[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART _____
J.S.C. *Justice*

Index Number : 102853/2006
TWOMEY, JOHN
VS
DBAB WALL STREET LLC.
Sequence Number : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is 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

FILED
OCT 28 2008
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 10/24/08

_____ J.S.C.
HON. JUDITH J. GISCHE

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: PART 10

----------x

JOHN TWOMEY,

Plaintiffs,

-against-

DBAB WALL STREET, LLC, DEUTSCHE BANK AG and HENEGAN CONSTRUCTION CO, INC.,

Defendants.

----------x

HENEGAN CONSTRUCTION, CO., INC.,

Third-Party Plaintiff,

-against-

ADCO ELECTRICAL CORP., and ADCO ELECTRICAL CORP.,

Third-Party Defendants

----------x

DECISION/ORDER
Index No.: 102853/06
Seq. No.: 002

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltf's n/m (§3212) w/DLF affirm, exhs	1
Def DBAB's n/xmot (§3212) w/ WDJ affirm, exhs	2
3RD Pty Def ADCO's n/xmot (§3212) w/ EDM affirm, exhs	3
Pltf's reply/opp affirm (DLF)	4
Def DBAB's reply/opp affirm (WDJ)	5
Pltf's reply/opp affirm (DLF)	6
3RD Pty Def ADCO's reply/opp affirm (EDM)	7
Def DBAB's reply/opp affirm (WDJ)	8

Upon the foregoing papers the court's decision is as follows:

In the main action, plaintiff seeks to recover monetary damages for personal

injuries he claims to have sustained as a result of defendants' violation of the labor laws. Defendant DBAB Wall Street, LLC ("DBAB") admitted in its answer that it is the owner of the building located at 60 Wall Street, New York, New York (the "building"), at which a construction project was taking place (the "project"). The project involved the renovation of existing interior spaces and certain infrastructure work inside the building. Defendant Henegan Construction Co. ("Henegan") was the construction manager at the project and third-party defendant ADCO Electrical Corp. ("ADCO") was a subcontractor at the project, as well as plaintiff's employer. James Dyson, director in corporate real estate and services for Defendant Deustche Bank AG ("Deutsche") testified at his deposition that Deutsche is also the owner of the building. The relationship between DBAB and Deutsche is unclear to the court, although neither entity disputes that it respectively owns the premises.

Plaintiff now moves for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1). Defendants cross move: [1] pursuant to CPLR § 3211 and/or 3212 dismissing plaintiff's complaint in its entirety; or, alternatively, [2] pursuant to CPLR § 3211 and/or 3212 on the third-party complaint against ADCO for contractual defense, indemnification and insurance procurement. ADCO cross-moves for summary judgment dismissing plaintiff's complaint and does not take any position with respect to defendants' motion on the third-party complaint.

Issue has been joined, and since these motions were brought timely after the note of issue was filed, they will be considered on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Many of the relevant facts are undisputed. Plaintiff was employed as a journeyman electrician by ADCO. ADCO was an electrical subcontractor at the project pursuant to a contract between ADCO and Hennegan. On March 25, 2003, plaintiff was installing light fixtures at the project. Plaintiff was working with a partner named David Brown ("Brown") who was also employed by ADCO. Plaintiff testified that he was using a wooden, eight foot, A-frame ladder provided by his employer while attaching kindorf supports to piping in the ceiling. Plaintiff further testified that he fully opened and locked the ladder, making sure that the ladder was stable on the floor. There is no dispute that the ladder did not have slip resistant feet.

Plaintiff stated that he used the ladder for approximately an hour before the accident and that the ladder appeared stable and did not shake. Brown was handing tools and other equipment, including the kindorf supports, up to plaintiff while plaintiff was on the ladder. Plaintiff testified as follows:

Q. After you installed that piece of Kindorf above the pipes, what happened next?

A. As I was installing the Kindorf, the Kindorf support with the strap, the ladder kicked out from under me and fell over.

Q. Immediately before the ladder fell over, did it shake at all

A. No.

Q. Did you have any material or equipment in your hands as you fell over?

A. A screwdriver and a wrench.

Q. Did you have any material or equipment in your

hands as you fell over?

A. A screwdriver and a wrench.

Q. Did the ladder have a stop step where you place material and equipment or something else?

A. Yes It's an A-frame and it has a top.

Q. Did you use that top step that morning while you were working, the top platform?

A. No.

Q. Which step were you standing on immediately before your accident?

A. Approximately the fourth step.

Q. The fourth step from the top?

A. Fourth from the bottom.

...

Q. Did the ladder completely fall over?

A. Yes.

Q. Did it fall to the left, right, forward, back?

A. I believe it fell to the left. Yes, the left.

...

Q. Immediately before the accident occurred, did you have both arms overhead?

A. Yes.

Brown submitted to an examination before trial, and his deposition testimony about the accident was entirely consistent with plaintiff's testimony. There were no

other eye witnesses to the accident. There were several accident reports created. An accident report dated March 26, 2003 provides: "while installing kindorf supports while on 8' ladder fell off + hit concrete slab hitting head, banging whole left side + right knee." A foreman's 24 hour incident report prepared by Gerard Pugliese ("Pugliese"), general foremen for ADCO, also dated March 26, 2003 states: "while installing kindore supports in mechanical room on M1 level, [plaintiff] was working off 8' ladder while reaching to put strap on, ladder kicked out from under him. Falling to concrete slab. Hit hard & banged up side & knees." Finally, an undated incident/safety/hazard report prepared by Victor Gomez for Deutsche provides as follows:

> On March 25, 2003, at approximately 1100 hours, [plaintiff], an employee of [ADCO] was working on an 8 foot ladder in the M1 level of [the premises]. [Plaintiff] was standing on the 5th step of the ladder and while attempting to climb up to the 6th step, the ladder shifted causing him to lose his balance and fall to the floor causing injury to his right knee and left shoulder.
> ...
> The ladder in question is manufactured by Michigan Ladders. Attached to it are warning signs as to maximum weight load (250 pounds) and highest standing level (5 feet 7 inches). The sixth step of this ladder would have taken [plaintiff] above 5 feet 7 inches.

Summary of the Parties' Arguments

The court will first address the motion and cross-motions seeking relief with respect to plaintiff's complaint before reaching the indemnification issues.

Plaintiff has asserted causes of action under Labor Law §§ 200, 240 (1) and 241(6). In support of his motion for summary judgment on the § 240 (1) claim, plaintiff

argues that the testimony establishes that the ladder failed, resulting in injury to plaintiff, thereby establishing *prima facie* liability. Plaintiff also contends that the failure of the defendants to provide any safety devices to plaintiff such as ropes and/or slings, and the fact that the ladder did not have rubber feet, constitutes a clear violation of Labor Law § 240 (1).

Defendants and ADCO each present many of the same arguments in opposition to plaintiff's motion and in support of their respective cross-motions. Defendants argue that not every fall from a ladder constitutes a violation of Labor Law § 240 (1). Defendants claim that plaintiff was in fact furnished an adequate safety device, namely, the eight foot wooden 8-frame ladder at issue. Defendants contend that plaintiff cannot demonstrate any evidence that the ladder was defective or inadequate. Rather, defendants maintain that plaintiff "clearly caused his own accident by leaning on the ladder." ADCO maintains that when a ladder which is not defective "indescribably 'shifts', the only reasonable conclusion that a jury could reach is that the plaintiff's actions atop the ladder caused its movement and ultimately caused the fall."

Defendants argue that plaintiff's Labor Law § 200 claim should be dismissed because plaintiff's accident did not occur as a result of a dangerous condition at the job site and the defendants did not exercise supervisory control over plaintiff's work. Defendants also seek dismissal of plaintiff's Labor Law § 241 (6) claim on the basis that plaintiff's alleged violations of Industrial Code §§ 23-1.5, 23-1.7 (f), 23-1.16 and 23-1.21 are either too general or are inapplicable to this case.

Discussion

Labor Law § 240 (1), also known as the Scaffold Law, was intended "to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site" (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1st Dept 2007]).

Labor Law § 240 (1) provides that:

> All contractors and owners and their agents..., in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, 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.

Labor Law § 240 (1) imposes absolute liability for a breach which has proximately caused an injury (Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]). "Proximate cause is demonstrated where the plaintiff generally shows that the defendant's negligence was a substantial cause of the events that produced the injury, and the plaintiff need not demonstrate that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable" (Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 [1st Dept 1996], quoting Public Adm'r of Bronx County v Trump Vil. Constr. Corp., 177 AD2d 258, 259 [1st Dept 1991]). Labor Law § 240 (1) is to be liberally construed so as to accomplish the purpose for which it was enacted (Rocovich v Consolidated Edison Co., *supra*).

Labor Law § 240 (1) "requires that the safety device made available must not only allow the worker to safely perform the work at an elevation without falling, but also

to safely ascend to the necessary height, and safely descend back to the floor thereafter" (Cohen v. Memorial Sloan-Kettering Cancer Center, 50 AD3d 227 [1st Dept 2008] (internal citations omitted)]. A ladder falls within the category of "safety devices" under Labor Law § 240 (1). Where a ladder is offered as a work-site safety device, it must provide the proper protection; the failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1) (Schultze v. 585 W. 214th St. Owners Corp., 228 AD2d 381 [1st Dept 1996]).

Summary judgment should be granted under Labor Law § 240 (1) where the effects of gravity cause an injury due to the failure of one of the devices enumerated in the statute to be properly constructed, operated or placed. Here, there is no dispute that the only elevation-related safety device provided to plaintiff was the ladder, which shifted and then suddenly kicked out. It is also undisputed that no other safety devices were provided to secure the ladder and prevent it from shifting, i.e. rubber feet, or prevent plaintiff from falling. Therefore, plaintiff has established, *prima facie,* a violation of Labor Law § 240 (1) (see Tavarez v. Weissman, 297 AD2d 245 [1st Dept 2002]; see also Rudnik v. Brogor Realty Corp., 45 AD3d 828 [2d Dept 2007]; Guaman v. New Sprout Presbyterian Church of New York, 33 AD3d 758 [2d Dept 2006]; Morin v. Machnick Builders, Ltd., 4 AD3d 668 [3d dept 2004]).

Defendants claim that plaintiff caused the accident by leaning on the ladder while he was on top of the ladder. Notwithstanding that Labor Law § 240 (1) is an absolute liability statute, if plaintiff's conduct was the sole proximate cause of the accident, then no liability will attach (Blake v. Housing Services of NYC, Inc., 1 NY3d 280 [2003]).

supervise or control plaintiff's work, no liability can be imposed under Labor Law § 240 (1). However, this argument is based on a mis-statement of the law. The duty imposed by this statute upon an owner and general contractor is nondelegable, meaning that they are strictly and vicariously liable for a violation even if they exercised no supervision or control over the work (Ross v. Curtis-Palmer, supra; Rocovich v. Consolidated Edison, supra; Russin v. Picciano & Son, 54 NY2d 311 [1981]).

Here it is undisputed that DBAB and Deutsche are both owners of the building. Henegan was the construction manager at the project. Drutjon's testimony about Henegan's role at the project was that Henegan was responsible for coordinating and supervising the project along with hiring subcontractors and enforcing safety standards. Based on Drutjon's testimony, plaintiff has established that Henagan was a statutory agent of the DBAB and Deutsche for purposes of Labor Law §§ 240(1) and 241(6) (Walls v. Turner Constr. Co., 4 NY3d 861 [2005]). Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against DBAB, Deutsche and Henegan. Defendants and ADCO's respective cross-motions for summary judgment dismissing this claim are denied.

Labor Law § 200 claim and common law negligence

Defendants also cross move for summary judgment dismissing plaintiff's claims under Labor Law §§ 200 and 241 (6).

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v. L.A. Wenger Contracting Co., *supra*). Unlike Labor Law §§ 240 (1) and 241 (6), liability can only be

imposed if the defendant has actually been negligent. A *prima facie* case requires that plaintiff prove the defendant actually exercised supervisory control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Rizzuto v. L.A. Wenger Contracting Co., *supra* at 352; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st Dept 1998]).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200 (Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim (Hughes v. Tishman Construction Corp., 40 AD3d 305 [1st Dept 2007]; Brown v. New York City Economic Dev. Corp., 234 AD2d 33 [1st Dept 1996]; Gonzalez v. United Parcel Serv., *supra*). It must be shown that the contractor controlled the manner in which the plaintiff performed his or her work, i.e. how the injury producing work was performed (Hughes v. Tishman Construction Corp., *supra* at 2).

The cross motion to dismiss plaintiff's Labor Law § 200 claim against DBAB and Deutsche must be granted. There is no dispute that the owners did not exercise any

supervisory control over the project. Absent control by the owners, there is no liability for injuries arising out of the negligent acts of Henegan or ADCO (Narducci v. Manhasset Bay Associates, 96 NY2d 259 [2001]). With respect the Labor Law § 200 claim against Henegan, that portion of the cross motion must be denied. Although Henegan claims it did not supervise the work, Drutjon's testimony is sufficient to raise a question of fact on this issue.

Labor Law § 241 (6)

Section 241 (6) of the Labor Law imposes "a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations" in a manner that provides for the reasonable and adequate protection of persons working at the site (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 350 [1998]). Supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent (Rizzuto v. L.A. Wenger Contracting Co., Inc., *supra*; DeStefano v. Amtad New York, Inc., 269 AD2d 229 [1st Dept 2000]). To support a cause of action, the plaintiff must plead a concrete specification of the Industrial Code, that it was violated, and that the violation was a proximate cause of his injuries (Rizzuto v. L.A. Wenger, *supra*).

Defendants argue that plaintiff has failed to cite a concrete specification of the Industrial Code, as opposed to general sections that would not be an adequate

predicate basis for a Labor Law § 241 (6) cause of action (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). Plaintiff has alleged violations of five provisions of the Industrial Code, to wit: § 23-1.5 (Protection in Construction, Demolition and Excavation Operations; General Responsibility of employers); § 23-1.7 (f) (Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Vertical passage); § 23-1.16 (Protection in Construction, Demolition and Excavation Operations; Safety belts, harnesses, tail lines and lifelines); § 23-1.21 (Protection in Construction, Demolition and Excavation Operations; Ladders and ladderways); and § 23-2.1 (a) (Construction Operations; Maintenance and housekeeping; Storage of material or equipment). Plaintiff has also alleged violations of the Occupational Safety & Health Administration regulations, namely, 29 CFR § 1926.20, 1926.285, 1926.104 and 1926.450 (collectively the "OSHA regulations"). Plaintiff argues in opposition to the cross motion that the alleged violation of § 23-1.21 is sufficient to support his § 241 (6) cause of action.

Well settled law has held that Industrial Code § 23-1.5 sets forth only general safety standards, and, therefore, this provision is insufficient to support a Labor Law § 241 (6) cause of action (see Murray v. Lancaster Motorsports, Inc., 27 AD3d 1193 [2006], Fairchild v. Servidone Const Corp, 288 AD2d 665 [3d Dept 2001]). Industrial Code § 23-1.7 (f), which applies to stairways, ramps or runways is not applicable here where plaintiff was provided a ladder and there is no dispute that it was not conducive to construct a stairway, ramp or runway for plaintiff to access the subject area (see i.e. Lavore v. Kir Munsey Park 020, LLC, 40 AD3d 711). Industrial Codes § 23-1.16 is

inapplicable because it sets forth safety standards for safety belts, harnesses, tail lines and lifelines, and none of these safety devices were provided to plaintiff. Industrial Code § 23-1.21 (a) is a general requirement that metal or fiberglass ladders longer than ten feet be approved and is inapplicable here.

Industrial Code § 23-1.21 (b) sets forth general requirements for ladders. Based upon plaintiff's description of how his accident happened, Industrial Code § 23-1.21 is relevant and applicable to the facts of this case, as alleged. Moreover, defendants have failed to submit sufficient evidence that the ladder did not violate this provision of the Industrial Code. The fact that plaintiff testified the ladder appeared stable before the accident does not preclude a finding that the ladder constituted a violation of this provision. There is no dispute that the ladder suddenly gave out and tipped over. A reasonable jury could conclude that the ladder was not capable of sustaining plaintiff without breakage [§ 23-1.21 (b) (1)], that the ladder was not maintained in good condition [§ 23-1.21 (b) (3)], or that the ladder footings were not firm, especially given the fact that this ladder did not have rubber footings at all [§ 23-1.21 (b) (4) (ii)].

Industrial Code § 23-2.1 (a) (1) is inapplicable because plaintiff's injury did not take place in a passageway, walkway or other thoroughfare (see Cafarella v. Harrison Radiator Div. Of General Motors, 237 AD2d 936). In addition, Industrial Code § 23-2.1 (a) (2) which provides that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge" does not apply because there are no facts to support this alleged violation. Finally, the OSHA regulations are inapplicable as well because they impose no duty on

a non-supervising owner or general contractor (see Rizzuto v. L.A. Wenger, *supra* at 351-52).

Accordingly, defendants' cross-motion for summary judgment is granted only to the following extent: [1] that the Labor Law § 241 (6) cause of action premised on Industrial Code §§ 23-1.5, 23-1.7 (f), 23-1.16, 23-2.1 (a) (1) and (2) and 29 CFR § 1926.20, 1926.285, 1926.104 and 1926.450 is hereby severed and dismissed; the cross-motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim based upon violations of Industrial Code §§ 23-1.21 (b) (1), 23-1.21 (b) (3), and 23-1.21 (b) (4) (ii) is denied.

The motions for summary judgment on the third-party complaint

Henegan also moves for summary judgment on the third-party complaint against ADCO. ADCO has not opposed the relief sought.

Henegan and ADCO entered into a Subcontractor Indemnity Agreement ("SIA") dated December 10, 2002 which states:

> To the fullest extent permitted by law, [ADCO] shall indemnify and hold harmless [Henegan]... from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance of the ADCO's work, provided that such claim, damage, loss or expense is attributable to bodily injury... regardless of whether or not it is caused in party by the party indemnified hereunder.

Henegan and ADCO also executed a Subcontractor Purchase Order ("SPO") dated July 24, 2002, which provides:

> To the fullest extent permitted by law, [ADCO] shall indemnify and hold harmless owner, construction manager... from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance of [ADCO's] work,

> provided that such a claim, damage, loss, or expenses is attributable to bodily injury... regardless of whether or not it is caused in party by a party indemnified hereunder.

Under the SPO, owner is defined as Deutsche Bank and construction manager is defined as Henegan. DBAB is not listed in this agreement. The SPO further requires ADCO to "purchase and maintain comprehensive general liability insurance of $1,000,000.00 per occurrence." The comprehensive general liability insurance is to include "Blanket Contractual Liability including indemnification of Henegan." The insurance is required to name Henegan as the ceritificate holder and list Henegan and Deutsche as additional insureds.

Although Henegan has provided a copy of a Certificate of Liability Insurance dated January 5, 2003 from Crum & Forster Insurance Company under policy number 543 085 863-3 with policy dates of December 31, 2002 through December 31, 2003 wherein Henegan is named as an additional insured, Henegan maintains that ADCO has failed to defend and indemnify either DBAB or Henegan is the underlying action. ADCO has not come forward with any proof that it obtained the aforementioned insurance policy, or any other insurance for that matter.

Henegan has asserted causes of action against ADCO sounding in: [1] contribution; [2] common-law indemnification; [3] contractual indemnification; [4] and breach of contract arising from ADCO's failure to procure insurance.

Breach of contract

Where a party is contractually obligated to procure insurance for another and it fails to do so, a cause of action for breach of contract arises, and that party is liable for the resultant damages (Encarnacion v. Manhattan Powell, 258 AD2d 339 [1st Dept

1999]). Although Henegan has provided a copy of a Certificate of Liability Insurance, this document specifically states that "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder." A Certificate of Insurance is not a contract to insure and is insufficient to raise a factual issue as to whether such a contract exists (St. George v. W.J. Barney Corp., 270 AD2d 171 (1st Dept 2000); Glynn v. United House of Prayer, 292 AD2d 319 (1st Dept 2002]). Since ADCO has not come forward with any proof that it performed the requirement under the SIA and SPO to procure insurance in conformance therewith, Henegan is, therefore, entitled to summary judgment on the issue of ADCO's liability with respect to the breach of contract claim. Henegan's damages arising from ADCO's breach shall be determined at the time of trial of the main action.

Contractual indemnification

DBAB and Henegan claim that under the SIA and SPO, ADCO promised to indemnify and hold them harmless. However, in the SIA, ADCO only agrees to indemnify and hold Henegan harmless, and in the SPO, ADCO only agreed to indemnify and hold Deutsche and Henegan harmless. Therefore, defendants have failed to establish that ADCO agreed to indemnify and hold DBAB harmless. There are no issues of fact, however, as to whether plaintiff's accident arose out of ADCO's work. Accordingly, Henegan is entitled to summary judgment on the issue of liability on its claim for contractual indemnification against ADCO.

Common law indemnification and contribution

Whether an owner or general contractor who is only vicariously liable is entitled to common-law indemnification or contribution from a subcontractor is dependent upon

whether the subcontractor is found liable for the occurrence (Krawczyk v. Ehrenfeld, 277 AD2d 205). A general contractor is entitled to common-law indemnity from a subcontractor where the subcontractor had complete control over plaintiff's work, supplied the ladder that slipped and caused plaintiff's injuries, and failed to provide adequate safety equipment (Morin v. Hamlet Golf Development Corp, 270 AD2d 321). Here, Henegan has established that ADCO was liable for plaintiff's accident. ADCO provided plaintiff the ladder from which plaintiff fell. Gerard Pugliese, general foreman for ADCO, testified that ADCO held weekly safety meetings with its employees at the project, and that ADCO employees received all of their instructions from either Pugliese or other foreman or sub-foreman employed by ADCO. Based on the foregoing, Henegan has demonstrated *prima facie* entitlement to summary judgment on the issue of liability on its claims for common law indemnification and contribution from ADCO.

Although ADCO has not specifically opposed Henegan's motion for summary judgment on the third party complaint, ADCO has sought summary judgment on the plaintiff's underlying claims, arguing freedom from negligence. However, for the reasons already stated herein, ADCO's arguments were unavailing and therefore, Henegan is entitled to summary judgment on it scause of action for common law indemnification and contribution from ADCO.

Since Henegan's damages on the causes of action for contribution and contractual/common law indemnification can only be ascertained at a hearing, the court directs that there be an inquest at the time of trial in the main action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim is granted against defendants DBAB Wall Street, LLC, Deutsche Bank AG and Henegan Construction Co., Inc.; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted only to the following extent: [1] that the Labor Law § 241 (6) cause of action premised on Industrial Code §§ 23-1.5, 23-1.7 (f), 23-1.16, 23-2.1 (a) (1) and (2) and 29 CFR § 1926.20, 1926.285, 1926.104 and 1926.450 is hereby severed and dismissed; [2] Henegan is granted partial summary judgment on the issue of liability on its claims for breach of contract, contractual/ common law indemnification and contribution against ADCO contained in the third party complaint; and it is further

ORDERED that there be an inquest at the time of trial in the main action for an assessment of Henegan's damages on its claims contained in the third-party complaint; and it is further

ORDERED that defendants' cross-motion is otherwise denied.

The issue of plaintiff's damages is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Clerk in Trial Support so that this case can be scheduled for jury selection.

Any requested relief that has not been addressed herein has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
October 24, 2008

So Ordered:

Hon. Judith J. Gische