[* 1]

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

PRESENT: DEBRA A. JAMES PART 59
Justice

EDWARD WINTERS,

Plaintiff,

- v -

LC MAIN LLC, THE RITZ-CARLTON HOTEL COMPANY of NEW YORK, INC. and GEORGE FULLER COMPANY INC.,

Defendants.

Index No.: 109387/07

Motion Date: 05/05/11

Motion Seq. No.: 004

Motion Cal. No.: _____

LC MAIN LLC and GEORGE A. FULLER COMPANY, INC.,

Third Party Plaintiff,

- v -

ROGER & SONS CONCRETE INC.,

Third Party Defendant.

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Notice of Cross Motion/Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☒ Yes ☐ No

The motion is decided in accordance with the attached Decision and Order.

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

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 59

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EDWARD WINTERS,

Plaintiff,

-against-

LC MAIN LLC, THE RITZ-CARLTON HOTEL COMPANY OF NEW YORK, INC., and GEORGE A. FULLER COMPANY, INC.,

Defendants.

----------x

LC MAIN LLC, and GEORGE A. FULLER COMPANY, INC.,

Third-Party Plaintiff,

-against-

ROGER & SONS CONCRETE INC.,

Third-Party Defendant.

----------x

Index No.: 109387/07

DECISION and ORDER

DEBRA A. JAMES, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, defendants LC Main LLC (LC Main) and George A. Fuller Company Inc. (Fuller)[1] move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them, and for summary judgment on their third-party complaint against third party defendant Roger & Sons Concrete,

[1] By so-ordered stipulation, dated August 17, 2009, the name of defendant George A. Fuller Construction Management, Inc. was corrected to reflect its proper name, George A. Fuller Company Inc.

Inc. (Roger) alleging common-law and contractual indemnification. Plaintiff Edward Winters (Winters) cross-moves, pursuant to CPLR 3212, for summary judgment against defendants with respect to liability on his Labor Law § 240 (1) cause of action.

In motion sequence number 005, third-party defendant Roger moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint.

Winter brought this action alleging personal injuries sustained during the course of his employment at the premises known as 221 Main Street, White Plains, New York. Winters has been a journeyman union carpenter since 1986, and holds a scaffold license from local union 11 and a safety certificate from Occupational Safety and Health Administration.

At his examination before trial, Winters testified that he received instructions from his foreman, Billy Koch (Koch) or another Roger employee only. His accident occurred on March 21, 2006, at approximately 1 P.M., when Winters was erecting a scaffold on the second floor, using U-shaped pipe scaffolding and planks. Standing on the scaffolding, he was being handed sections of the scaffolding from a co-worker, Tommy, who was standing on the ground, and lost his footing and almost dropped the scaffolding. Winters testified that the section that was handed to him was approximately five by six feet, and weighed approximately 50-75 pounds. Winters further stated that the

platform on which he was standing consisted of three 10-inch by two-inch planks that were placed side-by-side, but were not joined or secured. Winters did not fall, but stated that, as he bent down to hold on to the U-shaped section, which he almost dropped but which did not leave his hands, he felt a sharp pain in the right side of his lower back. Winters further said that he did not know what caused him to lose his footing; there was nothing on the planks that caused him to lose his footing; he did not see any debris on the planks where he was standing. Winters continued that he did not feel the scaffold shake or move and that he was not doing anything differently than he has been doing previously on that day while erecting the scaffold. According to Winters, in his experience, the procedure that he was using was the procedure that he always used when erecting scaffolding.

Winters never made any complaints about the working conditions at the job site prior to the incident in question, and he did not ask for different equipment than what he was provided in order to perform his job functions.

Bruce Wicks (Wicks) was the construction superintendent at the job site, employed by Fuller, and was responsible for constructing the concrete portion of the project. Wicks testified that steel piping scaffolds are erected by hand, and that no hoisting materials or mechanisms are used, although sometimes a simple rope is employed to pull up frames. Wicks

stated that it usually takes two men to erect a section of scaffolding, one man passing a section of the scaffold by hand up to another man to install it; that the workers who erected the scaffolding sometimes used harnesses as they erect the scaffolding; that Roger provided the harnesses or lanyards to its personnel at the job site. Wicks further stated that he did not learn of Winters' accident until one month before his deposition.

Peter Rodriguez (Rodriguez) was employed as the project manager at the job site. Fuller, the construction manager for the project, hired Roger. Roger's job was to install concrete work, foundation and superstructure at the job site, which involved a subterranean parking garage and two 49-story towers, with one 10-story hotel located between the two towers.

Rodriguez stated that Roger employees received instructions from their foremen at the site, and that Roger did not hire any subcontractors for this project. According to Rodriguez, Roger provided its workers with fall harnesses, hard hats, safety glasses and ear protection, and a lot of safety material was stored in his office, which was adjacent to the job site. However, Rodriguez also stated that no hoisting machinery, other than ropes, was used at this work site.

Rodriguez said that Roger used 10k scaffolding, which is what is generally used to create the support for horizontal formwork, and that such scaffolding comes in pieces that snap

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together in an engineered fashion. The individual components can weigh anywhere from 15 to 60 pounds, and sometimes ropes are used to pull the scaffolding components up to the place where they are to be installed, although it was standard practice for the workers to lift the scaffold components by hand.

Rodriguez testified that he was at the job site every day, but that he did not recall when he first learned of the incident that is the subject of this litigation, and that he was not involved in preparing the accident report.

Pursuant to a Memorandum of Understanding (MOU) between Fuller, the construction manager, and Roger, Roger was engaged to manage the construction of all concrete foundation and superstructure work at the project. Under the MOU, Fuller was responsible for all costs related to the project. Roger alleges that the MOU was incorporated into a contract between the parties. The contract was signed only by Roger; there is no signature in the space provided for Fuller's signature, and several lines and portions of lines are crossed out by hand.

Section 1.5 of the contract states that Roger was responsible for its means and methods of doing the work. Further, Schedule E of the contract states:

> "To the fullest extent permitted by law, [Roger] shall indemnify, hold harmless and defend [Fuller] and Owner and all of its agents and employees and additional insured listed below from and against all claims, damages, losses and expenses including attorneys' fees arising and additional insured listed below out of or resulting

> from the performance of the Agreement, provided that such claims, damage, loss or expense ... is caused in whole by any act or omission of [Roger] ... ."

This section of the contract contains many portions that were crossed out.

The contract designates LC Main as owner, and requires Roger to procure and maintain general commercial liability insurance. Roger obtained such a policy, in which Fuller and LC Main are named as additional insureds.

The complaint alleges causes of action based on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). The bill of particulars also alleges violations of the Industrial Code: 12 NYCRR (Industrial Code) 23-1.3, 23-1.4, 23-1.5, 23-1.7, 23-5 and 23-6. In his opposition to the instant motion, Winters argues the applicability of sections 23-1.7, 23-5.1 (b), (e), (h) and (f), 23-5.3 (e), (f) and (g), and 23-6 only. The court deems as abandoned by Winter the other sections of the Industrial Code.

To sustain a cause of action for breach of Labor Law § 200, the codification of the common-law duty to provide workers with a safe work environment, the injured worker must demonstrate that defendant created the unsafe condition, or that it had actual or constructive knowledge of the unsafe condition that caused the accident. See Murphy v Columbia University, 4 AD3d 200 (1st Dept 2004). Moreover, to constitute constructive notice, the alleged

defect must be visible and apparent for a length of time before the accident that is sufficient to permit defendant to discover and remedy it. Gordon v American Museum of Natural History, 67 NY2d 836 (1986).

In terms of evaluating the evidence, courts have consistently held that self-serving affidavits that contradict prior testimony create a mere feigned issue of fact and are insufficient to defeat a motion for summary judgment. Garcia-Martinez v City of New York, 68 AD3d 428 (1st Dept 2009); Telfeyan v City of New York, 40 AD3d 372 (1st Dept 2007); Lupinsky v Windham Construction Corp, 293 AD2d 317 (1st Dept 2002); Harty v Lenci, 294 AD2d 296 (1st Dept 2002); Phillips v Bronx Lebanon Hospital, 268 AD2d 318 (1st Dept 2000).

The court finds that defendants did not create a hazardous condition, which Winters alleges for the first time in his affidavit was the unsecured planks. Winters fails to raise an issue of fact as to whether defendants had actual or constructive notice of such condition.

If the injured worker claims that the accident arises from the means and methods employed to perform the work, under Labor Law § 200, he must show that the defendant exercised supervisory control over the injury-producing work. Comes v New York State Electric & Gas Corp, 82 NY2d 876 (1993). In this regard, the court finds that Winters was supervised and controlled by his

employer Roger only, not by the primary defendants. Winters' contention that the general supervisory function of Fuller over the work site is sufficient to indicate control over his work is a contention that has been consistently found to be without merit by the courts. Colozzo v National Center Foundation, Inc., 30 AD3d 251 (1st Dept 2006).

Therefore, based on the foregoing, the court grants that part of LC Main and Fuller's motion, and Roger's motion, seeking to dismiss the portion of Winters' complaint alleging common-law negligence and violations of Labor Law § 200.

The court likewise grants the portion of LC Main and Fuller's motion, and Roger's motion, seeking to dismiss that portion of Winters' complaint alleging a violation of Labor Law § 240 (1). It denies that portion of Winters' cross motion seeking summary judgment on the issue of defendants' liability for a violation of Labor Law § 240 (1).

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]."

In an opinion rendered ten years after Rocovich, the Court of Appeals reasoned that

> "Labor Law § 240 (1) applies to both 'falling worker' and 'falling object' cases. With respect to falling objects, Labor Law § 240 (1) applies 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.' Thus, for section 240 (1) to apply, a plaintiff must show ... 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.
>
> In addition, the fact that an injured plaintiff may have been working at an elevation when the object fell is of no moment in a 'falling object' case, because a different type of hazard is involved. Working at an elevation does not increase the risk of being hit by an improperly hoisted load of materials from above. The hazard posed by working at an elevation is that, in the absence of adequate safety devices (e.g., scaffolds, ladders), a worker might be injured in a fall. By contrast, falling objects are associated with the failure to use a different type of safety device (e.g., ropes, pulleys, irons) also enumerated in the statute [internal citations omitted]."

Narducci v Manhasset Bay Associates, 96 NY2d 259, 267-268 (2001).

However, "where a plaintiff 'was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1),' the plaintiff cannot recover under the statute [internal citation omitted]" (Toefer v Long Island Rail Road, 4 NY3d 399, 407 [2005]).

There is no evidence in the record that raises an issue of fact that height risk resulted in Winter's injury. There is no credible evidence that Winters' foot slipped due to the effects of gravity or that the section of scaffold in his hand fell at all, much less due to gravity.

According to Winters' deposition testimony, his foot slipped, but he does not know what caused his foot to slip. When his foot slipped, he was already holding the section of the scaffold that his co-worker had passed up to him, and he was thrust forward while maintaining his grip on the section of the scaffold in his hand. He alleges that this movement wrenched his back.

Moreover, Winters testified that procedures and methods being used at the time of the occurrence were those normally used in such situations. Thus, although Winters was elevated on the scaffold at the time of the occurrence, his injury was not caused by an elevation-related risk, but arose out of the ordinary and usual perils associated with construction sites. Neither Winters

nor the section of scaffolding in his hands fell. Further, Winters testified that he had been engaged in the same type of work for approximately twenty years at the time of his accident, and that the procedures that he was using to erect the scaffold were the procedures that he always used for such work. It is only in his affidavit submitted in opposition to the motion at bar that Winters claims that the scaffold boards were loose and unsecured, and that the section of scaffold being lifted to him should have been secured.

Simply stated, the cause of Winters' alleged injuries did not result from the risks inherent in an elevation-related task (Rocovich v Consolidated Edison Company, 78 NY2d 509 [1991]), and, therefore, he is not afforded the protection of Labor Law § 240 (1).

Labor Law § 241 (6) states:

> "Construction, excavation and demolition work. 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. Rizzuto v L.A. Wenger Contracting Co., Inc, 91 NY2d 343 (1998).

12 NYCRR 23-1.7 (d), alleged by Winters to have been violated, "unequivocally directs employers not to '*suffer or permit any employee*' to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that 'any foreign substance which may cause slippery footing *shall be removed ... to provide safe footing.*" *Id.* at 350-351. However, Winters testified that he did not know what caused his foot to slip, and that there was no debris or any other material on the scaffold that caused his foot to slip. Therefore, this section of the Industrial Code does not apply to the facts as alleged by Winters.

12 NYCRR 23-5.1 contains general provisions applicable to all scaffolds. Winters has alleged, in his bill of particulars, that subsections (b), (e), (h) and (j) of this section of the Industrial Code were violated.

12 NYCRR 23-5.1 (b) concerns scaffold footing or anchorage, and Winters did not allege that there was any problem with the scaffold footing or anchorage, and so the court finds that this subsection of Industrial Code does not apply to the facts of the case.

12 NYCRR 23-5.1 (e) concerns the length of scaffold planking, and there is nothing in the record that indicates that this section of the Industrial Code was violated.

12 NYCRR 23-5.1 (h) requires that scaffolds be erected and removed under the supervision of a designated person. Winters has provided no evidence with regard to this subsection of the Industrial Code.

12 NYCRR 23-5.1 (j) requires the use of safety railings, but there is no specific allegation regarding safety railings in the complaint or in the bill of particulars.

Based on the foregoing, the court concludes that there was no applicable violation of 12 NYCRR 23-5.1 in the case at bar.

Similarly, the court finds 12 NYCRR 23-5.3 the court inapplicable to the matter at hand. Although Industrial Code 23-5.3 (g) has been found sufficient to support a Labor Law § 241 (6) cause of action (Mugavero v Windows by Hart, Inc, 69 AD3d 694 [2d Dept 2010]), this section of the Industrial Code concerns general provisions with respect to metal scaffolds, and the subsections cited by Winters involve safety railings, access and footing. Winters has failed to provide any supporting evidence that any of those subsections has been violated.

Finally, with respect to Winters' Labor Law § 241 (6) claim, Winters alleges a violation of 12 NYCRR 23-6.0, which involves general requirements for maintaining hoisting equipment.

However, no hoisting equipment was involved in Winters' accident, and so this section of the Industrial Code is similarly found unavailing to support Winters' Labor Law § 241 (6) cause of action.

Based on the foregoing, the court grants the portion of LC Main and Fuller's motion, and Roger's motion, seeking to dismiss Winters' Labor Law § 241 (6) cause of action.

Lastly, the court must address that portion of LC Main and Fuller's motion seeking common-law and contractual defense and indemnification from Roger.

The Workers' Compensation Law prohibits a party from claiming common-law indemnification against an injured worker's employer absent a "grave injury" as defined in the statute. Castro v United Container Machinery Group, Inc, 96 NY2d 398 (2001). None of the "grave injuries" enumerated in the statute apply to Winters' injuries (*Fleming v Graham*, 10 NY3d 296 [2008]), and defendants do not argue that Winters suffered such an injury. Therefore, the court concludes that LC Main and Fuller are not entitled to common-law indemnification from Roger.

However, even if an injured worker's employer is shielded from common-law indemnification liability to third parties by the Workers' Compensation Law, the employer may be so bound contractually. Flores v Lower East Side Service Center, 4 NY3d 363 (2005). Therefore, the issue before the court is whether

Roger is bound by the provisions of its unsigned contract with movants.

In the case at bar, the contract that would provide for contractual indemnification was not signed by Roger, the party to be charged.

> "[A] contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute**such as the statute of frauds (General Obligations Law § 5-701)**that imposes such a requirement.
>
> * * *
>
> In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look ... to the objective manifestations of the intent of the parties as gathered by their express words and deeds ... .
>
> * * *
>
> [A]n unsigned contract may be enforeceable, provided there is objective evidence establishing that the parties intended to be bound [internal quotation marks and citations omitted]."

Id. at 368-369.

LC Main and Fuller contend that the course of conduct between the parties, and Roger's purchase of general commercial liability insurance naming them as additional insureds, also a provision in the unsigned agreement, evidence an intent by Roger to be bound by the contract's provisions. The court disagrees.

"[A]n agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify [internal quotation marks and citation omitted]." Longwood Central School District v American Employers Insurance Company, 35 AD3d 550, 551 (2d Dept 2006). The two provisions,

one for indemnification and one for acquisition of insurance, are not mutually enforceable, and simply because Roger purchased general commercial liability insurance naming movants as additional insureds does not automatically mean that it agreed to be contractually obligated to indemnify movants, or to be subject to any other provision of the unexecuted agreement.

In addition, the unexecuted contract in question had many sections of the indemnification provision inked out by Fuller, which raises the question as to whether Roger either did not know about the changes or was unwilling to sign the agreement as amended by Fuller. This is contrary to an assertion that Roger agreed to be bound to the contract, at least with respect to the indemnification clause.

Therefore, the court denies that portion of LC Main and Fuller's motion seeking contractual indemnification from Roger. In reaching this conclusion, the court passes no judgment on LC Main and Fuller's right to defense and indemnification costs under Roger's general commercial liability insurance contract as additional insureds, since that issue and policy are not presently before the court.

Based on the foregoing, it is hereby

ORDERED that the portion of defendants LC Main LLC and George A. Fuller Company Inc.'s motion (motion sequence number 004) to dismiss the complaint herein is granted and the complaint

is dismissed as against such defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the portion of defendants LC Main LLC and George A. Fuller Company Inc.'s motion seeking common-law and contractual indemnification against third-party defendant Roger & Sons Concrete, Inc. is denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that third-party defendant Roger & Sons Concrete, Inc.'s motion (motion sequence 005) to dismiss the third party complaint is granted.

Dated: May 3, 2011

ENTER:

DEBRA A. JAMES, J.S.C.

DEBRA A. JAMES
J.S.C.

FILED

MAY 20 2011

NEW YORK
COUNTY CLERK'S OFFICE