Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

EDWIN POPE, et al.

-against-

SAFETY AND QUALITY PLUS, INC., et al.

RC DOLNER, LLC

-against-

KNIGHT ELECTRICAL SERVICES CORP.

Index Number 22171 2006

Motion Date October 14, 2008

Motion Cal. Numbers 20-21

Motion Seq. Nos. 1-2

The following papers numbered 1 to 52 read on this motion by plaintiffs for summary judgment on the issue of liability pursuant to Labor Law §§ 240(1), 241(6), 200, and common-law negligence; and on this cross motion by defendant Safety and Quality Plus, Inc. (Safety) for summary judgment to dismiss plaintiffs' complaint; and separate notice of motion by defendants The Metropolitan Museum of Art (Metropolitan) and RC Dolner Construction, Inc. (RC Dolner) for summary judgment, for contractual indemnification against Safety, and for an extension of time to move for summary judgment against third-party defendant Knight Electrical Services Corp. (Knight); and on this cross motion by Safety to dismiss its co-defendants' indemnification claim; and on this cross motion by Knight for summary judgment to dismiss RC Dolner's third-party action.

	Papers Numbered
Notice of Motions - Affidavits - Exhibits.....	1-8
Notice of Cross Motions - Affidavits - Exhibits..	9-21
Answering Affidavits - Exhibits.....	22-35
Reply Affidavits.....	36-52

Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

Plaintiff Edwin Pope, employee of Knight, seeks to recover damages for personal injuries allegedly sustained on February 22, 2006 stemming from a construction site accident. Plaintiff contends that, while he and Edward Naab, plaintiff's supervisor and witness to the accident, were traversing a platform for the purpose of surveying the wall in which plaintiff would later run electrical conduits, plaintiff stepped off of the edge of said platform, causing him to fall and injure his left knee. Plaintiff testified that cardboard, which was stacked up to the level of the platform, obscured the platform's edge, which gave plaintiff the impression that the platform continued. Prior to the time of plaintiff's accident, a guardrail had been placed at the end of the platform as a safety measure; however, the guardrail was removed by an unknown person.

Labor Law § 240(1)

Labor Law § 240(1) subjects owners, contractors, and their agents to strict liability for their failure to provide workers with safety devices that properly protect against elevation-related risks, such as falling from a height (see Striegel v Hillcrest Hgts. Dev. Corp., 100 NY2d 974, 977 [2003]; Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693 [2006]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the defendants (see Gordon v E. Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Riccio v NHT Owners, LLC, 51 AD3d 897 [2008]).

The proffered evidence regarding plaintiff's alleged accident revealed that the concrete platform from which plaintiff fell was a permanent part of the basement floor. Though there exists no precedent with respect to the particular facts set forth here, this court finds that cases involving permanently installed ladders or stairways are more analogous to this case involving a permanent platform as opposed to those cases where the structures are specifically designed as a safety device so as to protect workers from elevation-related hazards, such as a temporary platform or scaffold (see e.g. Piontek v Huntington Pub. Lib., 306 AD2d 334 [2003]). A structure which is a permanent appurtenance to a building does not fall within the protection of § 240(1) (see e.g. Gelo v City of New York, 34 AD3d 636 [2006]; Linkowski v City of New York, 33 AD3d 971 [2006]; Gold v NAB Constr. Corp., 288 AD2d 434 [2001]). The difference seems to be between accidents stemming from the hazards faced during construction work versus the same kinds of accidents that might, by chance, occur to any building tenant once the work is completed – the latter of which is not covered under § 240(1). It follows, then, that since the

subject platform is a permanent appurtenance to the building not specifically designed for elevation-related risks, plaintiff's fall from same does not come under the protection of § 240(1). This would still be the case even if it were ultimately determined that the platform was negligently left without a guardrail (see Plotnick v Wok's Kitchen Inc., 21 AD3d 358 [2005]). Therefore, the branch of plaintiff's motion for summary judgment is denied with respect to his Labor Law § 240(1) cause of action. The branch of Safety's cross motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is granted. Since § 240(1) is inapplicable in this case, summary judgment is also granted to defendants Metropolitan and RC Dolner dismissing that cause of action (CPLR 3212[b]).

Labor Law § 241(6)

Labor Law § 241(6) requires owners, contractors, and their agents to provide reasonable and adequate protection and safety for workers, and to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor as set forth in the New York Industrial Code (see Ross v Curits-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]; Galarraga v City of New York, 54 AD3d 308 [2008]; Lodato v Greyhawk N. Am., 39 AD3d 491 [2007]). In order for plaintiff to maintain a cause of action under § 241(6), he must plead and prove a specific, positive violation under one or more of the above regulations (see Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 349 [1998]; Ferrero v Best Modular Homes, Inc., 33 AD3d 847 [2006]).

Plaintiff seeks to include the following violations pursuant to the Industrial Code under § 23: subsections 1.5, 1.7, 1.8, 1.15, 1.16, 1.23, and 1.33. Plaintiff cannot plead a violation of § 23-1.5, as same only establishes a general safety standard, which is insufficient to give rise to a duty under Labor Law § 241(6) (see Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]; Sparkes v Berger, 11 AD3d 601 [2004]). The regulations described in subsections 1.15 and 1.16, which set standards for safety railings and safety belts/harnesses, respectively, are inapplicable as it is agreed among the parties that plaintiff was not provided with any such devices at the time of the subject accident (see e.g. Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616 [2008]; Dooley v Peerless Importers, Inc., 42 AD3d 199 [2007]). Finally, plaintiff may not rely on subsections 1.8, 1.23, and 1.33, as these are inapplicable to the facts of this case.

The violations which remain in contention are §§ 23-1.7(b)(1) and 1.7(e)(2). This court finds that § 23-1.7(b)(1) is inapplicable to the particular facts presented here. The Second Department case of Rookwood v Hyde Park Owners Corp.

(48 AD3d 779 [2008]) is most instructive; there, plaintiff fell from a staircase landing from where the handrail had been removed. This court finds here, as the Second Department similarly concluded in Rookwood, that even though there was a height differential between the concrete platform and the basement floor, the place into which plaintiff fell did not constitute a hole or hazardous opening within the meaning of the statute (see id. at 781; see also Garlow v Chappaqua Cent. School Dist., 38 AD3d 712 [2007]). Based on a reading of the regulation itself, the safety measures described therein – planking, life nets, and safety belts – are intended to protect workers from falling through an opening to the floor below (see Alvia v Teman Elec. Contr., Inc., 287 AD2d 421 [2001]), which does not apply here.

A precondition of alleging a violation of § 23-1.7(e)(2), which covers tripping hazards, is that plaintiff must have necessarily tripped over something (see e.g. Riley v J.A. Jones Contr., Inc., 54 AD3d 744 [2008] [plaintiff tripped over a brick]; Hageman v Home Depot U.S.A., Inc., 45 AD3d 730 [2007] [plaintiff tripped on demolition debris]; Dubin v S. DiFazio & Sons Constr., Inc., 34 AD3d 626 [2006] [plaintiff tripped over a piece of steel]; Furino v P & O Ports, 24 AD3d 502 [2005] [plaintiff tripped on nails]). After careful review of the testimony of both plaintiff and Mr. Naab, there is no evidence in either of their depositions that would indicate that plaintiff tripped over anything. In fact, plaintiff testified that he "stepped" on some cardboard off the edge of the platform, and later admitted that the cause of his injury was due to his expectation that said platform would continue farther than it actually did. This testimony was corroborated by the deposition of Mr. Naab, as well as the several accident reports submitted by plaintiff. Thus, § 1.7(e)(2), is also inapplicable to the case at bar (see e.g. Madir v 21-23 Maiden Lane Realty, LLC, 9 AD3d 450 [2004]). Therefore, the branch of plaintiff's motion for summary judgment is denied with respect to his Labor Law § 241(6) cause of action. The branch of Safety's cross motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted. Since § 241(6) is inapplicable in this case, summary judgment is also granted to defendants Metropolitan and RC Dolner dismissing that cause of action (CPLR 3212[b]).

Labor Law § 200 and Common-Law Negligence

Under § 200 and common-law negligence, the general rule is that an owner or contractor has the duty to provide construction site workers with a safe place to work (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Romang v Welsbach Elec. Corp., 47 AD3d 789 [2008]). It is well settled, though, that when a defendant does not exercise supervisory control over the

operation, and when the alleged dangerous condition arises from a subcontractor's methods (see Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]; Kwang Ho Kim, 47 AD3d at 619), the charged party cannot be held liable under common-law negligence or under the above section of the Labor Law (see Lombardi v Stout, 80 NY2d 290, 295 [1992]; Garlow, 38 AD3d at 713). Liability may also exist where the defendant either created a dangerous condition or had actual or constructive notice thereof when the accident is caused by a premises defect (see Ragone v Spring Scaffolding, Inc., 46 AD3d 652 [2007]; DeBlase v Herbert Constr. Co., Inc., 5 AD3d 624 [2004]).

This court finds that plaintiff has not established liability by virtue of the "direction or control" facet of § 200 or under common-law negligence, as plaintiff's own testimony revealed that he received instructions, with respect to the method in which he performed his work, from only either his general or sub-foreman (see Hunter v R.J.L. Dev., LLC, 44 AD3d 822 [2007]; Zolotar v Ben Krupinski, Gen. Contr., Inc., 36 AD3d 802 [2007]).

Turning now to the "notice" aspect of § 200 and common-law negligence, with respect to RC Dolner, while the proffered depositions indicated that RC Dolner was wholly responsible for the erection and removal of guardrails on-site, testimony also reflected that RC Dolner was not made aware of the removal of the subject guardrail, when protocol indicated that it otherwise should have been. It also cannot be determined, based upon the evidence presented, which party, if any, was responsible for such removal, and when said removal even took place. Furthermore, while it was stated by Adam Galvin, safety manager for Safety, that RC Dolner was partially responsible for cleanliness of the work site, Mr. Galvin further testified that individual trades were also responsible for removing the accumulation of their own materials and debris at the work site. Moreover, when Michael Jones, Vice-President of RC Dolner, was deposed as to whether he was aware of the excessive cardboard debris at the accident site, he answered in the negative. However, Chris Capaccio, Knight's site foreman, testified that RC Dolner was, in fact, notified of the excessive debris by the accident area.

Similarly, with respect to Safety, deposition testimony demonstrated that Safety was present on-site to take notice, record, and correct any violations relating to safety, and even had the authority to stop work if it felt a violation existed. However, Mr. Galvin testified that he was never informed that the subject guardrail was removed, which would necessarily put him on notice so as to be given the opportunity to correct the alleged violation.

After a review of the testimony of the various parties involved, the central issues which would necessarily determine the existence of liability are in contention; thus, neither plaintiff nor Safety has established its entitlement to judgment as a matter of law, due to the numerous inconsistencies among the aforementioned deposition testimonies (see e.g. Artoglou v Gene Scappy Realty Corp., __ AD3d __, 2008 NY Slip Op 09542 [2008]).

With respect to Metropolitan, this court finds that plaintiff has not met his prima facie burden of establishing his entitlement to judgment as a matter of law. Plaintiff's argument rests on the notion that Metropolitan is liable by virtue of the fact that (1) it was the owner of the premises; (2) it established its own safety rules and regulations regarding guardrails and debris; (3) the guardrail at the end of the platform was removed at the location of plaintiff's fall; and (4) there was a collection of cardboard debris where plaintiff's accident occurred. First, the fact that Metropolitan was the owner of the premises does not, in and of itself, demonstrate the existence of liability under § 200 and common-law negligence, as discussed above. Second, the above arguments submitted by plaintiff provide no evidence that Metropolitan exercised the requisite supervision or control over plaintiff's work or that Metropolitan had actual or constructive notice of any premises defect (see Harris v Arnell Constr. Corp., 47 AD3d 768 [2008]; Hunter v R.J.L. Dev., LLC, 44 AD3d at 824). Third, the fact that Metropolitan sought to ensure compliance with safety regulations by employing its own, does not amount to the supervision or control necessary to impose liability upon it (see Dennis v City of New York, 304 AD2d 611 [2003]; Bright v Orange & Rockland Util., Inc., 284 AD2d 359 [2001]). Instead, it seems that plaintiff is attempting to impose a kind of per se liability based on the existence of Metropolitan's own safety regulations as applied to the work site, which plaintiff cannot do.

Contractual Indemnification

The right to contractual indemnification depends upon the specific language of the contract (see Cunha v City of New York, 45 AD3d 624 [2007]; Kader v City of New York, Hous. Preserv. & Dev., 16 AD3d 461 [2005]). In the case at bar, the indemnification provision of the parties' agreement is valid and enforceable as it contains coverage "to the fullest extent permitted by law" (see e.g. Brooks v Judlau Contr., Inc., 11 NY3d 204, 210 [2008]; Giangarra v Pav-Lak Contr., Inc., 55 AD3d 869 [2008]; Balladares v Southgate Owners Corp., 40 AD3d 667 [2007]). Safety's argument that the indemnification clause does not apply because no privity exists between itself and plaintiff is entirely misplaced. Here,

the language of the contract among the parties clearly reflects their intention that Metropolitan and RC Dolner be entitled to seek full indemnification from Safety under certain circumstances (see e.g. Lazzaro v MJM Indus. Inc., 288 AD2d 440 [2001]). It is simply irrelevant for the purposes of this motion that no privity exists between Safety and plaintiff.

Given the conflicting testimony among the parties, as discussed in detail above, none of the defendants are entitled to summary judgment on the issue of contractual indemnification (see e.g. Kozlowski v Grammercy House Owners Corp., 46 AD3d 756 [2007]). There are issues of fact which remain otherwise undetermined; to wit, whether neither is, either is, or all are negligent with respect to § 200 and the common law. Therefore, it cannot be said, as a matter of law, that the indemnification clause has yet been triggered (see e.g. D'Angelo v Bldrs. Group, 45 AD3d 522 [2007]; Keating v Nanuet Bd. of Educ., 40 AD3d 706 [2007]).

Extension of Time

Good cause must be shown for the filing of a late motion. A party must produce a "satisfactory explanation for the untimeliness" and a "perfunctory" excuse is not considered good cause (Brill v City of New York, 2 NY3d 648, 652 [2004]).

RC Dolner claims that further deposition testimony is needed from Bart Guilano, Knight's foreman responsible for the area in which plaintiff was working. It is opined that Mr. Guilano is a witness who may have information regarding the circumstances surrounding this accident; to wit: the identity of the party who may have removed the subject guardrail or who may have been responsible for the accumulation of debris. RC Dolner submitted a letter, dated June 13, 2008, addressed to Knight's attorney in an attempt to facilitate said deposition, to which Knight submits no opposition. Subsequent to the making of this motion, by stipulation dated September 23, 2008, Knight agreed to produce Mr. Guilano to be deposed. Considering these circumstances, RC Dolner has demonstrated good cause to extend the time to move for summary judgment against Knight (see Alvarez v Eviles, 56 AD3d 500 [2008]; McArdle v 123 Jackpot, Inc., 51 AD3d 743 [2008]).

Third-Party Action

Knight's motion for summary judgment is made in violation of this court's so-ordered stipulation dated April 16, 2008. That order clearly sets a fixed deadline in which motions for summary

judgment may be made returnable no later than July 8, 2008, and that a copy of said order must accompany any such motion. Not only was Knight's motion made over two months past the deadline, but no copy of the order was annexed to its motion. The only explanation that Knight offers is that it was not impleaded until after the filing of the note of issue, and that discovery has been ongoing in this case. Regardless of when Knight was impleaded, counsel for Knight nevertheless signed the so-ordered stipulation, which evidences Knight's awareness of its conditions. Thus, because Knight offers no satisfactory explanation for its untimely motion, it will not be considered (Brill, 2 NY3d at 652; Finger v Saal, __ AD3d __, 2008 NY Slip Op 9027 [2008]; Anderson v Kantares, 51 AD3d 954 [2008]).

Accordingly, plaintiff's motion for summary judgment is denied in its entirety. Safety's cross motion for summary judgment to dismiss plaintiff's complaint is granted to the extent that causes of action under Labor Law §§ 240(1) and 241(6) are dismissed. Those causes of action are also dismissed as against defendants Metropolitan and RC Dolner (CPLR 3212[b]). The branch of Safety's cross motion for summary judgment to dismiss the action under Labor Law § 200 and common-law negligence is denied. The branch of the motion for summary judgment made by Metropolitan and RC Dolner based on contractual indemnification against Safety is denied. Safety's cross motion for summary judgment to dismiss the contractual indemnification claim is denied. The branch of RC Dolner's motion to extend the time to move for summary judgment against Knight is granted. It is ordered that this motion for summary judgment shall be made no later than 15 days from the entry date of this order. Knight's cross motion for summary judgment to dismiss the third-party action is denied.

Dated: January 16, 2009

J.S.C.