Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

CESAR ZAPATA,

Plaintiff,

- against -

BOVIS LEND LEASE LMB, INC., et al.,

Defendants.

Index Number 11931 2008

Motion Date July 13, 2010

Motion Cal. Numbers 33, 34, 35, & 36

Motion Seq. Nos. 2, 3, 4, & 5

The following papers numbered 1 to 41 read on this motion by plaintiff for partial summary judgment against defendants on the issue of liability under Labor Law § 240(1); and on this motion by third-party defendant W&W Glass, LLC (W&W Glass) for summary judgment dismissing the third-party action against it or, in the alternative, for summary judgment on its second third-party action against second third-party defendant Metal Sales Co., Inc. (Metal Sales); and on this motion by defendants/third-party plaintiffs Bovis Lend Lease LMB, Inc. (Bovis Lend Lease), Slazer Enterprises Owner LLC (Slazer), FKF Madison Group Owner LLC (FKF), JMJS 23rd Street Realty Owner LLC (JMJS), and Madison Park Group Owner LLC (Madison Park) for summary judgment dismissing plaintiff's claims under Labor Law § 240(1), 241(6), and 200 and common-law negligence and all cross claims asserted against them, for summary judgment on their third-party cause of action for contractual indemnification against W&W Glass, and for leave to serve a cross claim for contractual and common-law indemnification against second third-party defendant Century-Maxim Construction Corp. (Century-Maxim), and on this separate notice of motion by Metal Sales for summary judgment dismissing the second third-party action and all cross claims asserted against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 16
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Upon the foregoing papers it is ordered that the motions are determined as follows:

Plaintiff was employed as a foreman by Metal Sales, which had a subcontract with W&W Glass to install curtain wall on a project involving the construction of a residential building owned by Slazer. Bovis Lend Lease was hired by Slazer to act as the construction manager on the project. Century-Maxim had a contract with Bovis Lend Lease to construct the superstructure of the subject building. On December 6, 2007, plaintiff, while working on a suspension scaffold between the fourth and fifth floors, was allegedly injured when he was struck by a metal pry bar that fell from the uppermost deck of the building. Plaintiff subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence. On August 23, 2008, Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park instituted a third-party action against W&W Glass alleging contractual indemnification and breach of contract to procure insurance. On June 8, 2009, W&W Glass commenced a second third-party action against Metal Sales alleging contractual indemnification and breach of contract to procure insurance and against Century-Maxim for common-law indemnification and breach of contract.

To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In cases involving falling objects, where as here, to establish liability under Labor Law § 240(1), a plaintiff must show more than simply that an object fell, thereby causing injury to a worker (*see Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 [2001]). Rather, a plaintiff must demonstrate that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*see Narducci*, 96 NY2d at 268; *Novak v Del Savio*, 64 AD3d 636 [2009]). While not all injuries caused by falling objects come within the ambit of Labor Law § 240(1), the statute affords protection where the falling of an object is related to "a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured" (*see Narducci*, 96 NY2d at 268; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), that is, the

statute applies to objects that require securing for the purposes of the undertaking (*see Outar v City of New York*, 5 NY3d 731, 732 [2005]).

Applying these principles to the circumstances of the instant case, the court finds that Labor Law § 240(1) is inapplicable because plaintiff's accident did not result from the type of elevation-related hazard contemplated by the statute (*see Narducci*, 96 NY2d at 268; *Harinarain v Walker*, 73 AD3d 701 [2010]; *Gambino v Mass. Mut. Life Ins. Co.*, 8 AD3d 337 [2004]; *Belcastro v Hewlett-Woodmere Union Free Sch. Dist. No. 14*, 286 AD2d 744 [2001]). The evidence in the record demonstrates that the pry bar was neither in the process of being hoisted nor an object that required securing at the time it fell. According to plaintiff's deposition testimony, at the time of the incident, the pry bar, a metal tool, was being used by carpenters working on the upper deck of the building in preparation for pouring concrete. This was not a situation where a hoisting or securing device of the kind enumerated in Labor Law § 240(1) was necessary or even expected and, thus, plaintiff's accident was a type of hazard that a construction worker usually encounters on the job site. Moreover, contrary to plaintiff's contention, the fact that plaintiff was working at an elevation when the pry bar fell is of no moment in a falling object case (*see Narducci*, 96 NY2d at 268). Therefore, plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action is denied, and the branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment dismissing plaintiff's claim under Labor Law § 240(1) asserted against them is granted.

The court next turns to the branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action. To recover under Labor Law § 241(6), a plaintiff must demonstrate the violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). In the bill of particulars, plaintiff herein alleged violations of 12 NYCRR 23-1.7, 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.20, 23-1.33, 23-2.1, 23-5, 23-6.1, 23-6.2, 23-6.3, 23-8.1, 23-8.3, 23-8.4, and 23-8.5.

In support of their motion, Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park established, prima facie, that the Industrial Code provisions cited by plaintiff are insufficiently specific to support liability under Labor Law § 241(6), are inapplicable to the facts of the instant case, or were not violated. The specific safety standards set forth in 12 NYCRR 23-1.8, which relates to the use of personal protective equipment, was not violated because plaintiff testified at his deposition that he was wearing a hard hat at the time of his accident. Industrial Code provision 12 NYCRR 23-1.11, which pertains to nail fastenings and lumber used in the construction of equipment or temporary structures, does not apply here because plaintiff's accident was not the result of defective lumber or nail fastenings. Likewise, 12 NYCRR 23-1.15, which sets forth safety standards for the construction of safety railings,

does not apply here because the subject accident did not involve a safety railing. Industrial Code provisions 12 NYCRR 23-1.16 and 23-1.17, which relate to the use of safety belts, harnesses, tail lines, lifelines, and life nets, are similarly inapplicable because plaintiff was not using any of these devices at the time of the incident and plaintiff's accident was not caused by the absence of or a defect in said devices. In addition, 12 NYCRR 23-1.18 does not apply to the facts of the case at bar because plaintiff's accident did not involve a sidewalk shed or sidewalk barricade. Industrial Code provision 12 NYCRR 23-1.19, which sets forth safety requirements with respect to catch platforms, is also inapplicable because plaintiff's accident did not involve a catch platform. Additionally, 12 NYCRR 23-1.20, which relates to safety requirements for chutes used for the removal of material and debris from elevated levels of a building, does not apply to the circumstances of this case because plaintiff's accident did not involve the use of a chute. Furthermore, 12 NYCRR 23-1.33, which requires protection for pedestrians passing by areas, buildings, or other structures in which construction, demolition, or excavation work is being performed, is inapplicable in this case because plaintiff was not a pedestrian. In addition, 12 NYCRR 23-2.1, which relates to the storage of building materials or equipment and the disposal of debris, is inapplicable because plaintiff's accident was not caused by the improper storage of materials or the improper disposal of construction debris. In any event, 12 NYCRR 23-2.1 has been held to lack the specificity required to be a predicate for liability under Labor Law § 241(6) (*see Venezia v State of New York*, 57 AD3d 522 [2008]). Industrial Code regulations 12 NYCRR 23-6.1, 23-6.2, and 23-6.3, which provide safety requirements for material hoisting equipment, also do not apply to the facts of this case because plaintiff does not allege that, at the time of the accident, such equipment was being used by himself or any other worker on the job site. Finally, 12 NYCRR 23-8.1, 23-8.3, 23-8.4, and 23-85, which set forth safety standards for mobile cranes, tower cranes, and derricks used in construction, demolition, and excavation operations, do not apply here because the subject accident did not involve any such equipment. Plaintiff did not submit any opposition to defendants' prima facie showing with respect to the aforementioned Industrial Code regulations and, thus, failed to raise a triable issue of fact.

In his opposition papers, plaintiff predicates his Labor Law § 241(6) cause of action solely on alleged violations of 12 NYCRR 23-1.7(a)(1) and 23-5.1(j)(3). Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park failed to establish their prima facie entitlement to judgment as a matter of law that these Industrial Code provisions were not violated and that their violation was not a proximate cause of the accident. In particular, 12 NYCRR 23-1.7(a)(1) provides, in pertinent part, that, "every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection . . . shall consist of tightly laid sound planks . . . plywood or other material of equivalent strength." Additionally, 12 NYCRR 23-5.1(j)(3) states that, "[a]ny end or side of any scaffold platform that is located within six feet horizontally of an unenclosed side of a material hoist tower, construction elevator or similar moving equipment shall be

effectively screened to a height of at least six feet above the scaffold platform." Here, plaintiff testified at his deposition that there was no safety netting in place above the scaffold upon which he was working at the time of his accident. However, Chris Richardson, president of Metal Sales, stated at his deposition that he observed overhead protection, including netting, in place above the subject scaffold at the time of the accident. Meanwhile, at their respective depositions, Vincent Ventorino, a superintendent employed by Century-Maxim, John S. Hyers, a senior superintendent for Bovis Lend Lease, and Aaron Margalit, a project manager for W&W Glass, testified that they did not know whether overhead protection, such as horizontal netting or cantilevered beams, was in place on the south side of the building, where plaintiff was working, on the date of the accident. In light of the contradictory deposition testimony, there remain triable issues of fact as to whether Industrial Code provisions 12 NYCRR 23-23-1.7(a)(1) and 23-5.1(j)(3) were violated. Based on the foregoing discussion, plaintiff's Labor Law § 241(6) cause of action is dismissed only to the extent that it is premised on a violation of Industrial Code provisions 12 NYCRR 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.20, 23-1.33, 23-2.1, 23-6.1, 23-6.2, 23-6.3, 23-8.1, 23-8.3, 23-8.4, and 23-8.5.

Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park established their prima facie entitlement to summary judgment dismissing those claims asserted against them alleging a violation of Labor Law § 200 and common-law negligence. In opposition, plaintiff failed to raise a triable issue of fact. Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Lane v Fratello Constr. Co.*, 52 AD3d 575 [2008]). In this case, the evidence in the record demonstrates that Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park did not supervise, direct, or control the method or manner in which plaintiff performed his work, and that they neither created nor had actual or constructive notice of the alleged absence of overhead protection and/or netting above the scaffold upon which plaintiff was working. Plaintiff's own deposition testimony indicates that Brian, an employee of Metal Sales, was the only person who gave him instructions at the work site. Contrary to plaintiff's contention, although Bovis Lend Lease coordinated the various subcontractors and had the authority to review safety on the site, that conduct is insufficient to impose liability under Labor Law § 200 and common-law negligence since there is no evidence that Bovis Lend Lease actually controlled the manner in which plaintiff's work was performed (*see Gasques v State of New York*, 59 AD3d 666; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465 [2000]).

The court will now address that branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment on their third-party cause of action for contractual indemnification against W&W Glass and the branch of the motion by W&W Glass for summary judgment dismissing said cause of action asserted against them. The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925 [2009]). A party seeking contractual indemnification

must also prove itself free from negligence because it cannot be indemnified to the extent its negligence contributed to the accident (General Obligations Law § 5-322.1; *see Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2009]). Here, Article 12 of the contract between Bovis Lend Lease and W&W Glass requires that W&W Glass, "to the fullest extent permitted by law," defend and indemnify,

> "Contractor and Owner, as well as any other parties which Contractor is required under the Contract Documents to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claim, cost, expense, or liability (including attorneys' fees, and including costs and attorneys' fees incurred in enforcing this indemnity) attributable to bodily injury, sickness, disease, or death, or to damage to or destruction of property (including loss of use thereof), caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by the Subcontractor, its subcontractors and suppliers, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder . . . ."

It is undisputed that plaintiff, an employee of Metal Sales, was allegedly injured while performing work, namely the installation of curtain wall, in connection with W&W Glass' subcontract with Metal Sales on the subject construction project. Contrary to W&W Glass' assertion, irrespective of whether W&W Glass specifically contracted with Bovis Lend Lease to provide overhead protection at the site, the clause "arising out of," such as the one at bar, is interpreted broadly by focusing not on the precise cause of the accident but on the general nature of the work in the course of which the injury was sustained (*see Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]). Additionally, while this indemnification agreement purports to indemnify Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for their own negligence, it is not void under General Obligations Law § 5-322.1 because it authorizes indemnification "to the fullest extent permitted by law" (*see Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870-871 [2008]). In any event, as previously discussed, there is no evidence in the record demonstrating that Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park were actively negligent in connection with plaintiff's accident. Therefore, Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park are entitled to contractual indemnification against W&W Glass.

On the branch of the motion by W&W Glass for summary judgment dismissing the third-party cause of action for breach of contract for failure to procure insurance insofar as asserted against it, W&W Glass failed to meet its prima facie burden. A promisee seeking summary judgment based upon a promisor's failure to name the promisee as an additional insured, as required by the contract between the two, need only show that the contract so required and that the promisor failed to comply with this provision (*see Keelan v Sivan*,

234 AD2d 516 [1996]). The insurance procurement clause contained in Article 11 of the contract between Bovis Lend Lease and W&W Glass required W&W Glass to purchase commercial general liability insurance, naming "the Contractor, Owner, and any other parties required by the Contract Documents as additional insureds under the policies . . ." In support of its motion for summary judgment, W&W Glass submitted a copy of its insurance policy with Navigators Insurance Company. While, as required by the contract, Bovis Lend Lease, the "contractor," is named as an additional insured, the insurance policy does not name the owner of the premises, Slazer, as an additional insured.

W&W Glass also seeks summary judgment on its second third-party causes of action for contractual indemnification and breach of contract to procure insurance insofar as asserted against Metal Sales, and Metal Sales separately moved for summary judgment dismissing those causes of action against it. As to W&W Glass' second third-party cause of action for contractual indemnification against Metal Sales, the indemnification clause contained in the purchase order agreement between W&W Glass and Metal Sales provides, in relevant part, that Metal Sales must

> "protect, defend, indemnify and hold harmless from and against any and all losses, claims, liens, demands and causes of action of every kind and character including, but not limited to, the amount of judgments, penalties, interest, court costs, legal fees incurred by W&W Glass LLC, Inc., arising in favor of any party, including claims, liens, debts, personal injuries, including employees . . . occurring or in anyway incident to, in connection with or arising directly or indirectly out of this order."

This broad indemnification agreement obligates Metal Sales to indemnify W&W Glass for "any and all losses, claims, liens, demands and causes of action of every kind and character" merely upon a determination that the claim arose from activity occurring, incident to, or in connection with the purchase order without regard to whether Metal Sales or its employees were a cause of the injury or the culpability of W&W Glass in whole or in part. These terms completely shift liability from W&W Glass to Metal Sales without limitation in terms of the negligence of W&W Glass, which is precisely the situation barred by General Obligations Law § 5-322.1. However, W&W Glass failed to make a prima facie showing, through submission of the deposition testimony of Mr. Hyers and Mr. Richardson, that it lacked control over the work site or had actual or constructive notice of the allegedly dangerous condition, thus precluding a finding, as a matter of law, that it was not negligent in connection with plaintiff's accident (*see Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099 [2009]). Given that W&W Glass' negligence, if any, cannot be determined as a matter of law, that branch of Metal Sales' motion for summary judgment dismissing the second third-party cause of action for contractual indemnification asserted against it is denied (*see Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708-709 [2007]).

With respect to W&W Glass' second third-party cause of action for breach of contract to procure insurance against Metal Sales, this court finds that the evidence in the record demonstrates that Metal Sales procured the requisite insurance coverage under the contract between W&W Glass and Metal Sales. Specifically, the purchase order agreement between W&W Glass and Metal Sales required Metal Sales provide a defense and indemnification to W&W Glass and procure general liability insurance in the amount of $5,000,000. In support of its summary judgment motion, Metal Sales submitted a letter by Great American Excess and Surplus Insurance Company (Great American) dated April 7, 2009 acknowledging that Great American would accept the defense and indemnification of W&W Glass because W&W Glass was named as an additional insured under the insurance policy issued to Metal Sales. Moreover, in its opposition papers, W&W Glass concedes that Metal Sales complied with its contractual obligation to procure the requisite insurance coverage for W&W Glass and, thus, withdrew its claim for breach of contract for failure to procure insurance against Metal Sales. As such, W&W Glass' second third-party cause of action for breach of contract to procure insurance asserted against Metal Sales is dismissed.

The branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for leave to serve a cross claim against Century-Maxim for contractual and common-law indemnification is granted. It is noted that, in light of the fact that Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park have already commenced a third-party action seeking indemnification, it would be more appropriate to amend the third-party complaint to add Century-Maxim as a third-party defendant and assert causes of action for contractual and common-law indemnification against it. Leave to amend a pleading is freely granted, absent prejudice or surprise resulting from the delay (CPLR 3025[b]). In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, whether prejudice or surprise resulted from the delay, and whether the proposed amendment has merit (*see Sidor v Zuhoski*, 257 AD2d 564, 564-565 [1999]). While Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park did not seek to amend the third-party complaint until after discovery was completed, mere lateness is not a barrier to the amendment (*see Edenwald Contracting Co. v New York*, 60 NY2d 957 [1983]; *St. Paul Fire & Mar. Ins. Co. v Town of Hempstead*, 291 AD2d 488 [2002]). Century-Maxim also failed to show prejudice or surprise by the proposed amendment, especially since the underlying facts remain the same and Century-Maxim has participated in discovery as a second third-party defendant. Furthermore, it cannot be said that the proposed amendment is palpably insufficient as a matter of law.

With respect to the branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park seeking summary dismissal of all cross claims against them, said defendants failed to address these issues in their moving papers and failed to submit any evidence to demonstrate their entitlement to judgment as a matter of law. As such, that branch of the

motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment dismissing all cross claims asserted against them is denied.

Furthermore, inasmuch as Century-Maxim's answer to the second third-party complaint does not allege any cross claims against Metal Sales, that branch of Metal Sales' motion seeking summary dismissal of all cross claims asserted against it is denied as moot.

Accordingly, plaintiff's motion for partial summary judgment on the Labor Law § 240(1) cause of action is denied in its entirety. Those branches of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 200 and common-law negligence claims asserted against them are granted. In addition, the branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted only to the extent that it is based on a violation of Industrial Code provisions 12 NYCRR 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.20, 23-1.33, 23-2.1, 23-6.1, 23-6.2, 23-6.3, 23-8.1, 23-8.3, 23-8.4, and 23-8.5. The branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park for summary judgment on their third-party cause of action for contractual indemnification against W&W Glass is also granted. The branches of the motion by W&W Glass for summary judgment dismissing the third-party causes of action for contractual indemnification and breach of contract for failure to procure insurance asserted against it are denied. Additionally, those branches of the motion by W&W Glass for summary judgment on its second third-party causes of action for contractual indemnification and breach of contract to procure insurance insofar as asserted against Metal Sales are denied. The branch of Metal Sales' motion for summary judgment dismissing the second third-party cause of action for breach of contract to procure insurance is granted. In all other respects, Metal Sales' summary judgment motion is denied. The branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park which, more appropriately, seeks leave to add Century-Maxim as a third-party defendant and assert causes of action for contractual and common-law indemnification and contribution against Century-Maxim is granted. Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park is directed to serve an amended third-party complaint on all third-party defendants. Finally, the branch of the motion by Bovis Lend Lease, Slazer, FKF, JMJS, and Madison Park seeking summary dismissal of all cross claims asserted against them is denied.

Dated: November 5, 2010

AUGUSTUS C. AGATE J.S.C.