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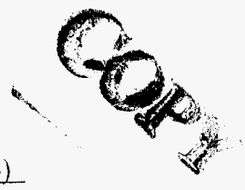
SHORT FORM ORDER

INDEX No. 07-37922

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY



PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5-20-10 (#004)
MOTION DATE 6-21-10 (#005 & 006)
ADJ. DATE 7-26-10
Mot. Seq. # 004 - MotD
005 - XMD
006 - XMD

BRIAN FRITZ,

Plaintiff,

- against -

THE SPORTS AUTHORITY, SONS RIVERHEAD, LLC, SHANNON CONSTRUCTION OF LONG ISLAND, ROLAND'S ELECTRIC, INC., C&G DEVELOPERS, INC. and NLS COMPANY,

Defendants.

THE SPORTS AUTHORITY and SONS RIVERHEAD, LLC,

Third-Party Plaintiff,

- against -

SHANNON CONSTRUCTION OF LONG ISLAND, GIAQUINTO MASONRY, INC. and ROLAND'S ELECTRIC, INC.,

Third-Party Defendants.

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C&G DEVELOPERS, INC., :
:
Second Third-Party Plaintiff, :
:
-against- :
:
GIAQUINTO MASONRY, INC., :
:
Second Third-Party Defendant. :
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Upon the following papers numbered 1 to 65 read on the motion and cross motions for summary judgment Notice of Motion/ Order to Show Cause and supporting papers 1 - 28 ; Notice of Cross Motion and supporting papers 29 - 39 ; 40 - 46 ; Answering Affidavits and supporting papers 47 - 53; 54 - 57; 58 - 59 ; Replying Affidavits and supporting papers 60 - 61; 62 - 63; 64 - 65; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by defendants/third-party plaintiffs The Sports Authority and Sons of Riverhead, LLC, and defendants C & G Developers, Inc. and NLS Company, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all cross claims asserted against them, summary judgment in their favor on their claim for contractual indemnification over and against Giaquinto Masonry, Inc. and Roland's Electric, Inc., and summary judgment in their favor on their claim for common-law indemnity over and against Roland's Electric, Inc. and Shannon Construction of Long Island, is granted to the extent that (1) summary judgment dismissing the plaintiff's Labor Law § 240 (1) claim is granted, (2) summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim is granted, with the exception of the claims predicated on the alleged violation of the Industrial Code found at 12 NYCRR §§ 23-1.30 and 23-9.8 (e), which are not dismissed, and (3) summary judgment on the claims for contractual and common-law indemnification is denied; and it is further

ORDERED that the cross motion (#005) by defendant/third-party defendant Roland's Electric, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross claims asserted against it is denied as untimely; and it is further

ORDERED that the cross motion (#006) by third-party/second third-party defendant Giaquinto Masonry, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party claim for contractual indemnification and dismissing the cross claims of Shannon Construction of Long Island and Roland's Electric, Inc. for contribution and indemnification is denied as untimely.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered when the front wheels of the lift he was operating fell into a conduit trench. Sons Riverhead, LLC owned the subject property and hired the general contractor, C & G Developers, Inc. (C & G), to build a facility for its lessee, The Sports Authority (Sports Auth.). C & G employed several contractors, including Giaquinto Masonry, Inc. (Giaquinto), and Roland's Electric, Inc. (Roland). Roland, in turn, subcontracted the digging and re-filling of trenches for its electrical conduit to Shannon Construction of Long Island (Shannon).

The plaintiff testified at his deposition that he was a union construction laborer employed by Giaquinto and that the only person who directed or controlled how he was to perform his work was his foreman from Giaquinto. On the day of his accident, the plaintiff was working on the interior of the building and was in the process of moving a "snorkel" lift about 60 feet, from where it was parked to the wall he was about to work on. He testified that the interior area was dark, with no electric lighting and little natural lighting, that, as he walked over to the lift, he could see that the floor was composed of crushed concrete, and that the floor appeared to be flat and level. The snorkel lift had four wheels and a 30-foot boom with a bucket. According to the plaintiff, he was operating the motorized lift via controls inside the bucket, he had driven the lift about 20 feet when the bucket shook violently, and, as it shook, he was thrown around inside the bucket. When he lowered the bucket to the floor, he saw that the front wheels of the lift had fallen or sunk about six inches into a trench which had been dug for electrical conduit and then backfilled. Among the plaintiff's allegations is that the trench was not sufficiently compacted to support the weight of the lift and created a dangerous condition.

Labor Law § 240 (1) was designed to prevent those types of accidents "in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Runner v New York Stock Exch.***, 13 NY3d 599, 604, 895 NYS2d 279 [2009] quoting ***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]; ***Shaw v RPA Assoc.***, __AD3d__, 2010 NY Slip Op 6239 [2d Dept 2010]). The "exceptional protection" provided for workers by section 240 (1) is aimed at "special hazards" and is limited to 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-Electric Co.***, 81 NY2d 494, 502, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). Here, it is clear that the plaintiff was not subjected to the "special hazards" contemplated by the statute and, therefore, not subject to its "exceptional protection" (*see* ***Shaw v RPA Assoc.***, *supra*; ***Wynne v B. Anthony Constr. Corp.***, 53 AD3d 654, 862 NYS.2d 379 [2d Dept 1985]); ***Miller v Weeden***, 7 AD3d 684, 777 NYS2d 516 [2d Dept 2004]). Further, the plaintiff has not opposed dismissal of this claim. Accordingly, so much of the motion for summary judgment by Sports Authority, Sons of Riverhead, C & G , and NLS which seeks to dismiss the plaintiff's section 240 (1) claim is granted and, upon searching the record, the Court dismisses the plaintiff's section 240 (1) claim as against all defendants (CPLR 3212 [b]; *see* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]).

Labor Law § 241 (6) imposes a "nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]). To recover on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 503-505). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 349).

Although the plaintiff's bill of particulars asserts various violations of the Industrial Code, the plaintiff has confined his opposition to the defendants' motion for summary judgment to violations found at 12 NYCRR §§ 23-1.30 and 23-9.8 (e). Section 23-1.30 is entitled "Illumination" and provides:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

This section has been found specific enough to form a predicate for a Labor Law § 241 (6) claim (*see* ***Long v Forest-Fehlhaber***, *supra*; ***Hernandez v Columbus Ctr.***, 50 AD3d 597, 857 NYS2d 84 [1st Dept 2008]; ***Murphy v Columbia Univ.***, 4 AD3d 200, 733 NYS2d 10 [1st Dept 2004]). Here, the plaintiff testified that the interior was dark and the lighting inadequate, and the defendants failed to establish that the section was inapplicable as a matter of law (*see* ***Lucas v KD Dev. Constr. Corp.***, 300 AD2d 634, 752 NYS2d 719 [2d Dept 2002]). Accordingly, so much of the defendants' motion which seeks to dismiss the plaintiff's Labor Law § 241 (6) claim based upon the alleged violation of section 23-1.30 is denied.

Section 9.8 is entitled "Lift and fork trucks" and provides, at subsection (e):

> Operating surfaces. No lift or fork truck shall be used on any surface that is so uneven as to make upsetting likely.

Since the basis of the plaintiff's claim is that the surface under the lift's wheels was unable to support the lift safely, the facts, at least arguably, support a claim under this section. Accordingly, so much of defendants' motion which seeks to dismiss the plaintiff's Labor Law § 241 (6) claim based upon the alleged violation of section 23-9.8 (e) is denied. As to the remaining sections of the code alleged to have been violated by the defendants, the Court has reviewed them and finds them to be too general or inapplicable to the plaintiff's accident and the plaintiff has not opposed dismissal of these sections. Therefore, the plaintiff's Labor Law § 241 (6) claim, with the exception of the alleged violation of sections 23-1.30 and 23-9.8 (e), is dismissed as against all defendants (*see* CPLR 3212 [b]; ***Rogers v C/S Assoc. Ltd. Partnership***, *supra*).

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*see* ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]; ***Mordkofsky v V.C.V. Dev. Corp.,*** 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NYS2d 311, 318, 445 NYS2d 127 [1981]) who exercise control or supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). Further, a subcontractor may be held liable for negligence where the work it contracted for or performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area (*see*

Tabickman v Batchelder St. Condominiums By Bay, 52 AD3d 593, 859 NYS2d 721 [2d Dept 2008]; ***Kelarakos v Massapequa Water Dist.***, 38 AD3d 717, 832 NYS2d 625 [2d Dept 2007]; ***Mendez v Union Theol. Seminary in City of N.Y.***, 17 AD3d 271, 793 NYS2d 420 [1st Dept 2005]). While the plaintiff must establish at trial that the defendants created or had actual or constructive notice of the alleged dangerous condition and that this was a proximate cause of his accident (*see*, ***Wolfe v KLR Mech.***, 35 AD3d 916, 918, 826 NYS2d 458 [3d Dept 2006]; ***Jurgens v Whiteface Resort on Lake Placid***, 293 AD2d 924, 742 NYS2d 142 [3d Dept 2002]); ***Johnson v Packaging Corp. of Am.***, 274 AD2d 627, 629, 710 NYS2d 699 [3d Dept 2000]), for the purpose of the defendants' motion for summary judgment dismissing the Labor Law § 200 and negligence claims, they had the initial burden to establish, *prima facie*, that they did not create nor have actual or constructive notice of the alleged dangerous condition (*see*, ***Wolfe v KLR Mech.***, *supra* at 919; ***Bell v Bengomo Realty***, 36 AD3d 479, 829 NYS2d 42 [1st Dept 2007]; ***Bonse v Katrine Apt. Assoc.***, 28 AD3d 990, 991, 813 NYS2d 578 [3d Dept 2006]). Here, the Court finds that the moving defendants did not meet their burden. Accordingly, so much of defendants' motion which seeks to dismiss the plaintiff's Labor Law § 200 and common-law negligence claims is denied.

The defendants also assert that NLS and Sports Auth. are incorrectly named as defendants herein. In support, the defendants have annexed the affidavit of Sports Auth.'s vice president wherein he avers that its lease for the subject store, although executed on January 28, 2005, did not commence until October 20, 2006, some five months after the plaintiff's accident and that it did not contract for any of the construction services nor did it have control or supervision over the general contractor or any subcontractors. However, the affidavit appears to state that it was executed in Queens County, New York but was notarized by a notary licensed in the State of Colorado. Moreover, a copy of the subject lease has not been annexed. Accordingly, Sports Auth. has not established its entitlement to summary judgment as a matter of law. In support of NLS's request for relief, the defendants have relied upon the deposition testimony of Roy Longworth. Longworth testified that he was employed by Nathan L. Serota as a construction supervision, that Serota functions as a general contractor for both NLS and C & G, and that he has no involvement as to which entity is named as the general contractor but that it appears that C & G was the named general contractor for contracts with Giaquinto and Roland for the Sports Auth. project.[1] However, the defendants have not annexed a copy of the contract between Sons Riverhead and the general contractor. Accordingly, NLS has not established its entitlement to summary judgment as a matter of law.

The defendants also seek summary judgment on their claims for contractual indemnification over and against Giaquinto and Roland and on their claims for common-law indemnification over and against Roland and Shannon. It is well settled that "the right to contractual indemnification depends upon the specific language of the contract" (***Kader v City of N.Y. Hous. Preserv. & Dev.***, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005], quoting ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Here, the contractual claims are based upon identical indemnification agreements contained in the separate contracts between C & G and Giaquinto and between C & G and Roland. The agreement provides, in relevant part, that the contractor would indemnify the agent and owner ("owner" includes the general contractor and lessee) "caused by, resulting from, arising out of, or occurring in connection with the

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[1] Longworth also testified that the general contractor was responsible for the "shell" of the building, including a concrete floor, and that Sports Auth. was responsible for the inside, including walls.

Work," whether performed by the contractor or its subcontractor or anyone for whose acts or omissions the subcontractor may be liable. In the event that the proposed indemnitee is found to be partially at fault (full indemnification would be unavailable in that it would violate General Obligations Law § 5-322.1), the agreement contemplates "partial contractual indemnification" (***Lesisz v Salvation Army***, 40 AD3d 1050, 837 NYS2d 238 [2d Dept 2007]; ***Balladares v Southgate Owners Corp.***, 40 AD3d 667, 835 NYS2d 693 [2d Dept 2007]). Therefore, while C & G's own negligence, if any, will not bar indemnification if Giaquinto and/or Roland are also found to be negligent, since these issues remained unresolved, an award of summary judgment would be premature (***D'Angelo v Builders Group***, 45 AD3d 522, 524-525, 845 NYS2d 814 [2d Dept 2007]; ***Farduchi v United Artists Theatre Circuit***, 23 AD3d 610, 612, 804 NYS2d 788 [2d Dept 2005]). Accordingly, summary judgment is denied to the moving defendants.

To establish a claim for common-law indemnification "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond some statutory liability but must also establish that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (***Perri v Gilbert Johnson Enter.***, 14 AD3d 681, 685, 790 NYS2d 25 [2d Dept 2005]; ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]; ***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]). Here, neither the general contractor nor the owner has been found vicariously liable to plaintiff, and the issue as to whether some negligence on the part of Roland and/or Shannon contributed to the plaintiff's accident remains unresolved (***Mendelsohn v Goodman***, 67 AD3d 753, 889 NYS2d 608 [2d Dept 2009] ***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]). Therefore, summary judgment on the claims for common-law indemnification over and against Roland and Shannon is denied as premature.

As to the cross motions for summary judgment by Giaquinto and Roland, the Court notes that they are procedurally defective because they were made more than 120 days after the filing of the note of issue, without any showing of good cause for the delay (CPLR 3212 [a]; ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]) and because they violate the general proscription against successive summary judgment motions (***Selletti v Liotti***, 45 AD3d 669, 844 NYS2d 878 [2d Dept 2007]; ***Williams v City of White Plains***, 6 AD3d 609, 775 NYS2d 868 [2d Dept 2004]; ***Klein v Auerbach***, 1 AD3d 317, 318, 766 NYS2d 580 [2d Dept 2003]. Therefore, apart from the relief already addressed by the Court (the Labor Law §§ 240[1] claim having been dismissed and 241 [6] claim having been limited) the motions are denied as untimely.

The claims dismissed herein are severed and the remaining claims shall continue.

Dated: 9/8/10

THOMAS F. WHELAN, J.S.C.