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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 102634/2009

SCOTT, MARKUS

VS

PINNACLE CONTRACTORS OF NY

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 102634/2009

MOTION DATE

MOTION SEQ. NO. 003

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/10/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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MARKUS SCOTT,

Plaintiff,

-against-

PINNACLE CONTRACTORS OF NY, INC. and RIVER TERRACE APARTMENTS, LLC c/o C&K PROPERTIES

Defendants.

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DECISION/ORDER
Index No.: 102634/09
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def River Terrace's n/m (3212) w/JDR affirm, exhs	1
Pltf's x/m (3212) w/BCA affirm	2
Def Pinnacle's opp w/BG affirm	3
Def Pinnacle's x/m (3212) w/BG affirm, exhs	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for personal injuries allegedly sustained by plaintiff, Markus Scott ("Scott" or "plaintiff"). Defendants are Pinnacle Contractors of NY, Inc. ("Pinnacle") and River Terrace Apartments, LLC c/o C&K Properties ("River Terrace"). Plaintiff claims his injuries were proximately caused by defendants' violation of Labor Law §§ 200, 240(1) and 241(6).

Issue has been joined and River Terrace seeks summary judgment dismissing the complaint and all cross-claims against it. Plaintiff cross-moves for summary judgment on its Labor Law § 241(6) claim. Pinnacle cross-moves for summary

judgment dismissing the complaint and all cross-claims against it. River Terrace and plaintiff's motions were timely brought after plaintiff filed his note of issue on June 24, 2010. Since River Terrace's motion is timely, it can and will be decided on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004). However, Pinnacle's cross-motion for summary judgment was made on October 27, 2010, which is more than 120 days after the note of issue was filed, and is, therefore, untimely (further discussion below). *See* Brill v. City of New York, *supra*.

Arguments Presented

On September 23, 2008, the date of the accident, Scott was employed by non-party, Construction Force Systems, LLC ("CFS"), to perform demolition work. He was injured at approximately 11:15 a.m. while working on the 3rd floor of a construction project located at 515 East 72nd Street, New York, New York (the "Premises"). River Terrace is the owner of the Premises and Pinnacle was hired as the general contractor.

Scott provided a bill of particulars and was deposed. During his examination before trial ("EBT"), Scott testified that he began working at the Premises approximately two to three months prior to the accident. Scott testified that, on the date of his accident, he was working for CFS and that Marvin Hernandez was the foreman from Pinnacle. Scott testified that Hernandez "addresses the group of us, letting us know what our job description was; garbage removal; might have us doing a little demolition."

Scott testified that at the time of his accident, Hernandez asked him to remove garbage, specifically AC units, from the third floor. Scott stated that to remove the garbage, he was using a gray container plastic bin with a handle and wheels, similar in

shape to the back of a dump truck. Scott stated that he told Hernandez that he needed another guy to give him a hand because each unit weighed approximately 85-90lbs, but that Hernandez responded, "I'll send somebody as soon as I get somebody free. Just continue the work." Scott stated that the bins were supposed to have four wheels, but his bin only had two wheels. Scott also stated that when he told Hernandez there were no more bins with four wheels, he was told to make do with what he had and to start moving the AC units. Scott testified that "the weight of the ACs fell backwards and as it was coming back toward me before I let it hit my groin section I had grabbed it with my hand from the handles and the weight was too much for my hand and it pushed my thumb back."

Hernandez was also deposed. Hernandez testified at his deposition that he is employed as a labor foreman for Pinnace and is responsible for distributing work to the laborers. Hernandez stated that on the date of the accident he was the only labor foreman employed by Pinnacle on that job site. Hernandez testified that all problems on the job site would be reported to him and he would be responsible for fixing it, depending on the request, but that no complaints had been made. Hernandez stated that back in September of 2008, there were approximately five to seven supers who would be present at the job site on a daily basis

John Prendergast ("Pendergast") testified that at the time of the accident, he was a project manager for Pinnacle, which involved in-office work such as coordinating submittals, billings, and going to project meetings with owners. Prendergast testified that Pinnacle was not responsible for the construction work, rather, they managed the trades on the job by telling the laborers "what work had to be done, the schedules they

had to meet and so forth . . . we coordinated what they had to do." Prendergast stated that Rich Furlow from River Terrace was present on the job site making sure that Pinnacle was performing its duties.

James Sheehan ("Sheehan") testified that he is an owner's representative for River Terrace. Sheehan stated that River Terrace acquires and develops properties and converts them into luxury condominiums. Sheehan stated that Keith Allone managed the Premises and was the on-site property manager at the time of the accident. Sheehan stated that in September of 2008, River Terrace owned approximately ninety percent of the units in the building. River Terrace hired Pinnacle to be the general contractor for "the amenities portion of the project. That included the renovation of the lobby, the gym, the health club, the pool, the spa, and all the other amenity areas in the project . . ." from late 2006/early 2007 through February 2009. Pinnacle was also hired to be the construction manager for all apartment renovations. When asked whether he directed or supervised the work of any of the laborers at the Premises, he responded "absolutely not." He stated that communications between River Terrace and the individuals at the Premises were "to get updates of the progress . . . issues . . . that needed ownership input . . . funding of the job site for the trades, payment issues . . ." Sheehan stated that he did not have any interaction with the labor foreman, other than to say hello and that River Terrace had no authority to fire anyone from CFS or to stop work on the project for any reason. Sheehan stated that he was unaware of any problems with the carts and of any complaints prior to the incident.

River Terrace contends that it is entitled to: (1) summary judgment dismissing the complaint and all cross-claims against it; and (2) indemnification from Pinnacle.

River Terrace argues that § 240(1) is inapplicable to the facts of this case; that § 200 should be dismissed because River Terrace did not have the requisite superivision, director, or control over plaintiff's work; and that plaintiff's § 241(6) claim is not supported by sufficient evidence.

Plaintiff cross-moves for summary judgment on its labor law 241(6) claim for failure to comply with Industrial Code § 23-1.28(b) and to set this matter down for an assessment of damages.

Pinnacle cross-moves for summary judgment on the basis that plaintiff was a special employee of Pinnacle at the time of the accident and Pinnacle is, therefore, protected by Worker's Compensation Law §§ 11 and 29(6).

A cross-motion for summary judgment made after the expiration of the statutory 120-day period, even in the absence of good cause, is properly considered where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross-motion (Fahrenholz v. Security Mut. Ins. Co., 32 A.D.3d 1326, 1328 [2006]; Bressingham v. Jamaica Hosp. Med. Ctr., 17 A.D.3d 496, 497 [2005]). Filannino v. Triborough Bridge and Tunnel Authority, 34 A.D.3d 280 (1st Dept. 2006). In such circumstances, the issues raised by the untimely cross-motion are already properly before the court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212[a]) to review the merits of the untimely cross motion (*see* Grande v. Peteroy, 39 A.D.3d at 592). Snolis v. Clare, 81 A.D.3d 923 (2d Dept. 2011).

Here, Pinnacle's cross-motion for summary judgment is based on entirely different grounds (i.e.- worker's compensation law), and since late, will not be

considered by the court for summary judgment. This defense, however, is still available at trial.

Applicable Law

"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." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64 (1980). Only if this burden is met, will it then shift to the opposing party, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See* Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003)

Discussion

Labor Law § 240 (1)

Labor Law § 240(1), commonly known as the "scaffold law," was enacted to

protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site. Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 (1st Dept 2007) *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 (1995). The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed. Panek v. County of Albany, 99 N.Y.2d 452 (2003).

The statute is not intended to protect construction workers from routine workplace risks, but from pronounced risks arising from construction work site elevation differentials. This means that there is no liability under this statute unless the accident is attributable to that kind of risk. Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 (2009). Consequently, the statute's protections extend only to a narrow class of special hazards [Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914 [1999]) and not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1). Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001).

In order to recover damages for violation of the statute, the "plaintiff must show more than simply that an object fell causing injury to a worker." Novak v. Del Savio, 64 A.D.3d 636 (2d Dept. 2009) *citing* Narducci, *supra*. The single decisive issue of whether plaintiff has a claim under Labor Law § 240(1) is whether his injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Runner, *supra*.

Here, plaintiff's accident did not involve an elevation injury. In fact, it is

undisputed that plaintiff's accident occurred while he was pushing a bin with AC units on the third floor of the Premises.

Accordingly, River Terrace's motion for summary judgment dismissing plaintiff's second cause of action (violation of Labor Law § 240[1]) is granted and plaintiff's second cause of action is hereby severed and dismissed.

Labor Law § 241 (6)

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers. Comes v. New York State Electric & Gas Co., 82 N.Y.2d 876 (1993); Rizzuto v L.A. Wenger Contr. Co., 91 N.Y.2d 343, 348 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993). To properly state a claim under Labor Law § 241(6), the plaintiff must identify a specific and applicable Industrial Code provision that has been violated. Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*. The question of whether the plaintiff has alleged a specific provision of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 A.D.2d 121 (1st Dept. 2002).

Plaintiff is relying on provision 12 NYCRR §§ 1.28(a) and (b)[1] of the Industrial Code in seeking liability under Labor Law § 241(6). Defendants claim that this provision

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[1]Plaintiff's complaint asserts a cause of action for Labor Law § 241(6) without identifying Industrial Code §§ 1.28(a) and (b). However, these provisions, though not pled, have been addressed on the merits by defendants. Therefore, the court will address these claims on the merits, as well.

has no application under the facts of this case.

12 NYCRR §§ 1.28 provides:

> (a) Maintenance. Hand-propelled vehicles shall be maintained in good repair. Hand-propelled vehicles having damaged handles or any loose parts shall not be used.
>
> (b) Wheels and handles. Wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles. Buggy handles shall not extend beyond the wheels on either side.

Here, plaintiff alleges that his accident resulted from the damaged bin. Scott testified that the bin was supposed to have four wheels, but that the remaining bins only had two wheels or less. Scott was instructed by Hernandez to continue working with the two-wheeled bin, despite the inadequate number of wheels. The court finds that the bin was clearly not "maintained in good repair" and that the wheels were not "well secured to the frame[ ]," as required under §§ 1.28(a) and (b). 12 NYCRR § 1.28(a) and (b) is, therefore, applicable and provides a basis for liability under Labor Law § 241(6).

Plaintiff has made a *prima facie* case that defendants violated this section of the Industrial Code. Since defendants have not set forth any triable issues of fact [Alvarez, *supra*; Zuckerman, *supra*], plaintiff's motion for summary judgment is granted only insofar as a finding that Industrial Code §§ 1.28(a) and (b) have been violated; and River Terrace's motion for summary judgment on this provision is denied. Notwithstanding that plaintiff has shown *prima facie* liability and is entitled to summary judgment under Labor Law § 241(6), Pinnacle may still defend liability as to it based upon the special employee defense, on which it has the burden of proof. Nelson v.

Shaner Cable, Inc., 56 A.D.2d 1263 (4th Dept. 2008).

Accordingly, plaintiff's motion for summary judgment is granted to the extent of finding that Labor Law § 241(6) was violated in connection with Industrial Code §§ 1.28(a) and (b). As a consequence, liability is established as to River Terrace. However, since Pinnacle has raised a special employee defense, that defense needs to be resolved before the Court can draw any conclusion as to Pinnacle's liability.

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto, *supra*. Unlike Labor Law § 241(6), liability can be imposed only if the defendant has actually been negligent. The party moving for summary judgment on this cause of action must prove it did not exercise supervision and control over injury producing work, or have actual or constructive notice of the dangerous condition alleged, or create the condition. Sheridan v. Beaver Tower Inc., 229 A.D.2d 302 (1st Dept. 1996) *lv den* 89 N.Y.2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 A.D.3d 225 *aff'd* 7 N.Y.3d 805 (2006); Rizzuto, *supra*; Gonzalez v. United Parcel Serv., 249 A.D.2d 210 (1st Dept. 1998).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200. Comes v. New York State Elec. & Gas Corp., 82

N.Y.2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505 (1993). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., 40 A.D.3d 305 (1st Dept. 2007); Brown v. New York City Economic Dev. Corp., 234 A.D.2d 33 (1st Dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

River Terrace has met the initial burden of showing that it did not control the manner in which the plaintiff performed his work, i.e. how the injury producing work was performed. Hughes v. Tishman Construction Corp., *supra* at 2. Plaintiff's Labor Law § 200 claim is deemed abandoned as plaintiff does not address or oppose this portion of defendant's motion and plaintiff has not come forward to present factual disputes that have to be tried on this issue.

Therefore, River Terrace's motion for summary judgment, dismissing plaintiff's cause of action for Labor Law § 200 is granted and plaintiff's first cause of action is hereby severed and dismissed against River Terrace.

Indemnification

River Terrace also seeks indemnification from Pinnacle for contractual and common law indemnification. Under the "Standard Form Agreement Between Owner and Construction Manager" dated September 2007, Pinnacle is obligated to indemnify and hold River Terrace harmless from any injuries in connection with services under the Agreement (¶ 9).

Generally, a party seeking contractual indemnification must "prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." Cava Construction. Co., Inc. V. Gealtec Remodeling Corp., 58 A.D.3d 660 (2d Dept. 2009). There are no actions by River Terrace that constitute negligence on its part. Liability against River Terrace is only predicated on Labor Law § 241(6), which is strict statutory liability. German v. City of New York, 14 Misc.3d 1204(A) (NY Sup. 2006). Thus, River Terrace is entitled to conditional summary judgment that it is entitled to contractual indemnification from Pinnacle, the amount to be determined at and immediately after trial.

Conclusion

It is hereby:

ORDERED that defendant, RIVER TERRACE APARTMENTS, LLC c/o C&K PROPERTIES' motion for summary judgment is granted to the extent that plaintiff's first and second causes of action for violation of Labor Law §§ 200 and 240(1) are hereby severed and dismissed against RIVER TERRACE APARTMENTS, LLC c/o C&K PROPERTIES; and it is further

ORDERED that defendant, RIVER TERRACE APARTMENTS, LLC c/o C&K PROPERTIES' motion for summary judgment is denied as to plaintiff's third cause of action; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted to the extent of declaring that PINNACLE CONTRACTORS OF NY, INC. and RIVER

TERRACE APARTMENTS, LLC c/o C&K PROPERTIES violated Industrial Code §§ 1.28(a) and (b) in violation of Labor Law § 241(6), and setting it down for an inquest of damages against RIVER TERRACE APARTMENTS, LLC c/o C&K PROPERTIES and otherwise proceeding to trial on the special employee defense and damages as to PINNACLE CONTRACTORS OF NY, INC.; and it is further

ORDERED that RIVER TERRACE APARTMENTS, LLC c/o C&K PROPERTIES is entitled to conditional summary judgment that it is entitled to contractual indemnification from Pinnacle, the amount to be determined at and immediately after trial; and it is further

ORDERED that this case is ready for trial. The plaintiff is directed to immediately file a copy of this decision with Trial Assignment Part 40, so that the issue of damages may be tried; and it is further

ORDERED that any relief requested, but not expressly addressed has nonetheless been considered by the court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
May 10, 2011

So Ordered:

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. JUDITH J. GISCHE, J.S.C.