Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

JORGE OSPINA

- against -

DISANO CONSTRUCTION CO., et al.

Index Number 29674 2008

Motion Date October 13, 2010

Motion Cal. Number 44

Motion Seq. No. 3

The following papers numbered 1 to 20 read on this motion by plaintiff for partial summary judgment against defendants on the issue of liability under Labor Law §§ 240(1) and 241(6); and on this cross motion by defendant A-Val Properties, LLC (A-Val Properties) for partial summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action insofar as asserted against it and for partial summary judgment on its cross claims for contractual indemnification and breach of contract to procure insurance against defendant/third-party plaintiff Disano Construction Co., Inc. (Disano Construction).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff was employed as a laborer by third-party defendant Image Iron Works, Inc. (Image Iron Works), which was hired by Disano Construction to perform steel work in the construction of a two-story commercial office building. The subject premises was owned by A-Val Properties, which contracted with Disano to serve as the general contractor on the project. On August 28, 2008, plaintiff, while working on the roof, was allegedly injured

when metal decking fell as it was being lowered to the roof by a crane. Plaintiff subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence.[1]

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 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, while being hoisted or secured, 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]).

Plaintiff herein made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) cause of action insofar as asserted against Disano Construction and A-Val Properties by demonstrating that plaintiff was injured when he was struck by inadequately secured metal decking that fell from an elevated height (*see e.g. Orner v Port Auth. of N.Y. & N.J.*, 293 AD2d 517 [2004]; *Ortlieb v Town of Malone*, 307 AD2d 679 [2003]; *cf. Millard v Hueber-Breuer Constr. Co.*, 4 AD3d 817 [2004]). According to the deposition of plaintiff, approximately 20 to 25 pieces of metal decking were being lowered to the roof by a crane, when they fell four feet below, where the injured plaintiff was waiting to receive them. Plaintiff further testified that the bundle of metal decking was tied together with fraying bands which broke, thereby causing the pieces of metal to fall and strike plaintiff on his legs.

In opposition, Disano Construction and A-Val Properties failed to raise a triable issue of fact. Disano Construction's argument that it did not have control over plaintiff or the work site and that plaintiff's employer, not Disano Construction, furnished the bands tied

[1] Pursuant to a stipulation between the parties dated October 2, 2009, this action was voluntarily discontinued as against defendant A-Val Architectural Metal Corp.

around the bundle of metal decking is insufficient to defeat summary judgment. It is clear that, in light of the nature and purpose of the work being performed at the time of plaintiff's accident, there was a significant risk that an unsecured piece of metal decking would fall, causing injury to a worker below, such as the injured plaintiff. Consequently, Disano Construction, as the general contractor, and A-Val Properties, as the owner, had a nondelegable duty under Labor Law § 240(1) to provide adequate safety devices to secure the metal decking (*see Smith v Cari, LLC*, 50 AD3d 879 [2008]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421 [2006]; *Costa v Piermont Plaza Realty, Inc.*, 10 AD3d 442 [2004]; *Bornschein v Shuman*, 7 AD3d 476 [2004]). Significantly, contractors and owners are liable under the statute whether or not they supervise or control the work (*see Chlebowski v Esber*, 58 AD3d 662, 663 [2009]). Furthermore, contrary to A-Val Properties' assertion, the unsigned deposition transcript of plaintiff, which plaintiff submitted in support of his summary judgment motion, is admissible under CPLR 3116(a) since that transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by plaintiff, as the deponent (*see Ashif v Won Ok Lee*, 2008 NY Slip Op 9936 [2d Dept 2008]; *Thomas v Hampton Express*, 208 AD2d 824 [1994]). Since there is no triable issue of fact as to the cause of plaintiff's injury or the inadequacy of the safety equipment used to secure the metal decking, plaintiff is entitled to summary judgment on his Labor Law § 240(1) cause of action as against Disano Construction and A-Val Properties.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). In the bill of particulars, plaintiff alleged violations of Industrial Code provisions 12 NYCRR 23-1.11. 23-1.24, 23-2.1 - 2.7, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4, 23-8.5, 23-9.1, 23-9.2, 23-9.3, 23-9.4, 23-9.5, 23-9.6, 23-9.7, 23-9.8, 23-9.9, 23-9.10, and 23-9.11. In support of his motion for summary judgment, however, plaintiff predicates his Labor Law § 241(6) cause of action solely on alleged violations of 12 NYCRR 23-8.1(a), (b), (f)(1)(iv), (f)(2)(i), and (f)(6), 23-8.2(c)(3), and 23-8.5(c) and (f). Plaintiff's summary judgment motion does not address the other sections of the Industrial Code previously cited by him in the bill of particulars and, therefore, the court deems the Labor Law § 241(6) claim premised upon them abandoned.

The court hereby finds that the following Industrial Code provisions relied upon by plaintiff are either insufficiently specific to support liability under Labor Law § 241(6) or inapplicable to the facts of the instant case: 12 NYCRR 23-8.1(a) and (b) and 23-8.2(c)(3). It has been held that 12 NYCRR 23-8.1(a), which requires a crane and its associated parts to provide adequate stability and strength, is merely a general safety standard (*see Thompson v Ludovico*, 246 AD2d 642 [1998]). Additionally, 12 NYCRR 23-8.2(c)(3), which requires loads lifted by mobile cranes to be raised vertically so as to avoid swinging during hoisting, is inapplicable because plaintiff does not allege that the subject load was not raised vertically

by the crane. Lastly, plaintiff incorrectly states that 12 NYCRR 23-8.5(f) requires that a crane operator be at least 21 years of age with at least three years of practical experience in the operation of cranes. Instead, 12 NYCRR 23-8.5(g), not 23-8.5(f), imposes such requirements on *applicants for a certificate of competence* (emphasis added). In any event, 23-8.5(g) is inapplicable to the facts of this case because plaintiff does not allege that the employee operating the subject crane had applied for a certificate of competence.

Plaintiff established, prima facie, that Industrial Code provisions 12 NYCRR 23-8.1(f)(1)(iv), 23-8.1(f)(2)(i), 23-8.1(f)(6), 23-8.1(b), and 23-8.5(c) were violated and that their violation was the proximate cause of the accident. In opposition, Disano Construction and A-Val Properties failed to raise a triable issue of fact. Industrial Code regulation 12 NYCRR 23-8.1(f)(1)(iv) provides that a load must be well secured and properly balanced before being lifted more than a few inches in a sling or other lifting device, and 23-8.1(f)(2)(i) prohibits the sudden acceleration and deceleration of loads during the hoisting operation. Based on plaintiff's description of the accident in his deposition testimony and affidavit, the bands tied around the metal decking broke when the crane suddenly accelerated, causing the load to move and fall on plaintiff. In addition, the evidence in the record demonstrates that 12 NYCRR 23-8.1(f)(6), which specifically prohibits the hoisting or carrying of any load over and above any person, was violated because plaintiff testified at his deposition that, at the time of the accident, the load was hoisted four feet above his head. Plaintiff also made a prima facie showing that 12 NYCRR 23-8.1(b), which provides that mobile cranes must be inspected at least monthly and that records of such inspection be posted, and 12 NYCRR 23-8.5(c), which requires the crane operator to be licensed with a certificate of competence, were violated through submission of OSHA citation and notification of penalty forms dated January 29, 2009. In particular, the OSHA forms indicate that the crane operator was unlicensed and that the crane involved in the accident did not undergo an annual inspection and was not inspected prior to and during each use. Therefore, plaintiff's motion for partial summary judgment on his Labor Law § 241(6) cause of action is granted only to the extent that it is predicated on a violation of 12 NYCRR 23-8.1(f)(1)(iv), 23-8.1(f)(2)(i), 23-8.1(f)(6), 23-8.1(b), and 23-8.5(c).

To the extent that plaintiff seeks partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) as against defendant Disano Construction Management Co., Inc. (Disano Management), those branches of plaintiff's motion are denied. Plaintiff failed to present any evidence demonstrating Disano Management's role on the subject construction project in order to impose liability under the Labor Law against them, that is, whether Disano Management functioned as the general contractor or owner. In fact, Al Salgado, Disano Construction's director of operations, testified at his deposition that he did not know the type of business in which Disano Management is engaged or whether Disano Construction and Disano Management have the same employees and owners. Given that plaintiff failed to meet his prima facie burden as to Disano Management, the

sufficiency of the opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

With respect to the branches of the cross motion by A-Val Properties for partial summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action asserted against it, said defendant established its prima facie entitlement to judgment as a matter of law. 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 A-Val Properties did not supervise, direct, or control the method or manner in which plaintiff performed his work. In particular, the deposition testimony of Vladimir Blaskovic, an owner of A-Val Properties, indicates that the laborers' supervisors would give directions to their employees regarding the method and manner in which to perform their work at the site and that A-Val Properties did not have the authority to do so. In addition, plaintiff failed to oppose those branches of A-Val Properties' motion for partial summary judgment dismissing the Labor Law § 200 and common-law negligence claims insofar as asserted against it and, thus, failed to raise a triable issue of fact.

The court will now address that branch of A-Val Properties' motion for partial summary judgment on its cross claim for contractual indemnification against Disano Construction. The right to contractual indemnification depends upon the specific language of the contract (*see Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2005]). Here, the indemnification provision in the agreement between A-Val Properties and Disano Construction states, in pertinent part,

> "To the fullest extent permitted by law, Subcontractor shall indemnify, hold harmless, and defend Owner, Contractor, Architect, and consultants, and agents and employees of any of them from and against all claims, damages, losses and expenses including but not limited to attorneys' fees arising out of or in any way connected with the performance or lack of performance of this contract, provided any such claim, damage, loss, or expense is (a) attributable to bodily injury, sickness, disease or death . . . . and (b) caused in whole or in part by any actual or alleged . . . . act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable pursuant to the performance of this contract, or . . . . violation of any statutory duty or regulation or obligation arising out of the Subcontractor's performance or lack of performance of this contract . . . ."

The plain language of the indemnification clause obligates the subcontractor, not the general contractor, to indemnify the owner for the negligent acts or omissions of the subcontractor. Therefore, A-Val Properties, the owner, is not entitled to indemnification against Disano

Construction, the general contractor, under the terms of their contract. As such, the branch of A-Val Properties' motion for partial summary judgment on its cross claim for contractual indemnification against Disano Construction is denied.

Similarly, the branch of A-Val Properties' motion for partial summary judgment on its cross claim for breach of contract to procure insurance against Disano Construction is denied. The insurance procurement clause of the contract between A-Val Properties and Disano Construction states that "the subcontractor shall purchase and maintain" commercial general liability coverage and that the "Contractor, Owner and all other parties required of the Contractor, shall be included as insureds" on the policy. Like the aforementioned indemnification provision, the insurance procurement clause specifically requires the subcontractor, not the general contractor, to procure commercial general liability insurance and to name the owner as an additional insured on the policy. As such, Disano Construction, the general contractor, was not contractually obligated to do so on behalf of A-Val Properties, the owner.

In the absence of a notice of motion, the court will not entertain Disano Construction's informal requests for contractual and common-law indemnification as against Image Iron Works. An application to the court for such relief must be made by notice of motion setting forth the relief demanded (CPLR 2214).

Accordingly, that branch of plaintiff's motion for partial summary judgment on the Labor Law § 240(1) cause of action is granted. In addition, the branch of plaintiff's motion for partial summary judgment on his Labor Law § 241(6) claim is granted only to the extent that it is predicated upon a violation of 12 NYCRR 23-8.1(f)(1)(iv), 23-8.1(f)(2)(i), 23-8.1(f)(6), 23-8.1(b), and 23-8.5(c). In all other respects, plaintiff's summary judgment motion is denied. The branches of the cross motion by A-Val Properties for partial summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action asserted against it are granted. Those branches of A-Val Properties' motion for partial summary judgment on its cross claims for contractual indemnification and breach of contract to procure insurance against Disano Construction are denied.

Dated: January 28, 2011

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J.S.C.