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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ZBIGNIEW AUGUSTYN and MALGORZATA AUGUSTYN,
Plaintiff(s),

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and DEAN BUILDERS GROUP, INC.,
Defendant(s).

INDEX NO. 106934/08

MOTION DATE 03-30-2011

MOTION SEQ. NO. 001, 002 & 003

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and DEAN BUILDERS GROUP, INC.,
Third-Party Plaintiff(s),

- v -

AAAA ASBESTOS ABATEMENT SERVICES CORP., and SND CONSTRUCTION, INC.,
Third-Party Defendant(s).

THIRD-PARTY IDEX NO. 590021/09

The following papers, were read on these motions consolidated for disposition:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2, 5-6, 9-10
Answering Affidavits — Exhibits	3, 4, 7, 8, 11, 12
Replying Affidavits	13, 14

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that these motions, consolidated for disposition:

Are decided in accordance with the accompanying memorandum decision.

MANUEL J. MENDEZ
J.S.C.

Dated: March 30, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 13

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ZBIGNIEW AUGUSTYN and MALGORZATA AUGUSTYN,

Plaintiffs,

Index No.: 106934/08

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and DEAN BUILDERS GROUP, INC.,

Defendants.

----------x

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION and DEAN BUILDERS GROUP, INC.,

Third-Party Plaintiffs,

-against-

AAAA ASBESTOS ABATEMENT SERVICES CORP., and SND CONSTRUCTION, INC.,

Third-Party Defendants.

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TP Index No.: 590921/09

DECISION

Manuel J. Mendez, J.S.C.:

BACKGROUND

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In motion sequence number 001, third-party defendant AAAA Asbestos Abatement Services Corp. (AAAA) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint

asserted as against it.

In motion sequence number 002, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on their cause of action based on an alleged violation of Labor Law § 240 (1).

In motion sequence number 003, the City of New York and New York City Department of Design (together, the City) move, pursuant to CPLR 3212, for summary judgment against plaintiffs on their causes of action for negligence and violations of Labor Law §§ 200 and 240 (1), and for summary judgment against defendant Dean Builders Group, Inc. (Dean) and third-party defendant AAAA for contractual and common-law indemnification.

On June 14, 2007, the City was the owner of the premises known as 187/189 East 100th Street, New York, New York, and Dean was the general contractor for work that was being performed at that location. The building is a homeless shelter. At some time prior to June 14, 2007, the date of the accident, Dean hired AAAA, plaintiff Zbigniew Augustyn's (plaintiff's) employer, to perform asbestos abatement and lead paint removal from the fire escapes located on the front exterior of the premises.

At the time of the accident, plaintiff was working on a sidewalk bridge as part of the construction project. The sidewalk bridge ran the length of the front exterior wall of the building, and was approximately 12 feet high in some parts, and

approximately 15 feet high in others, with ramps between the height differentials of the bridge. While plaintiff was walking from the higher level of the bridge to a lower portion of the bridge, he fell 12 to 15 feet to the ground, thereby sustaining injuries.

Plaintiffs have asserted three causes of action against the City and Dean: (1) common-law negligence; (2) violations of Labor Law §§ 200, 240 (1) and 241 (6); and (3) a derivative suit on behalf of plaintiff's wife.

The third-party complaint seeks common-law and contractual contribution and indemnification from AAAA and SND Construction, Inc. (SND). SND has failed to appear in this action.

At his examination before trial (EBT), plaintiff testified that, on the day of the accident, he was removing lead paint from two fire steps. Plaintiff's EBT, at 27. In order to perform this work, tents were erected around the steps on top of the sidewalk bridge, and to access the steps, the steps themselves were used. *Id.* at 27, 40. According to plaintiff, there were safety lines, harnesses and lanyards available on the job site, and there were enough safety devices for all of the workers. *Id.* at 12. The accident occurred as plaintiff was going towards the area where another tent was being constructed to determine whether any more material was needed to build the tent. *Id.* at 13, 43.

As plaintiff was walking down an incline from the higher level to the lower level of the bridge, he fell. *Id.* at 46, 52. At the time of the fall, plaintiff was not wearing a safety harness. Plaintiff's 2d EBT, at 11. According to plaintiff, he did not know why or how he fell, he did not feel the bridge move, although there were some loose planks, loose planks had nothing to do with his accident, and there was no gap between the sidewalk bridge and the wall of the building where his accident took place. Plaintiff's EBT, at 55-57. Plaintiff further attested that he did not notice any defect in the bridge, and that he was not aware of any complaints being made about the bridge prior to his accident. *Id.* at 32-33.

Plaintiff testified that AAAA provided harnesses and/or safety belts to everyone who worked on the fire steps, and they had safety lines to tie off when working on the step. *Id.* at 47-48. Earlier on the day of the accident, plaintiff had worn his safety harness when he was up on the fire steps, but he stated that he only used a harness when he was on a scaffold, working at a height. *Id.* at 47; Plaintiff's 2d EBT, at 11. Plaintiff further said that he did not wear a safety harness when he was on the sidewalk bridge. Plaintiff's 2d EBT, at 11.

Michael Mendelewski (Mendelewski), the senior construction project manager for the City was deposed in this matter on March 19, 2009. Mendelewski testified that his role in the project at

the premises that are the subject of this litigation was to document the progress of the construction by visiting the site two to three times each week. Mendelewski EBT, at 27. Mendelewski said that he did not inspect the sidewalk bridge after it was constructed, and that Dean was responsible for the maintenance of the bridge. *Id.* at 32-33. Mendelewski said that he was unaware of any complaints regarding the sidewalk bridge prior to plaintiff's accident. *Id.* at 57.

Abid Mahmood (Mahmood), president of Dean, was deposed twice in this matter. Dean was the general contractor for the project. After the sidewalk bridge was constructed, AAAA began to perform abatement around the fire escapes. Mahmood EBT, at 31. Mahmood testified that he was on site at the project every other day and that he checked to make sure that everyone was working safely. *Id.* at 19. Mahmood attested that Dean did not provide any safety equipment for AAAA employees, and that he never saw any AAAA employees working in an unsafe manner. *Id.* at 19. Mahmood also said that he never received any complaints about AAAA workers or the sidewalk bridge. *Id.* at 37

James Gill (Gill), the supervisor for Dean, was also deposed twice in this matter. Gill testified that his duties as an onsite supervisor were to oversee the workers' progress and their safety. Gill EBT, at 21-23. Gill said that, before any work could be done, the sidewalk bridge had to be constructed. *Id.* at

33. Gill stated that he would check the bridge every day to make sure that it had not shifted and that the parapets were in place. *Id.* at 34. Further, Gill averred that he never received any complaints about the sidewalk bridge prior to plaintiff's accident. *Id.* at 73-74.

Robert Joyce (Joyce), a project engineer for Dean, was also deposed. Joyce testified that Dean was responsible for overall site safety on the project, and that the subcontractors were also responsible for the safety of their own workers. Joyce EBT, at 42. Dean hired SND to install the sidewalk bridge and AAAA to perform the lead paint removal from the fire escapes. *Id.* at 40-41. Joyce was unaware of any complaints regarding the sidewalk bridge prior to the date of the accident.

Jan Proniewski (Proniewski), AAAA's owner and president, was deposed in this matter. Proniewski testified that, in order to remove the lead paint from the fire escapes on the front facade of the building, AAAA constructed a shed around the fire escapes and then removed the lead paint using scrapers and grinders. Proniewski EBT, at 23. According to Proniewski, plaintiff was considered to be the foreman on the project, and there was a second supervisor as well, Robert Waniurske. *Id.* at 17. Proniewski averred that AAAA provided all of their own safety equipment for the job, including safety harnesses, but that the workers did not need harnesses when they were working because

they would stand on the fire escapes themselves. *Id.* at 23, 45. Further, according to Proniewski, the workers did not need harnesses when they were on the sidewalk bridge. *Id.* at 45. However, Proniewski stated that, prior to the date of the accident, there was an issue with respect to the amount of space between the bridge and the facade of the building, but that issue was addressed and repaired prior to plaintiff's accident. *Id.* at 27-30.

Plaintiff argues that he is entitled to summary judgment on his cause of action based on a violation of Labor Law § 240 (1) because the cause of his accident was the collapse of the sidewalk bridge, and that owners and general contractors are held to be strictly liable for height-related injuries to workers on a job site. The court notes that no witness has been produced to testify that the sidewalk bridge collapsed, and that plaintiff himself testified that he did not know what caused him to fall.

In opposition to plaintiff's motion, the City argues that, not only is it entitled to summary judgment dismissing plaintiffs' causes of action for negligence and violations of Labor Law §§ 200 and 240 (1), but that, at the least, there are material questions of fact as to the exact cause of plaintiff's fall so as to preclude granting plaintiffs partial summary judgment on their cause of action based on a violation of Labor Law § 240 (1). Moreover, according to the City, at the time of

the accident, plaintiff was not performing a task that required being elevated, and plaintiff has not met his burden of proof evidencing that a violation of the statute caused his injury.

Dean has also filed opposition to plaintiff's motion, arguing that plaintiff is unable to articulate the exact cause of his fall, that he never noticed any defects in the sidewalk bridge, and that he was unaware of a single complaint made about the bridge prior to his accident. In addition, according to Dean, plaintiff testified that there were no gaps between the bridge and the facade of the building where his fall occurred. Therefore, Dean contends, there are, at least, questions of fact precluding granting plaintiffs' motion for partial summary judgment.

In reply, plaintiff asserts that, at the time of the occurrence, he was engaged in a protected activity entitling him to the protection of Labor Law § 240 (1), and that it was necessary for him to be at an elevated height to perform the function of seeing to the construction of the tent.

In opposition to the City's motion, plaintiff contends that his causes of action for common-law negligence and violation of Labor Law § 200 as against the City should not be dismissed because the City was on notice of the defective condition of the sidewalk bridge, thereby engendering liability for plaintiff's injuries. Plaintiff reiterates his arguments regarding his Labor

Law § 240 (1) cause of action, and provides an accident report, allegedly filed by the New York City Department of Homeless Services, in which it is written that plaintiff was on a scaffold when he fell through the plywood that was being put in place by AAAA. However, there is no indication as to the individual who made this statement.

Dean has also provided partial opposition to the City's motion, with respect to the City seeking common-law and contractual indemnification from it, but otherwise supports and joins in the City's request for dismissing plaintiffs' common-law negligence and Labor Law §§ 200 and 240 (1) claims. In addition, Dean raises the question as to whether plaintiff was a recalcitrant worker, because plaintiff admitted that adequate safety devices were available but that he did not use them.

AAAA, in support of its motion and in opposition to the City's motion, argues that its insurer is already providing defense for the City and, therefore, the City's motion is a violation of the antisubrogation rule.

In reply to the opposition to its motion, the City asserts that plaintiff's causes of action for common-law negligence and violation of Labor Law § 200 should be dismissed because there is no evidence that the City had any notice of any defect with the sidewalk bridge, and plaintiff himself testified that there was no gap between the bridge and the building wall where his fall

occurred. Additionally, the City contends that plaintiff has failed to establish that he was required to be on the sidewalk bridge to identify materials that might be needed to erect the tent and, further, that plaintiff himself attested to the fact that there were safety devices available for plaintiff's use but that a harness was not necessary when walking on the bridge.

In opposition to AAAA's motion, both the City and Dean argue that the antisubrogation rule does not bar insurance companies from seeking indemnification for settlements or judgments that exceed the limits of the insurance policy, which, so they say, is being done in the instant action.

AAAA has replied to the opposition to its motion, reasserting that the antisubrogation rule bars the City's motion.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt

as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of the City's motion seeking to dismiss plaintiff's causes of action based on common-law negligence and a violation of Labor Law § 200 is granted.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work. *See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 (2d Dept 2007).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident, and, under such theory, the defendant's supervision and control over the work being performed is irrelevant. *See Murphy v Columbia University*, 4 AD3d 200 (1st Dept 2004). Conversely, if the accident arises from the means and methods employed to

perform the work, the injured worker must evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009). General supervision over the job site is insufficient to render an owner or general contractor liable under Labor Law § 200. *Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347 (1st Dept 2006).

In the case at bar, the City neither directed or controlled plaintiff's work, nor is there any evidence at all that the City was on notice, actual or constructive, of a dangerous condition. Not only has not a single witness been produced who was aware of any complaints having been made about the sidewalk bridge, plaintiff himself testified that he did not notice any defect in the bridge, nor was he aware of any complaints about the bridge having been made prior to the date of the accident. Moreover, plaintiff stated that there was no gap between the bridge and the facade of the building at the place where he fell.

Based on the foregoing, plaintiff's causes of action for common-law negligence and violations of Labor Law § 200 are dismissed.

In addition, since Dean, in its partial opposition to the City's motion, stated that it was joining with the City in the City's request to dismiss plaintiffs' common-law negligence and

Labor Law § 200 causes of action, in searching the record, the court dismisses those causes of action as against Dean as well.

That portion of the City's motion seeking to dismiss plaintiff's cause of action based on a violation of Labor Law § 240 (1) is granted, and plaintiffs' motion for partial summary judgment is denied.

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

As stated by the Court in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Labor Law § 240 (1) was designed to protect workers against

76 AD3d 503 (2d Dept 2010); *Bellefleur v Newark Beth Israel Medical Center*, 66 AD3d 807 (2d Dept 2009); *Sledz v 333 East 68th Street Corp.*, 254 AD2d 196 (1st Dept 1998).

The court is unpersuaded by AAAA's argument that the antisubrogation rule bars the instant motion.

> "Pursuant to the antisubrogation rule, '[a]n insurer ... has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered.' 'The rule against allowing subrogation claims against an insured is based, in part, on the potential for conflict of interest that is inherent in these situations.' The antisubrogation rule applies only to the policy limits of the comprehensive general liability policy at issue, and claims for contribution and/or indemnification beyond the limits of a common insurance policy are not barred [internal citations omitted]."

Lodovichetti v Baez, 31 AD3d 718, 719 (2d Dept 2006).

Therefore, whereas claims for indemnification beyond the limits of the policy would not be barred, granting even conditional indemnification at this juncture would be premature, considering that the court has, by this decision, dismissed three of plaintiffs' causes of action. *Porter v Annabi*, 65 AD3d 1322 (2d Dept 2009).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that third-party defendant AAAA Asbestos Abatement Services Corp.'s motion for summary judgment dismissing the third-party action asserted as against it (motion sequence number 001) is denied as premature; and it is further

ORDERED that plaintiffs' motion seeking partial summary judgment on the issue of liability on their cause of action based on a violation of Labor Law § 240 (1) (motion sequence number 002) is denied; and it is further

ORDERED that the portion of defendants the City of New York's and New York City Department of Design and Construction's motion for summary judgment dismissing the plaintiffs' causes of action asserted as against them based on common-law negligence and violations of Labor Law §§ 200 and 240 (1) (motion sequence number 003) is granted and those causes of action are dismissed; and it is further

ORDERED that plaintiffs' causes of action based on common-law negligence and violations of Labor Law §§ 200 and 240 (1) are dismissed as against Dean Builders Group Inc.; and it is further

ORDERED that the portion of defendants the City of New York and New York City Department of Design and Construction's motion seeking common-law and contractual indemnification from co-defendant Dean Builders Group, Inc. and third-party defendant AAAA Asbestos Abatement Services Corp. is denied as premature.

Dated: March 30, 2011

ENTER

MANUEL J. MENDEZ
J.S.C.

Manuel J. Mendez, J.S.C.