Scheiner v Port Dock & Stone Corp.

2011 NY Slip Op 32612(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 112541/2008

Judge: Marcy S. Friedman

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[* 1]

SCANNED ON 10/5/2011

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

MARCY S. FRIEDMAN
PRESENT:

PART 057

Index Number : 112541/2008

SCHEINER, JAMES

vs

PORT DOCK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. 004

MOTION CAL. NO. ____

The following papers, numbered 1 to 9 **were read on this motion ~~to~~/for** Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A
Answering Affidavits — Exhibits	2, 3, 4-9
Replying Affidavits	Memo of Law M1

Cross-Motion: ☑ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion and cross-motions are:

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

FILED

OCT 05 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10-4-11

[signature] **J.S.C.**

MARCY S. FRIEDMAN

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

-- x

JAMES SCHEINER and JENNIFER SCHEINER,

Plaintiffs,

- against -

PORT DOCK AND STONE CORP., J.T. MAGEN CONSTRUCTION COMPANY INC., J.T. MAGEN & COMPANY, INC., and FORDHAM CONSTRUCTION CO. INC.,

Defendants.

-- x

Index No.112541/2008

DECISION/ORDER

J.T. MAGEN AND COMPANY, INC. i/s/h/a J.T. MAGEN CONSTRUCTION COMPANY INC.

Third Party Plaintiff,

- against -

FORDHAM CONSTRUCTION CO. INC.,

Third Party Defendant.

-- x

Third-Party Index No. 590344/2009

FILED
OCT 05 2011
NEW YORK
COUNTY CLERK'S OFFICE

In this Labor Law action, plaintiff seeks damages for injuries sustained on April 17, 2006 while working as a carpenter. Defendant J.T. Magen and Company, Inc. (Magen) moves for summary judgment dismissing plaintiff's claims under Labor Law §§240(1), 241(6), and 200, and plaintiff's claim for common law negligence, as well as any cross-claims. Magen also

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moves for summary judgment on its indemnification claims against defendant Fordham Construction Co. (Fordham). Fordham cross-moves for summary judgment dismissing plaintiff's complaint. Defendant Port Dock and Stone Corp. (Port Dock) moves for summary judgment dismissing plaintiff's complaint and all cross-claims. Port Dock alternatively moves for summary judgment on its cross-claims against Magen and Fordham. Plaintiff cross-moves against all defendants for summary judgment on his Labor Law §240(1) claim.

Plaintiff was employed by non-party Putnam Interiors (Putnam). (P.'s Dep. at 15.) Putnam was hired by Fordham to do rough carpentry at the site. (Fordham Aff. in Support, ¶ 3.) Fordham was a subcontractor at the site, hired by Magen to do carpentry work. (Magen Aff. in Support, ¶ 4.) Magen was hired by non-party American Chophouse Enterprises LLC (American Chophouse) under a contract that named Magen as the construction manager. (Port Dock Ex. 15.) However, Magen acknowledges that it "performed those tasks that a general contractor ordinarily performs at a work site." (Magen Aff. in Opp. to Port Dock Motion, ¶ 4.) American Chophouse had a 40-year lease with Port Dock for the property in question. (Port Dock Aff. in Support, ¶ 9.)

At the time of the accident, plaintiff was working as a carpenter on a construction project to build a new restaurant. (P.'s Dep. at 15.) It is undisputed that plaintiff was injured when a framing clamp fell from above and hit plaintiff on the head. (Id. at 48.) As discussed more fully below, the parties dispute the cause of the fall of the clamp.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d

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557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law §240(1)

Defendants seek summary judgment dismissing plaintiff's §240(1) claim on the ground, among others, that the framing clamp that struck plaintiff was not in the process of being secured or hoisted at the time of accident, and was not an object that required securing. (See Port Dock Aff. in Support, ¶ 42.)[1] Plaintiff contends that his co-worker had to use a framing clamp to perform the work in progress at the time of plaintiff's accident, and that the clamp was improperly secured. (P.'s Aff in Support, ¶ 4.)

Labor Law §240(1) provides:

> All contractors and owners and their agents, * * * 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison

[1]It is noted that Fordham seeks dismissal of the Labor Law §240(1) claim on the grounds advanced by its co-defendants. It does not seek dismissal on the ground that it is a subcontractor, not a general contractor.

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Co., 78 NY2d 509, 513 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) "[A]n accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff's fall. (Id. at 287-289.)

While section 240(1) should be construed liberally so as to effectuate its purpose, it is well settled that the statute applies only to "elevation-related hazards." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Rocovich, 78 NY2d at 514.) The hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich, 78 NY2d at 514; Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001].)

As a threshold matter, the court rejects defendants' contention that the protection of Labor Law §240(1) does not apply because the clamp was not being hoisted or secured at the time of plaintiff's accident. It is well settled that falling object liability "is not limited to cases in which the falling object is in the process of being hoisted or secured." (Quattrocchi v F.J. Sciame Constr. Co., 11 NY3d 757, 758-759 [2008]; see also Outar v City of New York, 5 NY3d 731 [2005], affg 11 AD3d 593 [2004]; Vargas v City of New York, 59 AD3d 261 [1st Dept 2009].)

In moving for summary judgment, defendants further contend that the clamp that hit plaintiff did not require securing. In support of this contention, defendants cite the accident report. (Ex. L to Magen Motion.) This report, which was authored by John Thorne, plaintiff's foreman, states: "A framming [sic] clamp fell off the top of the scaffel [sic] 9 ft and hit Jim in the back of head. Hard hat fell off just before the accident [happened]." Defendants also cite plaintiff's testimony that he did not know the location above him from which the clamp fell. (P.'s Dep. at 50.)

In opposition, plaintiff cites his deposition testimony explaining the events leading up to his accident. Plaintiff testified that at the time of the accident, he was working with another Putnam employee to create an access line for the ceiling. His partner was on a scaffold approximately 20 feet above him, while plaintiff was on the ground approximately three to four feet away from the scaffold. (P.'s Dep. at 43-44, 47.) The creation of the access line required plaintiff to make a pencil mark on the floor so that numbers could be transferred back up to the ceiling. (Id. at 46, 48.) Plaintiff further explained that there was "no way [his partner] could see the mark" on the floor, and that he had to "reach out of the scaffolding" to see the mark. (Id. at 51.) He also testified that clamps, like the one that hit him, are used not only to "clamp two pieces of metal[] together" (id. at 50), but also to help a worker "steady himself as leans over the scaffold," by serving as a "handle." (Id. at 51, 53.)

Plaintiff acknowledged that he did not remember whether he actually saw his partner using a clamp to steady himself before the accident. (Id. at 51.) However, he specifically described the work that he and his partner were doing at the time of the accident, the need his partner had to lean over the scaffold in order to do this work, and the fact that it was "common"

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for a framer to use a clamp to steady himself when leaning over the scaffold. (Id.) Plaintiff testified that there were clamps attached to the side of the scaffold, as well as "clamps in the ceiling, there were handles." (Id. at 60.) He estimated that there were 30 to 50 clamps attached to the ceiling on the day of his accident. (Id. at 61.)

Significantly, defendants do not dispute plaintiff's testimony as to the work he and his partner were performing at the time of the accident. Nor do defendants submit any evidence that framing clamps were not used to enable workers to steady themselves. On the contrary, Sean Murray, Magen's Vice President, testified that it is a "general practice for installation of frames to use clamps." (Murray Dep. at 62.) While he also testified that he was not aware of anyone at the site using a framing clamp to maintain balance, this testimony merely shows his lack of personal knowledge of such use. Moreover, he acknowledged that it would not necessarily be an unsafe practice to attach a clamp to the ceiling for this purpose. (Id.) Magen's construction superintendent, Mikhail Gorelik, also testified that one worker was "not supposed to work above another." (Gorelik Dep. at 52.)

Under these circumstances, the court holds that plaintiff's detailed testimony as to the work that he and his partner were performing just before the accident, and as to the practice of using clamps for balance, is sufficient to raise a triable issue of fact as to whether he was hit by a clamp that was not properly secured and fell from the ceiling.

In so holding, the court is unpersuaded by defendants' contention that plaintiff cannot prove the cause of his accident. Plaintiff's burden at trial will not be to prove the cause with absolute certainty but to demonstrate that it is "more likely" than not that the cause was one for which one or more defendants is liable. (Gayle v City of New York, 92 NY2d 936, 937 [1998].)

The court further rejects Port Dock's and Fordham's contention that plaintiff's failure to secure his hard hat was the sole proximate cause of his injury. It is well settled that comparative negligence is not a defense to a Labor Law §240(1) claim. (Gordon, 82 NY2d at 562.) In order for a plaintiff's acts to constitute a defense to a §240(1) claim, such acts must have been "the sole proximate cause" of the plaintiff's injuries. (Weininger v Hagedorn & Co., 91 NY2d 958, 960 [1998], rearg denied 92 NY2d 875; Blake, 1 NY3d at 290.) "[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." (Id.)

On this record, defendants fail to demonstrate that plaintiff's act was the sole cause of his injury. Plaintiff testified that before his accident, he was on all fours, about to mark the floor, and "[a]s [he] bent over, the hard hat fell off and the clamp was on its way down and hit [him] in the head." (P.'s Dep. at 48.) Plaintiff's foreman testified that hard hats have an interior feature that the worker fits to his or her head, and that if properly fitted, a hard hat would not fall off. (Thorne Dep. at 72.) He also testified that the worker was responsible for adjusting the interior. (Id. at 82.)

Plaintiff's foreman did not inspect the hard hat after the accident, and had no knowledge as to whether plaintiff's hard hat had been properly calibrated or fitted on the day of the accident. (Thorne Dep. at 73.) However, even assuming arguendo that plaintiff did not fit his hard hat properly, he will not have been the sole proximate cause of his accident if a jury finds that a cause was the falling of an improperly secured clamp. (See Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, supra.)

The court accordingly holds that triable issues of fact exist on plaintiff's Labor Law §240(1) claim. Defendants' motions and plaintiff's cross-motion for summary judgment on this

claim should accordingly be denied.

Labor Law §241(6) claim

Defendants also move for summary judgment on plaintiff's Labor Law §241(6) claim on the ground that the sections of the Industrial Code on which plaintiff premises this claim are too general or do not apply.

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
>
> 6. 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.

It is well settled that this statute requires owners and contractors and their agents "'to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross, 81 NY2d at 501-502.) In order to maintain a viable claim under Labor Law §241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

Although plaintiff's Bill of Particulars cites numerous sections of the Industrial Code, in opposing defendants' motion to dismiss, plaintiff alleges only that defendants violated §23-

1.7(a)(1),[2] pertaining to overhead hazards. (P.'s Aff. in Opp. [attached to P's Cross-Motion], ¶ 11.) This section is sufficiently specific to support liability under Labor Law §241(6). (See Zuluaga v P.P.C. Constr., LLC, 45 AD3d 479 [1st Dept 2007].)

Defendants Magen and Port Dock argue that 12 NYCRR 23-1.7(a)(1) is inapplicable as plaintiff was not working in an area "normally exposed" to falling material.[3] (See Port Dock Aff. in Support, ¶ 45.) In support of this contention, defendants cite the testimony of plaintiff that he did not recall seeing any clamps fall from the ceiling at the site prior to the accident. (P.'s Dep. at 56.) Defendants also cite the testimony of various of defendants' representatives to the same effect. (See Murray Dep. at 63; Gorelik Dep. at 20.)

Plaintiff testified that "[t]hings were falling on the construction site. Things fall all day long." (P.'s Dep. at 56.) However, this vague, conclusory testimony is insufficient to raise a triable issue of fact as to whether plaintiff was working in an area that is normally exposed to falling material. Plaintiff's section 241(6) claim should accordingly be dismissed.

Defendant Port Dock's Liability as Owner under §§240(1) and 241(6)

Defendant Port Dock moves for summary judgment on plaintiff's Labor Law claims on the ground that it was not an "owner" for purposes of imposition of vicarious liability under

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[2] 23-1.7(a)(1) provides:

> Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

[3] Defendant Fordham also moves for summary judgment on plaintiff's §241(6) claim, but makes no argument as to §23-1.7(a)(1) specifically.

sections 240(1) and 241(6). In support of the motion, Port Dock asserts that although it owned the property at which the accident occurred, it did not contract for or control the construction. (Port Dock Aff. In Support, ¶¶ 18-19.) Port Dock submits the testimony of its president, Oreste Albicocco, that he did not sign any construction contracts and did not hire anyone to observe the construction or speak to any of the contractors. (Albicocco Dep. at 10, 19-20.) Port Dock annexes a 40-year lease to American Chophouse which provided for American Chophouse to renovate the premises for a restaurant. (Lease, ¶ 45 [Port Dock, Ex. 14].) Port Dock also supports its motion with the contract for the renovation between American Chophouse and Magen. (Port Dock, Ex. 15.) In opposition, plaintiff cites the testimony of Port Dock's president that he visited the site and signed off on the building permits. (Albicocco Dep. at 10, 18-19.)

The court holds that Port Dock qualifies as an owner for purposes of the Labor Law. Port Dock cites authority which holds that the owner must contract for the work in order to be liable. (See Frierson v Concourse Plaza Assoc., 189 AD2d 609 [1st Dept 1993]; Sweeting v Board of Coop. Educ. Servs., 83 AD3d 103 [1981].) However, this authority does not govern as it is now well settled that an owner who did not contract for the construction that resulted in a worker's injury may be held vicariously liable under the Labor Law where there is "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." (See Morton v State, 15 NY3d 50, 56 [2010], quoting Abbatiello v Lancaster Studio Assoc., 3 NY3d 46, 51 [2004].) An exception, which is not applicable here, may be found where an owner "had no choice but to allow [workers] to enter its property." (Scaparo v Village of Ilion, 13 NY3d 864, 866 [2009].) Port Dock's motion to dismiss the complaint on this

issue should accordingly be denied.

Labor Law § 200 and Common Law Negligence

Labor Law §200(1) provides in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993].) Recent cases have clarified that liability under section 200 may arise in two circumstances: where workers are injured as a result of the manner in which the work is performed, or where they are injured as a result of a dangerous condition on the site. (Makarius v Port Auth. of New York and New Jersey, 76 AD3d 805, 808 [Roman, J., concurring], 817 [Moskowitz, J., concurring] [1st Dept 2010], citing Ortega v Puccia, 57 AD3d 54, 61 [2nd Dept 2008].)

It is well settled that "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200." (Comes, 82 NY2d at 877; see also Ross, 81 NY2d 494, 505 [1993] [same for general contractor]; Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.) The rationale for this rule is that "[a]n implicit precondition to [the] duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the

injury to enable it to avoid or correct an unsafe condition." (See Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981].) Liability does not attach "solely because the owner had notice of the allegedly unsafe manner in which the work was performed." (Comes, 82 NY2d at 878; Ortega, 57 AD3d at 61.)

Neither "general supervisory powers" nor the authority to stop work for safety reasons amounts to the control necessary to impose liability under Labor Law §200 or a common law negligence claim. (Foley v Consolidated Edison Co. of New York, Inc., 84 AD3d 476, 477-478 [1st Dept 2011]; Hughes v Tishman Constr. Corp., 40 AD3d 305, 309 [1st Dept 2007].) General supervisory authority for the purpose of inspecting the work product, or reporting safety violations, is likewise insufficient to establish liability. (Vaneer v 993 Intervale Ave. Housing Development Fund Corp., 5 AD3d 161 [1st Dept 2003]; Cahill v Triborough Bridge & Tunnel Authority, 31 AD3d 347, 350 [1st Dept 2006].) That a general contractor has an on-site safety manager with responsibility for the safety of the work done by subcontractors, or for holding safety meetings, does not provide "any basis for imposing liability on the general contractor based on an injury allegedly caused by a subcontractor's work." (O'Sullivan v IDI Constr. Co., 28 AD3d 225 [1st Dept 2006], affd 7 NY3d 805 [2006]; Hughes, 40 AD3d at 309. See also Geonie v OD & P NY Ltd., 50 AD3d 444 [1st Dept 2008][safety meetings].)

Rather, "[a]bsent any evidence that [the owner or general contractor] gave anything more than general instructions as to what needed to be done, as opposed to how to do it, these entities cannot be held liable under Labor Law 200 or for common-law negligence." (O'Sullivan, 28 AD3d at 226.) An owner or general contractor thus will not be liable under section 200 where the evidence demonstrates that the plaintiff's employer, and not the owner or general contractor,

specifically controlled the methods by which the plaintiff's work was performed. (See id.; Hughes, 40 AD3d at 307-308; Reilly, 303 AD2d at 219-220.)

In contrast, where the general contractor has or exercises the authority to control the methods by which plaintiff's work is performed, liability may be established. (See Rizzuto v L.A. Wenger Constr. Co., 91 NY2d 343 [1998] [where general contractor had authority to exclude workers from an area in the worksite and to direct one contractor to cease operations while another potentially hazardous activity was taking place nearby, triable issue of fact found as to whether general contractor had requisite supervisory control to be liable under §200.]; Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 683 [2nd Dept 2005] [triable issue of fact found as to general contractor's supervision and control where general contractor "supervised all" construction work, purchased materials, and was referred to as "the supervisor."].)

Where, however, the injury arises out of "a dangerous condition on the site," rather than "the methods or materials" used by the worker or his employer, it is "not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury-producing work," only that it "had notice of the condition." (Minorczyk v Dormitory Auth. of State of New York, 74 AD3d 675 [1st Dept 2010]; Seda v Epstein, 72 AD3d 455 [1st Dept 2010]; Murphy v Columbia Univ., 4 AD3d 200 [1st Dept 2004].) "General awareness" that a dangerous condition may be present is insufficient. (See Gordon v American Museum of Natural History, 67 NY2d 836, 838 [1986].) "The notice must call attention to the specific defect or hazardous condition and its specific location." (Mitchell v New York Univ., 12 AD3d 200, 201 [1st Dept 2004].) Furthermore, constructive notice of a defect requires that the "defect must be visible and apparent and it must exist for a sufficient length of time prior to the

accident to permit defendant's employees to discover and remedy it." (Gordon, 67 NY2d at 837.)

Applying these principles to the instant case, the court finds that defendants Port Dock and Magen make a prima facie showing that they did not supervise or control plaintiff's work. The court holds that plaintiff's injury arose out of the means and methods of the subcontractor's work, as it is undisputed that he was injured by a falling clamp while performing work for Putnam. The issue is therefore whether defendants exercised supervisory control over the work.

In support of their motion, defendants rely on the undisputed evidence that plaintiff's employer, Putnam, supervised his work. Plaintiff's foreman testified that he was the only person who supervised Putnam employees, including plaintiff, as to "how the work was being done." (Thorne Dep. at 74.) Plaintiff confirmed that Thorne supervised him before the accident, and that no one but Thorne supervised him. (P.'s Dep. at 70-71.) Such testimony has repeatedly been held to satisfy a defendant's burden of showing that it did not supervise or control the activity that gave rise to the injury, and to shift the burden to the plaintiff to raise a triable issue of fact. (Reilly, 303 AD2d at 220; see O'Sullivan, 28 AD3d at 226; Hughes, 40 AD3d at 307-308.)

In opposition, plaintiff fails to meet this burden. As discussed above, Port Dock submitted uncontradicted evidence that it did not contract for or supervise the work. The evidence that its president visited the site and signed permits (see supra at 10), is plainly insufficient to raise a triable issue of fact as to Port Dock's supervision and control.

The record presents a closer question as to Magen's supervision and control. Magen's

construction superintendent testified that he oversaw the subcontractors' work (Magen Dep. at 9) and walked the site "three hundred times" a day to coordinate between the trades. (Id. at 63-64.) He stated that he had the authority to stop work if he saw a worker on a scaffold who was performing work that he considered unsafe. (Id. at 31-32.) When asked about safety concerns at the framing stage, he responded: "Just to use proper tools and equipment, and work in a safety manner. I mean, like one person not supposed to work above another person, using safe ladders, using not damaged or spliced extension cords, using GFI. It's a lot [of] rules and regulations at each stage of the work." (Id. at 52.) He also stated that everyone had to wear hard hats, and that if he saw someone working without a hard hat, he "would throw them out of the job." (Id.) Magen's vice president testified that Magen had a site safety supervisor who visited the site "as required." (Murray Dep. at 60.) Magen issued a document that was given to subcontractors regarding Magen's site safety policies. (Id. at 17-18, 56.)

The safety responsibilities and concerns to which Magen's representatives testified are examples of general supervisory authority which do not give rise to liability. There is no evidence in the record that Magen ever instructed plaintiff as to the means by which plaintiff's work should be performed. Magen's authority to stop work, issuance of general safety directives, and maintenance of a site safety supervisor are insufficient, under the legal authorities discussed above (supra at 12) to raise a triable issue of fact as to whether it had the requisite supervision and control for liability under section 200.

The court reaches a different result as to Fordham. Fordham moves for summary judgment dismissing the section 200 claim on the ground that it did not have notice of a dangerous condition of falling clamps. (Fordham Aff. In Support, ¶¶ 37-38.) Fordham contends

that a Labor Law claim requires proof of both supervision and notice. This contention is incorrect under the recently clarified authority discussed above (supra at 11-13). Liability under section 200 is not contingent on notice, but rather on supervisory control. (See Comes, 82 NY2d at 877-878.) While Fordham cites strong evidence that it did not have notice of problems at the site with falling clamps (Fordham Affidavit In Support, ¶ 38), it does not claim, let alone make any showing, that it did not exercise supervision and control over plaintiff's work. Nor could it do so based on the mere fact that it subcontracted the work to Putnam. (Cf. Nascimento v Bridgehampton Constr. Corp., 86 AD3d 189 [1st Dept 2011].)

The court accordingly holds that plaintiff's section 200 and common law negligence claims should be dismissed against Port Dock and Magen, but not against Fordham.

Indemnification Claims

Port Dock seeks contractual indemnification from Fordham and common law indemnification from Magen and Fordham. Magen seeks contractual and common law indemnification from Fordham.

When seeking contractual indemnification, the party seeking indemnity must prove it was "free from any negligence and was held liable solely by virtue of the statutory liability." (Correia v Professional Data Mgt., Inc., 259 AD2d 60, 65 [1st Dept 1999].) In contrast, when seeking common-law indemnification, the party seeking indemnity must prove not just that it was not negligent beyond the statutory liability but also that the proposed indemnitor was guilty of some negligence that contributed to causing the accident in question. (Correia, 259 AD2d at 65; see generally McDermott v City of New York, 50 NY2d 211.)

Here, the Purchase Order between Magen and Fordham contains an indemnification provision which provides, in pertinent part:

> "To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless J.T. Magen & Company, Inc. and Owner * * * from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor [Fordham], its officers, directors, agent, employees and subcontractors, in connection with the performance of any work by Subcontractor pursuant to this Purchase Order." (Purchase Order, ¶ 11.2 [Ex. P to Magen Motion].)

This indemnification provision requires Fordham to indemnify Magen and the Owner, Port Dock, for any claim arising out of the work of Fordham or its subcontractor Putnam, without regard to Fordham's negligence. (See Brown v Two Exch. Plaza Partners, 76 NY2d 172, 178 [1990].)

Plaintiff's accident clearly arose out of Fordham's work, as plaintiff was injured while performing work for Fordham's subcontractor. As discussed in connection with plaintiff's section 200 claim, the evidence does not raise a triable issue of fact as to whether Port Dock or Magen supervised or controlled plaintiff's work. Nor is there any evidence in the record that Port Dock or Magen had notice of a dangerous condition caused by falling clamps. Plaintiff testified that he was not aware of falling clamps. (P.'s Dep. at 56, 174.) Port Dock makes an unrebutted showing that it did not have a presence at the work site. (See Albicocco Dep. at 10, 19-20.) Magen's superintendent testified, without contradiction, that he did not recall any previous incidents involving falling clamps. (Gorelik Dep. at 20.) Port Dock and Magen thus demonstrate the absence of negligence on their part. They are accordingly entitled to contractual indemnification from Fordham.

In view of the above holding, the court does not reach Port Dock's or Magen's claim for common law indemnification from Fordham. As to Port Dock's claim for common law indemnification from Magen, the court holds that this claim should be denied, based on Port Dock's failure, for the reasons already stated, to show or raise a triable issue of fact as to Magen's negligence.

It is accordingly hereby ORDERED that the motion of defendant J.T. Magen and Company, Inc. (Magen) for summary judgment is granted to the extent of dismissing plaintiff's claims against it under Labor Law §§241(6) and 200, and for common law negligence; and it is further

ORDERED that the aforesaid motion of defendant Magen is granted to the extent of awarding Magen partial summary judgment as to liability on its contractual indemnification claim against defendant Fordham Construction Co. (Fordham); and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any other disposition of the underlying action, upon the filing of a note of issue and payment of the proper fees, if any; and it is further

ORDERED that the cross-motion of Fordham for summary judgment is granted to the extent of dismissing plaintiff's Labor Law §241(6) claim against it; and it is further

ORDERED that the motion for summary judgment of defendant Port Dock and Stone Corp. (Port Dock) for summary judgment is granted to the extent of dismissing plaintiff's claims against it under Labor Law §§241(6) and 200, and for common law negligence; and it is further

ORDERED that the aforesaid motion of defendant Port Dock is granted to the extent of

awarding Port Dock partial summary judgment as to liability on its contractual indemnification claim against defendant Fordham; and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any other disposition of the underlying action, upon the filing of a note of issue and payment of the proper fees, if any; and it is further

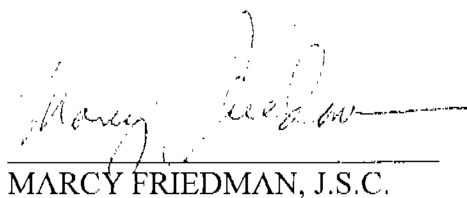
ORDERED that, within 20 days from the date of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon the defendants and shall file same with the Clerk of this Court and the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that the cross-motion of plaintiff for summary judgment on his Labor Law §240(1) claim is denied; and it is further

ORDERED that plaintiff's remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
October 4, 2011



MARCY FRIEDMAN, J.S.C.

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