Naughton v City of New York
2010 NY Slip Op 33316(U)
November 30, 2010
Supreme Court, New York County
Docket Number: 104026/2005
Judge: Martin Shulman
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SCANNED ON 12/2/2010
[* 1]

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

PRESENT: HON. MARTIN SHULMAN, *Justice* PART 1

Patrick Naughton, Jr.,

- v -

The City of New York, et al.

INDEX NO. 104026/05

MOTION DATE

MOTION SEQ. NO. 008

MOTION CAL. NO.

The following papers, numbered 1 to 15 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Plaintiff's Notice of Motion — Affidavits — Exhibits 1-13	1
Answering Affidavits (Petrocelli) — Affidavits — Exhibits A-C	2
Notice of Cross Motion (Petrocelli) — Affidavits — Exhibit A-G	3
Plaintiff's Aff. in Opp. to Petrocelli Cross-Motion	4
Petrocelli Reply Aff.	5
Notice of Cross Motion (W&W Glass) — Affidavits — Exhibit A-D	6
Plaintiff's Aff. in Opp. to W&W Glass Cross-Motion	7
Petrocelli Aff. in Partial Opp. to W&W Glass Cross-Motion	8
Metal Sales Aff. in Partial Opp. to W&W Glass Cross-Motion - Exhibits A-C	9
W&W Glass Reply Aff.	10
Notice of Cross Motion (Metal Sales) — Affidavits — Exhibit A-J	11
Plaintiff's Aff. in Opp. to Metal Sales Cross-Motion	12
Petrocelli Aff. in Partial Opp. to Metal Sales Cross-Motion - Exhibits A&B	13
W&W Glass Aff. in Partial Opp. to Metal Sales Cross-Motion	14
Metal Sales Reply Aff.	15

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided in accordance with the attached decision and order.

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

FILED

NEW YORK COUNTY CLERK'S OFFICE

Dated: NOV 30 2010

Martin Shulman, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 1

--X

Patrick Naughton, Jr.,
Plaintiff,
-against-

The City of New York and Petrocelli Construction, Inc.,
Defendants.

--X

Petrocelli Construction, Inc.,
Third-Party Plaintiff,
-against-

W & W Glass Systems, Inc. and Metal Sales Co., Inc.,
Third-Party Defendants.

--X

Index No. 104026/2005

FILED

NEW YORK
COUNTY CLERK'S OFFICE

Martin Shulman, J.:

Plaintiff moves for summary judgment on liability on his claim under Labor Law §240 (1) (the "Scaffold Law"). Petrocelli Construction, Inc. ("Petrocelli") cross-moves for summary judgment dismissing plaintiff's complaint and for summary judgment on its common-law and contractual indemnification claims against W & W Glass Systems, Inc. ("W&W") and Metal Sales Co., Inc. ("Metal"). W&W cross-moves for summary judgment dismissing plaintiff's complaint, dismissing Petrocelli's claims against it and for contractual indemnification against Metal. Metal cross-moves for summary judgment dismissing plaintiff's claims under the Scaffold Law and Labor Law § 241 (6) and dismissing Petrocelli's contractual indemnification claim against it. The action against the City of New York was discontinued by stipulation dated June 1, 2009. The motion and cross-motions are consolidated for disposition and decided as noted below.

Parties

Plaintiff is an ironworker who was employed by Metal and, on July 21, 2004, was working at 60 Lafayette Street, New York, N.Y. (the "Site" or "Family Court") (Naughton EBT, at 9, 10, 14). Petrocelli was the prime contractor with the Dormitory Authority of the State of New York ("DASNY") for the renovation (the "Project") of the facade and lobby of Family Court (Stone EBT, at 25-26). W&W was the subcontractor responsible for supplying the curtain wall panels (the "panels") that were to be installed (*id.* at 58-59). Metal was W&W's subcontractor that delivered and installed the panels (Garcia EBT, at 10, 13, 25–26).

Parties' Allegations

Plaintiff alleges that on July 21, 2004 he was working for Metal at the Site on a flatbed truck unloading panels (Naughton EBT, at 17-18). He states that the panels were in stacks or bundles of four panels each and that, as part of a work crew, he hooked up four steel chokers from a hoist, one to each corner, so that the bundle of panels could be hoisted off the truck onto a sidewalk bridge (*id.* at 22-23). He further states that he was supervised solely by Metal's project manager, Jose Garcia (*id.* at 17).

Plaintiff asserts that Garcia told him to get on top of the bundles and was not given a ladder despite his request for one (*id.* at 24, 39). He states that the flatbed of the truck was ten feet above the ground and that standing on top of the bundle of panels elevated him an additional five feet (*id.* at 26-27). He also states that there were six bundles of panels to be unloaded.

Plaintiff further states that, as he was on top of the last bundle of panels, the fifth of the six bundles originally on the truck was being hoisted, when it "started to swing at

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[him] and hit him" (*id.* at 30). He contends that he attempted to get out of the way, but that the bundle of panels struck him on his knee and knocked him to the street, where his left ankle hit a concrete barrier (*id.* at 33-35). He states that he suffered a broken fibula requiring surgery and insertion of a metal plate with screws and that he was out of work for three months due to his injuries (*id.* at 43, 50).

Petrocelli alleges that E & F Walsh ("Walsh") was the general contractor for DASNY (Stone EBT, at 29; Weber EBT, at 10, Delgado EBT, at 8-9), that its responsibility in the Project was for the steel, panels and facade work, but that other prime contractors had responsibility for electrical, plumbing, sprinkler and HVAC work (Stone EBT, at 29-33). Petrocelli further asserts that: 1) it hired W&W to install the panels (*id.* at 31); 2) it oversaw its subcontractors; 3) it had the authority to stop work but acted under Walsh's authority (*id.* at 39-40, 47-48); and 4) W&W coordinated the delivery of the panels that Metal installed (*id.* at 58-59, 130).

Petrocelli argues that under its contract with W&W it is entitled to contractual indemnification from W&W and that, under a purchase order between W&W and Metal, it is entitled to contractual indemnity from Metal.

W&W asserts that Metal was responsible for the delivery and installation of the panels (Garcia EBT, at 13; Haber EBT, at 17). It also contends that, under the indemnification provision of its contract with Petrocelli, it is not liable for contractual indemnity.

Metal asserts that it worked for W&W (Garcia EBT, at 13, 29), that it had no contractual privity with Petrocelli, that the terms of its purchase order do not provide for

contractual indemnity to Petrocelli and, consequently, it is not liable for contractual indemnity to Petrocelli.

Petrocelli, W&W and Metal all assert that plaintiff's accident was not the type of elevation-related injury contemplated by the Scaffold Law. They also argue that plaintiff's accident was solely the result of his own conduct, pointing to Dane Delgado's accident report which states that plaintiff jumped off the truck. They further contend that the regulations plaintiff cites to support his claim under Labor Law § 241 (6) are either inapplicable or too general to support liability. Petrocelli and W&W further state that they were not responsible for supervising plaintiff's work in delivering and installing the panels.

Plaintiff claims that Petrocelli was the general contractor (Stone EBT, at 25; Weber EBT, at 64) and is, therefore, absolutely liable under the Scaffold Law. He further states that the bundle of panels struck him (Buckley EBT, at 24-25) as a result of being inadequately secured.

Labor Law § 200 and Common-Law Negligence

In opposing Petrocelli's cross-motion and W&W's cross-motion, plaintiff presents no opposition to dismissal of his Labor Law § 200 and common-law negligence claims against these parties. 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, 877 [1993]). There is no liability for a party that exercises no supervisory control over the operation where the purported defect or dangerous condition arose from the contractor's method (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

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Plaintiff has stated that he was supervised solely by Garcia (Naughton EBT, at 17). He asserts that Garcia was in charge of the unloading and that Garcia directed him to stand on top of the bundle of panels (*id.* at 24, 40). Garcia was working as the project manager for Metal (Garcia EBT, at 10, 13; Delgado EBT, at 13). Accordingly, the portions of Petrocelli's and W&W's cross-motions seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims against them are granted.

Labor Law § 241 (6)

Labor Law § 241 provides:

> All contractors and owners and their agents ... when constructing ... buildings ... shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction ... 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].

Defendant and third-party defendants seek dismissal of plaintiff's claims against them under Labor Law § 241 (6). While plaintiff has asserted claims under various sections of the New York State Industrial Code (the "Code") in his bill of particulars, in opposition to the cross-motions, plaintiff has only argued that claims under 12 NYCRR 23-6.1 (h) apply (Levien affirmation dated September 21, 2010 opposing Petrocelli's cross-motion, ¶ 53; Levien affirmation dated September 21, 2010 opposing Metal's cross-motion, ¶ 47). Therefore, plaintiff's claims based upon other sections of the Code are dismissed.

A cause of action under Labor Law § 241 (6) must allege violation of a specific, rather than a general, safety standard under a Code rule (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]). 12 NYCRR 23-6.1 (h) (the "Tag Line Rule") provides:

> (h) Tag line. Loads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines.

The Tag Line Rule "is insufficient to establish a violation ... [under] Labor Law §241 (6) since it only sets forth a general safety standard and not a concrete specification" (*Smith v Homart Dev. Co.*, 237 AD2d 77, 80 [3d Dept 1997]). While plaintiff claims the Tag Line Rule has been held to be specific, citing *Locicero v Princeton Restoration, Inc.*, (25 AD3d 664 [2d Dept 2006]), that case held that Code Section 23-6 was inapplicable to mobile cranes and did not determine the Tag Line Rule was concrete enough to support a claim under Labor Law § 241 (6). Moreover, tag lines were used in this case (Buckley EBT, at 18). Accordingly, plaintiff's claim under the Tag Line Rule is also 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, ... ladders, slings, ... braces, ... 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,* 81 NY2d at 500). 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 was struck by a panel as it was being hoisted off a flatbed truck to a sidewalk bridge at the Site for later use on the facade of the Family Court (Naughton EBT, at 17-18, 30).

Defendant and third-party defendants argue that the Scaffold Law is directed at exceptionally dangerous conditions caused by significant elevation differentials and "[a] four-to-five foot descent from a flatbed trailer ... does not present the sort of elevation-related risk that triggers Labor Law § 240 (1)'s coverage" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]). The usual and ordinary dangers of a construction site do not warrant the extraordinary protections of the Scaffold Law (*Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc.*, 84 NY2d 841, 843 [1994]). In particular, falling from a flatbed truck, even ten feet off the ground, is generally not the type of enhanced elevation-related risk covered by the Scaffold Law (*Berg v Albany Ladder Co. Inc.*, 40 AD3d 1282, 1284 [3d Dept 2007], *affd* 10 NY3d 902 [2008]).

However, where an object must be hoisted and the hoisting mechanism fails, the Scaffold Law is applicable (*Harris v 170 E. End Ave., LLC,* 71 AD3d 408 [1st Dept 2010]; *Gonzalez v Glenwood Mason Supply Co., Inc.,* 41 AD3d 338 [1st Dept 2007]). Where a plaintiff was on a flatbed truck, an additional elevation-related risk may bring the case into the Scaffold Law's ambit (*Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1322-1323 [3d Dept 2009]). Falling from the top of a stack of curtain wall panels during the process of unloading them from a flatbed truck has been held to be within the

scope of the Scaffold Law (*Ford v HRH Constr. Corp.*, 41 AD3d 639, 640 [2d Dept 2007]). Dismissal of plaintiff's Labor Law § 240 (1) claim on the basis that the accident was not the type of elevation-related risk contemplated by the Scaffold Law is, therefore, denied.

Sole Proximate Cause

A plaintiff who refuses to use an available safety device is considered to be a recalcitrant worker and is, therefore, held to be the sole proximate cause of the accident (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). This bars recovery under the Scaffold Law. Similarly, a plaintiff who fails to use a ladder available at the job site and who jumps off an inverted bucket elevated four feet is "the sole cause of his injury" (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]).

However, while Delgado's accident report states that he was told that plaintiff jumped off the flatbed truck, Delgado testified that he was not sure whether Nolan, the shop steward, or plaintiff provided this account to him (Delgado EBT, at 75-76). Delgado did not observe plaintiff's accident himself, but rather was informed about it afterwards (*id.* at 45).

Plaintiff has presented both his own testimony and an eyewitness, who stated that he saw plaintiff struck by the swinging bundle of panels (Buckley EBT, at 30). Defendant and third-party defendants have not established as a matter of law that plaintiff's accident was caused solely by his own conduct. Therefore, dismissal of the Scaffold Law claim, based upon plaintiff's being the sole proximate cause of the accident, is denied.

Prime versus General Contractor

Petrocelli's final argument seeking dismissal of plaintiff's Scaffold Law claim is that it was not the general contractor for the Project. It contends that Walsh was the general contractor with overall authority and that its scope of responsibility was more limited.

Petrocelli's role is significant since the Scaffold Law places "ultimate responsibility for safety practices at building construction jobs ... on the owner and general contractors" who are considered to be in the best position by their status to ensure that proper safety practices are observed and proper safety devices are used" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]).

Plaintiff has noted that Petrocelli was referred to as the general contractor (Garcia EBT, at 53; Weber EBT, at 64) and that Petrocelli had the authority to supervise its subcontractors. However, "[t]he label of construction manager versus general contractor is not necessarily determinative ... [A party will be considered the agent of the owner or general contractor if it is the] coordinator and overall supervisor for all the work being performed on the job site" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

Petrocelli did not direct or supervise the hoisting operation performed by Metal (Stone EBT, at 107, 110). A prime contractor that lacked supervisory authority over plaintiff's work is not considered to be a general contractor or its agent (*Decotes v Merritt Meridian Corp.*, 245 AD2d 864, 866 [3d Dept 1997]; *Wright v Nichter Constr. Co., Inc.*, 213 AD2d 995, 995 [4th Dept 1995]; *Nowak v Smith & Mahoney, P.C.*, 110 AD2d 288, 290 [3d Dept 1985]). Petrocelli has presented evidentiary proof that Walsh was the general contractor with overall authority for the Project and that Petrocelli was

subordinate to it (Weber EBT, at 9-10). Plaintiff has not presented evidentiary proof controverting Petrocelli's evidence that it lacked supervisory authority over plaintiff's work and that it was not supervisor and coordinator for all the work on the Project (*Walls*, 4 NY3d at 864). Accordingly, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is denied and the portion of Petrocelli's cross-motion seeking dismissal of that claim against it is granted.

Common-Law and Contractual Indemnity

Common-law indemnification shifts responsibility from a party liable based upon its status to a party at fault (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]). In contractual indemnity, a party seeking indemnity must show that it is free from negligence, but need not show that the proposed indemnitor is negligent (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]).

Petrocelli and W&W executed a contract for provision and inspection of the panels. Article 4.6 (the "Indemnification Clause") of the Contract provides:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner [and the] Contractor ... from and against claims, damages, losses and expenses ... arising out of or resulting from performance of the Subcontractor' Work ... but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors (or its employees].

Metal executed a purchase order (the "Purchase Order") with W&W in which Metal agreed "to protect, defend, indemnify and hold harmless from and against any and all losses ... incurred by W&W Glass Systems, Inc." (the "Purchase Order Indemnity Agreement").

Petrocelli cannot obtain common-law indemnification against W&W since W&W had no supervision or control over plaintiff's work and therefore, it had no fault. The Indemnification Clause mirrors common-law indemnification, since W&W is responsible only for negligent actions or omissions. Petrocelli has not established that W&W or its subcontractor acted negligently. Accordingly, its claim against W&W for common-law and contractual indemnification must be dismissed.

The Purchase Order Indemnity Agreement imposes obligations between W&W and Metal and does not run to Petrocelli, which is not in contractual privity with Metal. Therefore, Petrocelli's claim for contractual indemnity against Metal must be dismissed. Petrocelli's claim for common-law indemnification against Metal must also be dismissed, since it has not established that Metal was at fault.

However, as between W&W and Metal, the Purchase Order set forth those parties' agreement. W&W is entitled to compensation for the losses it has incurred as a result of Metal and its employees' conduct. It is, therefore, entitled to contractual indemnification against Metal. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability on his Labor Law § 240 (1) claim is denied; and it is further

ORDERED that the portion of Petrocelli Construction, Inc.'s cross-motion for summary judgment dismissing plaintiff's complaint is granted and the Clerk is directed to enter judgment accordingly, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the portion of Petrocelli Construction, Inc.'s cross-motion for summary judgment on its common-law and contractual indemnification claims against W&W Glass Systems, Inc. and Metal Sales Co., Inc. is denied; and it is further

ORDERED that the portion of W&W Glass Systems, Inc.'s cross-motion for summary judgment dismissing plaintiff's complaint and dismissing Petrocelli Construction, Inc.'s third-party complaint against it is granted and the Clerk shall enter judgment accordingly, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the portion of W&W Glass Systems, Inc.'s cross-motion for summary judgment on its contractual indemnification claim against Metal Sales Co., Inc. is granted as to liability, the claim is severed and the issue of the amount W&W Glass Systems, Inc. is entitled to recover against Metal Sales Co., Inc. is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for W&W Glass Systems, Inc. shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that Metal Sales Co., Inc.'s cross-motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) and Petrocelli Construction, Inc.'s claim against it for contractual indemnification is granted.

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[1] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).

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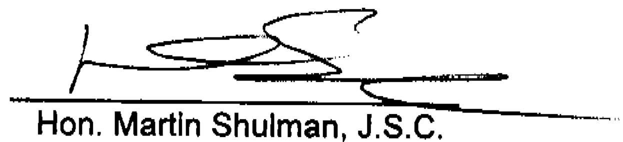
The foregoing constitutes this Court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
November 30, 2010



Hon. Martin Shulman, J.S.C.

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