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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 601667/2008

NIEVES-HOQUE, ILIA

VS

680 BROADWAY

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/31/11

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 ...	1-3
Answering Affidavits — Exhibits _____	4-8
Replying Affidavits _____	9-12

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. - Pre-trial conference scheduled for Aug 22, 2011 at 2 PM.

FILED

JUL 27 2011

COUNTY CLERK'S OFFICE NEW YORK

Dated: 7/26/11

JANE S. SOLOMON 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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----------X

ILIA NIEVES-HOQUE as ADMINISTRATRIX OF THE ESTATE OF M.D. ROBIUL HOQUE,

Plaintiff,

-against-

680 BROADWAY, LLC, MARC JANCOU FINE ART LIMITED, and ATLANTIC ELECTRICAL CONTRACTING, INC.

Defendants,

----------X

Index No. 601667/08

DECISION and ORDER

680 BROADWAY, LLC,

Third Party Plaintiff,

-against-

M.D. ROBIUL HOQUE CO., INC.,

Third Party Defendant,

----------X

Index No. 590711/08

ATLANTIC ELECTRICAL CONTRACTING, INC.,

Second Third Party Plaintiff,

-against-

M.D. ROBIUL HOQUE CO., INC.,

Second Third Party Defendant,

----------X

Index No. 591105/08

MARC JANCOU FINE ART LIMITED,

Third Third Party Plaintiff,

-against-

M.D. ROBIUL HOQUE CO., INC.,

Third Third Party Defendant.

----------X

Index No. 590242/09

JANE S. SOLOMON, J.:

Defendants 680 Broadway, LLC (motion sequence 005),

Marc Jancou Fine Art Limited (motion sequence 006), and Atlantic Electrical Contracting, Inc. (motion sequence 008) move for summary judgment dismissing the complaint. Third-party defendant M.D. Robiul Hoque Co., Inc. moves for summary judgment dismissing the third-party complaints against it. By stipulation, the complaint and all cross-claims by and against Atlantic Electrical are dismissed, as is its third-party complaint against M.D. Robiul Hoque Co., Inc., so motion 008 is moot. The remaining motions are decided as follows.

Plaintiff's decedent, M.D. Robiul Hoque (Hoque), was the principal owner of third-party defendant M.D. Robiul Hoque Co., Inc. (M.D. Robiul Hoque Co.). He was a building contractor and carpenter. In the evening of October 11, 2007, Hoque and an employee of M.D. Robiul Hoque Co. named Metin Mourad (Mourad) delivered wooden boards to be used to construct book shelves at the art gallery operated by defendant Marc Jancou Fine Art Limited (Jancou Fine Art), located at 680 Broadway in Manhattan. Defendant 680 Broadway, LLC (Landlord) owned the building and leased the gallery to Jancou Fine Art.

Hoque had purchased the wood earlier that day, and transported it to Jancou Fine Art on top of a van owned by M.D. Robiul Hoque Co. A heavy rain had fallen, and the wood was covered with paper and plastic, and tied to the roof rack. Hoque parked the van in a private alley behind the building. He climbed to the top of the van, untied the boards, and handed them

down one at a time to Mourad, who carried them into the art gallery. As Mourad placed the final board within the gallery, he heard a noise outside. When he came back to the van, Hoque was no longer on top. Mourad looked around and found Hoque unconscious on the ground, foaming at the mouth. He had sustained a fractured skull and subdural hemorrhage, consistent with a fall. Hoque died in the hospital thirty-four days later. There is evidence that he had a history of diabetes and other health problems, but on the day of the accident, Hoque appeared normal and energetic to Mourad. Mourad did not know whether the top of the van was slippery, and Hoque did not say anything to him about the condition of the van roof surface.

Hoque's wife, plaintiff Ilia Nieves-Hoque, commenced this action as administratrix of his estate. The verified complaint alleges that Hoque's death was caused by defendants' negligence, and was a result of their having violated Labor Law §§ 200, 241(6) and 240(1). The verified complaint likewise alleges that defendants caused him to sustain conscious pain and suffering.

Jancou Fine Art had hired M.D. Robiul Hoque Co. to perform a significant renovation of the gallery. Their agreement provided that M.D. Robiul Hoque Co. would name Jancou Fine Art as an additional insured on its liability insurance, and Jancou Fine Art was given a certificate of insurance indicating same. The book shelf project was not a part of their initial agreement, but

was added later in a change order.

The lease between Landlord and Jancou Fine Art has an indemnification clause, which states the following:

> Tenant agrees to indemnify and save Landlord harmless against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from and, work or thing whatsoever [sic] done by or on behalf of Tenant, in or about the Demised premises, and will further indemnify and save Landlord harmless against and from any and all claims arising from any breach or default on the part of the Tenant performance or any covenant or agreement on the part of the Tenant to be performed, pursuant to the terms of this Lease, or arising from an act of negligence of Tenant, or any of its agents, contractors, servants, employees or licensees, and from and against all costs, reasonable counsel fees, expenses and liabilities incurred as a result of any such claim or action or proceeding brought thereon; and in case of any such claim, Tenant, upon notice from Landlord, covenants to resist or defend at Tenant's expense, such action or proceeding by counsel reasonably satisfactory to Landlord.

Lease, paragraph 54. The same lease section required Jancou Fine Art to procure liability insurance with limits of no less than $3 million per occurrence, and $5 million for property damage.

Landlord served a cross-claim against Jancou Fine Art for contractual indemnification and common law contribution, and served a third-party complaint against M.D. Robiul Hoque Co. for indemnification and contribution. Jancou Fine Art also cross-claimed against its co-defendants for indemnification and contribution, and served a third-party complaint against M.D. Robiul Hoque Co. for indemnification and contribution as well, and for breach of contract in failing to procure the correct

insurance per their contract. In answering the third-party complaints, M.D. Robiul Hoque Co. alleged in part that plaintiff's own actions were the sole proximate cause of his death.

DISCUSSION

To the extent that plaintiff alleges common law negligence and liability under Labor Law § 200, summary judgment dismissing those claims is granted because there is no evidence of common law negligence by any defendant. Hoque worked without supervision, and no defendant played any part in his unfortunate accident. Their liability, if any, is vicariously imposed by statute.

Plaintiff's remaining claims, under Labor Law §§ 240(1) and 241(6), are premised on the theory that Hoque fell from his van due to the failure of a safety device that would have provided a safe means to descend from the roof to the ground, or alternatively, that he slipped off the roof of the van, and his injury was the result of a too-slippery surface on the roof (Industrial Code, 23 NYCRR § 1.7[d] and [f][1]).

Under CPLR 3212(b), the movants must make a prima facie showing of entitlement to judgment as a matter of law, tendering

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[1] These are the only Industrial Code provisions cited in plaintiff's opposition to the motions, although other sections are referenced in her bill of particulars. Defendants argue that code sections referenced in the bill of particulars are inapplicable, which is deemed admitted but for § 1.7 in light of plaintiff's failure to rebut.

sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this prima facie showing has been made, the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to raise a triable question of fact which, if credited by the jury, is sufficient to rebut defendants' showing (*Ramos v Howard Indus.*, 10 NY3d 218, 224 [2008]). In this regard, any expert affidavit offered as rebuttal evidence "must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor." (*Adamy v Ziriakus*, 92 NY2d 396, 402 [1998]) [citation omitted]; *see also Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] [speculative or unsupported expert assertions are insufficient to withstand summary judgment]).

Although, as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof (*Pace v International Bus. Mach. Corp.*, 248 AD2d 690, 691 [2nd Dept 1998], quoting *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 [4th Dept 1992]), here, defendants may meet their burden of establishing prima facie entitlement to judgment as a matter of law by showing that there was no causal connection between a violation of the Labor Law and Hoque's death (*see Heckstall v Pincus*, 19 AD3d 203, 204 [1st Dept

2005] [lack of causation coupled with failure of nonmovant to adequately show causation warrants dismissal]; *see also Anzolone v Long Island Care Ctr.*, 26 AD3d 449, 451 [2nd Dept 2006] [failure to raise triable issue of fact on the issue of causation warrants dismissal]).

As defendants note, there is no non-speculative theory as to what caused Hoque to hit his head and fracture his skull. Defendants offer their own speculation on possible causes, including that he suffered a seizure or had a dizzy spell brought on by the health issues of which he had a documented history, or that he slipped and fell on water in the alley.

Plaintiff's opposition offers no evidence of a triable issue of fact that does not rest on speculation. For example, plaintiff's opposition makes reference to two Industrial Code sections that were violated: § 1.7(d) states that employers shall not suffer or permit any employee to use a floor or any elevated working surface which is in a slippery condition; and § 1.7(f) states that stairways, ramps or runways shall be provided as the means of access to working levels above or below the ground. Reliance on these code sections implies either that Hoque slipped on the roof surface, which caused him to fall, or that he was trying to climb down and somehow fell. But there is no evidence either that he slipped on a slippery surface or that he had difficulty climbing down. Indeed, there is no evidence that a ladder or any other safety device would have prevented his death.

Plaintiff further relies upon the affidavit of a doctor, Lone Thanning, M.D., for the proposition that the fracture to Hoque's skull must have been the result of a fall from a height, and could not have been caused by falling with his feet on ground level. This affidavit supports the theory that he fell from the van, but gives no insight as to what caused him to fall. While it is possible that he slipped, or that he had difficulty climbing down that would have been alleviated with a ladder or ramp, it also is possible that these things did not happen. Dr. Thanning offers no explanation of what caused Hoque to be foaming at the mouth, a fact apparently consistent with defendants' supposition that he had a seizure. We will never know what happened, and no reasonable jury could determine that without resort to speculation.

The Court of Appeals has held that, to prevail on a § 240(1) claim, a plaintiff must show that there was a violation of the statute, and that the violation was a contributing cause of his fall (*Blake v Neighborhood Housing Services of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003]). Hoque submits an affidavit from an engineer who opines that § 240(1) was violated based on Hoque's failure either to cause a scaffold to be erected or to procure a rolling platform with an attached ladder and protective guard rails before he attempted to unload his van (Affidavit of Robert A. Rubinstein, Ex. 11 to Affirmation in Opposition of Roy A. Kuriloff, Esq.).

In *Toefer v LIRR*, the Court of Appeals found no violation of the statute where plaintiff fell from a flatbed truck while unloading construction material (4 NY3d 399 [2005]). The Court reasoned that the plaintiff's injury was not attributable to the sort of elevation-related risk that § 240(1) was meant to address (*id.* at 408), in part because a flatbed truck bed is itself a stable platform for which no safety device is required, and because a worker does not normally use a ladder or other safety device to go on or off a truck. Therefore, defendants' argument that *Toefer* bars this claim is unfounded because Hoque's van may not have been as stable a platform, or as routinely climbed upon, as a flatbed truck, so the Court of Appeal's reasoning is not entirely applicable to this claim.

Even accepting plaintiff's argument that Hoque was a covered worker under § 240(1), there is no evidence that the failure to provide a safety device enumerated in that statute resulted in his fall. Accordingly, defendants have made a prima facie showing that plaintiff cannot establish liability as a matter of law.

To prevail on this motion, plaintiff has the burden of proving a prima facie case by generally showing that defendants' negligence (or in this case, culpable conduct under the Labor Law) was a substantial cause of the events producing the injury (CPLR 3212; *Derdianian v Felix Contracting Corp.*, 51 NY2d 308 [1990]; *Grzelecki v Sipperly*, 2 AD3d 939 [3rd Dept 2003]). This

is so even in a case grounded on circumstantial evidence (see *Thomas N.Y.C. Transit Auth.*, 194 AD2d 663 [2d Dept. 1993] and *Motto v N.Y.C. Transit Auth.*, 13 AD3d 170 [1st Dept 2004], both involving unwitnessed falls onto subway tracks). In an effort to do so, plaintiff argues that she is entitled to the benefit of the *Noseworthy* Doctrine, which shifts the burden of proof for a deceased accused of contributory negligence from the plaintiff to the defendant because the plaintiff is not alive to speak for himself (*Noseworthy v City of New York*, 298 NY 76, 80 [1948]).

However, the *Noseworthy* Doctrine does not apply where, as here, "plaintiff and defendant are similarly situated insofar as accessibility to the facts of the deceased's death is concerned." (*Lynn v Lynn*, 216 AD2d 194, 195 [1st Dept 1995]). There is no indication that defendants may have any information that plaintiff does not have (*Lynn*, 216 AD2d at 195). Moreover, the Doctrine does not obviate the need for plaintiff to introduce prima face evidence of liability, nor does it allow for speculation, guess or surmise to substitute for competent evidence (*Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 398 [1st Dept), *lv dismissed in part, denied in part* 100 NY2d 636 (2003).

In light of the foregoing, the motions for summary judgment dismissing the complaint are granted, and the third-party action claims for contribution likewise are dismissed.

That branch of Landlord's motion seeking contractual

indemnification on its cross-claim against Jancou Fine Art is granted. As relevant here, section 54 of the lease requires Jancou Fine Art to indemnify Landlord from any claim arising from work done "by or on behalf of Tenant, in or about the Demised premises". Jancou Fine Art contends that this provision is void and unenforceable under General Obligations Law (GOL) § 5-321. GOL § 5-321 states that a lease agreement exempting the lessor from liability for damages for personal injuries caused by the negligence of the lessor, or its agents or employees, is void as against public policy. Jancou Fine Art argues that because paragraph 54 does not expressly carve out indemnification resulting from Landlord's negligence, it is void under GOL § 5-321. This argument fails, however, both because the relevant provision relates to work done on the demised premises by or on Tenant's behalf, so on its face it does not pertain to the Landlord's conduct, and because the same lease provision requires Jancou Fine Art to procure liability insurance (*Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412 [2006]). Also, there are no facts alleged in this action from which Landlord's negligence could be inferred, so the statute does not bar enforcement of the indemnification agreement (*see, Brown v Two Exchange Plaza Partners*, 76 NY2d 172 [1990] [interpreting similar language in GOL § 5-322.1 with respect to contracts to maintain, demolish or alter real property]). The indemnification is unquestionably triggered because the fall arises from M.D. Robiul

Hoque Co.'s work on behalf of Jancou Fine Art in and about the premises, and for the reasons above, it is enforceable.

Finally, Landlord and Jancou Fine Art are entitled to common law indemnification from M.D. Robiul Hoque Co. A party seeking common law indemnification must establish that it was not negligent and that the party against whom it seeks indemnification was either negligent or had the authority to direct, supervise or control the work giving rise to the injury (*Galindo v Dorchester Tower Condominium*, 56 AD3d 285 (1st Dept. 2008]). As discussed above, Landlord and Jancou Fine Art were not negligent, and M.D. Robiul Hoque Co. had exclusive control over the operation. Workers Compensation Law § 11 does not bar recovery against M.D. Robiul Hoque Co. because Hoque suffered a "grave injury" as defined in that statute.

For the foregoing reasons, it hereby is

ORDERED that the motions by defendants Landlord and Jancou Fine Art, and third-party defendant M.D. Robiul Hoque Co., for summary judgment dismissing the complaint are granted, and the complaint is severed and dismissed; and it further is

ORDERED that the motion by M.D. Robiul Hoque Co. for summary judgment dismissing the third-party complaints is denied; and it further is

ORDERED that the branch of Landlord's motion for summary judgment on its cross-claim for contractual indemnity against Jancou Fine Art is granted as to liability; and it

further is

ORDERED that the branch of Landlord's motion for summary judgment on its claim for common law indemnity in the third-party complaint against M.D. Robiul Hoque Co. is granted as to liability; and it further is

ORDERED that the branch of Jancou Fine Art's motion for summary judgment on its claim for common law indemnity in the third third-party complaint against M.D. Robiul Hoque Co. is granted as to liability; and it further is

ORDERED that counsel for the defendants and M.D. Robiul Hoque Co. shall appear for a pre-trial conference regarding the indemnity claims in Part 55, 60 Centre Street, Room 432, New York, NY on August 22, 2011 at 2 PM; and it further is

ORDERED that the Clerk shall enter partial judgment dismissing the Complaint with costs and disbursements to Landlord and Jancou Fine Art as taxed.

Dated: July 26, 2011

ENTER:

J.S.C.

[illegible] S. SOLOMON