Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

MANUEL AREVALO,
Plaintiff,

- against -

304 E. 45TH ASSOCIATES, et al.,
Defendants.

304 E. 45TH ASSOCIATES,
Third-Party Plaintiff,

-against-

ALEXANDER WOLF & SON, etc.,
Third-Party Defendant.

ALEXANDER WOLF & SON, etc.,
Second Third-Party Plaintiff

-against-

FREEDOM DEMOLITION, INC.,
Second Third-Party Defendant.

Index
No. 4030 2009

Motion
Date February 7, 2012

Motion
Cal. Nos. 3 & 4

Motion
Seq. Nos. 6 & 7

The following papers numbered 1 to 25 read on this motion by defendant 304 E. 45th Associates (304 East) for an order granting it summary judgment in its favor dismissing the claims against it or, in the alternative, a conditional award of summary judgment on its cross claims against defendants/third-party defendant/second third-party plaintiff Alexander Wolf & Son, A Division of A.W. & S. Construction Co. Inc., and A.W. & S. Construction Co. Inc. (AWS) for contractual indemnification; and by separate notice of motion by AWS for an order granting it summary judgment dismissing all claims against it; and on this cross motion

by plaintiff for an order granting him partial summary judgment in his favor and against defendants on his Labor Law §§ 240 (1) and 241 (6) claims.

	Papers Numbered
Notices of Motion - Affirmation - Exhibits.....	1-6
Notice of Cross Motion - Affirmation - Exhibits.....	7-11
Answering Affirmation - Exhibits.....	12-18
Reply Affirmation.....	19-25

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff, on October 31, 2008, as a result of a workplace injury. The accident occurred while plaintiff was in the process of demolishing a 14-foot high plaster ceiling in the lobby of a 17-story commercial office building owned by 304 East. AWS was retained as the general contractor for the project. At the time of the accident, plaintiff was employed by second third-party defendant Freedom Demolition, Inc., a demolition subcontractor retained by AWS. As a result of his accident, plaintiff seeks damages based upon common law negligence and violations of Labor Law sections 200, 240, 241(6), and the Industrial Code.

Upon examination before trial, plaintiff testified that he worked at the subject premises for the first time on the date of the accident. He was hired to perform an overnight ceiling demolition job in the lobby of a commercial premises. His employer provided all the tools and equipment, including a scaffold, that plaintiff used on the job. The scaffold that he used to reach the ceiling was higher than the ceiling, as its posts were embedded into ceiling. Plaintiff took directions only from Freedom Demolition's superintendent Gaetano Bravo on what to do and how to do his work. Preceding the accident, plaintiff worked atop a Baker scaffold, along with his coworker Mr. Orellana, for four consecutive hours without descending it or taking a break. After four hours, at the direction of Mr. Bravo, plaintiff and Mr. Orellana got off the scaffold and moved it to another area in order to work on a different section of the ceiling. Plaintiff indicated that "it was a little awkward in the corner" so, in order to remove that particular portion of the ceiling that was situated in said corner, he climbed into the ceiling to perform the demolition. Plaintiff had broken down approximately four-by-six feet of plaster, working his way backward. Though plaintiff has no specific recollection of his fall, plaintiff testified that his shop steward told him that plaintiff fell to the floor when Mr. Orellana pulled down a metal hanger that was attached the ceiling where

he was working. That hanger was part of the suspension mechanism used to hold up the plaster ceiling that was being demolished and it was attached to the floor directly above the subject ceiling. Plaintiff stated that no one told him to leave the scaffold and climb into the ceiling, and that he made the decision himself.

Mr. John Werner, the site superintendent for AWS, testified upon examination before trial that he conducted a brief inspection at the site and determined that the scaffolds were functioning properly on the date of the accident. He also testified that neither he nor anyone from 304 East supervised the work or provided any materials for the demolition. With respect to plaintiff's accident, Mr. Werner testified that he saw plaintiff create a hole in the ceiling and then climb up into it, at which point he advised Mr. Bravo that he did not want plaintiff on the ceiling. Antonio Meola, a representative of 304 East's property manager, also testified that he never supervised the work, nor provided instructions nor tools.

Those branches of the respective motions by 304 East and AWS which seek summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them is granted. Where as here, when the claim arises out of defects or dangers in the methods or materials of the work, liability may only attach when it is shown that the party to be charged had authority to control or supervise the work (*see Fernandez v Abalene Oil Co., Inc.*, 91 AD3d 906 [2012]; *Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642 [2011]). Based upon this standard and the evidence presented by these defendants, which included plaintiff's admission on examination before trial that the moving defendants did not exercise supervisory control over the method of his work and were not responsible for same, 304 East and AWS have established that summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them is appropriate. In opposition, plaintiff fails to raise a triable issue of fact (*see generally Alvarez v Prospect Hospital*, 65 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557[1980]. Initially, the court is unpersuaded by the contention that the accident arose from a dangerous condition on the premises. Clearly, the accident is alleged to have occurred as a result of the specific manner in which plaintiff was performing his work, and not from any dangerous condition at the job site; those cases cited by plaintiff in support are inapposite. Further, any reference to the right of 304 East or AWS to "generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Gasques v State*, 59 AD3d 666 [2009]; *see Harrison v State*, 88 AD3d 951 [2011]).

Turning to the plaintiff's Labor Law § 240 (1) claim, that section provides, in relevant part, as follows: "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning . . . 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." It is well-settled that the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, "those best suited to bear that responsibility" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]) instead of on the workers, who are not in a position to protect themselves (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]). This provision imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury (*see Striegel v Hillcrest Heights Dev. Corp.*, 100 NY2d 974 [2004]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Keaney v City of New York*, 24 AD3d 615 2005]). The duty imposed by the statute is "nondelegable and . . . 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 [citations omitted]." (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, *supra*; *see also Amato v State of New York*, 241 AD2d 400 [1997], lv denied 91 NY2d 805).

Plaintiff contends that it was the failure to provide an adequate safety device which was the proximate cause of his fall, thereby entitling him to the protections under Labor Law § 240 (1), while 304 East and AWS aver that plaintiff's own actions were the sole proximate cause of the accident. The court finds that neither plaintiff nor defendants are entitled to summary judgment,[1] and that the issue of whether plaintiff's actions were the sole proximate cause of the occurrence is one that is better suited for a jury. While it was plaintiff's decision to climb up and work on the ceiling, he also testified and stated pursuant to his affidavit that, since the wooden planks (constituting the scaffold platform) were longer than the base of the scaffold, plaintiff was unable to get close to the corner of the ceiling and was unable to demolish the ceiling using the scaffold provided.[2] Contrary to defendants' contentions, the court does not find the affidavit to be inconsistent with plaintiff's testimony. Plaintiff testified that it was awkward and hard to reach the corner, so he went up to the ceiling. To

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1. To the extent defendants' argue that the cross motion is untimely, since same is based upon facts which are nearly identical to the timely motions, the court, pursuant to its power to search the record before it, may consider the untimely cross motion (*see Whitehead v City of New York*, 79 AD3d 858 [2010]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]).

2. To the extent that it is argued that plaintiff's affidavit is not in admissible form, the court finds that it is since it was accompanied by an English translator's affidavit (*cf. Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2011] [English affidavit is defective and inadmissible when not accompanied by translator's affidavit]).

the extent that defendants point to the testimony in which plaintiff stated that neither he nor his coworker had problems with the scaffold up until that point, same does not speak to whether plaintiff had problems with the scaffold *at that point*, which, from his testimony and affidavit, it appears that he did. Thus, whether or not plaintiff performed the demolition work on the ceiling out of convenience or ease, or whether he did so because the device provided to him was inadequate, is a question of fact (*see generally Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

Turning to Labor Law § 241(6), same imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J&S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]); *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2006]).

As a preliminary matter, it is noted that, since there are issues of fact regarding plaintiff's potential comparative negligence, to that extent, whether or not specific provisions of the Industrial Code as outlined by plaintiff apply, plaintiff is, nevertheless, precluded from an award of summary judgment in his favor pursuant to this section of the Labor Law (*see e.g. Kozlowski v Ripin*, 60 AD3d 638 [2009]; *Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606 [2009]; *Copp v City of Elmira*, 31 AD3d 899 [2006]). The focus of the court's inquiry, then, becomes whether the specific provisions cited by plaintiff in his cross motion for summary judgment are applicable to the facts of this matter.[3] Those violations specified are 12 NYCRR 23-1.7 (f), 3.3 (b) (4), 5.1 (e), (f), (j) (1), and 5.2. With respect to subsection 23-1.7 (f), initially it is noted that, contrary to defendants' contentions, same is sufficiently specific to serve as a predicate for liability under Labor Law § 241 (6) (*see Miano v Skyline New Homes Corp.*, 37 AD3d 563 [2007]). Further, there is an issue of fact as to whether defendants provided a safe means of access to the plaster ceiling. With respect to subsection 5.1 (e), (f), and (j) (1), the accident did not involve the scaffold (and, notwithstanding, with respect to 23-5.1 [f], same is not sufficiently specific enough to support a violation of the

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3. It is noted that both defendants move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. However, as neither defendant sets forth which specific provisions should be dismissed and why (focusing only upon the defense of sole proximate cause), it is not the court's obligation to discuss each and every Industrial Code violation submitted by plaintiff in his bill of particulars and determine which of those are entitled to dismissal in defendants' favor.

Labor Law). Further, subsection 3.3 (b) (4) is inapplicable as plaintiff was neither demolishing a wall nor a partition, nor was he standing on top of a wall, and subsection 5.2, regarding "special approval" of a scaffold, is also inapplicable to the facts of this case. Based on the above, all sections discussed, with the exception of 12 NYCRR 23-1.7 (f) must be dismissed as inapplicable.

Finally, 304 East moves for an order granting it summary judgment in its favor on its claim for contractual indemnification against AWS, and AWS moves for dismissal of that claim against it. Neither party is entitled to summary judgment, as there is an issue of fact as to whether the named corporate entity herein is a separate entity from the corporate entity which was the signatory to the indemnification contract dated July 21, 2008,, and whether the parties intended that the named 304 East entity be entitled to indemnity.

The parties' remaining contentions are either academic or without merit.

Accordingly, the respective branches of the motions by 304 East and AWS for an order granting them summary judgment dismissing plaintiff's claims under Labor Law § 200 and common-law negligence are granted, and those claims against defendants are dismissed. The respective branches of their motions, and the branch of plaintiff's cross motion, seeking summary judgment with respect to the Labor Law § 240 (1) claim, are denied. The branch of plaintiff's cross motion for summary judgment in his favor on his Labor Law § 241(6) claim is denied. Defendants are granted summary judgment on plaintiff's Labor Law § 241 (6) claim only to the extent that violations of 12 NYCRR 23-3.3 (b) (4), 5.1 (e), (f), and (j) (1), 5.2 are dismissed. The branch of 304 East's motion for an order granting it summary judgment on its cross claim for indemnification is denied.

Dated: May 18, 2012

J.S.C.