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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

Index Number : 109808/2006
REYES, JOSHUA
VS.
MAGNETIC CONSTRUCTION, INC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 109808/06
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for Summary judgment

PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

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

FILED
AUG 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

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

Dated: 8-2-10

MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK- PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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JOSHUA REYES and MAGGIE REYES,

Plaintiffs, Index No: 109808/06

-against-

MAGNETIC CONSTRUCTION, INC., 377 GREENWICH LLC, and UNIVERSAL BUILDERS SUPPLY, INC.,

Defendants.

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MAGNETIC CONSTRUCTION, INC. and 377 GREENWICH LLC,

Third-Party Plaintiffs,

-against- TP Index No: 590889/06

MASTERCRAFT MASONRY 1H, INC.,

Third-Party Defendant.

MAGNETIC CONSTRUCTION, INC. and 377 GREENWICH LLC,

Second Third-Party Plaintiffs,

-against-

UNIVERSAL BUILDERS SUPPLY INC., STP Index No: 590145/08

Second Third-Party Defendant.

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In this Labor Law action, plaintiff moves for summary judgment under §240(1) against defendants Magnetic Construction Inc. ("Magnetic") and 377 Greenwich LLC. Defendants move for summary judgment dismissing plaintiff's claims under §§240(1), (2), and (3), 202, and 241(6), and for common law negligence. Defendants also seek

summary judgment dismissing all cross-claims against them, and summary judgment on their third-party claim for contractual indemnification against third-party defendant Universal Builders Supply, Inc. ("Universal"). Plaintiff has withdrawn his §§202, 240(2) and 240(3) claims. Defendants have discontinued their claims against third-party defendant Mastercraft Masonry. (See Stipulation of Discontinuance [Ex. C to Defs.' Motion].)

The undisputed facts of this case are as follows. Plaintiff, Joshua Reyes, sues for damages for injuries sustained while ascending a temporary staircase at a site for the construction of the Downtown Hotel at 377 Greenwich Street, New York, New York. 377 Greenwich LLC was the owner of the building. Magnetic was the construction manager responsible for hiring subcontractors, coordinating work schedules and monitoring the quality outcome of the work. (See Aff. of Leonard Dymond [Project Manager for Magnetic Construction], ¶4; Deposition of Louis Guzman [Project Executive of Magnetic Construction Group] at 15 [Ex. P to Defs.' Motion, Ex. H to P.'s Motion].) Plaintiff was employed by Millennium, a subcontractor of Magnetic. Universal was the subcontractor hired by Magnetic to install the temporary staircase from the sub-cellar level to the second floor. (Guzman Dep. at 42-50.)

On January 26, 2006, plaintiff, a bricklayer foreman, climbed the temporary staircase at the site to check on his workers. (P.'s Dep. at 30-33 [Ex. F to P.'s Motion, Ex. R and S to Defs.' Motion].) The temporary staircase was constructed by Universal, and made of metal scaffolding, ascending approximately 20 feet from the first to the second floor. (See id. at 21.) The rise between the stairs was between 8 to 8 ½ inches. (Dep. of Steve Uglialoro [Foreman of Carpenters, Universal Building Supply] at 66-67 [Ex. V to Defs.' Motion, Ex. I to P.'s Motion].) The rise between the top stair and the

second floor landing was approximately 16 to 19 inches. (P.'s Dep. at 32; Uglialoro Dep. at 75-77.) In order to ascend the last stair, Reyes was required to pull himself up by holding a piece of plywood located at the top of the stairs. As plaintiff attempted to climb the final stair, his right foot hit the landing, and he fell forward onto the second floor. (P.'s Dep. at 32-33.) As a result of this fall, plaintiff sustained injuries to his right rotator cuff and biceps and required two surgeries.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law §240 (1) Claims

Labor Law §240 (1) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993];

Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) "The contemplated hazards 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, 78 NY2d at 514.) " [A]n accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff's fall. (Id. at 287-289.)

Plaintiff contends that defendants are in violation of §240(1) because they failed to provide a safe way to gain access to the upper level of the construction site and did not instruct workers to use any additional safety devices. He further argues that because the rise between the top stair and the landing was higher than the rest of the stairs, and in violation of industry standards, it was not adequate protection against the elevation related risk. Defendants argue in opposition that plaintiff's accident does not fall within the scope of §240(1) because plaintiff's injury resulted from a fall while ascending the staircase onto the landing, rather than a fall from an elevated height. Defendants conclude that plaintiff's fall was not a result of a gravity related risk.

The temporary staircase "was being used to facilitate plaintiff's access to a different elevation level, and therefore [was] indisputably an elevation device within the meaning of Labor Law §240(1)." (Megna v Tishman Constr. Corp of Manhattan, 306

AD2d 163, 164 [1st Dept 2003].) Plaintiff presents uncontroverted evidence that the temporary staircase was defective, as the distance between the top tread and the landing exceeded accepted industry standards. (See Uglialoro Dep. at 76-77.) The temporary staircase was accordingly inadequate as a safety device, as it did not protect plaintiff from the risks associated with the height differential between the first and second floors.

It is well settled that "[a] fall down a temporary staircase is the type of elevation-related risk the statute was intended to cover, regardless of the distance the worker falls." (McGarry v CVP 1 LLC, 55 AD3d 441 [1st Dept 2008]; Megna, 306 AD2d at 164.) Defendants cite no support for their contention that plaintiff's accident is not covered by Labor Law §240(1) because he tripped up, rather than down, the staircase. The cases on which defendants rely hold that §240(1) does not protect a worker while he is partly on an elevation device and partly on his work level at the time of the accident (see Sihly v New York City Tr. Auth., 282 AD2d 337 [1st Dept 2001], lv dismissed 96 NY2d 897), or where the worker falls on the level where he is working. (See e.g. Auchampaugh v Syracuse Univ., 57 AD3d 1291 [3d Dept 2008]; Cundy v New York State Elec.& Gas Corp., 273 AD2d 743 [3d Dept 2000], lv denied 95 NY2d 766.) Section 240(1) liability will also be denied "where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place." (Cohen v Memorial Sloan-Kettering Cancer Center, 11 NY3d 823, 825 [2008], Nieves v Five Boro Air Conditioning & Refrigeration Corp, 93 NY2d 914, 916 [1999].)

In the instant case, as held above, plaintiff was injured while traversing between work levels on an elevation device that failed to protect him from falling. Moreover, defendants' claim that plaintiff was the sole proximate cause of his accident is without

any factual basis. Plaintiff is accordingly entitled to partial summary judgment as to liability on his Labor Law §240(1) cause of action.

Labor Law §241(6) Claim

Defendants also move to dismiss plaintiff's Labor Law §241(6) claim. Plaintiff opposes dismissal of the §241(6) claim only under Industrial Code §§23- 1.7(e)(1) and 23-1.7(f) (12 NYCRR), and §27-375 of the Building Code (see P.'s Aff. in Opp. [Affirmation of Carmine J. Goncalves] ¶3.) Accordingly, plaintiff's §241(6) claim, insofar as pleaded on the basis of other sections of the Industrial Code, will be dismissed.

Labor Law §241(6) provides:

> All contractors and owners and their agents . . . shall comply with the following requirements:
>
> 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

It is well settled that this statute requires owners and contractors and their agents "to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) This duty is nondelegable, and a plaintiff need not show that the defendant exercised supervision or control over the worksite to recover under this section. (Id. at 502.) In order to maintain a viable claim under Labor Law §241(6), however, the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.)

12 NYCRR §23-1.7(e)(1) provides, in pertinent part:

> Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

Contrary to defendants' contention, plaintiff did not trip over the "permanent second floor landing." (Miller Aff. In Support of Defs.' Motion, ¶ 28.) Rather, plaintiff tripped while attempting to ascend the temporary stairway to the landing. This is therefore not a case in which plaintiff fell due to an "integral part of what is being constructed," and not due to debris or a condition that could cause tripping. (See O'Sullivan v IDI Constr. Co., 28 AD3d 225, 226 [1st Dept 2006], affd 7 NY3d 805 [no liability under § 241(6) where plaintiff tripped over protruding pipe that was integral part of floor].) Defendant also fails to cite any authority that holds that defective construction of a temporary stairway is not a condition within the meaning of Industrial Code §23-1.7(e)(1). The branch of defendants' motion to dismiss the §241(6) claim based on this provision will therefore be denied.

12 NYCRR §23-1.7(f) states:

> Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Defendants fail to demonstrate that this provision is inapplicable to the facts of this case. On the contrary, where a stairway fails to provide a safe means of access to different working levels, the statute is applicable. (McGarry, 55 AD3d at 442; Gonzalez v Pon Lin Realty Corp., 34 AD3d 638 [2d Dept 2006].) As it is undisputed that the stairway was defectively constructed, defendant is not entitled to dismissal of plaintiff's §241(6) claim based on Industrial Code §23-1.7(f).

The court finds, however, that even assuming arguendo that a § 241(6) claim is maintainable based on a violation of the Building Code, plaintiff makes no showing that the stairway was "interior stairs" within the meaning of the Code. (See Building Code §27-232.)

Labor Law §200 and Common Law Negligence Claims

Defendants also move to dismiss plaintiff's Labor Law §200 and common law negligence claims.

Labor Law §200(1) provides in pertinent part, as follows:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993].) An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981].)

Thus, "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200." (Comes, 82 NY2d at 877. See also Ross, 81 NY2d at 505 [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.)

Recent authority has clarified that where a Labor Law §200 claim is based on a dangerous condition on the site, it is not necessary to show supervisory control over the

manner of performance of the injury producing work; the only issue is whether there was notice of the condition. (See Minorczyk v Dormitory Authrity of the State of New York, 74 AD3d 675 [1st Dept 2010]; Seda v Epstein 72 AD3d 455 [1st Dept 2010]; Urban v No.5 Times Square Dev., LLC, 62 AD3d 553 [1st Dept 2009]; Murphy v Columbia Univ., 4 AD3d 200 [1st Dept 2004].)

With respect to common law claims of negligence, constructive notice of a defect requires that the "defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986].)

As Reyes' accident resulted from the unsafe condition of the temporary staircase, liability in this case depends on whether Magnetic and 377 Greenwich LLC had notice of the defect, and not on whether they controlled the manner in which the work was performed. Here, the height differential of the last stair and the mechanism required to ascend to the landing were apparent. In fact, the defendant states that this was an "open and obvious danger." (See Defs.' Aff. in Reply [Aff. of Brian L. Miller, Esq.], ¶¶3-5). Additionally, plaintiff states that there were Magnetic representatives on site daily, although they did not direct plaintiff's work. (See P.'s Dep. at 15, 17, 18, 53.) Given the fact that representatives of Magnetic were on site daily and that the condition was apparent and existed for at least six months, there is a triable issue of fact as to whether Magnetic had actual or constructive notice of the defect. (See P.'s Dep. at 24.)

In so holding, the court rejects defendants' contention that liability in plaintiff's favor is barred because the condition that caused plaintiff's injury was open and obvious. (See Defs.' Aff. in Reply [Aff. of Brian L. Miller, Esq.], ¶¶ 3-5.) There is substantial

recent authority that "[l]iability under §200 is not negated . . . by the 'open and obvious' nature of any danger; rather these factors go to plaintiff's comparative negligence." (Maza v University Avenue Development, 13 AD3d 65 [1st Dept 2004]; Smith v McClier Corp., 22 AD3d 369 [1st Dept 2005].)[1]

Plaintiff's Labor Law §200 and common law claims are therefore maintainable against Magnetic. The record does not, however, contain any evidence that 377 Greenwich LLC was present at the site or had notice of the defect. Therefore, these claims will be dismissed as against 377 Greenwich LLC.

Contractual Indemnification

Magnetic and 377 Greenwich LLC seek contractual indemnification from Universal.

Article 9 of the contract between Magnetic and Universal (subcontractor) states:

> The Subcontractor hereby assumes the entire responsibility and liability for any and all injury . . . caused by, or resulting from or arising out of any act, or omission on the part of the Subcontractor, its subcontractors, suppliers, material men and or consultants, . . . in connection with this SUBCONTRACT, or of the prosecution of the work hereunder. This provision shall be made part of all contracts with Subcontractors suppliers, material men and or consultants, and the Subcontractor shall save and hold harmless the Owner, General Contractor and Project Architect from and against any and all loss and/or expense which they may suffer or pay as a result of the claims or suits due to, because of, or arising out of any and all such injuries, death and or damage. Further, the Subcontractor, if requested, shall assume and defend, at no cost to Owner, General Contractor or Project Architect, any suit, action or other proceeding arising therefrom. (Contract [Ex. N to Defs.' Motion].)

Thus, the contract provides for indemnification when a claim arises out of Universal's work, even if Universal has not been negligent. Brown v Two Exch. Plaza

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[1] The recent decision in Matthews v Vlad Restoration Ltd. (74 AD3d 692 [1st Dept 2010]), is not to the contrary. In this case, plaintiff tripped on the lower braces of scaffolding at street level. Although the court granted defendant's summary judgment motion dismissing the complaint, the court noted that plaintiff failed to show that the scaffold was inherently dangerous or violated industry standards. In the instant case, in contrast, the staircase posed an inherent danger, and the record contains evidence that the staircase violated industry norms.

Partners,76 NY2d 172 [1990]; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1st Dept 1999].)

Universal does not dispute that, according to the contract, Magnetic and 377 Greenwich LLC are entitled to indemnification. However, it opposes indemnification on the ground that Magnetic and 377 Greenwich LLC must establish freedom from negligence. (See Universal Aff. [Aff. of Sean M. Broderick, Esq.],¶¶ 16-22.)

It is well settled that an indemnification clause is void to the extent that a party seeks indemnification for its own acts of negligence. (See Kennelty v Darlind Constr., Inc., 260 AD2d 443 [2d Dept 1999]; General Obligations Law §5-322.1.)

As discussed above, on this record there is a triable issue of fact as to whether Magnetic, but not 377 Greenwich LLC, had notice of the defective condition of the staircase and was therefore negligent. Accordingly, only 377 Greenwich LLC is entitled to contractual indemnification from Universal at this juncture.

Accordingly, it is hereby ORDERED that plaintiff's motion for summary judgment on his §240(1) claim is granted to the extent that plaintiff is awarded judgment as to liability against defendants Magnetic Construction Inc. and 377 Greenwich LLC; and it is further

ORDERED that the motion of defendants Magnetic Construction Inc. and 377 Greenwich LLC for summary judgment is granted to the following extent: Plaintiff's §241(6) claim is dismissed, except to the extent that claim is based on alleged violations of 12 NYCRR §§23- 1.7(e)(1), and 23-1.7(f); and plaintiff's § 200 claim is dismissed as against 377 Greenwich LLC only; and it is further

ORDERED that the branch of defendants' motion for summary judgment on their indemnification claim is granted to the extent that 377 Greenwich LLC is awarded

judgment as to liability against Universal Builders Supply, Inc. on its claim for contractual indemnification, with an assessment of damages to be held at the time of trial; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
August 2, 2010

MARCY FRIEDMAN, J.S.C.