules governing all Justices in the Non Commercial Division of New York County Supreme Court, Civil Branch, including Part 48, require that, unless specified otherwise in a particular case, all motions for summary judgment must be made no later than 60 days after the filing of the note of issue. *See* Rule 17. Since counsel has therefore failed to show cause for the third-party plaintiffs' two-month delay in bringing this motion, the motion must be denied.

Although the motion has been denied, the court notes that the parties have raised a number of issues about the underlying merits of the application which should be addressed at this time. First, there is no merit to Action Chutes's argument that the subcontract between it and Bovis which has been submitted in support of the third-party plaintiffs' motion should not be considered because the document has not been properly authenticated. In the absence of any proof by Action Chutes that the subcontract or any of its associated documents are invalid or fraudulent, they may properly be considered. *See Szalkowski v. Asbestospray Corp.*, 259 AD2d 867, 868 (3rd Dept 1999).

Second, the court agrees that The John Buck Company is not a proper party on this motion for contractual indemnification since it is not a third-party plaintiff and has not otherwise asserted a claim against Action Chutes.

Third, the indemnification clause of the subcontract does not, as Action Chutes argues, violate the proscription under GOL § 5-322.1 against a party from indemnifying another party for the other party's negligence. Although the clause otherwise obligates Action Chutes to indemnify the third-party plaintiffs from claims asserted against them for bodily injury even if caused in part by their active negligent, this ostensible violation of GOL § 5-322.1 is of no consequence since the clause also contains the limitation that its terms apply only "[T]o the full extent permitted by the law." Thus, the subcontract clearly contemplates only partial indemnification for vicarious, statutory liability in the event that a particular defendant is found to have been negligent. As such, the indemnification clause is enforceable. *See Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 NY2d 786, 795 (1997); *Correia v. Gotham Constr. Corp.*, 259 AD2d 60, 64 (1st Dept 1999).

Fourth, contrary to the assertion of Action Chutes, the indemnification clause of the subcontract entitles 92nd & First and Bovis to indemnification without any finding that Action Chutes was negligent. Although the prime contract between Bovis and the Owner (identified as an entity named Buck Development LLC) requires that Bovis be found negligent in order to entitle the owner and its related companies, including 92nd & First, to indemnification from Bovis, this requirement of negligence was not incorporated into the subcontract. Rather, the subcontract merely stated that Action Chutes was obligated to indemnify and hold harmless Bovis, the John Buck Company and any other parties which Bovis is obligated to indemnify and hold harmless under the prime contract. Thus, the reference in the subcontract to the prime contract is limited to the purpose of identifying which entities Action Chutes is obligated to indemnify and does not concern the terms of that indemnification.

Fifth, there is no merit to Action Chutes's argument that the plaintiff's accident is not covered by the indemnification clause in the subcontract because it arose not out of Action Chute's work of unloading boiler flues but, rather, out of Century Maxim's work of pouring concrete. In addition to covering bodily injuries arising out of Action Chute's work, the clause also applies to injuries occurring "in connection" with its work. Clearly, the accident occurred in connection with the work plaintiff was performing. *See, e.g., Greater New York Mut. Ins. Co. v. Marine Mutual Co.*, 3 AD3d 44 (1st Dept 2003).

Finally, the court notes that the parties have not addressed the issue of whether, in fact, the indemnification clause of the subcontract was even intended to apply to an owner/employee of Action Chutes. 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 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, the clause does not specify that it covers injuries to anyone working for Action Chutes. Unless the third-party plaintiffs can show that the purpose of the subcontract and the surrounding circumstances otherwise imply such coverage, their claim for contractual indemnification against Action Chutes will be denied.

**C. NTW's Cross-Motion For Summary Judgment** - - As previously discussed, NTW was retained by Century Maxim to install netting around the building to capture any falling cement or debris. Bovis, John Buck, 92nd & First and Century Maxim have brought a fifth-party action against NTW asserting causes of action for contractual indemnification, failure to procure an insurance policy on their behalf and common law indemnification/contribution. NTW has now cross-moved for summary judgment dismissing the fifth-party complaint or, in the alternative, for an order declaring that Century Maxim is contractually obligated to defend and indemnify it in this action.

The motion is clearly untimely since it was not made until May 28, 2008, more than 120 days after the filing of the note of issue. Nevertheless, NTW's counsel, William N. DeVito, has submitted an affirmation in which he attempts to establish good cause for the lengthy delay. He states that he was unable to bring this motion earlier because the deposition of NTW's representative, Richard Reese, was not taken until after the note of issue was filed and that he only recently obtained a signed transcript of the deposition and a copy of the contract between NTW and Century Maxim. The deposition, however, was taken on February 27, 2008, nineteen days before the expiration of the 60-day time period. Although he had ample opportunity to do so, counsel never sought an extension of time to bring this motion. *See Miceli v. State Farm Mutual Automobile Ins. Co.*, 3 NY3d at 725. Moreover, there is simply no excuse for waiting more than three months after Reese's deposition was taken to bring this motion. Indeed, counsel has not explained why there was such an alleged delay in having the transcript signed and in obtaining a copy of the contract. In the absence of any such explanation, NTW's extended delay in bringing this motion is without good cause. The cross-motion must therefore be denied.

Nevertheless, as with the late motion brought by Bovis and 92nd & First, the parties have raised a number of issues which should, at this time, be addressed. First, it is clear that the first two causes of

action in the fifth-party complaint are without merit. The contract between NTW and Century Maxim which NTW has submitted to the court, which is unsigned but which none of the fifth-party plaintiffs has suggested is invalid or fraudulent, does not contain any provision obligating NTW to indemnify Century Maxim or any other party. Nor is there any provision which obligates NTW to procure an insurance policy on behalf of any other party.

Second, NTW has failed to establish that the fifth-party complaint must be dismissed under the anti-subrogation rule. Under the anti-subrogation rule, an insurer cannot maintain a subrogation action against its own insured for a claim arising from the same risk for which the insured was covered. *See North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 NY2d 281, 294 (1993). Thus, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor, where the third-party is an additional insured under the same policy and the claim involves a risk which the policy covers. *See Elrac Inc., v. Ward*, 96 NY2d 58, 67 (2001). Here, NTW argues that the anti-subrogation rule is applicable because, pursuant to its contract with Century Maxim, it is an additional insured under the insurance policy which AIU issued to Century Maxim. It is true that the unsigned contract between NTW and Century Maxim which has been submitted to the court contains a provision which obligates Century Maxim to procure a liability policy naming NTW as an additional insured. However, there is no evidence that any such policy was ever issued. In the absence of such evidence, the anti-subrogation rule cannot be applied.

Third, NTW is not entitled to summary judgment dismissing the third cause of action for common law indemnification/contribution since there is evidence that it was negligent. NTW has not disputed that there was a gap between the netting which it installed around the building and the building itself. It own representative, Richard Reese, testified at his deposition that no such gap should have existed. Moreover, Century Maxim's representative, Robert Richardson, testified at his deposition that the wet concrete which struck the plaintiff fell through the gap. Although there is conflicting evidence about whether the plaintiff was actually standing below the gap when he was struck, such evidence merely raises a triable issue of fact.

Fourth, there is no merit to NTW's claim that it is contractually entitled to be indemnified by Century Maxim in this proceeding. It is true that the unsigned contract between NTW and Century Maxim which has been submitted to the court contains an indemnification provision running from Century Maxim to NTW. However, the provision is clearly unenforceable under GOL § 5-322.1 since it requires Century Maxim to indemnify NTW for NTW's own negligence and does not contain any limitation on this obligation such that it only applies "to the full extent permitted by law." *See Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 NY2d at 786.

Accordingly, in motion sequence number 006, the plaintiff's motion for partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) is hereby granted. In motion sequence number 007, the motion by 92nd & First, John Buck and Bovis for summary judgment is denied. NTW's cross-motion for summary judgment is also denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on October 21, 2008 at 10:00 a.m. to pick a trial date.

ENTER ORDER



**Dated:** 9/11/08

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

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