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

GENE COLLINS and PAULA COLLINS,

Plaintiffs,

-against-

THE SWITZER CONSTRUCTION GROUP, INC. et al.,

Defendants.

And Third-Party Action.

INDEX NO. 115054/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 001, 002, 003 and 004 are consolidated herein for disposition. This personal injury action arises out of a construction site accident that occurred on February 22, 2005 at the Sports Illustrated Building, located at 135 West 50th Street, New York, New York (the premises). Plaintiff, Gene Collins, a journeyman electrician, alleges that he slipped on construction debris after descending from a ladder. Plaintiff and his wife, Paula Collins, suing derivatively, thereafter commenced this action against the construction manager (Switzer Construction Group, Inc.), building owner (135 West 50 Owner, LLC) and lessee (Time, Inc) asserting claims under Labor Law §§ 240(1), 241(6) and 200(1), as well as under the principles of common law negligence. In, turn, Switzer brought a third-part action for common law indemnification and contribution against the plaintiff's employer (Hugh O'Kane Electric Company LLC).

In motion sequence number 001, O'Kane now moves (1) pursuant to CPLR 3025, to amend its answer to assert an affirmative defense pursuant to the Workers' Compensation Law and (2) pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint on the basis of this defense. In motion sequence number 002, defendants Time and 135 Owner move for summary judgment (1) declaring that Switzer must defend and indemnify them and (2) dismissing the complaint, cross claims and counterclaims as against them. In motion sequence number 003, Switzer moves for summary judgment dismissing the complaint and all cross claims asserted against it. Time and 135 Owner cross-move, pursuant to CPLR 3025 (c), for leave to amend their answer to the fourth amended complaint, and to deem their amended answer served nunc pro tunc. In motion sequence number 004, Switzer also moves, pursuant to CPLR 3126, for dismissal of plaintiff Paula Collins's claims for failure to appear at a deposition. Time and 135 Owner cross-move for the same relief.

Background

The project at issue involved renovating storage space into office space at the premises. Time, the lessee, retained Switzer as a construction manager. Switzer, in turn, hired O'Kane to perform certain renovation work.

On the date of his accident, plaintiff was assigned by O'Kane to install metal conduit sleeves for electrical wires in the ceiling and to install electrical outlets in a wall. As part of his work, plaintiff was required to place silver-colored conduit across a step of a ladder, using a hacksaw to cut it to the correct length, and then discard the remainder. Plaintiff set up the ladder in a corner of the room where he working. At and around the ladder were black sprinkler pipe fittings which had been left on the floor by other tradesmen who were also working in the room at the time. When plaintiff stepped off the ladder, he "stepped onto something and fell." After plaintiff fell, he saw sprinkler fittings and believed that they caused him to fall, but was not sure.

Discussion

A. The Defendants' Motions for Summary Judgment Dismissing the Complaint

1. Labor Law § 240 (1) - - At the outset, the court notes that plaintiff has conceded that his Labor Law § 240(1) claim lacks merit. The claim is therefore dismissed.

2. Labor Law § 241 (6) - - Labor Law § 241 (6) requires Owner, contractors and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To recover under Labor Law § 241(6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision reiterating common-law safety standards (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [internal quotation marks and citation omitted]). The violation of an Industrial Code rule or regulation provides "some evidence of negligence," which is to be considered along with all other evidence on the issue (*Long v Forest-Fehlhaber*, 55 NY2d 154, 159, *rearg denied* 56 NY2d 805 [1982]). Comparative negligence is a defense to liability (*Spages v Gary Null Assoc., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]).

Plaintiffs' bills of particulars allege that defendants violated three sections of the Industrial Code: 23-1.7, 23-1.21, and 23-1.30. In opposing summary judgment, plaintiffs only assert that defendants violated sections 23-1.7(e)(2) and 23-2.1(a)(1) and (b). Plaintiffs have apparently abandoned reliance on sections 23-1.21 and 23-1.30, and therefore, their claim is dismissed to the extent that it is predicated upon these alleged violations. Although plaintiffs did not allege a violation of section 23-2.1 in the complaint or bills of particulars, the court shall consider this alleged violation since there is no prejudice to defendants (*see Kelleir v Supreme Indus. Park*, 293 AD2d 513, 514 [2d Dept 2002]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [1st Dept 2000]). Indeed, plaintiffs do not allege any new factual allegations or assert any different legal theories (*see Noetzell*, 271 AD2d at 233). Therefore, the court only considers the alleged violations of sections 23-1.7(e)(2) and 23-2.1(a)(1) and (b).

Section 23-1.7 (e), entitled "Tripping and other hazards," provides that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed" (12 NYCRR 23-1.7 [e] [2]). This regulation has been held to be sufficiently specific for recovery under section 241(6) (*see Clark v Town of Scriba*, 280 AD2d 915, 916 [4th Dept 2001]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]).

This regulation does not apply when the instrumentality causing the injury is created by the plaintiff, since the item is an integral part of the work being performed (*see e.g. Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 66 [1st Dept 2004]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2d Dept 2001]). In moving to dismiss this claim, the defendants argue that, in fact, plaintiff fell over debris that he created while performing his work. They point out that accident reports filled out by plaintiff state that he slipped on "conduit debris" while installing conduit sleeves. However, plaintiff testified at his deposition that he believed that he tripped on sprinkler pipe fittings and stated that he did not create the debris while performing his work. Under the circumstances, there is a triable of fact which precludes summary judgment.

As to 12 NYCRR 23-2.1, this provision governs maintenance and housekeeping during construction operations, and provides as follows:

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

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(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

Since the First Department has held that section 23-2.1(b) is too general to support a section 241(6) claim, *see Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 (1st Dept 2007), it must be dismissed.

In contrast to section 23-2.1(b), the First Department has determined that section 23-2.1(a)(1) is a sufficient predicate upon which to base a section 241(6) claim (*see Scannell v Mt. Sinai Med. Ctr.*, 256 AD2d 214 [1st Dept 1998]). The provision, however, is inapplicable to material or equipment which is not actually being "stored" (*see Waitkus v Metropolitan Housing Partners*, 50 AD3d 260 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]), Moreover, it is inapplicable where the plaintiff is not injured in a "passageway, walkway, stairway or other thoroughfare" (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 [1st Dept 2007]). Here, this regulation does not apply because the debris was not being stored and because plaintiff fell in a room, not a passageway or similar thoroughfare.

Finally, Switzer asserts that plaintiff was the sole proximate cause of his accident since he chose not to ask someone to clean up the debris after he initially saw it on the floor. Where a plaintiff has acted in an unforeseeable, reckless, unnecessary or intentional manner, he has been found to be the sole proximate cause of his injuries under Labor Law § 241 (6) (*see Capellan v King Wire Co.*, 19 AD3d 530, 532 [2d Dept 2005]; *Weingarten v Windsor Owner Corp.*, 5 AD3d 674, 677 [2d Dept 2004]. Since the evidence does not indicate that plaintiff acted in such a manner, Switzer's argument is without merit.

3. Labor Law § 200 (1) and Common Law Negligence - - Labor Law § 200 is merely a codification of the common-law duty imposed on Owner and general contractors to maintain a safe work site (*Rizzuto*, 91 NY2d at 352) and, therefore, the same standards apply to both theories of recovery. To prevail on a claim under Labor Law § 200 and common-law negligence, where, as here, the injury arises out of the means or methods of the construction work, the plaintiff must establish that the defendant supervised or controlled the activity giving rise to the injury (*Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). Nonetheless, general supervision of the work is insufficient to impose liability under either theory (*Geonie*, 50 AD3d at 445; *Hughes*, 40 AD3d at 306).

Here, plaintiff testified that he only received his work assignment and directions as to how to perform his work from his foreman from O'Kane. All of plaintiff's equipment and safety devices were supplied by O'Kane. Additionally, Switzer's owner and president, Ken Switzer, testified that he did not direct or control any of the work of O'Kane's workers. Nor did Time employees tell subcontractors how to perform their work. The plaintiff has not disputed these assertions. Although Time had an employee on site who ensured compliance with the scope of work and project completion dates, this presence is insufficient to establish supervisory control (*see Chuqui v Church of St. Margaret Mary*, 39 AD3d 397 [1st Dept 2007]; *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]). These negligence claims must therefore be dismissed as against Time and 135 Owner. As to Switzer, although its president was on the job site every day and had authority to stop work if he saw a dangerous condition, this only establishes general supervision and is therefore insufficient to support a section 200 claim (*see Hughes*, 40 AD3d at 309; *Matter of New York City Asbestos Litig.*, 25 AD3d 374 [1st Dept 2006]). Plaintiffs' Labor Law § 200(1) and common-law negligence claims must therefore also be dismissed as against Switzer.

B. O'Kane's Motion to Amend its Answer and for Summary Judgment Dismissing the Third-Party Complaint

O'Kane's motion for leave to amend its answer so as to assert an affirmative defense that Switzer's third-party claims are barred by the Workers' Compensation Law is granted without opposition. Tthe proposed amended answer, in the form annexed to O'Kane's moving papers, is deemed served nunc pro tunc.

As to O'Kane's motion for summary judgment dismissing Switzer's third-party complaint against it on the basis of this affirmative defense, the motion must be granted. Workers' Compensation Law § 11 prohibits third-party indemnification or contribution against employers, except where (1) the employee sustained a "grave injury" for common-law indemnification or contribution claims or (2) the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 430 [2005]). Since no one has seriously suggested that any of plaintiff's alleged injuries qualify as an enumerated grave injury and since O'Kane has submitted uncontroverted evidence that it never entered into any written agreement to indemnify Switzer, the third-party complaint must be dismissed.

C. Time and 135 Owner' Cross-Motion to Amend Their Answers so as to Assert Cross-Claims Against Switzer for Contractual Indemnification and Their Motion for Summary Judgment On These Cross Claims

Time and 135 Owner have cross-moved to amend their answers so as to assert cross claims for contractual indemnification against Switzer. They also seek summary judgment on these cross claims. In opposition to the cross-motion, Switzer contends that it will be prejudiced by the amendment, since discovery is now complete and the application was only made after summary judgment motions were filed. Switzer, however, should hardly be surprised by the assertion of a claim against it for contractual indemnification. It was aware of the nature and extent of its contractual obligations. Moreover, Time requested defense and indemnification on its behalf and on behalf of 135 Owner in April, 2007. Nor has Switzer shown that it has been somehow "hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Cherebin*, 43 AD3d at 365).

Switzer also contends that the cross-motion should, in any event, be denied because the indemnification clause at issue is unenforceable under General Obligations Law § 5-322.1, which provides that a clause in a construction contract which, as here, purports to indemnify a party for its own negligence is against public policy and is void (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, [1997]). The problem with Switzer's argument is that even if an indemnification clause is otherwise void under the GOL, it may nevertheless be where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]). Since the court has found that neither Time nor 135 Owner was negligent, the clause is enforceable. The defendants' cross-motion must therefore be granted and the proposed amended answers, as annexed to the motion papers, are deemed served and filed nunc pro tunc.

Time and 130 Owner have, given this amendment, moved for summary judgment on their cross claims for contractual indemnification. In opposition, Switzer argues that the indemnification is ambiguous. The court disagrees. The proper inquiry in determining whether an agreement is ambiguous is whether the agreement is reasonably susceptible to more than one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Chiusano v Chiusano*, 55 AD3d 425 [1st Dept 2008]). Here, the indemnification provision at issue expressly provides that Switzer is obligated to indemnify out of *either* (1) performance of the Work, (2) any act, omission, fault, or neglect of Switzer or a subcontractor, (3) claims of injury to or disease, sickness or death of persons or damage to property, *or* (4) mechanics' or materialmen's or other liens or claims. Contrary to Switzer's contention, the plain language of the provision does not require that the first three events occur in concert for the provision to apply.

Finally, Switzer also argues that there are issues of fact as to whether plaintiff's accident arose out

of O'Kane's performance of work for Switzer. The court again disagrees. Although plaintiff did not recall the specific room where his accident occurred and testified that there was sprinkler work being performed there, there is no genuine dispute that plaintiff's accident occurred at the premises while working for O'Kane, that Switzer was retained as the construction manager and that Switzer retained O'Kane to perform renovation work. Therefore, plaintiffs' claim arises out of the performance of Switzer's work (*see Vargas v New York City Tr. Auth.*, – AD3d –, 2009 WL 587941, *2, 2009 NY App Div LEXIS 1737, **6 [1st Dept 2009]; *Lesisz,* 40 AD3d at 1052; *Pope v Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523, 525 [2d Dept 1999]). Under the circumstances, Time and 135 Owner are entitled to a defense and indemnification pursuant to the terms of the contract with Switzer.

D. Dismissal of Ms. Collins's Claim for Loss of Consortium

All of the defendants have moved, pursuant to CPLR 3126, to dismiss Ms. Collins's claims since she failed to appear at a deposition on or before August 14, 2008, as required by court order dated July 2, 2008. The motions are granted. Counsel for plaintiffs states that his clients are separated and in the process of divorcing, and that he has had no contact with Ms. Collins since December, 2007 or January, 2008. He states that, since January, 2008, he has sent letters via certified and regular mail to Ms. Collins's address, advising her that she had to appear at a deposition in order to maintain her claim. Counsel represents that his office did not receive a receipt for any of the letters delivered by certified mail, but that none of the letters delivered by regular mail were returned as undeliverable. Additionally, counsel states that his office has been unable to contact her by telephone. He surmises that Ms. Collins does not have any interest in maintaining her claim. Under the circumstances, it would appear that Ms. Collins's failure to appear for her deposition was wilful and that her claims should therefore be dismissed.

Conclusion

Accordingly, in motion sequence number 001, O'Kane's motion is granted and the third-party complaint is hereby dismissed, with costs and disbursements, as taxed by the Clerk.

In motion sequence number 002, the motion by Time and 135 West for summary judgment is granted to the extent of (1) granting contractual indemnification and defense over and against Switzer, (2) dismissing plaintiffs' Labor Law § 200 and common-law negligence claims and (3) dismissing plaintiffs' Labor Law § 241(6) claims except as to 12 NYCRR 23-1.7 (e)(2).

In motion sequence number 003, Switzer's motion for summary judgment is granted to the extent of (1) dismissing plaintiffs' Labor Law § 200 and common-law negligence claims and (2) dismissing plaintiffs' Labor Law § 241(6) claims except as to 12 NYCRR 23-1.7(e)(2).

The cross-motion of Time and 135 Owner for leave to amend their answer is granted.

The defendants' respective motion and cross-motion to dismiss plaintiff Paula Collins's claims against them is granted and the these claims are hereby dismissed.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on May 5, 2009 at 10:00 a.m. to pick a trial date.

ENTER ORDER

Dated: 4/7/09

MARYLIN G. DIAMOND, J.S.C.

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