Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

SEWNARINE SAMAROO, Plaintiff, - against - T-MOBILE USA, INC. and DIMARCO MANAGEMENT CO., LP, Defendants.	Index Number 17599 2007 Motion Dates April 7, 2010 Motion Cal. Numbers 39-42 Motion Seq. Nos. 1-4

The following papers numbered 1 to 66 read on this motion by second third-party defendant Bear Steel, Inc. (Bear Steel), to sever the second third-party action, to strike the action from the trial calendar, and to compel discovery, or, in the alternative, to stay trial proceedings until the completion of discovery, to vacate plaintiff's note of issue, to set down a schedule for the completion of discovery, and to extend Bear Steel's time to file dispositive motions; and on this cross motion by second third-party defendant Cel Tech Contracting Corp. (Cel Tech), seeking similar relief; and by separate notice of motion by defendant/third-party plaintiff/second third-party plaintiff T-Mobile USA, Inc. (T-Mobile), for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, dismissing the cross-claims made by third-party defendant Davrial Enterprises, Inc. (Davrial), and granting T-Mobile conditional summary judgment in its favor on its cross-claim for contractual indemnification against Davrial; and on this cross motion by defendant DiMarco Management Co., LP, (DiMarco), to extend the time to move for summary judgment for 120 days following the completion of discovery; and by separate notice of motion by plaintiff for summary judgment in its favor on the issue of liability; and by separate notice of motion by T-Mobile for a joint trial.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-15
Notices of Cross Motion - Affidavits - Exhibits.....	16-23
Answering Affidavits - Exhibits.....	24-53
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Upon the foregoing papers these motions and cross motions are consolidated for the purposes of a single decision and are determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on June 3, 2005 while he was working as a trade man for Davrial at a construction site located at 40-07 75th Street in Elmhurst. DiMarco is the managing agent for the subject premises. T-Mobile leased the right to install cellular phone equipment on the roof of DiMarco's building. T-Mobile retained Davrial to install the equipment. Cel Tech was hired to install the antennae, and Bear Steel manufactured the steel beams. The accident occurred while transporting a steel c-channel beam from the ground level of the building to the roof.

The circumstances surrounding the happening of the accident are sharply in dispute. Plaintiff testified: that on the day of the accident, he was told by a "T-Mobile guy" (T-Mobile employee) that a crane would arrive shortly so that the c-channel beam could be transported to the roof; that the T-Mobile employee left the site, and when he returned, he indicated to the workers that the crane would not be coming; that the T-Mobile employee, instead, had a wheel and rope; that the T-Mobile employee instructed plaintiff, the other Davrial employees, and several Cel Tech employees, that they would be pulling the rope to lift the beam – weighing approximately 2000 pounds – to the roof by utilizing a makeshift pulley system; that the T-Mobile employee instructed the workers as to how to get the beam from the ground to the roof using this system; that the beam was approximately 15 to 20 feet above plaintiff's head when the rope started to give slack; and that the beam fell vertically on the ground and then fell over, striking the right side of plaintiff's body.

However, Sashi Mulchand (Mulchand), a laborer employed by Davrial and witness to the accident, testified: that Davrial and Cel Tech employees were attempting to transport 450-pound c-channel beam to the roof; that no other contractors were present at the site; that Joel Mitchell (Mitchell) – a Davrial foreman – decided that the beam would be carried up manually through the stairwell of the building; that the beam was resting on the floor when plaintiff attempted to step over it and tripped; that the workers, including plaintiff, then

carried the beam to the roof without incident; and that a makeshift pulley was never employed to move the c-channel beam to the roof.

Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "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 NY2d 494, 501 [1993]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). 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 owners and contractors (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

Plaintiff has failed to meet his prima facie burden of establishing his entitlement to judgment as a matter of law with respect to this claim. While Labor Law § 240 (1) would certainly be applicable under plaintiff's version of events, as he testified that the beam fell while being hoisted with an inadequate safety device (*see Cruci v General Elec. Co.*, 33 AD3d 838 [2006]; *Keaney v City of New York*, 24 AD3d 615 [2005]), the statute would not apply if the accident occurred as described by Mulchand, since his testimony revealed that plaintiff's injuries were not caused by a gravity-related activity; rather, plaintiff merely tripped over the stationary beam (*see Madero v Pizzagalli Constr. Co.*, 62 AD3d 670 [2009]; *Cruz v Neil Hospitality, LLC*, 50 AD3d 619 [2008]). Whether plaintiff's accident occurred one way or the other is ultimately an issue of fact, and an award of summary judgment in the face of these two irreconcilable versions of the accident would certainly be inappropriate.

Plaintiff's contention that, inter alia, Mulchand's testimony should be disregarded by this court as it is merely an attempt to create a feigned issue of fact to avoid indemnification costs, is unavailing. It is precisely plaintiff's assertion – one challenging the credibility of a witness – that can only be assessed by the trier of fact (*see generally Ferguson v Shu Ham Lam*, 59 AD3d 388 [2009]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Lelekakis v Kamamis*, 41 AD3d 662 [2007]).

Turning to plaintiff's claim pursuant to Labor Law § 241 (6), this section 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*, 81 NY2d at 501-502; *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 section 241 (6), he must plead and prove a specific, positive violation of 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]), and that said violation was the proximate cause of plaintiff's injuries (*see Rakowicz*, 56 AD3d at 747; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579 [2008]; *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396 [2005]).

Although plaintiff alleges multiple violations of the Industrial Code in his complaint and bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.5, 23-2.3 (a) (1), and 23-2.3 (c), plaintiff has failed to address these violations in his moving papers. Consequently, those parts of plaintiff's Labor Law § 241 (6) claim predicated on the violations not discussed by plaintiff in his motion papers are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832 [2003]; *Mulvihill v Brooklyn Law School*, 22 Misc 3d 1114(A) [Sup Ct, Kings County 2009]).

Turning to those sections that have been addressed, plaintiff cannot plead a violation of 12 NYCRR 23-1.5 as same sets forth only a general standard of care and, therefore, cannot serve as a predicate for liability under Labor Law § 241 (6) (*see Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 [2005]).

Neither can plaintiff rely on section 23-2.3 (a) (1) since it specifically addresses a particular phase of work, to wit: the "final placing of structural steel members." Regardless of which account of the accident is accepted as true, neither account involved plaintiff engaging in the final placing of the c-channel beam. Finally, it cannot be determined as a matter of law whether section 23-2.3 (c) applies, as there is a discrepancy as to whether the c-channel beam was being hoisted at the time of plaintiff's accident.

Both plaintiff and T-Mobile separately move on plaintiff's Labor Law § 200 and common-law negligence claims. The general rule with respect to these claims is that an owner or contractor has the duty to provide construction site workers with a reasonably safe place to work (*see Rizzuto*, 91 NY2d at 352; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Radoncic v Independence Garden Owners Corp.*, 67 AD3d 981 [2009]). If a worker was injured as a result of the manner in which he or she performed the work – rather than from a dangerous or defective condition on the premises – and the owner or contractor has not exercised supervisory control over the operation, liability does not attach (*see e.g. Radoncic*, 67 AD3d at 982; *McFadden v Lee*, 62 AD3d 966 [2009]; *Ortega*, 57 AD3d at 61).

Preliminarily, plaintiff has not met his prima facie burden with respect to DiMarco, as the former has not addressed the applicability of this section of the Labor Law to DiMarco; rather, plaintiff gears his arguments entirely towards T-Mobile. That having been said, neither is plaintiff, nor T-Mobile, entitled to judgment as a matter of law on plaintiff's Labor Law § 200 and common-law negligence claims. According to plaintiff's version of events, the T-Mobile employee: (1) told plaintiff what his specific task was going to be on the date of the accident; (2) stated to plaintiff that he and the other workers were going to implement the pulley system to transport the c-channel beam to the roof; (3) supplied the tools to get the job done; and (4) specifically instructed plaintiff and the other workers how to perform the task. Thus, if this set of circumstances occurred as plaintiff described, T-Mobile would be subject to liability both because it supplied an inadequate device (*see Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 [2008]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2008]), and because it controlled the means and methods of the injury-causing task (*cf. Kajo v E.W. Howell Co., Inc.*, 52 AD3d 659 [2008]; *Murray v City of New York*, 43 AD3d 429 [2007]). However, Mulchand's testimony makes clear that T-Mobile was not even present on the site on the date of plaintiff's accident, and that Mitchell was responsible for directing the method and manner of plaintiff's work. Therefore, it cannot be determined – on this record – whether Labor Law § 200 and common-law negligence apply.

Turning now to the portion of T-Mobile's motion which seeks: (1) summary judgment dismissing Davrial's cross claims against it; and (2) conditional summary judgment on its contractual indemnification claim against Davrial, T-Mobile points to the following clause pursuant to the parties' master construction service agreement:

> "Contractor hereby agrees to indemnify, defend and hold . . . T-Mobile USA . . . harmless from and against any and all claims, damages, liabilities, obligations, penalties, liens, costs, charges, losses, expenses, including, but not limited to, reasonable attorneys' fees and expenses, arising out of or resulting from: (a) Contractor's breach of this Agreement, including, without limitations, breaches of any warranties or representations; (b) the conduct of Contractor's business without or outside the scope of this Agreement; (c) actions and omissions of Contractor, subcontractor or a sub-subcontractor; (d) bodily injury (including, without limitation, death), personal injury, property damages, and other losses . . . [and] (g) any of the foregoing with respect to any subcontractor, a sub-subcontractor, or anyone directly or indirectly employed by any of the parties listed under subsection (c) of this Section 7.1, or by anyone from whose acts they may be liable and for which Contractor is responsible."

T-Mobile is not entitled to summary judgment in this instance. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2009]; *see Hirsch v Blake Hous., LLC*, 65 AD3d 570 [2009]). Here, the indemnification clause is broad enough to be read to exempt T-Mobile from liability for damages resulting from its own negligence, rendering the clause unenforceable (General Obligations Law § 5-321; *see DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656 [2008]; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348 [2005]). In any event, as discussed in detail above, T-Mobile has not conclusively demonstrated its freedom from negligence in the happening of plaintiff's accident (as there is an issue of fact as to whether T-Mobile, inter alia, directed the work), which it must do in order to be entitled to contractual indemnification (*see Hirsch*, 65 AD3d at 571; *Cava*, 58 AD3d at 662; *Farduchi v United Artists Theatre Circuit, Inc.*, 23 AD3d 610 [2005]).

The separate motion made by T-Mobile for a joint trial of the main action, the third-party action, and the second third-party action, is denied as moot. T-Mobile need not have affirmatively moved for this relief, as these actions are already being tried together under the original Index Number 17599/2007 (*see* CPLR 1007).

Notwithstanding the above, the respective portion of the motion and cross motion made by Bear Steel and Cel Tech, which seeks severance of the second third-party action, is hereby granted. CPLR 603 states, in relevant part: "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." The court has considerable discretion in deciding whether severance is appropriate (*see Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]; *Quiroz v Beitia*, 68 AD3d 957 [2009]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]; *see also* CPLR 603; CPLR 1010). Severance of the second third-party action is warranted in this case, given: (1) the delay that would be created in the absence of severance; (2) the completion of discovery in the main and third-party action; and (3) the prejudice to plaintiff, who is ready for trial (*see e.g. Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803 [2009]; *Abreo v Baez*, 29 AD3d 833 [2006]; *Wassel v Niagara Mohawk Power Corp.*, 307 AD2d 752 [2003]; *Singh v City of New York*, 294 AD2d 422 [2002]; *Ambriano v Bowman*, 245 AD2d 404 [1997]).

This court notes that, even if the second third-party action is severed, any potential judgment against T-Mobile in the main action will not prevent it from potentially obtaining judgment against the second third-party defendants in the severed action (*see Garcia v Gesher Realty Corp.*, 280 AD2d 440 [2001]).

In light of the above determination, this court need not consider, as moot, the remaining portions of the parties' respective motion and cross motion regarding, inter alia, vacatur of the note of issue and requests for various discovery documents (*see Attie v City of New York*, 221 AD2d 274 [1995]).

Finally, DiMarco's cross motion for an extension of time is denied. The fact that certain potential witnesses have not yet been deposed will not – as DiMarco suggests – lead to "factual resolution." Issues of fact will still remain, warranting trial, since the happening of the accident remains in dispute. Moreover, DiMarco's contention that an extension of time is warranted due to the late impleader of Bear Steel and Cel Tech is rendered moot in light of the discussion above regarding severance.

Accordingly, plaintiff's motion for summary judgment is denied. T-Mobile's motion for summary judgment is denied. T-Mobile's separate motion for a joint trial is denied as moot. DiMarco's cross motion is denied. The portion of the respective motion and cross motion by Bear Steel and Cel Tech to sever the second third-party action is granted. The remaining portions of same are denied. T-Mobile, as second third-party plaintiff, may, in exchange for its second third-party index number, obtain a new index number without fee; to that effect, the county clerk is directed to assign to T-Mobile a new index number. T-Mobile may then make a request for judicial intervention and, upon obtaining same, the parties will, thereafter, be scheduled for a preliminary conference.

Dated: June 8, 2010

J.S.C.