

Pacheco v City of New York

2010 NY Slip Op 31400(U)

June 4, 2010

Sup Ct, NY County

Docket Number: 111721/2006

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Pacheco

INDEX NO. 111721/2006
MOTION DATE 5/27/10
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

- v -

City of New York et al.

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
JUN 08 2010
NEW YORK
COUNTY CLERKS OFFICE

This Constitutes Decision and Order of the Court.

Dated: June 4, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
ERIK PACHECO and ELKA PACHECO,

Plaintiffs,

-against-

Index No. 111721/2006

CITY OF NEW YORK, THE NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION, and
TURNER CONSTRUCTION COMPANY,

DECISION AND ORDER

Defendants.

-----X
TURNER CONSTRUCTION COMPANY, THE CITY
OF NEW YORK and THE NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 518240/200

SEASONS INDUSTRIAL CONTRACTING
CORPORATION,

Third-Party Defendant.

-----X

FILED
JUN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA:

Motion sequence numbers 004, 005, and 006 are consolidated herein for purposes
of disposition.

In sequence number 004, plaintiffs Erik Pacheco (“Pacheco”) and Elka Pacheco
(the “Pachecos”) move, pursuant to CPLR 3212 (e), for an order granting partial
summary judgment in their favor on the Labor Law § 240 (1) claims asserted against

defendants. Defendants/third-party plaintiffs Turner Construction Company (“Turner Construction”), the City of New York (the “City”), and the New York City Economic Development Corporation (“Economic Development”), (collectively, the “Turner defendants”)¹ cross-move for an order granting summary judgment in their favor and dismissing the Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence claims. In sequence number 005, the Turner defendants move in the third-party action for an order granting summary judgment in their favor on the indemnification and breach of contract claims asserted against third-party defendant Seasons Industrial Contracting Corporation (“Seasons”). In sequence number 006, Seasons moves for an order granting summary judgment and dismissing the third-party action in its entirety.

Erik Pacheco, an apprentice carpenter, alleges that he sustained personal injury on June 3, 2005, while working at a construction site at a building on Pier 92, located at 711 12th Avenue at West 56th Street in Manhattan. Pacheco alleges that the accident occurred while he was standing on the third rung down from the top of a six-foot A-frame wooden ladder, preparing to measure the opening for a window to be cut into the mezzanine wall. He alleges that, as he stepped up on the ladder, it began to wobble, then steadied, and then, as he reached for the tape measure that he had placed at the top of the ladder, it inexplicably began to wobble again. Pacheco also alleges that, to regain his balance, he

¹By the parties' stipulations dated March 7, 2008 and June 9, 2008, all claims asserted against defendants the New York Department of Parks and Recreation and P&O Ports of North America, Inc. were voluntarily discontinued, and the caption was subsequently amended to reflect these changes.

reached for a pipe that was suspended from the ceiling above him. He further alleges that, when he touched the pipe, it fell and hit the ladder, knocking it out from beneath him and causing him to fall.

An inspection conducted by Turner Construction soon after the accident revealed that the pipe was L-shaped and had been cut at one end sometime earlier, and that the cut end was rusty. The pipe had been supported below the ceiling by a one-by-six inch piece of wood that had rotted and a support nipple that had come down with the pipe. The uncut end of the pipe continued along below the ceiling, down along the wall, and through the floor.

Economic Development owns the building, and hired Turner Construction as the general contractor for the construction project. Turner Construction hired Pacheco's employer, nonparty Girandola & Shutkind Construction ("Girandola"), to perform carpentry work at the site. Girandola, in turn, hired Seasons to perform asbestos abatement, wall relocation, and demolition work at the site, including the area where Pacheco was later injured, before Girandola began its work. Seasons completed its work and left the site on December 23, 2004, approximately six months prior to the accident.

In the complaint, plaintiffs allege causes of action against the Turner defendants for violations of Labor Law §§ 200, 240 (1), and 241 (6), for common-law negligence, and for loss of consortium. Plaintiffs do not assert any claims against Seasons.

The Turner defendants impleaded Seasons on allegations that Pacheco's accident was proximately caused by Seasons' acts or omissions, and that Seasons has improperly refused to provide them with a defense and indemnification in this action. In the third-party complaint, the Turner defendants assert causes of action against Seasons for common-law contribution and indemnification, contractual indemnification, and breach of contract to procure insurance for the Turner defendants, as third-party beneficiaries of the subcontract between Girandola and Seasons.

Discussion

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Labor Law § 240 (1)

Plaintiffs now seek partial summary judgment in their favor on the third cause of action and to impose absolute liability on the Turner defendants, on the grounds that the undisputed evidence demonstrates that the ladder did not provide Pacheco with adequate protection, and that the pipe was not adequately secured, in violation of Labor Law § 240 (1), commonly known as the “scaffold law.”

In opposition, the Turner defendants cross-move for summary judgment in their favor on the scaffold law claim on the ground that the accident was not the result of the type of elevation-related risk enumerated in the law because Pacheco was not injured as the result of an inadequate or improperly placed ladder, nor because he was struck by a falling object while it was being hoisted or which was required to be secured.

Section 240 (1) of the Labor Law “mandates that owners and contractors provide ‘devices which shall be so constructed, placed and operated as to give proper protection to’ persons performing work covered by the statute.” *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d 173, 174 (1st Dep’t 2004) (quoting *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1st Dep’t 1998)). The scaffold law subjects owners and general contractors to absolute liability to a worker whose injury is proximately caused by the inadequacy of a provided ladder to safely support the worker, even where, as here, the ladder itself is not inherently defective or the injured worker had placed the ladder in position. *See Klein v. City of New York*, 222 A.D.2d 351, 352 (1st Dep’t 1995), *aff’d* 89 N.Y.2d 833 (1996); Labor Law § 240 (1). The occupational hazards against which the legislature intended to afford absolute protection by enacting the statute “are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.” *Rocovich v. Consolidated Edison Co.*,

78 N.Y.2d 509, 514 (1991). Such hazards include “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.*, 81 N.Y.2d 494, 501 (1993). The statutory duty to protect workers from elevation-related risks “is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work.” *Ross*, 81 N.Y.2d at 500.

Here, the uncontradicted evidence demonstrates that Pacheco was injured, at least in part, as the result of the Turner defendants' failure to provide adequate safety measures to secure the ladder on which he was working, such as requiring someone to hold the ladder, that led to its unsteadiness and, ultimately, to Pacheco's fall. “Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [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).” *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d at 174. *See also Gordon v. Eastern Ry. Supply, Inc.*, 82 N.Y.2d 555, 561 (1993). Pacheco's undisputed deposition testimony conclusively demonstrates that the ladder wobbled while Pacheco was standing on the fifth rung, and that it was this unsteadiness that prompted his attempt to regain his balance by grabbing onto the pipe, causing it to fall and hit the ladder, which then toppled over, causing Pacheco to fall and sustain an injury.

Contrary to the Turner defendants' contention, neither Pacheco's placement of the ladder nor Pacheco's grabbing of the pipe shields the Turner defendants from liability. Where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of the plaintiff's injury, "[n]egligence, if any, of the injured worker is of no consequence." *Orellano v. 29 East 37th St. Realty Corp.*, 292 A.D.2d 289, 291 (1st Dep't 2002) (citation and internal quotation marks omitted).

For these reasons, plaintiffs have established a violation of Labor Law § 240 (1) by failing to provide an adequate safety device, as a matter of law.

Plaintiffs have also established a violation of the scaffold law by conclusively demonstrating that Pacheco was caused to fall when the pipe fell from above his head, and hit the ladder upon which he was standing. In the familiar scenario, falling object cases come within the ambit of Labor Law § 240 (1) when the plaintiff has been struck by an object that was improperly hoisted or inadequately secured. *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604 (2009) (citing *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 501). However, falling object liability under the scaffold law is not limited to cases in which the falling object is in the process of being hoisted or secured. *Runner*, 13 N.Y.3d at 604; *Stawski v. Pasternack, Popish & Reif, P.C.*, 54 A.D.3d 619, 620 (1st Dep't 2008). Falling object cases also come within the scaffold law's protective reach where, as here, the object does not fall on the worker, but "the harm flows directly from the

application of the force of gravity to the object.” *Runner*, 13 N.Y.3d at 604 (plaintiff injured by makeshift pulley he was using to lower 800-pound reel of wire down four steps); see *Nimirovski v. Vornado Realty Trust Co.*, 29 A.D.3d 762, 762 (2d Dep’t 2006) (piece of sign truss cut by plaintiff fell and struck plaintiff’s ladder, knocking it over).

Here, the pipe constitutes a falling object for purposes of the scaffold law. It is uncontroverted that the pipe was located near the ceiling, above Pacheco while he was climbing the ladder, and that the pipe had been cut at one end sometime prior to the accident. A plaintiff is entitled to summary judgment on liability pursuant to the scaffold law where an object is situated above the area where construction work is being performed, creating an elevation differential, and is not properly and safely secured. *Boyle v. 42nd St. Dev. Project, Inc.*, 38 A.D.3d 404, 406 (1st Dep’t 2007) (plaintiff struck by rod that fell from two floors above plaintiff because nuts securing rod were not fully tightened); *Tylutki v. Tishman Tech.*, 7 A.D.3d 696, 696 (2d Dep’t 2004), *lv dismissed* 3 N.Y.3d 702 (2004) (plaintiff injured by sprinkler pipe dislodged by co-worker).

Contrary to the Turner defendants’ contention, the fall of the pipe was foreseeable and, therefore, does not constitute a superceding event. “If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct, it may well be a superseding act which breaks the causal nexus” and shields the defendant from liability under the

scaffold law. *Cruz v. City of New York*, 218 A.D.2d 546, 548 (1st Dep't 1995) (internal citation and quotation marks omitted).

Here, however, the pipe falling was “not of such an extraordinary nature or so attenuated from the statutory violation as to constitute a superseding cause sufficient to relieve the defendant of liability.” *deSousa v. Dayton T. Brown, Inc.*, 280 A.D.2d 447, 448 (2d Dep't 2001). *See also Nimirowski*, 29 A.D.3d at 762; *Dasilva v. A.J. Contr. Co.*, 262 A.D.2d 214, 214-215 (1st Dep't 1999); *LeFleur v. Consolidated Edison Co. of N.Y., Inc.*, 221 A.D.2d 250, 250 (1st Dep't 1995) (“That the ladder was knocked over by a cabinet which collapsed when the plaintiff touched it with his hand was not such an extraordinary event so as to constitute a superseding cause”).

For these reasons, the branch of plaintiffs' motion for partial summary judgment as to liability on the third cause of action for violation of Labor Law § 240 (1) is granted. Summary judgment may be granted where no genuine triable issue of material fact exists. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 (1974); CPLR 3212. For these reasons as well, that branch of the Turner defendants' cross motion for summary judgment in their favor on the scaffold law claim is denied.

Labor Law § 241 (6)

The Turner defendants seek summary judgment in their favor on the fourth cause of action in which plaintiffs allege violations of Labor Law § 241 (6) on the ground that

none of the provisions of Rule 23 of the Industrial Code, 12 NYCRR § 23, are applicable in the circumstances presented here.

In opposition, plaintiffs contend that the undisputed record demonstrates that the Turner defendants violated 12 NYCRR 23-1.7 (a) (1), which applies to the protection of construction workers from overhead hazards.

In relevant part, Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety for construction and demolition workers, and requires them to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor, as set forth in the Industrial Code. *Misicki v. Caradonna*, 12 N.Y.3d 511, 515 (2009); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 878 (1993); *see also* NYCRR Art. 12. To prevail under the statute, a plaintiff must plead and prove a violation of a specific and concrete provision of the Industrial Code, and that the violation was a proximate cause of the plaintiff's injury. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 503-505; Labor Law § 241 (6).

Section 23-1.7 (a) (1) of the Industrial Code provides, in relevant part, that “(e)very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection.”

The uncontroverted record demonstrates that the area where Pacheco was working was one where workers are normally exposed to falling objects. *Clarke v. Morgan Contr.*

Corp., 60 A.D.3d 523, 523-524 (1st Dep't 2009); 12 NYCRR § 23-1.7 (a) (1). There is no dispute that Pacheco was working in the mezzanine level of Pier 92, an area that had been under continuous demolition and reconstruction for more than six months prior to the accident. Further, as Pacheco testified at his deposition, he and his foreman visually inspected the ceiling above where Pacheco set up the ladder for materials or objects that might present a falling object hazard, demonstrating their awareness that an overhead hazard might exist.

However, there exist genuine triable issues of material fact sufficient to preclude summary judgment on this claim. The worker's own negligence is relevant to the issue of causation under a Labor Law § 241 (6) claim and may form a defense to the claim. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 521-522, *rearg. denied* 65 N.Y.2d 1054 (1985). *See also DeFeo v. City of New York*, 25 Misc.3d 1221(A), *4, 2009 WL 3647036 (Sup. Ct. Richmond County 2009) (“Under Labor Law §241(6) the worker’s own negligence may be introduced into evidence on the issue of causation.”). Pacheco testified that, while placing the ladder, he inspected the ceiling and observed no objects that he foresaw to be at risk of falling, and that the pipe appeared stable and secure. Pacheco also testified that he placed the ladder on a clear, dry, level floor, locked the hinges open, and tested it before stepping up on it. He testified that, as he stepped on the bottom rung of the ladder, he felt a little shaking which stopped, and then continued up to the fifth rung, where the wobbling became more pronounced.

Pacheco's testimony raises triable issues regarding whether the Turner defendants' violation of the Industrial Code was a proximate cause of Pacheco's injury or whether Pacheco himself proximately caused his injury by, among other things, negligently failing to recognize the existence of an overhead hazard or to properly place the ladder or steady it, the first time the ladder began to wobble.

Therefore, that branch of the Turner defendants' motion for summary judgment on the fourth cause of action for violation of Labor Law § 241 (6) is denied.

Labor Law § 200

The Turner defendants also seek summary judgment on the first cause of action for violation of Labor Law § 200 and for common-law negligence on the grounds that the undisputed record demonstrates that they neither supervised nor controlled Pacheco's work, and had no notice of any defective condition associated with the pipe. In opposition, plaintiffs contend that the Turner defendants have failed to submit any evidence demonstrating that they were not responsible for the creation of the hazardous condition of the cut pipe or that they did not have actual or constructive notice of the hazard.

Section 200 of the Labor Law is a codification of the duty imposed at common law upon an owner or general contractor to provide construction workers with a safe place to work. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d at 505. "To be held liable under Labor Law § 200 and for common-law negligence when the method and manner of

the work is at issue, it must be shown that the party to be charged had the authority to supervise or control the performance of the work.” *Gasques v. State of New York*, 59 A.D.3d 666, 667 (2d Dep’t 2009) (internal citation and quotation marks omitted). See also *Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 91 N.Y.2d 343, 352 (1998). The assumption of general supervisory duties over a project, the right to stop the contractor’s work when a safety violation is noted, or to ensure compliance with safety regulations and contract specifications do not give rise to the level of supervision or control necessary to impute liability pursuant to Labor Law § 200. *Gasques*, 59 A.D.3d at 668; *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350 (1st Dep’t 2006).

Inspection of the work as it progresses does not constitute the requisite direction or control necessary for the imposition of liability under the statute. *Arama v. Fruchter*, 39 A.D.3d 678, 679 (2d Dep’t 2007). It has long been established that neither the owner nor the general contractor bears a duty to inspect the machinery or tools supplied by a subcontractor to the worker. See *Olsommer v. George W. Walker & Sons, Inc.*, 4 A.D.2d 424, 432-433 (4th Dep’t 1957), *aff’d* 4 N.Y.2d 793 (1957).

The undisputed record demonstrates that the Turner defendants did not supervise or control Girandola’s work at the site. Pacheco testified at his deposition that he received the ladder from Girandola, and received all his assignments and instruction from a Girandola foreman, and did not take any instruction from the Turner defendants. Anthony Sune, the Turner Construction project superintendent at the site, similarly

testified at his deposition that Turner Construction never provided any equipment, including ladders, to any of the site subcontractors, including Girandola, and never provided any instructions to Girandola regarding the means and methods by which it performed its contractual duties.

However, triable issues of material fact sufficient to preclude summary judgment exist regarding whether the Turner defendants had actual or constructive notice of the hazardous condition of the pipe. Sune testified that one end of the pipe had been cut prior to the accident, and that the pipe had been secured by wood that had rotted, but could give no explanation regarding why, how, or by whom the pipe was cut. It is uncontroverted that the mezzanine area of Pier 92 had been under demolition and reconstruction for many months prior to the accident, and that numerous subcontractors had been hired to perform demolition work, including removal of pipes, or work relating to the pipes, in that area. The demolition plans prepared by Turner Construction which include the area where the accident occurred may be interpreted as demonstrating that the pipe had been identified as an item for demolition and removal. Whether the Turner defendants knew or should have known that the pipe was designated for removal and had not been removed, or that the removal had not been completed and that the pipe had been left improperly secured, present triable issues for the jury to resolve.

Therefore, that branch of the Turner defendants' motion for summary judgment on the first cause of action is denied.

Third-Party Action Motions

In the third-party action, the Turner defendants allege that Seasons failed to properly cut, remove, cap, or secure abandoned plumbing vents, pipes, and waste lines in a Pier 92 ceiling, and that such misconduct was a proximate cause of Pacheco's accident. The Turner defendants also allege that Seasons improperly refused to provide them with a defense and indemnification and liability insurance in this action in breach of the subcontract between Girandola and Seasons and the prime contract between Turner Construction and Girandola. On these allegations, the Turner defendants assert causes of action against Seasons for common-law contribution arising out of Seasons' negligent performance of its work, common-law and contractual indemnification, and breach of contractual obligations owed to them as third-party beneficiaries, by failing to procure insurance.

The Turner defendants move for summary judgment in their favor on the second, third, and fourth causes of action for common-law and contractual indemnification and for breach of contract.

In opposition, Seasons moves for an order granting summary judgment and dismissing the third-party action in its entirety on the grounds that the Turner defendants cannot demonstrate that Seasons was contractually required to remove the pipe, attempted to remove the pipe, was aware of the pipe's existence and hazardous condition, or agreed to defend and indemnify the Turner defendants, or procure insurance for their benefit.

The branches of Seasons' motion for summary judgment on the first and second causes of action for common-law contribution and indemnification are granted. To establish a claim for common-law indemnification, the party seeking indemnity must prove that its conduct was not a proximate cause of the accident, and that "the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident or in the absence of any negligence that the proposed indemnitor had the authority to direct, supervise, and control the work giving rise to the injury." *Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 684-685 (2d Dep't 2005) (internal citations and quotation marks omitted). In addition, in order to establish constructive notice, the plaintiff must prove that the alleged hazard was both visible and apparent for a period of time long enough to permit the defendant to discover and correct the hazard. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986). The uncontroverted record is wholly devoid of evidence that Seasons was contractually required to remove the pipe, actually cut the pipe and failed to remove it, that Seasons' spraying the area with white epoxy to encapsulate airborne asbestos particles hid the pipe's cut end from view, or that the hazardous condition had existed long enough for Seasons to have discovered it before it left the worksite six months prior to Pacheco's accident.

Here, there is no dispute that Seasons completed its asbestos abatement and demolition work and left the site permanently on December 23, 2004, six months prior to Pacheco's accident. Sune testified at deposition that he did not know who cut the pipe or

why it had been cut. Mike Petrochko, a Turner Construction engineer at the site, similarly testified at deposition that he never learned why the pipe was there, whether it should have been there, and that no one ever told him that the pipe should have been removed by Seasons. Daniel Margiotta ("Margiotta"), a Seasons principal, testified at deposition that the drawing prepared by Seasons does not indicate whether the pipe was to be removed, and, instead, merely indicates the area where the asbestos abatement work was to be performed. Margiotta also testified that the area where the accident occurred contained pipe that was scheduled for asbestos abatement by Seasons, but not for removal. Margiotta attests that the demolition phase of Seasons' work was performed after completion of the abatement work, and was directed and supervised by Girandola. He further attests that, at the conclusion of Seasons' work in December 2004, Girandola performed a walk-through inspection, did not advise Seasons that any unfinished work or dangerous condition existed, and approved Seasons' work. Margiotta also attests that Seasons was not required to return to the site to correct any hazardous condition, and, in March 2005, received a check in final payment for its work.

It is uncontroverted that Pier 92 was continuously under construction from December 2004, when Seasons completed its work, through June 2005, when the accident occurred. There were at least 10 subcontractors working at the site in June 2005. Turner Construction's daily construction reports indicate that four or more subcontractors, in addition to Seasons, performed pipe-related work during that period. Where the

defendant does not have exclusive control over the area where the accident occurred, and the plaintiff cannot prove that the defendant created the condition, the defendant cannot be held liable for the plaintiff's injuries. *Vinicio v. Marriott Corp.*, 217 A.D.2d 656, 657 (2d Dep't 1995); *Raffile v. Tower Air Inc.*, 264 A.D.2d 721, 721-722 (2d Dep't 1999).

The Turner defendants' contention that Seasons was responsible for the dangerous condition of the pipe is mere speculation asserted by attorneys without personal knowledge of the facts. "Bald, conclusory allegations, even if believable, are not enough to defeat a motion for summary judgment." *Jones v. Gameray*, 153 A.D.2d 550, 551 (2d Dep't 1989); CPLR 3212. "[T]he bare affirmation of [a party's] attorney who demonstrated no personal knowledge of the [matter] . . . is without evidentiary value and thus unavailing." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980).

For these reasons, the branches of Seasons' motion for summary judgment in its favor on the first and second causes of action for common-law contribution and indemnification asserted in the third-party complaint are granted, and these claims are dismissed. For these reasons as well, the branches of the Turner defendants' motion for summary judgment in their favor on these claims are denied.

Next, the Turner defendants and Seasons each seek summary judgment on the third and fourth causes of action for contractual indemnification and breach of contract by failing to procure insurance for the benefit of the Turner defendants, and by refusing to provide the Turner defendants with a defense and indemnification in this action.

The October 27, 2004 subcontract upon which the Turner defendants assert third-party beneficiary rights is AIA standard form document A401-1997, which was never signed by either Girandola or Seasons. The subcontract defines the subcontract documents as including the subcontract itself and the prime contract, as modified, between Turner Construction and Girandola. The Turner defendants and Seasons dispute whether the record contains admissible evidence conclusively demonstrating that Seasons agreed to indemnify them and to procure liability insurance naming them as additional insureds.

It is uncontroverted that Seasons was hired by Girandola to provide asbestos removal and demolition services at the site and did provide such services. However, the record is devoid of evidence that Seasons intended to indemnify and hold the Turner defendants harmless or to procure insurance that would cover the Turner defendants, in the circumstances presented here. An unsigned contract may be enforceable where there exists objective evidence establishing that the parties intended to be bound. *Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 N.Y.3d 363, 3369, *rearg denied* 5 N.Y.3d 746 (2005) (“under the analysis in *Brown [Bros. Elec. Constr. Corp.]*, 41 N.Y.2d 397 (1977)], an unsigned contract may be enforceable, provided there is evidence establishing that the parties intended to be bound”); *Kowalchuck v. Stroup*, 61 A.D.3d 118, ___, 2009 NY Slop Op 1014, *6 (1st Dep’t 2009). “In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective

manifestations of the intent of the parties as gathered by their expressed words and deeds.”” (*Flores*, 4 N.Y.3d at 368, quoting *Brown Bros. Elec. Contrs., Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399-400 (1977)).

With regard to indemnification, the subcontract expressly requires Seasons to indemnify and hold the Turner defendants harmless from all claims “arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract.” An indemnification agreement negotiated at arms' length between sophisticated business entities, which allocates the risk of liability to a third party, is enforceable so long as “the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances.” *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 (1973). Assuming, as the Turner defendants contend, that Seasons is bound by this provision, Seasons' contractual obligation to indemnify and hold harmless is not triggered here. As discussed above, there is no evidence that Seasons' work performance was a proximate cause of Pacheco's accident.

With regard to insurance, the subcontract requires the subcontractor to purchase and maintain insurance naming the Turner defendants as additional insureds, as required by the prime contract. The prime contract requires the contractor to purchase comprehensive general liability insurance covering the Turner defendants. During contract negotiations with Girandola, Seasons proposed that it would provide “insurance,”

in addition to labor, materials, and equipment, in connection with the asbestos abatement and demolition work.

Here again, and assuming without deciding whether Seasons agreed to be bound by the insurance provisions set forth in the subcontract and prime contract, the record is wholly devoid of any evidence that demonstrates that Seasons agreed to procure insurance that would cover the Turner defendants in the circumstances presented here, where the loss was not the result of Seasons' acts or omissions.

For these reasons, the branches of the Turner defendants' motion for summary judgment on the third and fourth causes of action for contractual indemnity and failure to procure insurance are denied, and the branches of Seasons' motion for summary judgment in its favor on these claims is granted.

In accordance with the foregoing, it is

ORDERED that motion sequence number 004 is granted to the extent that partial summary judgment as to liability on the third cause of action for violation of Labor Law § 240 (1) is granted in favor of plaintiffs Erik Pacheco and Elka Pacheco and against defendants Turner Construction Company, the City of New York, and the New York City Economic Development Corporation; and it is further

ORDERED that the cross motion is denied in all respects; and it is further

ORDERED that the remainder of the main action shall continue; and it is further

ORDERED that motion sequence number 005 is denied in all respects; and it is further

ORDERED that motion sequence number 006 is granted in its entirety and summary judgment on the third-party complaint is granted in favor of third-party defendant Seasons Industrial Contracting Corp. and against third-party plaintiffs Turner Construction Company, the City of New York, and the New York City Economic Development Corporation, and the third-party action is severed and dismissed, with costs and disbursements to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
June 4, 2010

ENTER:

Saliann Scarpulla
Saliann Scarpulla, J.S.C.

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