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

PRESENT: JEFFREY K. OING J.S.C. PART 48

Index Number : 106100/2007

FIORENTINO, PHILLIP

VS

ATLAS PARK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The annexed memorandum constitutes the decision + order of the Court.

FILED

APR 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/20/11

JEFFREY K. OING J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

----------x

PHILLIP FIORENTINO and FRANCA FIORENTINO,

Plaintiffs,

-against-

ATLAS PARK, LLC, PLAZA CONSTRUCTION CORPORATION and SAGE ELECTRICAL CONTRACTING, INC.

Defendants,

----------x

PLAZA CONSTRUCTION, INC.

Third-Party Plaintiff,

-against-

DONALDSON ACOUSTICS, CO.,

Third-Party Defendant.

----------x

Index No.: 106100/07

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants, Atlas Park, LLC ("Atlas") and Plaza Construction Corporation ("Plaza"), move, pursuant to CPLR 3212, for an order granting them summary judgment: 1) on their cross-claims against Sage Electrical Contracting, Inc. ("Sage") for contractual and common law indemnification, for attorney's fees, and costs; 2) on their third-party complaint against Donaldson Acoustics, Co. ("Donaldson") for contractual indemnification, attorney's fees, and costs; and 3) dismissing plaintiffs', Phillip Fiorentino and

Franca Fiorentino, complaint and all cross claims against Atlas and Plaza.

Defendant Sage cross-moves for an order granting it summary judgment: 1) dismissing plaintiffs' Labor Law §§ 200, 240[1], and 241[6] claims against it; 2) dismissing Atlas' and Plaza's cross-claims for indemnification; and 3) dismissing third-party defendant Donaldson's cross-claims for indemnification.

Third-party defendant, Donaldson, cross-moves for an order granting it summary judgment: 1) on its claim against Sage for common-law indemnification, attorney's fees, and costs; and 2) dismissing plaintiffs' Labor Law §§ 240[1] and 241[6] claims.

Background

Plaintiff, Philip Fiorentino, was a carpenter working for defendant Donaldson at the Atlas Park Project (the "project") in the basement of Building #6 located at 8000 Cooper Avenue, Glendale, New York (the "property"). Defendant Atlas owned Atlas Park. Plaza was the construction manager of the project, Sage was one of the electrical subcontractors, and Donaldson was a carpentry subcontractor.

On April 6, 2006, plaintiff sustained personal injuries when he allegedly fell from a scaffold. He alleges that at the time of the accident he was standing on a scaffold provided by his employer, Donaldson, installing ceiling tile in the area where an Exit sign would later be installed. The scaffold was

approximately 3 to 3 ½ feet off the ground. Sage allegedly left a BX electrical cable in the ceiling for the Exit sign. During the course of plaintiff's work, he was holding the ceiling grid with one hand as he grabbed the electrical cable to push it back into the slot he had created in the ceiling tile. Plaintiff sustained an electrical shock. He claims that he was shocked because either the electrical cable or the ceiling grid was energized. At his EBT, plaintiff provided the following testimony:

Q. After you held onto the BX cable and the grid, you sustained what you described as a shock, how long did you remain holding onto those items, if you know?

A. It felt like forever. But to be honest with you, all I could do is just scream because I couldn't let go. I was basically stuck until somebody came, actually knocked me off the Baker's.

Q. How long would you estimate you were stuck in that position?

A. It felt like an hour. Maybe it was - I don't know, minute, 40 seconds to a minute.

Q. You said that somebody came in and knocked you off of the Baker's scaffold. Do you know who that was?

A. Yes.

Q. Who was that?

A. Richie Robbins.

Q. Who is Richie Robins?

A. The ceiling man for Donaldson.

Q. When you say that Richie Robbins knocked you off of the Baker's scaffold, can you describe for us how he did that?

A. A shove.

Q. He shoved you with his hand?

A. I believe he just - I didn't see it, I was facing the other way. But he knocked me from behind so it had to be from - I don't know what you call it, a shove I guess.

Q. And after he knocked you or pushed you or shoved you, did you fall off the Baker's scaffold?

A. Yes.

Q. How did you land?

A. I landed on my hand. My head hit the wall. I was on my side so I laid on my hip.

(Moving Papers, Ex. F, pp. 45-47).

Plaintiff commenced this action alleging violations of Labor Law §§ 200, 240[1], 241[6], and 12 NYCRR § 23-1.13.

Discussion

As an initial matter, Atlas and Plaza argue that this Court should not consider the cross-motions because they are untimely. The notice of issue was filed on June 4, 2010, therefore, they assert all dispositive motions were to be served by August 3, 2010. The argument is unavailing. Atlas and Plaza filed their motion on August 2, 2010, one day before the August 3 deadline for dispositive motions. The cross-motions, although filed after the August 3, 2010 deadline, seek relief on the same issues as

were raised in Atlas' and Plaza's timely motion (Conklin v Triborough Bridge and Tunnel Authority, 49 AD3d 320 [1st Dept 2008]). As such, this Court will consider the cross-motions.

Labor Law § 240[1]

Defendants argue that plaintiff's accident does not fall within the scope of Labor Law § 240[1] because his injuries did not result from an elevation-related risk or hazard. Instead, the proximate cause of plaintiff's accident was the electric shock and not any violation of the statute. Essentially, their argument is where a plaintiff is injured by electrocution while in an elevated position section 240 does not apply.

Contrary to defendants' argument, the mere fact that a worker falls from a ladder or scaffold after receiving an electric shock does not preclude recovery under section 240 (Vukovich v 1345 Fee LLC, 61 AD3d 533 [1st Dept 2009]; Hernandez v Ten Ten Company, 31 AD3d 333 [1st Dept 2006]; Weber v 1111 Park Avenue Realty corp., 253 AD2d 376 [1st Dept 1998]). Having said that, section 240[1] was designed to prevent those types of accidents in which the scaffold proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to a person (Ross v Curtis-Palmer Hydro-Electric Company, 81 NY 2d 494 [1993]).

Here, plaintiff did not fall from the scaffold as a result of the electrocution. Plaintiff's co-worker, Richard Robbins,

gave the following EBT testimony that he kicked the scaffold out from under plaintiff so as to release plaintiff from the electrical current:

Q. How did you first become aware of the accident?

* * *

The Witness: Sure, I saw Tino on a Baker with his hands in the air and he was vibrating and I heard some moaning coming out of his mouth.

Mr. Persky: His hands were shaking?

The Witness: Yes, his whole body a little bit.

* * *

Q. What happened after you saw this?

A. I went over and I kicked the Baker off underneath him.

Q. What happened after you kicked the Baker?

A. Tino fell to the floor.

Q. Did you notice what part of his body came into contact with the floor first?

A. Yes, I think his back.

(Moving Papers, Ex. J, pp. 18-20).

Thus, under these circumstances, plaintiff's fall from the scaffold was not due to an inadequate or malfunctioning scaffold, or even a situation where any failure by defendants to provide additional safety devices would have prevented plaintiff's fall. The scaffold was effective in preventing plaintiff from falling

as he was sustaining the electrical shock, thus the core objective of section 240[1] was met (Nieves v Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914 [1999]; Adams v Owens-Corning Fiberglass Corporation, 260 AD2d 877 [3rd Dept 1999]). Indeed, plaintiff's co-worker had to get plaintiff off the scaffold immediately, and was able to accomplish that task by either kicking the scaffold out from under the plaintiff or pushing plaintiff off the scaffold. Under these circumstances, Mr. Robbins' act, albeit necessary to save plaintiff from further injury from the electric shock, was an independent intervening act constituting a superseding cause of plaintiff's fall from the scaffold (Gordon v Eastern Railway Supply, Inc., 82 NY2d 555 [1993]). Consequently, liability under Labor Law § 240[1] does not attach.

Labor Law § 200 and Common-Law Negligence

Section 200 is the codification of the common-law duty imposed upon an owner or general contractor to provide workers with a safe place to work (Singh v Black Diamonds LLC, 24 AD3d 138 [1st Dept 2005]). Where the condition of the premises is at issue, property owners may be held liable for a section 200 violation if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the condition (Ortega v Puccia, 57 AD3d 54 [2nd Dept 2008]). Where a claim under section 200 is based upon a subcontractor's

methods or materials liability cannot be imposed on the owner and/or general contractor unless an injured worker shows that they exercised supervisory control over the work (Hughes v Tishman Construction Corp., 40 AD3d 305 [1st Dept 2007]). Moreover, general supervisory authority is insufficient to constitute supervisory control (Id.). Rather, plaintiff must show that the owner and/or general contractor controlled the activity bringing about the injury so as to enable the owner and/or general contractor to avoid or correct the unsafe condition (O'Sullivan v IDI Construction Company, Inc., 7 NY3d 805 [2006]).

Here, the record demonstrates that neither Atlas nor Plaza created, or had actual or constructive notice that the energized BX cable was a dangerous condition. Rather, the issue here involves a subcontractor's methods or materials, and whether Atlas, as owner, or Plaza, as construction manager, exercised the requisite supervision, control, or authority. In that regard, plaintiff testified at his EBT that the person who gave him his assignment was Eric Anderson, a Donaldson foreman (Moving Papers, Ex. F, p. 24). Further, during the time plaintiff worked at the site, he never saw anyone who worked for Plaza nor did he ever directly speak with anyone from Plaza about his work (Id., pp. 168, 218). As for Atlas, plaintiff testified that he did not know the owner of the property, that he never heard of a company

called Atlas, and that he did not directly talk to anyone representing Atlas (Id., pp. 216-217). In addition, plaintiff's co-worker, Mr. Robbins testified at his EBT that he did not receive any direction from anyone at the job site besides the Donaldson foreman, Eric Anderson (Moving Papers, Ex. J, p. 51).

Further, Plaza project supervisor, James Lumpe, testified that Sage was responsible for the disconnection and restoration of electricity in the basement area of Building 6 where plaintiff's accident occurred (Moving Papers, Ex. G, pp. 66-67). In fact, Mr. Lumpe gave testimony that the subcontractor would not inform Plaza if it was turning on a circuit breaker like the one involved in plaintiff's accident (Id., p. 141).

As to the extent of Plaza's supervision of the subcontractors, Mr. Lumpe testified that it was Plaza's responsibility to ensure that subcontractors were in compliance with their contracts and time frames (Id., p. 22). Further, Plaza hired the safety security firm, Total Security, as a site safety manager (Id., p. 24). Total Safety had a daily presence on the job site and shared an office on the job site with Plaza (Id., p. 26). Malcolm Punch of Total Safety was the supervisor in charge at the work site and would "daily, hourly walk the site reviewing the practices of the subcontractors to make sure they were working in a safe manner" (Id., p. 26). If Mr. Punch found a safety infraction, he would report it directly to the

subcontractor, and, depending on the severity of the infraction, Plaza would also be notified (Id., p. 89). Further, Mr. Punch would lead weekly safety meetings with the subcontractors and Plaza (Id., pp. 26-27, 76).

In support of its argument that Plaza exercised supervision and control over the subcontractors' work, Sage points to the following EBT testimony of the Donaldson foreman, Eric Anderson:

> Q. Do you also receive something with regard to a progress schedule or a schedule which you, when I say you, I mean Donaldson, that is supposed to keep?
>
> A. There is a schedule that Plaza would have set and we would go to weekly foreman's meetings and the scheduling would go from that.
>
> * * *
>
> Q. Where would you get most of your information with regard to scheduling?
>
> A. My project managers and from the supers from Plaza.
>
> Q. Were there times when this project was behind schedule, if you know?
>
> A. Yes.
>
> Q. And at or about the time that plaintiff's accident occurred, was this project behind schedule?
>
> A. Yes.
>
> * * *
>
> Q. Was work done in a different order because the project was behind schedule to get certain tenants in?

A. At times, yes.

Q. And what about with regard to the space where plaintiff's accident occurred?

A. Yes, it was a little bit out of sequence because we had to close that ceiling in for an inspection. Whether all the trades were done or not, they told us to close the ceiling.

* * *

Q. Was there some kind of notice that went out to the other subcontractors advising them that you were closing up the ceiling?

A. Yes.

Q. And who sent that notice out?

A. Plaza did.

(Sage Cross-motion, Ex. F, pp. 72-75).

Plaintiff's, Lumpe's, and Anderson's testimony, supra, however, are insufficient to show that Atlas or Plaza exercised the requisite supervision, control, or direction over plaintiff's work (O'Sullivan v IDI Construction Company, Inc., 28 AD3d 225 [1st Dept 2006], affd 7 NY3d 805 [2006]. In that regard, plaintiff was clear that he received direction and supervision from the Donaldson foreman, Eric Anderson, not from Plaza, and that he had no contact with anyone from Atlas. Mr. Lumpe's testimony indicates that Plaza's role was to ensure that various contractors adhered to their respective contracts and time tables. As such, Plaza did not exercise the requisite degree of control over plaintiff's or the subcontractors' work to impose

liability under section 200 of the Labor Law or common-law negligence (Burkoski v Structure Tone, Inc., 40 AD3d 378 [1st Dept 2007]). In addition, that Total Safety managed the overall safety conditions of the project is also insufficient to raise a question of fact as to Plaza's negligence (Singh v Black Diamonds LLC, 24 AD3d 138, supra, [construction manager's superintendent's regular walk-throughs and authority to stop work to correct unsafe conditions is insufficient to trigger liability]). Finally, Mr. Anderson's testimony that the project was behind schedule, and that subcontractors were working out of order so as to close up the ceiling for inspection, is also not sufficient to establish the requisite supervisory control (Haider v Davis, 35 AD3d 363 [2nd Dept 2006] [owner's general supervision consisting mostly of inspections and admonitions to hurry the work was insufficient to raise triable issues of fact as to the owner's liability under Labor Law § 200 or based on common-law negligence]).

As for that branch of Sage's cross-motion to dismiss plaintiff's section 200 claim against it, that branch is granted. Sage, as the electrical contractor, was neither the owner nor the general contractor thus liability cannot be assessed against it under Labor Law § 200 (Scuderi v Independence Community Bank Corp., 65 AD3d 928 [1st Dept 2009]). In order to impose liability upon Sage pursuant to section 200, plaintiff must show

that Sage had authority and control over plaintiff's work (Bell v Bengomo Realty, Inc., 36 AD3d 479 [2007]). While Sage was responsible for the electrical work in the area of plaintiff's accident, thus, allegedly the instrumentality giving rise to plaintiff's accident, this, standing alone, is insufficient for a section 200 claim (Urban v No. 5 Times Square Development, LLC, 62 AD3d 553 [1st Dept 2009]). Indeed, nothing in the record would indicate to the contrary. To the extent plaintiff has exerted claims against Sage for common-law negligence, however, those claims survive (Id.).

Labor Law § 241[6]

Section 241[6] requires owners and contractors to provide reasonable and adequate protection and safety to workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the state Labor Department (Ross v Curtis-Palmer Hydro-Electric Company, 81 NY 2d 494 [1993]. The duty is non-delegable, and liability will be imposed upon an owner or contractor for the negligence of a subcontractor even in the absence of control or supervision of the worksite (Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]).

According to the supplemental bill of particulars, plaintiff's Labor Law § 241[6] claims are based on defendants' alleged violation of the New York State Industrial Code sections 23-1.15 (safety railings), 23-1.16 (safety belts, harnesses, tail

lines and lifelines), 23-1.17 (life nets), 23-1.21 (ladders), and 23-1.13 (electrical hazards), including 23-1.13(b)[4] (Pl.'s Opp'n, Ex. D). Defendants argue that these sections are inapplicable to this case because they only set forth how such items are to be constructed or the specifications required when such items are being used by a worker. The sections do not apply when a worker is not using the particular item.

Given that the facts of this case fail to show, and that plaintiff fails to address, how sections 23-1.15 (safety railings), 23-1.16 (safety belts, harnesses, tail lines, and lifelines), 23-1.17 (life nets), and 23-1.21 (ladders) apply to this case, plaintiff's claims under these sections are dismissed. Merely reciting these sections and claiming violations is not enough.

12 NYCRR § 23-1.13 requires that workers who may come into contact with an electric power circuit be "protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means." In this case, plaintiff's claims are sufficiently specific to support a claim under section 23-1.13 of the Industrial Code. Accordingly, that branch of Atlas' and Plaza's motion to dismiss plaintiff's Labor Law § 241[6] claim pursuant to a violation of 12 NYCRR § 23-1.13 is denied.

As for that branch of Sage's cross-motion dismissing the Labor Law § 241[6] claim against it, that branch is granted. Similar to the reasoning for dismissal of the Labor Law § 200 claim, Sage is neither an owner nor a general contractor and there is nothing in the record showing Sage exercised supervision or control over plaintiff's work (Scuderi v Independence Community Bank Corp., 65 AD3d 928, supra).

As for that branch of Donaldson's cross-motion to dismiss plaintiff's Labor Law § 241[6] claim, as plaintiff points out, there is no direct claim against Donaldson under Labor Law § 241[6]. Accordingly, that branch is denied on the ground that there is no basis for the relief sought.

Indemnification

Donaldson's cross-motion to dismiss the common-law indemnification claim is denied as premature given that factual issues exist as to which party, if any, was negligent (Barraco v First Lenox Terrace Associates, 25 AD3d 427 [1st Dept 2006]). In that regard, the project manager for Sage at the time of plaintiff's accident, Eric Gil, gave testimony that Jim Liotta, Sage's foreman, understood that "the cable was somehow disrupted by somebody or somehow" and that "it was safed off and tied up ... and that somehow, it must have [come] loose" (Sage Cross-motion, Ex. E, pp. 63-64). This testimony is contradicted by Eric Anderson's testimony that he looked at the actual BX cable

that caused plaintiff's accident and saw that "it was not safed off", and that "the wires were spliced and there were no wire nuts on them" (Moving Papers, Ex. I, pp. 48-49). Based on these conflicting accounts, factual issues exist as to whether Sage failed to ensure that the BX cable was properly safed off, or whether another contractor, possibly Donaldson, disrupted the cable causing it to lie on the grid.

Similarly, those branches of Sage's cross-motion for summary judgment dismissing the cross-claims of Atlas, Plaza, and Donaldson for indemnification are denied.

As for Atlas' and Plaza's contractual indemnification claims, these defendants proffer their contract with both Sage and Donaldson which includes the same indemnification provision in both contracts (Moving Papers, Exs. K and M, Article 9). The indemnification provision provides as follows:

> To the extent permitted by law, Subcontractor shall indemnify, defend, save and hold the Owner, the Contractor ... harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:
>
> 1. The performance of Work by the Subcontractor, or any of its Sub-Subcontractors, any act or omission of any of the foregoing;
>
> 2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work ... (b) while any of the Subcontractor's property, equipment or personnel

> are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work.

Based on Atlas' and Plaza's lack of supervision and control over plaintiff's work, their liability, if any, would only be vicarious and statutory under Labor Law 241[6]. As such, Atlas and Plaza are entitled to enforce the indemnification provisions in their agreements with Sage and Donaldson (Macedo v J.D. Posillico, Inc., 68 AD3d 508 [1st Dept 2009]; Aarons v 401 Hotel, LP, 12 AD3d 293 [1st Dept 2004]).

Accordingly, conditional summary judgment is granted on those branches of Atlas' and Plaza's motion for contractual and common-law indemnification against Sage and Donaldson pending a determination of negligence.

Accordingly, it is

ORDERED that those branches of defendants' motion and cross-motion dismissing plaintiff's Labor Law §§ 240[1] and 200 claims are granted, and those claims are dismissed; and it is further

ORDERED that the branch of defendants Atlas' and Plaza's motion to dismiss plaintiff's Labor Law § 241[6] claim pursuant to a violation of 12 NYCRR § 23-1.13 against them is denied; and it is further

ORDERED that the branch of defendant Sage's cross-motion to dismiss the Labor Law § 241[6] claim against it is granted; and it is further

ORDERED that those branches of defendants Atlas' and Plaza's motion for contractual and common-law indemnification against Sage and Donaldson are granted to the extent of awarding conditional summary judgment on those claims; and it is further

ORDERED that those branches of defendant Sage's cross-motion to dismiss the cross-claims against it for indemnification are denied; and it is further

ORDERED that the branch of third-party defendant Donaldson's cross-motion for common-law indemnification against Sage is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/20/11

HON. JEFFREY K. OING, J.S.C.