Rome v North Shore Cent. School Dist.
2010 NY Slip Op 33188(U)
November 4, 2010
Supreme Court, Nassau County
Docket Number: 017457/08
Judge: Randy Sue Marber
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[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

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CHARLIE ROME,

Plaintiff,

-against-

Index No.: 017457/08
Motion Sequence...01, 02, 03
Motion Date...08/24/10

NORTH SHORE CENTRAL SCHOOL DISTRICT, STALCO CONSTRUCTION, INC. and SAVIN ENGINEERS, P.C.,

Defendants.

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NORTH SHORE CENTRAL SCHOOL DISTRICT and STALCO CONSTRUCTION, INC.,

Third-Party Plaintiffs,

-against-

LINDENHURST FABRICATORS INC.,

Third-Party Defendants.

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Papers Submitted:
Notice of Motion (Mot. Seq. 01)................x
Notice of Cross-Motion (Mot. Seq. 02)......x
Notice of Cross-Motion (Mot. Seq. 03)......x
Affidavit in Opposition...............................x
Affidavit...x
Affirmation in Opposition..........................x

Affirmation in Reply....................................x
Reply Affirmation..x

The Plaintiff moves, pursuant to CPLR § 3212, seeking an order granting him summary judgment as to the issue of liability against the Defendants under Labor Law § 240 (Mot. Seq. 01).

The Defendants, North Shore Central School District and Stalco Construction, Inc., cross-move, pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint and for an order granting judgment as a matter of law on their third-party claims for contractual and common law indemnification against the Third-Party Defendant, Lindenhurst Fabricators, Inc. (Mot. Seq. 02).

The Defendant, Savin Engineers, P.C., cross-moves for an order seeking the dismissal of the Plaintiff's complaint (Mot. Seq. 03).

The motion and cross-motions are determined as set forth hereinafter.

In 2007, the Defendant, North Shore Central School District (hereinafter referred to as "North Shore") elected to undertake a renovation project with respect to it's transportation facility located at 340 Shore Road, Glenwood Landing, New York (*see* Abruzzino Affirmation in Support at Exhibit M; *see also* Hall Affirmation in at Exhibit B). The Defendant, Stalco Construction Corporation, Inc. (hereinafter referred to as "Stalco") was hired as the General Contractor, and the Defendant, Savin Engineers, P. C. (hereinafter referred to as "Savin") was hired as the construction manager (*see* Abruzzino Affirmation in Support at Exhibit M; *see also* Hall Affirmation in Support at ¶ 3). Stalco subcontracted

the steel fabrication work to the Third-Party Defendant, Lindenhurst Fabricators, Inc. (hereinafter referred to as "Lindenhurst"), which in turn sub-contracted with County Building Inc. (hereinafter referred to as "County"), for the installation thereof (*id.*). County, which is not a party to the within action, was the employer of the Plaintiff (*id.; see also* Abruzzino Affirmation in Support at Exhibit H).

As adduced from his deposition and 50-h testimony, on March 4, 2008, the Plaintiff was working as an apprentice level iron worker at North Shore's transportation facility (*see* Abruzzino Affirmation in Support at ¶¶ 6, 7, 8, 9, 65; *see also* Exhibit M). On said date, the facility consisted of a structural steel skeleton and was comprised of two levels, the higher of which was approximately 35 feet in height and the lower of which was between 15 and 20 feet in height[1] (*id.* at ¶¶ 8, 9, 16; Exhibits G and J). The Plaintiff testified that on the day of the occurrence, he was working on the lower of these two levels, which in addition to being comprised of steel beams, also had a "area of decking * * * approximately, 20 feet by 15 feet" (*id.* at Exhibit G at p. 30). The Plaintiff stated that he was specifically engaged in welding pour stops "around the perimeter of the decking" (*id.* Exhibits G at pp. 29, 30). In so doing, he utilized a "welding cable/welding lead" attached to a "welding machine", the latter of which was located at ground level in the pick up truck in which the Plaintiff was transported to the work site (*id.* at ¶¶ 8, 9, 18, 20; Exhibit G at pp. 42, 43). The Plaintiff

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[1] The Court notes that the Defendants, North Shore and Stalco challenge such height descriptions and contend that the lower level of the facility was "10 to 12 feet above the ground" and the higher lever was "approximately 23 feet" above the ground (*see* Vultaggio Affidavit at ¶¶ 3, 4).

began to unwrap the "welding cable" and, utilizing a ladder which was already at the work site, began to ascend to the lower level of the facility (*id.* at ¶¶ 18; Exhibit J). After reaching the lower level, the Plaintiff continued to unwrap the welding cable as he walked upon a steel beam to gain access to the decking area upon which he was welding (*id.* at Exhibits G and J). Subsequent to completing the welding, the Plaintiff "started wrapping up the welding lead" around his right shoulder, and walked along a steel beam back towards the ladder so he could descend to ground level (*id*). The steel beam upon which he walking was approximately nine inches in width and the welding cable was "a half inch in diameter" and weighed between 20 and 25 pounds (*id.* at ¶¶ 9, 10; *see also* Exhibits G and J). The Plaintiff states that as he "got right by the ladder * * * the lead dropped off [his] shoulder" and he "just went down" falling from the steel beam to the ground (*id.* at ¶¶ 9, 10, 11, 19, 20, 22, 23, 27; Exhibits G and J). The Plaintiff testified that he initially landed on his feet and subsequently "hit the ground and * * * rolled" (*id.* at ¶ 23; *see also* Exhibit J at p. 70). As a result thereof, the Plaintiff sustained injuries to his right foot (*id.* at Exhibit J at p. 97).

The underlying action was thereafter commenced on or about September 19, 2008, setting forth allegations predicated upon Labor Law §§ 200, 240, 241[6], as well as upon the New York State Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23 -1.24, 23-2.3, 23-2.4 (*id.* at Exhibits A and B).

As noted above, the Plaintiff moves herein for an order granting summary judgment against the Defendants, North Shore, Stalco and Savin, as to the issue of liability

on the claims predicated upon Labor Law §240 (Abruzzino Affirmation in Support at ¶ 1).

In support thereof, counsel for the Plaintiff initially argues that North Shore, Stalco and Savin are all entities which properly fall within the purview of Labor Law § 240 and thus liability thereunder attaches to all three defendants (*see* Abruzzino Affirmation in Support at ¶¶ 55-58). With particular respect to North Shore and Stalco, counsel argues that given said defendants respective status as owner and general contractor, the statutory provision clearly applies thereto (*id.* at ¶¶ 55 and 58). Counsel additionally argues that given Stalco and Savin's contracts with North Shore and that said defendants possessed the authority to "halt work that did not comply with specifications or appropriate safety standards", said defendants were statutory agents of North Shore and thus fall within the reach of the statute (*id.* at ¶¶ 56 and 57).

In addition to the foregoing, counsel posits that all three defendants failed to provide the Plaintiff with adequate safety devices in the form of a safety line, a safety net or scaffolding and that such failure was a proximate cause of the Plaintiff's accident thus entitling the Plaintiff to summary judgment as to the issue of liability under Labor Law §240 [1] (*id.* at ¶¶ 59-74; *see also* Abruzzino Affirmation in Opposition and Reply dated June 11, 2010 at ¶¶ 2, 26, 28, 29, 32, 33, 42, 44, 73). Counsel provides and relies upon the expert affidavit of Mr. Herbert Heller, P.E., a licensed professional civil engineer in New York (*see* Abruzzino Affirmation in Support at Exhibit U at ¶¶ 1 and 4). Mr. Heller states that the Plaintiff, in his capacity as "an iron worker * * * must have mobility to perform welds in

various areas and to collect the welding cable/lead" and thus required "mobility to walk the beams from one area to the other" (*id.* at ¶ 14). Mr. Heller states that "no safety line/cable was constructed around the perimeter of the mechanical loft[2], from which Mr. Rome fell" and that "there was no scaffolding on the exterior side of the building where Mr. Rome fell" (*id.* at ¶14). Mr. Heller opines that "scaffolding could have provided a safety platform" upon which the Plaintiff "could have simply stepped onto * * * if he was losing his balance" and that "safety netting could have been installed underneath the side of the building where Mr. Rome was working" which "would have also caught Mr. Rome before he struck the ground" (*id.*). Mr. Heller concluded that the failure of the defendants herein to provide said safety devices "was a violation of New York State Labor Law § 240, and that violation was a proximate cause of Mr. Rome's accident" (*id.* at ¶21).

Finally, counsel argues that the Plaintiff's actions were not the sole proximate cause of his accident and that the failure of the defendants to provide adequate safety devices was a substantial factor in causing the Plaintiff's accident (*id.* at ¶¶ 75, 76, 78, 81, 87, 91, 93; *see also* Abruzzino Affirmation in Opposition and Reply dated June 11, 2010 at ¶¶ 41-44).

The Plaintiff's application is opposed by North Shore, Stalco and Savin, each of whom cross-move for an order granting summary judgment dismissing the Plaintiff's complaint. The Plaintiff's application is also opposed by the Third-Party Defendant, Lindenhurst.

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[2] The lower level of the structure upon which the Plaintiff was working is commonly referred in the construction industry as a mechanical loft (*see* Abruzzino Affirmation in Support at Exhibit U at ¶6).

In opposition to the Plaintiff's application and in support of the cross-motion seeking the dismissal of the Plaintiff's complaint, counsel for North Shore and Stalco initially argue that the Plaintiff's claim, predicated upon Labor Law § 240 (1), must be dismissed inasmuch as the sole proximate cause of the subject accident was the Plaintiff's unwillingness to employ available and safer means by which he could have accessed his work area (*see* Hall Affirmation at ¶¶ 5, 6, 23, 33, 34, 35, 37, 38, 39, 40, 41, 42). Specifically, counsel asserts that the Plaintiff could have easily positioned the ladder, which he was already utilizing, to a location closer to the area of decking upon which he was working, thus providing the Plaintiff with more direct access thereto and obviating the need to walk across the steel beams (*id.* at ¶23). Additionally, counsel argues that the Plaintiff could have utilized a "snorkel manlift" which belonged to Mr. Hansen, his boss at County, and which the Plaintiff had previously used to lift himself and his welding cable to the higher level of the facility (*id.* at ¶¶ 6, 35, 37, 38, 39, 40, 41, 42).

Counsel for North Shore and Stalco provides the affidavit of Mr. Joseph Vultaggio, who was the "superintendent for the transportation facility and was present at the site on a daily basis" including March 4, 2008 (*see* Vultaggio Affidavit at ¶ 1, 2, 8). Mr. Vultaggio states that "[o]n March 4, 2008, the roof of the lower level was basically a skeleton comprised of multiple steel beams positioned 10 to 12 feet above ground" (*id.* at ¶ 4). "Immediately inside of these steel beams located by the center of the lower roof there was positioned a platform made of corrugated steel decking" and that "the purpose of the

decking" was to be utilized as work platform (*id.* at ¶¶ 4, 7, 9, 10). Mr. Vultaggio further states that the decking "had multiple access points" and "the ladder used by the plaintiff was mobile and he could easily have moved it to one of the points that provided direct access to the decking" which would have allowed "the plaintiff to step directly onto the decking without having to walk on the beams" (*id.* at ¶ 10). Mr. Vultaggio additionally states that "scaffolding, safety lines, safety railings, an anchorage point for the plaintiff's harness and lanyard and safety net" were not necessary as "the plaintiff was never supposed to be walking on steel beams" and that "the work area was the decking" (*id.* at ¶ 12).

As to the plaintiffs claims predicated upon Labor Law § 241 [6], counsel for North Shore and Stalco argues that those violations based on Industrial Code sections 23-1.15 (Safety Railings), 23-1.16 (Safety Belts, Harnesses, Tail lines and Lifelines) and 23-1.17 (Life Nets), must be dismissed as the Plaintiff was never provided with the safety apparatus contemplated by such regulations and thus same are inapplicable herein (*id.* at ¶ 46). With respect to the claim based upon section 23-1.7, counsel again argues that same is inapplicable as the various hazards enumerated therein were not of the type alleged to have caused the Plaintiff's accident (*id.* at ¶ 47). As to the claims based upon section 23-1.24, counsel contends this section is equally inapplicable as the provisions thereof deal specifically with work undertaken on sloped roofs, where certain roofing machines and/or roofing material transporters are utilized (*id.* at ¶ 48). Finally, counsel argues that section 23-2.3 and section 23-2.4 are both inapplicable to the underlying action as the former section addresses

structural steel assembly in which the Plaintiff was not engaged, and the latter addresses flooring requirements, and thus has no relevance to welding "pour stops" (*id.* at ¶¶ 49 and 50).

With particular regard to those claims predicated upon Labor Law § 200, counsel for North Shore and Stalco contends that there is no evidence that either of said defendants exercised any supervision or control over the work in which the Plaintiff was engaged warranting dismissal of the Plaintiff's common law negligence claims (*id.* at ¶¶ 50, 55, 56, 57). Additionally, counsel posits that there is no evidence that either North Shore or Stalco created the dangerous condition alleged to have caused the Plaintiff's accident or had actual or constructive notice thereof and rather the record demonstrates that it was the Plaintiff's employer, County, that provided him with all his tools and instructed him in relation to the work he was to perform (*id.* at ¶58).

In opposition to the Plaintiff's application and in support of the cross-motion seeking dismissal of the Plaintiff's complaint, counsel for Savin argues that the evidence as adduced herein clearly demonstrates that it was not necessary for the Plaintiff to traverse the steel beam to access the decking where he was required to weld the pour stops and rather access thereto could have easily been obtained by other more safer alternatives (*see* Toher Affirmation in at ¶¶ 13, 14, 15, 16, 17, 18, 20, 21, 22, 24). Counsel makes reference to and relies upon the deposition testimony of the aforementioned Mr. Vultaggio, who testified that there was "plenty of access" to the decking upon which the Plaintiff was working and that

said access could be accomplished by the use of a "ladder to get up to the decking area where the pour stop was installed (*id.* at ¶¶ 14-16). Counsel argues that the Plaintiff's election to access the decking by means of walking upon the steel beam "should not create an absolute liability situation against the defendants" and is an improper basis upon which to assert a claim under Labor Law § 240 (*id.* at ¶ 25).

With respect to those claims predicated upon Labor Law § 200, counsel argues that the record herein is devoid of any evidence that Savin either directed or controlled the work in which the Plaintiff was engaged thus warranting dismissal of the Plaintiff's claims sounding in common law negligence (*id.* at ¶ 27). Finally, as to those claims based upon Labor Law § 241 (6), counsel argues that the failure by Plaintiff's expert to cite a particular industrial code violation mandates dismissal of the Plaintiff's claims based thereon (*id.* at ¶¶ 29 and 30).

In opposing the Plaintiff's application, and with particular respect to the Plaintiff's claims based upon Labor Law § 240 (1), counsel for Lindenhurst expressly adopts those arguments previously set forth by counsel for North Shore and Stalco, as well as counsel for Savin (*see* Adams Affidavit at ¶¶ 2, 24, 25).

In Reply, counsel for the Plaintiff reiterates many of those arguments previously set forth in the supporting affirmation and stresses that the defendants have failed to demonstrate that they provided adequate safety apparatus for the Plaintiff who was "working on a beam" (*see* Abruzzino Affirmation in Opposition and in Reply at ¶¶ 2, 26, 28,

29, 32, 33, 34, 35, 42, 59, 61). Additionally, in Reply, counsel asserts, *inter alia*, that the Plaintiff "did not have the authority to make a decision to move [the] ladder" and it "would have been impermissible for Mr. Rome to untie the ladder and move it from one area of the construction site to another" (*id.* at ¶¶ 36, 37). Counsel further argues in Reply that the Plaintiff's presence on the beams was foreseeable within the context of his task of welding the pour stops and thus the subject accident falls within the purview of Labor Law § 240 (*id.* at ¶¶ 45, 46, 48, 53, 54, 55).

Labor § 240 (1), provides in relevant part that "all contractors and owners and their agents * * * shall furnish or erect, or cause to be furnished or erected * * * scaffolding, hoists, stays, ladders, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection. . ." to construction workers who are employed on the subject premises. The duty imposed by the statutory provisions is nondelegable and an owner or contractor or agent which breaches the duty may be held liable in damages caused thereby, irrespective of whether it has actually exercised supervision or control over the work (*Rocovich v. Consolidated Edison Company*, 78 N.Y.2d 509 [1991]; *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 [1993], *supra*).

While the statute is to be liberally construed so as to give effect to the purposes for which it was promulgated, " '[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1])" (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280

[2003] quoting *Narducci v. Manhasset Bay Asssoc.*, 96 N.Y.2d 259 at 267). The strict liability contemplated by the statute "is necessarily contingent on a violation of section 240 (1)" *(Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003], supra at 289) and "the failure to provide any safety devices is such a violation" (*Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 [1985] at 522). However, a "[v]iolation of the statute is not enough" (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003], *supra* at 287 quoting *Duda v. Rouse Constr, Corp.*, 32 N.Y.2d 405 at 410) and liability thereunder is predicated upon both "a statutory violation and proximate cause" (*id.* at 287). Thus, for a plaintiff to establish a viable claim under Labor Law § 240 (1), the plaintiff is required to demonstrate that the violation of the statute was a "contributing cause" to the subject accident (*Duda v. Rouse Constr. Corp.*, 32 N.Y.2d 405 at 410).

Having carefully reviewed the record herein, the Court finds that there exists questions of fact as to whether the Plaintiff was properly provided with adequate safety devices, whether any failure to so provide them was a "contributing cause" of the Plaintiff's accident, or whether the Plaintiff's actions were the sole proximate cause of his accident (*id.*). Here, as stated in the Plaintiff's expert affidavit, the defendants herein allegedly violated Labor Law § 240 as "no safety line/cable was constructed around the perimeter of the mechanical loft, from which Mr. Rome fell" and that "there was no scaffolding on the exterior side of the building where Mr. Rome fell". However, as adduced from the

deposition and supporting affidavit of Mr. Vultaggio, a ladder was on site which could have been utilized by the Plaintiff to gain direct access to the decking upon which the Plaintiff was working, thus potentially obviating the need to traverse the steel beam. The record herein further indicates that the Plaintiff was clearly aware of the this 25 foot ladder having frequently used same during the two weeks he had worked at the site. Further, while counsel for the Plaintiff asserts that Mr. Rome did not possess the authority to move the ladder, the record herein indicates Mr. Rome indeed had some degree of control over the ladder inasmuch he testified that he took it upon himself to secure same to the steel structure, for purposes of safety.

Accordingly, based upon the foregoing, the branch of the Plaintiff's motion (Mot. Seq. 01) interposed pursuant to CPLR § 3212, which seeks an order granting him summary judgment on the issue of liability against the named defendants under Labor Law § 240, is hereby **DENIED**.

In consideration of this Court's determination herein above, the branch of the cross-motion (Mot. Seq. 02) interposed by the Defendants, North Shore and Stalco, seeking an order granting it summary judgment dismissing the Plaintiff's claims, predicated upon Labor Law § 240, is hereby **DENIED** as moot.

Labor Law § 200 and the provisions therein embodied are a codification of the common law and impose upon owners, contractors and agents thereof, a duty to provide workers with a safe environment in which to perform their assigned duties (*Lombardi v.*

Stout, 80 N.Y.2d 290 [1992]; *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494 [1993]; *Everitt v. Nozkowski*, 285 A.D.2d 442 [2d Dept. 2001]; *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616 [2d Dept. 2008]. "It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Rizzuto v. Wenger Contracting Co.,* 91 N.Y.2d 343 [1998] quoting *Russin v. Picciano & Son*, 54 N..Y2d 311, 317 [1981]).

In the instant matter, North Shore and Stalco have demonstrated that they did not exercise any control over the work in which the plaintiff was engaged when he was injured (*id.*). As extrapolated from his deposition transcript, the Plaintiff testified that he took his orders directly from Mr. Hansen (his boss at County), to whom he reported on a daily basis, and that during his time at the construction site, he only worked with other welders from County, including Artie Quintana. Additionally, the Plaintiff testified that "other than the guy in the food truck and Artie" he did not have any contact with or speak to anyone from either North Shore or Stalco (*id.*).

Therefore, based upon the foregoing, that branch of the Defendants' North Shore and Stalco's cross-motion (Mot. Seq. 02), which seeks an order granting summary judgment dismissing the Plaintiff's claims predicated upon common law negligence and Labor Law § 200, is hereby **GRANTED**.

Labor Law § 241(6) provides that "[a]ll 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." In the instant matter, the Plaintiff has alleged violations of New York State Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23 -1.24, 23-2.3, 23-2.4. To sustain a cause of action under Labor Law § 241 (6), it is well settled that the plaintiff must establish "that a concrete specification of the Code has been violated" (*Rizzuto v. L. A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 [1998] at 350).

Having reviewed the supporting affidavits proffered by the Plaintiff's expert, nowhere therein does he cite to or render any opinion as to how said sections were violated. Thus, as the Plaintiff has failed to set forth specific allegations with regard to the regulations the defendants purportedly violated, that branch of the cross-motion (Mot. Seq. 02) interposed by the Defendants, North Shore and Stalco, seeking an order granting summary judgment dismissing the Plaintiff's claims based upon Labor Law § 241 (6) is hereby **GRANTED** (*Ross v. Curtis -Palmer Hydro-Co.,* 81 N.Y. 2d 494 [1993] at 502).

The Court now addresses the branch of the Defendants, North Shore and Stalco's cross-motion which seeks an order granting summary judgment on their third-party claims for contractual and common law indemnification against Third-Party Defendant, Lindenhurst. In support of the application, counsel for the Defendants, North Shore and Stalco argues that in accordance with a purchase order executed by and between Stalco and

Lindenhurst, the latter was obligated to indemnify and hold Stalco and North Shore harmless for any liability "arising out of or in consequences of the performance of" the purchase order (*see* Hall Affirmation in Support at ¶¶ 61, 63, 64; *see also* Exhibit C). The terms of said purchase order required that Lindenhurst would supply and install a structural steel skeleton (*id.* at Exhibit C).

Counsel posits that while the Plaintiff was working for County, he was nonetheless engaged in performing Lindenhurst's work, as contemplated by the purchase order, and thus the Plaintiff's accident falls within the scope of the indemnity provision warranting an award of summary judgment on those claims for contractual indemnification (*id.* at ¶¶ 62, 64, 67, 85). Counsel further argues that given the absence of any negligence on the part of North Shore or Stalco in connection to the happening of the Plaintiff's accident, the indemnity clause is not barred by the provisions embodied in General Obligations Law § 5-322.1 (*id.* at ¶¶ 68, 70, 71, 73; *see also* Hall Reply Affirmation at ¶¶ 8, 9). Counsel further asserts that the moving defendants are entitled to summary judgment on their claims for common law indemnification for any finding of vicarious liability asserted against them under Labor Law § 240 (*see* Hall Affirmation at ¶¶ 85, 87).

The application is opposed by counsel for Lindenhurst who argues that as there remain unresolved issues of fact with respect to North Shore and Stalco's own negligence, summary judgment is inappropriate given that the contractual indemnification clause would function to indemnify said defendants for their own negligence in direct contravention of

General Obligations Law § 5-322.1 (*see* Adams Affidavit in Opposition at ¶¶ 75, 84, 87, 88).

General Obligations Law § 5-322.1 provides the following, in pertinent part:

> "[a] covenant, promise, agreement or understanding in, or in connection with * * * a contract or agreement relative to the construction, alteration, repair or maintenance of a building * * * purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to person or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees or indemnitee, where such negligence be in whole or in part, is against public policy and is void and unenforceable."

In the instant matter, the indemnity clause at issue provides the following, in relevant part:

> "You shall indemnify and hold us [Stalco] as well as the Owner [North Shore] of the building * * * harmless against any and all claims, suits, losses or expenses by reason of any liability arising out of or in consequences of the performance of this Order * * * because of bodily injuries, including death at any time resulting therefore, sustained by any person or persons and damage to property, whether such injuries to person or damages to property are due or claimed to be due to any negligence of your [sic] or for any other reason, except for out or [sic] an indemnity's sole negligence."

As noted above, this Court has dismissed the Plaintiff's causes of action predicated upon both Labor Law § 241(6) and Labor Law § 200. Thus, only the causes of action asserted against the Defendants, North Shore and Stalco, that were predicated upon Labor Law § 240 remain. Liability under Labor Law § 240 "is not predicated on fault" and rather "is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172 [1990] at 179). Moreover, "[a] violation of the

statute is not the equivalent of negligence and does not give rise to an inference of negligence" (*id.*).

Thus, in the matter *sub judice*, given this Court's dismissal of the Plaintiff's negligence claim against the Defendants, North Shore and Stalco, the statutory prohibition against indemnifying a general contractor or owner for it's own negligence has no applicability herein (*id.* at 179). Thus, that branch of the cross-motion interposed by North Shore and Stalco, which seeks an order granting summary judgment as to their third party claim seeking contractual indemnification against Lindenhurst is hereby **GRANTED**.

With respect to North Shore and Stalco's third-party claim sounding in common law indemnification, summary judgment thereon "is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to each party involved" (*Kwang Ho Kim v. D& W Shin Realty Corp.*, 47 A.D.3d 616 [2d Dept. 2008]). Here, as there remains questions of fact as to whether the Plaintiff was the sole proximate cause of his accident, the granting of summary judgment is premature and accordingly, that branch of the cross-motion interposed by North Shore and Stalco, seeking an order granting summary judgment as to their third-party claim seeking common law indemnification against Lindenhurst, is hereby **DENIED**.

For the reasons set forth above, the cross-motion (Mot. Seq. 03) interposed by the Defendant, Savin, seeking an order granting summary judgment dismissing the Plaintiff's claims predicated upon Labor Law § 240 is hereby **DENIED** as moot.

With respect to the Plaintiff's claims based upon Labor Law § 200, as noted above, the Plaintiff testified that he took his orders directly from Mr. Hansen and worked with other welders from County. Moreover, the Plaintiff specifically testified that he did not have any interaction with anyone from Savin (*Rizzuto v. Wenger Contracting Co.,* 91 N.Y.2d 343 [1998], *supra*; *Wade v. Atlantic Cooling Tower Services, Inc.*, 56 A.D.3d 547 [2d Dept. 2008]). Thus, as there is no evidence herein that the Defendant, Savin, exercised any control over the work in which the Plaintiff was engaged, that branch of Savin's cross-motion (Mot. Seq. 03), which seeks an order granting summary judgment dismissing the Plaintiff's claims predicated upon Labor Law § 200, is hereby **GRANTED**.

For the reasons set forth above, that branch of the Defendant, Savin's cross-motion which seeks an order granting summary judgment dismissing the Plaintiff's claims based upon Labor Law § 241 (6) is hereby **GRANTED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
November 4, 2010

Hon. Randy Sue Marber, J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE