[* 1]

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

PRESENT: _____ PART _____

Index Number : 102050/2007

GRAY, CHARLES

VS.

BOVIS LEND LEASE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes ✓ No

Upon the foregoing papers, it is ordered that this motion is decided as

attached

Dated: 6/21/10

_____ 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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 17

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Charles Gray and Virginia Gray,

Plaintiffs,

Index Number 102050/2007

-against-

Bovis Lend Lease Corp., American Museum of Natural History, the Museum of Natural History and Planetarium Authority, the City of New York, and Liberty Contracting Corp.,

Defendants.

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Bovis Lend Lease LMB, Inc., American Museum of Natural History and the City of New York,

Third-Party Plaintiffs,

-against-

Fresh Meadow Mechanical Corp. and Liberty Contracting Corp.,

Third-Party Defendants.

----------X

Emily Jane Goodman, J.:

Bovis Lend Lease Corp. (Bovis), American Museum of Natural History (Museum), the Museum of Natural History and Planetarium Authority (Planetarium) and the City of New York (the City) move for summary judgment dismissing plaintiffs' claims against them under Labor Law § 240 (1) (the Scaffold Law), Labor Law § 241-a, Labor Law § 200, common-law negligence and portions of plaintiffs' claims under Labor Law § 241 (6) and for summary judgment on their contractual indemnity claims against Fresh

Meadow Mechanical Corp. (Fresh Meadow) and Liberty Contracting Corp. (Liberty). Liberty moves for summary judgment dismissing plaintiffs' claims against it under Labor Law § 240 (1), Labor Law § 241-a and Labor Law § 241 (6). The motions are consolidated for disposition and decided as noted below.

Parties

Plaintiff Charles Gray (plaintiff) was a foreman employed by Fresh Meadow (plaintiff EBT, at 7) in connection with a construction project (the Project) at the Museum. The Museum, the Planetarium and the City (collectively, the Owners) are the owners of the property on which the Museum is located. Bovis was the general contractor for the Project (Garner EBT, at 7, 8). Fresh Meadow was a subcontractor involved in HVAC work and it installed cooling towers at the Museum (plaintiff EBT, at 17; Smith EBT, at 10). Liberty was a demolition subcontractor that was working in the second floor bathroom (the Bathroom) of the Museum. It was performing demolition work as part of the installation of new facilities (Knafelman EBT, at 8, 11).

Parties' Contentions

Plaintiff contends that, on June 15, 2006, he was working for Fresh Meadow at the Museum (plaintiff EBT, at 9). He alleges that, as part of the Project, Fresh Meadow was upgrading the air conditioning system, and that, as part of that work, he and his

co-workers had to get to the cooling towers (*id.* at 10, 17). He further states that there was a catwalk 30 feet above the ground that provided access to the cooling towers and that access to the catwalk was through a window in the Bathroom (*id.* at 16-19).

Plaintiff further contends that there was an enclosed radiator and a step at the window in the Bathroom that was used as the means of access to the catwalk (*id.* at 17-18, 22, 88). He also states that, on June 15, 2006, he had previously used this route to get to the cooling towers to perform his work. He asserts that, at approximately 11:45 A.M., he was going to lunch, so he stepped through the window down onto the enclosed radiator and that while he was stepping down to the floor, he stepped on a stone or brick on the floor and his right foot slid out (*id.* at 25, 27, 102). He further states that, although he did not fall, he injured himself as a result of this slip, and that he later went to the hospital and learned that he had a torn meniscus in his right knee (*id.* at 28, 43-45). He contends that, after he slipped, he saw cinder blocks and other debris, as well as puddles of water, on the Bathroom floor (*id.* at 23-24, 28-29).

Plaintiff has asserted claims under Labor Law §§ 240 (1), 241-a, 241 (6), 200 and common-law negligence against Bovis, the Owners and Liberty (amended complaint, ¶ 39). Plaintiff Virginia Gray seeks damages for her loss of services (*id.*, ¶ 42).

Bovis alleges that it was the construction manager for the Project and that it contracted with Liberty to perform demolition work to the Bathroom as part of the Project (Garner EBT, at 11). It also states that it was aware that the bathroom window was used as an access route to the catwalk and then to the cooling towers (*id.* at 15). It further states that the enclosed radiator and a step 10 to 12 inches high were used by various construction trade subcontractors to get through the window to go to the cooling towers (*id.* at 13-15, 65).

Bovis also contends that it had workers at the Museum who cleaned up debris and that it had weekly safety meetings (*id.* at 21-22, 28-29). It also asserts that it did not supply equipment or materials to Liberty (*id.* at 28). It further states that it did not control the manner or means by which Liberty performed its work (Groenendaal affidavit, ¶ 7). The contract between Bovis and Liberty contained an indemnification clause.

Bovis further alleges that it contracted with Fresh Meadow in connection with the air conditioning work and that, in addition to access through the Bathroom window, there was a ladder to the catwalk (Smith EBT, at 10, 27). It also states that, after plaintiff's accident, there was both debris and water on the Bathroom floor (Garner EBT, at 60; Smith EBT, at 37). The contract between Bovis and Fresh Meadow contained an

indemnification clause.

The Owners assert that they hired Bovis as the general contractor and that they had no responsibility for the Project.

Bovis and the Owners assert that the Scaffold Law is inapplicable, that Labor Law § 241-a is inapplicable and that most of the regulations that plaintiff seeks relief under, pursuant to Labor Law § 241 (6), are inapplicable. They further contend that they did not control Liberty's work and that, since they were not actively negligent, Bovis is entitled summary judgment on its contractual indemnity claims against Liberty and Fresh Meadow.

Liberty contends that it performed the demolition work in the Bathroom which was required to install new facilities pursuant to a contract with Bovis (Knafelman EBT, at 8, 11). It states that, as part of the demolition, it misted the area to control dust and that there were no prior complaints (*id.* at 16, 19-20). It also states that it used its own equipment for the demolition and that it complained to Bovis about the window access (*id.* at 34, 36). It further contends that a Bovis supervisor came around "constantly" to look at the work, that it was responsible for keeping its own work area clean and that it placed caution signs outside the Bathroom (*id.* at 35, 38).

Liberty seeks dismissal of plaintiff's claims under the

Scaffold Law, Labor Law § 241-a and Labor Law § 241 (6). It contends that Bovis was actively negligent and, therefore, that it should not be entitled to summary judgment on contractual indemnity.

Fresh Meadow asserts that the debris and water on the Bathroom floor was not on the Bathroom floor at 7:25 A.M., when plaintiff went through the Bathroom on his way to work on June 15, 2006 (plaintiff EBT, at 19) and that Fresh Meadow was not informed of the demolition work being conducted by Liberty (*id.* at 24). It further states that, since the cooling towers that plaintiff was working on were outside the building, plaintiff's work accident did not result from, or was not in connection with, Fresh Meadow's work (Terranova affirmation, ¶¶ 14, 15). Consequently, it asserts that it should not be liable to Bovis under the indemnification clause of its contract with Bovis.

Labor Law § 241-a

Labor Law § 241-a protects workers in "elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition...." Plaintiff has not contested Bovis, the Owners and Liberty's contention that it is inapplicable and, therefore, plaintiff's claim under this statute is dismissed.

Labor Law § 240 (1)

Labor Law § 240 (1) provides that:

> "All contractors and owners and their agents ... shall furnish or erect, or cause to be furnished or erected ... scaffolding, hoists, stays, ladders, slings, ... pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a [worker]."

The purpose of the Scaffold Law is to protect workers and place responsibility for safety equipment and practices on owners and general contractors who are deemed to be best situated to bear that responsibility (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). However, the Scaffold Law is aimed at the extraordinary risks of elevation related hazards, rather than the ordinary risks of a construction site (*id.* at 500-501; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

In this case, plaintiff alleges that he slipped and slid on debris on the Bathroom floor as he stepped down from the boxed radiator (plaintiff EBT, at 24). Slipping and falling on debris on the floor at a construction site is not the sort of hazard "related to the effects of gravity where protective devices are called for (due to different elevation levels)" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Therefore, plaintiff's claim under Labor Law § 240 (1) is dismissed.

Labor Law § 241 (6)

Labor Law § 241 provides:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any

> excavating in connection therewith, shall comply with the following requirements:
> ***
> [6] All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] ...[in accordance with rules promulgated by the Commissioner of Labor]."

Plaintiff has withdrawn his claims for violations of 12 NYCRR (the Code) except for § 23-1.7 (e)(2) (McCone affirmation, ¶ 11). He also seeks to rely upon an additional section of the Code, § 23-1.7 (d). However, this alleged violation was not raised in plaintiffs' bill of particulars (Item 17) and, therefore, it may not be raised for the first time in opposition to motions for summary judgment. Therefore, plaintiff's claim under Labor Law § 241 (6) is dismissed except as to § 23-1.7 (e)(2).

Bovis and the Owners did not seek dismissal of plaintiff's claim under this section (Yaron affirmation dated August 10, 2009, ¶ 31 n 2).

Tripping Hazard

Code section 23-1.7 (e)(2) (the Debris Accumulation Rule) provides:

> "Working areas. The 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."

Liberty contends that there was no violation of the Debris Accumulation Rule since it was performing demolition work (Garner EBT, at 53) and, therefore, it would necessarily create dust and debris. However, plaintiff has stated that the Bathroom was also being used as a passageway to his work at the cooling towers (plaintiff EBT, at 18-19). The Debris Accumulation Rule requires that both work areas and passageways be kept free of accumulations of dirt, debris, scattered tools and materials, to reduce the potential risk of tripping over such accumulations (*see Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348 [2nd Dept 2005]; *Beltrone v City of New York*, 299 AD2d 306 [2nd Dept 2002]).

Liberty has not established, as a matter of law, that the Debris Accumulation Rule is inapplicable, since plaintiff has set forth evidentiary facts asserting there was extensive debris over the floor and that he slipped on that debris (*see Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407 [1st Dept 2010]; *Farina v Plaza Constr. Co.*, 238 AD2d 158 [1st Dept 1997]). Accordingly, dismissal of plaintiff's claim under the Debris Accumulation Rule is denied.

Labor Law § 200 and common-law negligence

Bovis and the Owners seek dismissal of plaintiff's claims under Labor Law § 200 and common-law negligence. Liberty does not seek dismissal of these claims against it.

Labor Law § 200 is a codification of common-law negligence and, to be held liable, a party must have the authority to control the activity that caused the plaintiff's injury (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). There is no liability for an owner that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

The Owners were not responsible for the Project since they hired Bovis as the general contractor. Bovis did not supply the materials or equipment for Liberty's demolition work (Garner EBT, at 28). Liberty contends that a Bovis supervisor came around "constantly" to look at the work it performed (Knafelman EBT, at 34). However, Bovis asserts that it did not control or direct how Liberty performed the demolition work (Groenendaal affidavit, ¶ 7). Since there is no evidentiary proof that Bovis or the Owners exercised supervisory control over Liberty's work, the Labor Law § 200 and common-law negligence claims against them are dismissed (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317

[1981]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007], *lv denied*, 10 NY3d 710 [2008]).

Indemnification

Bovis entered into contracts with Liberty and Fresh Meadow for their work on the Project, which contained indemnification clauses. Fresh Meadow asserts that, since plaintiff was on his way to lunch, the accident did not arise out of Fresh Meadow's work on the Project. However, the work required him to go through the Bathroom "to reach and leave his workplace" (*Daily News v OCS Sec.*, 280 AD2d 576, 577 [2nd Dept 2001]). Therefore, plaintiff's accident arose out of his work.

The indemnity clauses are enforceable, since the court has dismissed the claims of active negligence against Bovis and the Owners (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]). Bovis and the Owners may be held liable to plaintiff for violation of the Debris Accumulation Rule. However, this would be due to their status as owners and a general contractor under Labor Law § 241 (6), rather than based upon any wrongdoing on their part. Consequently, Bovis's motion for conditional summary judgment on contractual indemnity is granted.

Order

It is, therefore,

ORDERED that Bovis Lend Lease Corp., American Museum of Natural History, the American Museum of Natural History and Planetarium Authority and the City of New York's motion for summary judgment is granted to dismiss plaintiff Charles Gray's claims against them and all cross-claims against them under Labor Law § 240 (1), Labor Law § 241-a, Labor Law § 200 and common-law negligence and all claims pursuant to Labor Law § 241 (6) except as to 12 NYCRR § 23-1.7 (e)(2); and it is, further

ORDERED that Liberty Contracting Corp.'s motion for summary judgment is granted to dismiss plaintiff Charles Gray's claims against it under Labor Law § 240 (1), Labor Law § 241-a and all claims pursuant to Labor Law § 241 (6) except as to 12 NYRCC § 12-1.7 (e)(2) and, as to said section, is denied; and it is, further,

ORDERED that Bovis Lend Lease Corp.'s motion for summary judgment on its contractual indemnification claim against Liberty Contracting Corp. and Fresh Meadow Mechanical Corp. is granted, conditioned upon a finding of liability against Bovis Lend Lease Corp. in the trial; and it is further

ORDERED that the parties shall appear for trial on July 19, 2010 to pick a jury.

Dated: June 21, 2010

ENTER:

J.S.C.