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SHORT FORM ORDER

INDEX No. 05-21183
CAL. No. 07-02862-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 5-1-08
ADJ. DATE 8-29-08
Mot. Seq. # 003 - MD
004 - MD
005 - XMotD

SHANE MCCANN,

Plaintiff,

- against -

JATO, INC., MATTITUCK CVS, LLC and NORTH FORK PROPERTIES, LLC,

Defendants.

JATO, INC.

Third-Party Plaintiff,

- against -

TRINITY ROOFING, LLC and ADMIRAL INSURANCE COMPANY,

Third-Party Defendants.

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Upon the following papers numbered 1 to 83 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 24 - 46 ; Notice of Cross Motion and supporting papers 47 - 60 ; Answering Affidavits and supporting papers 61 - 66 ; 67 - 68 ; 69 - 70 ; 71 - 72 ; 73 - 74 ; 75 - 76 ; Replying Affidavits and supporting papers 77 - 79 ; 80 - 81; Other 82 - 83 ; (~~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 (#003) by defendant/third-party plaintiff Jato, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims and summary judgment on its claim for contractual indemnification over and against third-party defendant Trinity Roofing, LLC, is denied; and it is further

ORDERED that the motion (#004) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to defendants' liability pursuant to Labor Law § 240(1) is denied; and it is further

ORDERED that the motion (#005) by defendant Mattituck CVS, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and summary judgment on its cross claim for contractual indemnification and a defense, and breach of contract for failure to procure insurance, over and against Jato, Inc., and summary judgment on its cross claim for common-law indemnification over and against third-party defendant Trinity Roofing, LLC, is granted to the extent (i) that movant is granted summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it; (ii) that movant is granted conditional summary judgment on its claim for contractual indemnification over and against Jato, Inc.; (iii) and that movant is granted conditional summary judgment on its claim that Jato, Inc. breached the insurance provision of the subject contract, and is otherwise denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he allegedly suffered in a fall through an opening for a roof hatch. The property owner, defendant Mattituck CVS, LLC (CVS), had contracted with defendant Jato, Inc. (Jato) to act as the general contractor in construction of its new store. Jato had subcontracted installation of the roof to third-party defendant Trinity Roofing, LLC (Trinity), the plaintiff's employer.

The plaintiff testified at his deposition that he was an experienced roofing mechanic, that he had worked with Trinity on approximately 20 roofs for other CVS stores, and that they all contained roof hatch openings, which were used as emergency exits in case of a fire, but that there was no uniform placement of the hatches, rather, each store was different. Trinity installed or "screwed down" the hatch covers and would make sure that the roofing material was firmly attached to the hatch cover fixture, to prevent leaking. Construction of the flat roof was a two-step process: the base layer consisted of Rubberoyd sheets, and the second layer consisted of a granulated Rubberoyd material, also in sheets or rolls. The first layer was installed approximately a week before the accident. The plaintiff testified that,

when the first layer was installed, there was no opening for the roof hatch.[1]

The plaintiff also testified that the day of his accident was his first day back at the CVS store. In preparation for installation of the second layer, the plaintiff was removing debris on the roof, including pieces of scrap insulation, and throwing it to the ground. He saw a sheet of plywood with a screw in each corner. Each screw was facing up, with the body extending out of the wood. The plaintiff assumed that the plywood was debris and proceeded to flatten or break the body of the screws with his hammer, in preparation for throwing the plywood off the roof. To get a better grip, he lifted one side of the plywood and simultaneously took a step. As he stepped, he fell through the hatch opening, landing on the cement floor below and sustaining the injuries alleged herein. The plaintiff testified that he did not know, and was not warned, that the plywood was covering a hole for the roof hatch. The plaintiff also stated that when the paramedics arrived and turned him over (he was lying face down), he was able to see the plywood was roughly over the opening above him and that the side facing the floor had the word "hole" spray-painted on it. There was no witness to the plaintiff's fall.

Trinity is owned by Robert Guiffreda (Rob) and his son, Timothy Guiffreda (Tim), is employed as its foreman. Rob testified at his deposition that, although Trinity would normally install or attach the roof hatch cover as part of a roofing job, it did not normally cut the opening in the roof. Rob testified that he examined the roof the day before the accident and saw that the subject opening had been made in the roof and that it was covered with plywood which was secured with screws, although he could not remember if there was any warning on the plywood. When he returned the next morning, he saw that other trades were already present and that the plywood was no longer secured, rather, the screws were facing up. He did not know who unfastened the cover. Rob also testified that his supplier was present at the site to pick up surplus base layer, and to deliver the second layer of Rubberoyd and the roof hatch. When he met with his crew, including Tim and the plaintiff, he told them that the hatch was to be placed right away and warned them that the plywood cover was not attached. Tim testified at his deposition that he and members of his crew, including the plaintiff, were on the roof when he warned them that the plywood was unattached and to stay away from it. Tim, the plaintiff, and another worker, placed some of the surplus roofing material around the plywood, to act as a barrier. Tim directed his crew to get the roof ready for the next layer by removing any debris.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to 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.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***,

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[1] While the exact timing of the installation of the base layer remains unclear, the parties do not dispute that Trinity had left the store for a number of days before returning to install the second layer. There is also no dispute that, at the time that the base layer was installed, there was no opening for the roof hatch, that it was cut into the roof thereafter, and that Trinity did not cut the opening.

65 NY2d 513, 493 NYS2d 102 [1985]). The legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accidents" (***Rocovich v Consolidated Edison Co.***, *supra*). Nevertheless, the "special hazards" afforded by § 240(1) "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*see,* ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra; **Rodriguez v Margaret Tietz Ctr. for Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994]). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]). While an injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240(1) (***Raquet v Braun***, 90 NY2d 177, 184, 659 NYS2d 237 [1997]), a defendant is not liable under § 240(1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (***Robinson v East Med. Ctr.***, 6 NY3d 550, 814 NYS2d 589 [2006]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

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 his entitlement to judgment as a matter of law (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Fabbricatore v Lindenhurst Union Free School Dist.***, 259 AD2d 659, 686 NYS2d 822 [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, 665 NYS2d 25 [1997]). Here, the plaintiff argues that he did not know that the plywood was covering the opening, that he was not warned to avoid it, and that the plywood was inadequate to provide protection from falling. In opposition, the defendants argue that the plaintiff was an experienced roofer and had installed many roofs at other CVS stores which contained roof hatches, that it was plaintiff's own action in removing the plywood cover which was the sole proximate cause of his accident,[2] and that the covering was an appropriate safety device but that the plaintiff was recalcitrant in failing to heed the warning to avoid or use caution around the unfastened plywood. In situations like the present scenario, where the conflicting depositions offered raise questions as to whether there was any violation of § 240(1), whether any alleged violation was the proximate cause of the accident (***Sing v Black Diamonds***, 24 AD3d 138, 805 NYS2d 58 [2005]; ***LaRock v KD Intl. Dev. Corp.***, 277 AD2d 429, 716 NYS2d 601 [2000]; ***Bahrman v Holtsville Fire Dist.***, 270 AD2d 438, 704 NYS2d 660 [2000]), and whether plaintiff's own actions were the sole proximate cause of his accident (***Robinson v East Med. Ctr.***, *supra*; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*), summary judgment is inappropriate.[3] Accordingly, the plaintiff's motion is denied.

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[2] The parties do not dispute that the plaintiff was aware that an employee of another contractor had fallen through an opening in the roof at a previous CVS job, under similar circumstances, i.e. by removing a plywood covering.

[3] While there are cases in which a plaintiff's fall through a roof or floor opening has established his entitlement to summary judgment, the Court notes that the injured plaintiffs in those cases, and in some instances their supervisors as well, were unaware that the wood or other material was covering a hole (*see,* ***Valensisi v Greens***

(continued...)

Mr. Ortega, the on-site supervisor for Jato, testified at his deposition that the procedure for the roof hatches at the CVS stores was basically the same: the steel fabricator would cut the opening in the roof, the carpenter would fasten a plywood cover, and the roofer would supply and install the hatch. At this CVS, the plywood cover had the word "hole" written on it. Ortega testified that, after the hole was cut, the cover had been removed by other trades and the opening used to access the roof, via an extension ladder. Ortega also stated that he made sure that the cover was replaced and secured at the end of each day. On the afternoon before the plaintiff's fall, Ortega and his laborer made use of the opening and were on the roof clearing trash. Ortega testified that he personally replaced and secured the plywood before he left. The next morning, before the plaintiff's fall, Ortega learned from Rob that the cover was not secured. Both Ortega and Rob testified that they did not know who had unfastened the plywood cover.

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, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [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, 294-295, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, there is no dispute that neither defendant controlled or supervised the plaintiff's work. However, 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, 858 NYS2d 175 [2008]; ***Payne v 100 Motor Parkway Assoc.***, 45 AD3d 550, 846 NYS2d 211 [2007]; ***Gadani v Dormitory Auth. of State of N.Y.***, 43 AD3d 1218, 841 NYS2d 709 [2007]).

It will be the plaintiff's burden at trial to establish that the unfastened hatch cover itself was a dangerous condition and that it was a proximate cause of his accident, rather than the work methods controlled by his employer or his own negligence (***Azud v 270 5th Realty Corp.***, 46 AD3d 728, 848 NYS2d 688 [2007] *lv denied* 10 NY3d 706, 857 NYS2d 39 [2008]). However, for the purposes of the defendants' motions to dismiss plaintiff's Labor Law § 200 claim, it is their initial 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 alleged (***Weinberg v Alpine Improvements***, 48 AD3d 915, 917-918, 851 NYS2d 692 [2008]; ***Gadani v Dormitory Auth. of State of N.Y.***, *supra* at 1220-1221; ***Wolfe v KLR Mech.***, 35 AD3d 916, 826 NYS2d 458 [2006]). The Court

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[1](...continued)
at Half Hollow, 33 AD3d 693, 823 NYS2d 416 [2006]; ***Ladaro v New York City Bldrs. Group***, 271 AD2d 574, 706 NYS2d 174 [2000]; *see also*, ***Geca v Best Roofing of N.J.***, 15 Misc 3d 1120[A], 839 NYS2d 433 [2007], wherein the plaintiff's employer could not substantiate its claim that the plaintiff had been warned of the opening). Here however, the testimony is contradictory as to whether the plaintiff was told that the plywood was covering the hatch opening and was warned to use caution or stay away from it. The Court is aware of the contrary holdings in ***Justyk v Treibacher Schleifmittel Corp.*** (4 AD3d 882, 771 NYS2d 615 [2004]) and ***Clark v Fox Meadow Bldr.*** (214 AD2d 882, 624 NYS2d 685 [1995]) and does not find them controlling.

finds that CVS met its burden and that plaintiff did not rebut its showing. Therefore, CVS is granted summary judgment as to the plaintiff's Labor Law § 200 and common-law negligence claims. However, based on the evidence before it, the Court finds that Jato did not eliminate all triable issues of fact as to whether it had the authority to control the unsafe condition that the plaintiff alleges caused his accident[4] (***Nasuro v PI Assoc.***, *supra* at 831; ***Farduchi v United Artists Theatre Circuit***, 23 AD3d 610, 612, 804 NYS2d 788 [2005]). Accordingly, summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims is denied to Jato.

Jato's Indemnification Claim

Jato seeks summary judgment on its claim for contractual indemnification over and against Trinity. 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, 791 NYS2d 634 [2005], quoting ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [1995]). The hold harmless agreement between Jato and Trinity requires Trinity to indemnify and hold harmless Jato from and against "claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of its work. . . . provided such claim, damage, loss or expense is caused in whole or in part by negligent or willful acts or omission of the Subcontractor, or anyone employed by them . . . regardless of whether or not it is caused in part by a party indemnified hereunder." Therefore, the obligation to indemnify is dependent upon a finding that a negligent act or omission of Trinity, or the plaintiff's own action, was a proximate cause of his accident (***Rodriguez v N & S Bldg. Contr.***, 5 NY3d 427, 433, 805 NYS2d 299 [2005]; ***Robinson v City of New York***, 8 Misc 3d 1012[A], 801 NYS2d 781, *affd* 22 AD3d 293, 802 NYS2d 48 [2005]).

Further, while an indemnification clause that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such a clause does not violate the General Obligations Law where, as here, the provision authorizes indemnification to the "fullest extent permitted by law," which contemplates the concept of "partial indemnification" (***Lesisz v Salvation Army***, 40 AD3d 1050, 837 NYS2d 238 [2007]; ***Balladares v Southgate Owners Corp.***, 40 AD3d 667, 835 NYS2d 693 [2007]). Therefore, while Jato's own negligence, if any, will not bar indemnification if Trinity and/or plaintiff are also found to be negligent, since these issues remained unresolved, an award of summary judgment would be premature (***D'Angelo v Builders Group***, 45 AD3d 522, 524-525, 845 NYS2d 814 [2007]; ***Farduchi v United Artists Theatre Circuit***, *supra*). Accordingly, summary judgment is denied to Jato.

CVS's Insurance and Indemnification Claims

Jato relies upon the holding in ***Sing v Black Diamonds*** (*supra*) to support its entitlement to dismiss the plaintiff's Labor Law § 200 claim. However, in ***Sing*** the general contractor testified that it merely conducted walk-through inspections, that it had the authority to have unsafe conditions corrected, and that it had inspected the plywood cover. It was found to have only general supervision and coordination authority which, the Court reasoned, was insufficient to trigger liability. Here, however, Ortega testified that he made sure that the plywood was securely fastened at the end of each day, that he had secured it himself the night before the plaintiff's accident, and that he was aware it was unfastened before the plaintiff's fall. Therefore, the circumstances are not the same.

As a general rule, an owner held vicariously liable for a plaintiff's injuries pursuant to Labor Law §§ 240(1) and/or 241(6) is entitled to full common-law indemnification from the "actor who caused the accident" (***Chapel v Mitchell***, 84 NY2d 345, 618 NYS2d 626 [1994]; ***Rivera v D'Alessandro***, 248 AD2d 522, 669 NYS2d 877 [1998]; ***Werner v East Meadow Union Free School Dist.***, 245 AD2d 367, 667 NYS2d 386 [1997]). However, pursuant to Workers' Compensation Law §11, the Omnibus Worker's Compensation Reform Act (L. 1996, c. 635, §2), a plaintiff's employer is exempt from claims for contribution or indemnity in the absence of plaintiff's "grave injury" (*see also*, ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]) unless there is a specific contractual obligation for such. Here, it does not appear that plaintiff suffered a grave injury. Therefore, CVS's cross claim for common-law indemnification does not lie against Trinity and summary judgment on this claim is denied (***Martelle v City of New York***, 31 AD3d 400, 817 NYS2d 504 [2006]).

CVS also seeks summary judgment on its cross claims for common-law and contractual indemnification over and against Jato. To establish a claim for common-law indemnification "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond some statutory liability but must also establish that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (***Perri v Gilbert Johnson Enter.***, 14 AD3d 681, 685, 790 NYS2d 25 [2005]; ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [2004]; ***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1999]). Here, CVS has not been found vicariously liable to plaintiff, and the issue as to whether some negligence on the part of Jato contributed to the plaintiff's accident remains unresolved (***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2006]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 818 NYS2d 546 [2006]). Therefore, summary judgment on CVS's claim for common-law indemnification over and against Jato is denied, as premature.

CVS's claim for contractual indemnification is based upon Article 17 of its contract with Jato, entitled "INDEMNIFICATION," which provides, in relevant part:

> The Contractor will defend, indemnify and hold harmless CVS, . . . from and against all claims, damages, losses and expenses, including attorneys' fees, arising out of or resulting from:
>
> (i) Any negligence or tortious act or omission on the part of Contractor or any of its agents, contractors, subcontractors, . . .; or
>
> (ii) Any failure on the part of Contractor to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in this Contract on its part to be performed or complied with; or
>
> (iii) Operations or performance of any kind associated with and/or under the Contract by the Contractor, any subcontractor, anyone directly or indirectly employed by the Contractor or any subcontractor, or anyone for whose acts the Contractor or any subcontractor may be liable, which are caused in whole or in part by any error, omission or act of the Contractor,

> any subcontractor, anyone directly or indirectly employed by the Contractor or any subcontractor . . .

The clear language of the indemnification provision establishes that CVS is entitled to indemnification and Jato does not dispute that CVS is entitled to contractual indemnification (***Cunningham v Alexander's King Plaza***, 22 AD3d 703, 803 NYS2d 125 [2005]).[5] Since the plaintiff's Labor Law § 200 and common-law claims have been dismissed as against CVS, the only potential liability CVS faces is that vicariously imposed under Labor Law §§ 240(1) and/or 241(6). Accordingly, conditional summary judgment is granted to CVS on its cross claim for contractual indemnification over and against Jato in the event that a judgment is entered awarding damages in favor of the plaintiff and against CVS (***Lofaso v J.P. Murphy Assoc.***, 37 AD3d 769, 831 NYS2d 230 [2007]; ***Tranchina v Sisters of Charity Health Care Sys. Nursing Home***, 294 AD2d 491, 492, 742 NYS2d 655 [2002]; ***Werner v East Meadow Union Free School Dist.***, *supra*).

The contract between CVS and Jato provided, *inter alia*, that Jato would obtain liability insurance for not less than $3,000,000.00 for personal injuries and would name CVS as an additional insured. Upon tender, Jato's insurer advised CVS that it would defend and indemnify CVS up to the limits of the policy, which was $1,000,000.00, not the $3,000,000.00 required by the contract. Therefore, CVS is entitled to summary judgment on its breach of contract claim, conditioned upon CVS's payment of damages to plaintiff in excess of the $1,000,000.00 and less than $3,000.000.00 (***Nrecaj v Fisher Liberty Co.***, 282 AD2d 213, 723 NYS2d 26 [2001]). The issue of whether CVS may recoup its defense costs, although it refused a defense offered by Jato's carrier based upon Jato's failure to secure $3,000,000.00 in coverage, is also premature (***Netjets v Signature Flight Support***, 43 AD3d 1016, 1019, 844 NYS2d 331 [2007]), and summary judgment as to this issue is denied.

The plaintiff's Labor Law § 200 and common-law negligence claims against CVS, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: Oct. 17, 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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[5] Jato's assertion that Trinity owes CVS indemnification does not relieve it of its contractual obligation.