Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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MARCILIO MARQUES and MARIA MARQUES,

Plaintiffs,

Index No: 2734/10
Motion Date: 11/17/11
Motion Cal. No: 23
Motion Seq. No: 6

-against-

ELITE FLOORING, INC., INNOVAX-PILLAR, INC., VICTORIA CONSULTING AND DEVELOPMENT LLC, THE ROMAN CATHOLIC CHURCH OF THE AMERICAN MARTYRS, Individually and d/b/a AMERICAN MARTYR SCHOOL, ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, and THE NEW YORK CITY SCHOOLS CONSTRUCTION AUTHORITY,

Defendants.

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The following papers numbered 1 to 37 read on this motion for an order, pursuant to CPLR § 3212, granting summary judgment to defendants The Roman Catholic Church of the American Martyrs and Roman Catholic Diocese of Brooklyn on all plaintiffs' causes of action against them; and as to liability on their cross-claim for contractual liability against defendant the New York City Schools Construction Authority; and on this further motion by defendants Elite Floors, Inc., incorrectly s/h/a Elite Flooring, Inc., Innovax-pillar, Inc., New York City Department of Education, the City of New York and New York City School Construction Authority Incorrectly s/h/a the New York City School Construction Authority, for an order, pursuant to CPLR § 3212, for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against them.

	PAPERS NUMBERED
Notices of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 17
Answering Affidavits-Exhibits-Memorandum of Law.....	18 - 29
Reply.....	30 - 37

Upon the foregoing papers, it is hereby ordered that the motions are disposed of as follows:

Facts

Defendants The Roman Catholic Church of the American Martyrs and Roman Catholic Diocese of Brooklyn (collectively the "Church defendants"), the owners of the American Martyrs Catholic School, leased the premises to defendant New York City Schools Construction Authority s/h/a the New York City School Construction Authority ("SCA"), for the purposes of converting the building to an Annex School for defendant New York City Department of Education. SCA contracted with defendant Innovax-pillar, Inc. ("Innovax"), the general contractor, for the school conversion and renovation project. Innovax hired Elite Floors, Inc., incorrectly s/h/a Elite Flooring, Inc. ("Elite"), the sub-contractor who hired non-party Metro, plaintiff's employer, to perform the removal and installation of the basement floor of the premises. Plaintiff was allegedly injured when he and two co-workers were attempting to lower a scarifying machine, a heavy piece of machinery used to remove the existing floor, to the basement of the premises using an elevated plywood ramp positioned over stairs. The ramp broke under the weight of the machine, causing plaintiff to fall and the machine fell on top of him, knocking him to the ground below. It is upon the foregoing that the Church defendants and defendants Innovax, Elite, New York City Department of Education, the City of New York and SCA (collectively the "City defendants"), move for, inter alia, summary judgment dismissing the Marques plaintiffs' complaint, pursuant to CPLR § 3212, asserting violations under Labor Law §§ 200, 240(1) and 241(6). The Church defendants also seek liability on their cross-claim for contractual liability against SCA, and the City defendants further seek summary judgment and dismissal of all cross-claims asserted against them.

Discussion

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

I. Labor Law § 200 and Common Law Negligence

Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace. See, Reilly-Geiger v. Dougherty, 85 A.D.3d 1000 (2nd Dept. 2011). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those

involving the manner in which the work is performed. Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (citations omitted). By contrast, when the manner of work is at issue, 'no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed' (citations omitted). Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (citations omitted)." Ortega v. Puccia, 57 A.D.3d 54, 61-62 (2nd Dept. 2008); see, Reyes v. Arco Wentworth Management Corp., 83 A.D.3d 47 (2nd Dept. 2011); LaRosa v. Internap Network Services Corp., 83 A.D.3d 905 (2nd Dept. 2011); Aragona v. State, 74 A.D.3d 1260 (2nd Dept. 2010); Martinez v. City of New York, 73 A.D.3d 993 (2nd Dept. 2010); Kwang Ho Kim v D & W Shin Realty Corp., 47 A.D.3d 616, 620 (2nd Dept. 2008); Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2nd Dept. 2003). "The determinative factor is whether the party had 'the right to exercise control over the work, not whether it actually exercised that right.'" Herrel v. West, 82 A.D.3d 933, 933-934 (2nd Dept. 2011); see, Bakhtadze v. Riddle, 56 A.D.3d 589 (2nd Dept. 2008).

"Moreover, '[a]lthough property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (citations omitted).'" Pilato v. 866 U.N. Plaza Associates, LLC, 77 A.D.3d 644, 646 (2nd Dept. 2010); see, Cabrera v. Revere Condominium, 91 A.D.3d 695 (2nd Dept. 2012). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." McKee v. Great Atlantic & Pacific Tea Co., 73 A.D.3d 872 (2nd Dept. 2010); Ortega v. Puccia, 57 A.D.3d 54, 61-62 (2nd Dept. 2008).

In the case at bar, the evidence adduced clearly establishes that the Church defendants are not liable under Labor Law § 200, as they did not have notice of the allegedly defective condition, nor did they have the opportunity to direct or supervise the work, or take measures to ensure the safety of plaintiff Marcilio Marques ("plaintiff"). With regard to the motion by the City defendants, that branch of the motion to dismiss the complaint based upon the insufficiency of the Notices of Claims is denied. "The test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the city to investigate ... Thus, in determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the [claim]." Rosenbaum v. City of New York, 8 N.Y.3d 1(2006). The Court finds that the allegations set forth therein were sufficient to put the City defendants on notice of the potential Labor Law causes of action that would possibly arise as a result of the accident. Likewise denied is that branch of the motion for dismissal of section 200, as the Marques plaintiffs have raised triable issues of fact as to whether the City defendants had actual or constructive notice of the unsafe condition, and exercised sufficient control over the work being performed to correct or avoid the unsafe condition.

II. Labor Law § 240(1)

A cause of action under section 240(1) of the Labor Law, imposes a nondelegable duty upon owners and general contractors which applies when an injury is the result of one of the elevation-related risks contemplated by that section, which prescribes safety precautions to protect laborers from unique gravity-related hazards such as falling from an elevated height or being struck by a falling object where the work site is positioned at or below the level where materials or loads are being hoisted or secured. See, Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1 (2011); Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335 (2011); Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); La Veglia v. St. Francis Hosp., 78 A.D.3d 1123 (2nd Dept. 2010); Novak v. Del Savio, 64 A.D.3d 636 (2nd Dept. 2009) . The section provides, in pertinent part, the following: "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."

The central premise triggering Labor Law § 240(1) is "that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability." Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1, 7 (2011). Thus, "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity.'" Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625, 627 (2nd Dept. 2007); see, Cohen v. Memorial Sloan-Kettering Cancer Center, 11 N.Y.3d 823 (2008); Nieves v. Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999).

In the context of the falling objects, "in order to recover damages for violation of the statute, the 'plaintiff must show more than simply that an object fell causing injury to a worker.' A plaintiff must show that, at the time the object fell, it was 'being hoisted or secured' (citations omitted) or 'required securing for the purposes of the undertaking.'" Novak v. Del Savio, 64 A.D.3d 636 (2nd Dept. 2009); see, Ravinov v. Popeye's, 68 A.D.3d 1085 (2nd Dept. 2009). "Moreover, the plaintiff must show that the object fell 'because of the absence or inadequacy of a safety device of the kind enumerated in the statute.'" Marin v. AP-Amsterdam 1661 Park LLC, 60 A.D.3d 824 (2nd Dept. 2009). Lastly, "[r]outine maintenance activities in a non-construction, non-renovation context are not protected by Labor Law § 240 (citations omitted)." Paciente v. MBG Development, Inc., 276 A.D.2d 761 (2nd Dept. 2000); see, Garcia v. Piazza, 16 A.D.3d 547 (2nd Dept. 2005); Jani v. City of New York, 284 A.D.2d 304 (2nd Dept. 2001).

Here, the Church defendants and the City defendants have failed to demonstrate their prima facie entitlement to summary judgment and dismissal of the Marques plaintiffs' Labor Law §240(1) claim. Indeed, the collective defendants proffer a litany of reasons in support of the inapplicability

of this strict liability provision, to no avail. In giving consideration to the most salient arguments, the City defendants contend that liability cannot be imposed under Labor Law § 240(1), because the scarifying machine does not qualify as a falling object due to the lack of elevation differential and plaintiff did not fall as a result of the accident. In support of these positions, the City defendants rely upon Misseritti v. Mark IV Const. Co., Inc., 86 N.Y.2d 487 (1995) and its progeny. However, as was stated by the Court of Appeals in Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1, 9-11 (2011):

> We do not agree that Misseritti calls for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff. Misseritti did not turn on the fact that plaintiff and the base of the wall that collapsed on him were at the same level. Rather, just as in Narducci, the absence of a causal nexus between the worker's injury and a lack or failure of a device prescribed by section 240(1) mandated a finding against liability (citations omitted). Thus, we decline to adopt the "same level" rule, which ignores the nuances of an appropriate section 240(1) analysis.
>
> Moreover, the so-called "same level" rule is inconsistent with this Court's more recent decisions, namely Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757, 866 N.Y.S.2d 592, 896 N.E.2d 75 (2008) and Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 895 N.Y.S.2d 279, 922 N.E.2d 865 (2009) []. In Quattrocchi, we articulated for the first time that liability is not limited to cases in which the falling object was in the process of being hoisted or secured (see 11 N.Y.3d at 759, 866 N.Y.S.2d 592, 896 N.E.2d 75). Next, in Runner, the Court had occasion to apply section 240(1) to novel factual circumstances that did not involve a falling worker or falling object (see 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865). In Runner, the plaintiff was injured while he and coworkers moved an 800 pound reel of wire down a flight of four stairs (see id. at 602, 895 N.Y.S.2d 279, 922 N.E.2d 865). The workers were instructed to tie one end of a 10–foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel (see id.). The plaintiff, acting as a counterweight, held the loose end as other workers pushed the reel down stairs (see id.). As the reel descended, the plaintiff was pulled horizontally into the bar, injuring his hands as they jammed against it (see id.). After a review of our precedents, we concluded that "the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's

> injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential " (citation omitted).
>
> As the "elevation differential ... [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" [], we held the defendants liable under Labor Law § 240(1) for using a "jerry-rigged device" rather than hoists or pulleys as provided under the statute (citations omitted).

Further, the Runner Court found that "the dispositive inquiry framed by [New York jurisprudence] does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 at 603. The Court of Appeals in Runner further stated the following [13 N.Y.3d 599, 604]:

> The governing rule is to be found in the language from [Ross v. Curtis–Palmer Hydro–Elec. Co., 81 N.Y.2d 494], following closely upon that just quoted, where we elaborated more generally that "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person [].
>
> Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the worker. The relevant inquiry—one which may be answered in the affirmative even in situations where the object does not fall on the worker—is rather whether the harm flows directly from the application of the force of gravity to the object. Here, [], the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path.

Thus, in applying these holdings to the case at bar, this Court finds that the height differentials were not de minimis given the amount of force the scarifying machine may have generated in the course of its potentially rapid descent down the ramp. Nonetheless, there is a triable

issue of fact with regard to whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Further, defendants have failed to demonstrate, and the record is devoid of evidence that establishes, that the ramp in question was not a functional scaffolding, but a passageway outside the protections of the relevant section. Lastly, the fact that plaintiff was transporting equipment does not, in and of itself, preclude plaintiff from asserting a 240(1) claim. Defendants' misplaced reliance upon Sandi v. Chaucer Assoc., 170 A.D.2d 663, 664 (2nd Dept. 1991) in support of this proposition is belied by the fact that the Appellate Division, Second Department in the Sandi case, found that the purpose of Labor Law § 240(1) "is to protect workers from the inherent dangers of construction work by requiring the use of certain protective devices on elevated worksites and in the lifting and lowering of persons, materials and *equipment* [emphasis added]."

III. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed." See, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 347 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993). It is well settled that to support a § 241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a specific standard of conduct, and that such violation was the proximate cause of his injuries. See, St. Louis v. Town of North Elba, 16 N.Y.3d 411 (2011); Gasques v. State, 15 N.Y.3d 869 (2010); Fusca v. A & S Const., LLC, 84 A.D.3d 1155 (2nd Dept. 2011); Forschner v. Jucca Co., 63 A.D.3d 996 (2nd Dept. 2009); Harris v. Arnell Const. Corp., 47 A.D.3d 768 (2nd Dept. 2008). "In order to support a claim under section 241(6), however, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles." Misicki v. Caradonna, 12 N.Y.3d 511 (2009).

Here, the Church and City defendants have demonstrated their prima facie entitlement to summary judgment and dismissal of the Labor Law § 241(6) based upon the Marques plaintiffs' failure to allege specific violations of the New York State Industrial Code which were the proximate cause of plaintiff's injuries. Though the Marques plaintiffs assert five violations in support of their 241(6) claim, in opposition to the motions, the Marques plaintiffs contend that defendants violated Industrial Code § 23-1.22(b)(3), applicable to structural runways, ramps and platforms constructed for the use of wheelbarrows, power buggies, hand carts and hand trucks. Notwithstanding the Marques plaintiffs' contentions to the contrary, they have failed to raise a triable issue in opposition to the collective defendants' prima facie showing. Consequently, the Labor Law § 241(6) claim, which is unsupported by any relevant violations of the Industrial Code, must be dismissed.

IV. Punitive Damages

The City defendants also seek summary judgment and dismissal of the Marques plaintiffs' cause of action for punitive damages.[1] The law in this State is well-settled that recovery of punitive damages are not recoverable in an action that is grounded upon a private breach, and does not seek to vindicate a public right or deter morally culpable conduct. See, Reads Co., LLC v. Katz, 72 A.D.3d 1054 (2nd Dept. 2010). "Punitive damages are only recoverable where [there is] fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally." Tartaro v. Allstate Indem. Co., 56 A.D.3d 758 (2nd Dept. 2008). Moreover, "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action." Brualdi v. IBERIA, 79 A.D.3d 959 (2nd Dept. 2010). Thus, it is well-settled that an independent or separate cause of action for punitive damages cannot be maintained. See, 99 Cents Concepts, Inc. v. Queens Broadway, LLC, 70 A.D.3d 656 (2nd Dept. 2010); Paterra v. Nationwide Mut. Fire Ins. Co., 38 A.D.3d 511 (2nd Dept. 2007). Instead, "[p]unitive damages are available where the conduct constituting, accompanying, or associated with the breach [] is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious . . . to warrant the additional imposition of exemplary damages. Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603 (1994); see, Entler v. Koch, 85 A.D.3d 1098 (2nd Dept. 2011); Logan v. Empire Blue Cross and Blue Shield, 275 A.D.2d 187 (2nd Dept. 2000).

Here, the record is wholly devoid of any evidence of conduct by any of the defendants which is aimed at the general public and evinces a high degree of moral turpitude, and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations. Thus, as this claim for punitive damages is not viable, that branch of the motion by the City defendants for summary judgment and dismissal of this claim must be granted. Moreover, a court, upon consideration of a motion for summary judgment, has the inherent power to search the record where appropriate and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court. Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425, 429-430 (1996); Marrache v. Akron Taxi Corp., 50 A.D.3d 973 (2nd Dept. 2008); Morris v. Edmond, 48 A.D.3d 432 (2nd Dept. 2008); Whitman Realty Group, Inc. v. Galano, 52 A.D.3d 505 (2nd Dept. 2008); see, also, Micciche v. Homes by the Timbers, Inc., 1 A.D.3d 326 (2nd Dept. 2003); Shelter

[1] The City defendants seek dismissal of the punitive damages claim based upon three theories: (1) plaintiffs' failure to assert such in the Notice of Claim; (2) punitive damages cannot be assessed against a governmental entity; and (3) defendant Elite and Innovax have not engaged in any behavior that warrants such imposition of exemplary damages. However, as a claim for punitive damages is based upon the behavior of the defendants, the Court will first consider the general behavior of all the City defendants, and give further consideration to the other prongs, if necessary.

v. MCM Distributors, Inc., 299 A.D.2d 332 (2nd Dept. 2002); Image Clothing v. State Natl. Ins. Co., 291 A.D.2d 377 (2nd Dept. 2002). In light of the aforementioned determination, this Court, in its inherent authority, hereby searches the record and further grants summary judgment in favor of the Church defendants on the punitive damages claim.

V. Loss of Consortium

"To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim (citations omitted). General Municipal Law § 50-e [reasonably read, ...] does not require 'those things to be stated with literal nicety or exactness' (citations omitted)." Brown v City of New York, 95 N.Y.2d 389, 393 (2000). "The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the public corporation to investigate the allegations contained in the notice of claim (citation omitted). In determining whether there has been compliance with the requirements of General Municipal Law § 50–e(2), a court must focus on whether, based on the plaintiff's description, the relevant authorities can locate the place, fix the time, and understand the nature of the occurrence." Kim L. v. Port Jervis City School Dist., 40 A.D.3d 1042, 1044 (2nd Dept. 2007). "In making a determination on the sufficiency of a notice of claim, a court must look to the circumstances of the case, and is not limited to the four corners of the notice of claim[]." Luke v. Metropolitan Transp. Authority, 82 A.D.3d 1055, 1056 (2nd Dept. 2011). Here, in both the caption and textual description of the notice of claim, plaintiff identified himself solely and individually as the claimant. "In light of the notice's specification of parties here, and since corrections of a substantive nature are beyond the scope of the discretion conferred by General Municipal Law § 50-e(6)," dismissal of the derivative claim is appropriate. Moore v. Melesky, 14 A.D.3d 757, 759 (3rd Dept. 2005). Thus, the complaint of plaintiff Maria Marques is hereby dismissed as against the City defendants.

VI. Contractual Indemnification

The Church defendants also seek contractual indemnification against defendant SCA pursuant to Article 23 of the licensing agreement entered into on July 3, 2007, for the conversion of the American Martyrs Catholic School. "'While owners and general contractors owe nondelegable duties under the Labor Law to the plaintiffs who are employed at their worksites, these defendants can recover in indemnity, either contractual or common-law, from those considered responsible for the accident'(citations omitted)." Lazzaro v. MJM Industries, Inc., 288 A.D.2d 440, 441 (2nd Dept. 2001). "'The right to contractual indemnification depends upon the specific language of the contract' (citations omitted). 'The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances' (citations omitted). In addition, 'a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor' (citations omitted)." Reisman v. Bay Shore Union Free School Dist., 74 A.D.3d 772, 773 (2nd Dept. 2010); see, also, General Obligations Law § 5–322.

As the proponent of the motion for summary judgment, the Church defendants met their initial burden of demonstrating their entitlement to contractual indemnification by introducing the agreement which included an express hold harmless clause in their favor. In opposition, defendant SCA has failed to raise a question of fact as to whether the contractual indemnification clause should not be enforced, as the record is devoid of evidence that the Church defendants were negligent or had the authority to supervise, direct, or control the work that caused the injury. See, Naranjo v. Star Corrugated Box Co., Inc., 11 A.D.3d 436 (2nd Dept. 2004). Indeed, the evidence demonstrates that the liability of the Church defendants to plaintiff under Labor Law § 240(1), if any, is based solely upon their status as the owners of the premises. See, Lazzaro v. MJM Industries, Inc., 288 A.D.2d 440 (2nd Dept. 2001). Nonetheless, the City defendants have successfully demonstrated that an award of summary judgment would be premature based upon the specific language of the underlying licensing agreement. The indemnification provision at issue requires defendant SCA to indemnify and save harmless the Church defendants for, inter alia, all claims and losses arising from injury to persons and property, resulting from the negligence or misconduct of the City defendants or its agents and contractors. As there has not been a determination as to whether plaintiff's injuries were caused by any acts or omissions by the City defendants, summary judgment on this cross-claim would be premature. See, Langner v. Primary Home Care Services, Inc., 83 A.D.3d 1007 (2nd Dept. 2011); Quiroz v. Beitia, 68 A.D.3d 957 (2nd Dept. 2009); D'Angelo v. Builders Group, 45 A.D.3d 522 (2nd Dept. 2007).

Conclusion

Accordingly, the motion by defendants The Roman Catholic Church of the American Martyrs and Roman Catholic Diocese of Brooklyn for summary judgment and dismissal on all plaintiffs' causes of action against them is granted to the extent that the claims for punitive damages, and violations of Labor Law §§ 200 and 241(6), as well as common law negligence, hereby are dismissed. That branch of the motion for summary judgment on their cross-claim for contractual liability against defendant the New York City Schools Construction Authority is denied as premature. The balance of the motion hereby is denied. The motion by defendants Elite Floors, Inc., incorrectly s/h/a Elite Flooring, Inc., Innovax-pillar, Inc., New York City Department of Education, the City of New York and New York City School Construction Authority Incorrectly s/h/a the New York City School Construction Authority, for summary judgment dismissing plaintiffs' complaint and all cross-claims asserted against them, is granted to the extent that the claims for punitive damages, and violations of Labor Law § 241(6), hereby are dismissed, as is the complaint of plaintiff Maria Marques. All other arguments asserted herein were considered and found without merit by this Court, and therefore, are otherwise denied.

Dated: March 16, 2012

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J.S.C.