Kolinek v Brisam Hotel, LLC
2012 NY Slip Op 33894(U)
March 13, 2012
Supreme Court, Bronx County
Docket Number: 7643/2005
Judge: Alison Y. Tuitt

 FILED Mar 27 2012 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

TOMAS KOLINEK and MICHAELA KOLINEK,

Plaintiffs,

-against-

BRISAM HOTEL, LLC, NORMAN CREEK CONSTRUCTION, LLC, TRITEL CONSTRUCTION GROUP, LLC, COLGATE SCAFFOLD & EQUIPMENT CORP., FLINTLOCK CONSTRUCTION CO., INC., FLINTLOCK CONSTRUCTION SERVICES, LLC and MAJOR CONSTRUCTION SERVICES, INC.,

Defendants.

INDEX NUMBER: 7643/2005

Present:
HON. **ALISON Y. TUITT**
Justice

BRISAM HOTEL, LLC,

Third-Party Plaintiff,

-against-

ILLINOIS UNION INSURANCE COMPANY, PRINCETON INSURANCE COMPANY, AMERICAN SAFETY RISK RETENTION GROUP, INC., ABC INSURANCE COMPANIES I-X (said names being fictitious and presently unknown) HCS CONSTRUCTION SERVICES, L.P., FLINTLOCK CONSTRUCTION CO., E&E ASSOCIATES and WALTER CHIN,

INDEX NUMBER:

TRITEL CONSTRUCTION GROUP LLC,

Second Third-Party Plaintiff,

-against-

FLLINTLOCK CONSTRUCTION SERVICES LLC,

Second Third-Party Defendants.

The following papers numbered 1 to 15,

Read on this Plaintiff's and Defendant/Third-Party Plaintiff's Motions for Summary Judgment and Indemnification

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On Calendar of **7/11/10**

Notices of Motion-Exhibits, Affirmations 1, 2, 3, 4, 5

Affirmations in Opposition 6, 7, 8, 9, 10, 11, 12

Reply Affirmations 13, 14, 15

Upon the foregoing papers, the parties' motions and cross-motions for summary judgment and indemnification are consolidated for purposes of this decision.

The within action involves personal injuries sustained by plaintiff Tomas Kolinek as a result of an accident that occurred on March 2, 2004 at 9:00 a.m. at 116 West 31st Street, New York, New York where there was an ongoing hotel construction project. Plaintiff was injured while in the course of his employment with Superior Scaffolding he was allegedly struck by a falling brick. Plaintiff alleges that the brick had been previously installed as part of the exterior facade of the building above the 9th floor. Plaintiff states that at the time of the accident, he was outside of the building on a sidewalk shed at the second floor level when this misleveled brick dislodged and traveled through an opening in the allegedly damaged vertical netting hitting his back.

Plaintiff brought the instant action pursuant to Labor Law §§200, 240 and 241(6) against the owner of the subject building, Brisam Hotel, LLC (hereinafter "Brisam"); the general contractors, Norman Creek Construction LLC (hereinafter "Norman Creek") and Flintlock Construction Co./Flintlock Construction Services, LLC (hereinafter "Flintlock"); the construction manager, Tritel Construction Group, LLC (hereinafter "Tritel"); the masonry subcontractor, Major Construction Services, Inc.; and, the supplier of scaffolds, Colgate Scaffolding. Brisam and Tritel cross claimed against Norman Creek, Major Construction and Flintlock seeking common law and contractual indemnification. Tritel has a third party action against Flintstock.

The motions are as follows:

1. Brisam and Tritel move for summary judgment seeking dismissal of the plaintiff's Labor Law claims and the cross-claims of co-defendants. Brisam and Tritel also seek contractual and common law indemnification as against Norman Creek and Major Construction and for a finding of breach of contract as against Major Construction for failing to procure insurance.
2. Major Construction moves for summary judgment seeking dismissal of the plaintiff's complaint and the cross-claims arguing that Labor Law §240(1) does not apply as it was not an owner or general contractor. Major Construction also argues that Labor Law §241(6) does not apply to it as there is no evidence that it violated any specific Industrial Code regulation. Additionally, Major Construction argues that plaintiff cannot show that the falling brick resulted from its actions or negligence.
3. Norman Creek and Flintstock (hereinafter collectively referred to as "Norman Creek") move to dismiss plaintiff's complaint arguing that plaintiff cannot show that the subject brick was being hoisted or secured when it fell as required by Labor Law §240(1). Norman Creek further argues that none of the Industrial Code violations plaintiff alleges were violated pursuant to Labor Law §241(6) apply to it. Norman Creek also argues that plaintiff's Labor Law §200 claim must be dismissed because it did not supervise plaintiff's work.
4. Norman Creek moves for an Order granting it contractual indemnification against Major Construction on the grounds that the Contract and Agreement of Indemnity between Norman Creek and Major Construction contains an indemnification clause by which Major Construction agrees to hold Norman Creek harmless as to this claim. Norman Creek argues that these indemnification clauses should be enforced inasmuch as the work which caused plaintiff's injuries was supervised by Major Construction and because Norman Creek was not negligent in connection with plaintiff's accident.
5. Plaintiff moves for summary judgment on his Labor Law §240(1) claim against Brisam as owner of the building and against Tritel, Flintlock and Norman Creek as general contractors arguing that plaintiff was engaged in protected activity at that time of his accident. Plaintiff also moves for summary judgment as against Major Construction under the doctrine of res ipsa loquitor. Plaintiff concedes that his claims pursuant to Industrial Code 12 NYCRR 23-5.1, 12 NYCRR 23-5.3 and 12 NYCRR 23-5.18 under Labor Law §241(6) are inapplicable to the claims herein and withdraws those claims. However, plaintiff seeks leave to supplement his Bill of Particulars to allege a violation of 12 NYCRR 23-2.1(a)(2).

Deposition Testimony

Plaintiff testified as follows: On the date of the accident, plaintiff and his co-worker, Samuel Mendez, were the only workers from Superior Scaffolding at the work site that day. Generally, plaintiff's job entailed setting up scaffolding based on Flintlock's instructions or requests. Plaintiff would receive instructions from his workshop at the offices of Superior Scaffolding as to what work he would need to perform on the scaffold on that day. When he arrived at the work site, he had to report to the foreman of the site, someone from Flintlock, who he believed was named Frank. Plaintiff advised Frank what he would be doing with the scaffolding that day and Frank told them that the scaffolding was now empty and plaintiff could do his work. The foreman from Flintlock would tell them what to do from time to time. Frank told him to wear a hard hat and gloves.

On the date of the accident, plaintiff arrived at the project site to remove the rigging points of a hanging scaffold from the 10th floor in the direction up to the roof. In order to do so, the masons had to leave the scaffolding on which they were working that day. The masons left the hanging scaffolding prior to the plaintiff beginning his work that day. The Flintlock foreman instructed the masons to leave the area so that plaintiff would be able to perform his work. At the time of his accident, plaintiff and his co-worker were working on that scaffold, changing the position of the scaffolding. At that time, the brickwork on the facade of the building had been installed to the 9th floor. It was his understanding that the hanging scaffold had to be jumped to the roof of the building so that the masons could complete the brickwork from the 10th floor to the roof. When plaintiff arrived at the work site, there were two masons on the scaffold. Plaintiff saw the masons on the scaffold close to the 9th floor but he did not see them on the 9th floor. Plaintiff used the hoist car mounted at the front of the building to ride up to the 9th floor to access the scaffold through an open window. Plaintiff did not see the masons when he arrived at the 9th floor. Plaintiff stepped out of the 9th floor window opening onto the hanging scaffold with his co-worker. As he stepped onto the scaffold, plaintiff noticed that there were two bricks on the wall at either end of the platform that were not affixed, but were instead left resting on a row of bricks installed on the building. Plaintiff believes the brick came from the facade based upon his viewing of the bricks of the facade and viewing the brick that hit him. As they lowered the scaffold, plaintiff felt a vibration from the hoist and they continued to lower the scaffold until it came to rest on top of a sidewalk bridge on the 2nd floor. The accident occurred when a brick hit his back after the hanging scaffold came to rest on the sidewalk bridge while

plaintiff was untangling one of the scaffold pulley ropes. Plaintiff states that the brick came from the 9th floor because it was the only loose brick that was on the 9th floor. However, plaintiff states that when the brick hit him he was looking down and did not see where the brick that struck him came from. Plaintiff also states that it was his impression that the vibration of the hoist caused the brick to fall from the building but he has no direct knowledge that that's what occurred.

Frank Concilio testified that he was the site superintendent for Flintlock. Flintlock was hired by Tritel to erect a 20 story hotel at the subject location. His general duties were to ensure that the various contractors on the site were doing their work correctly and safely and he had the authority to stop any unsafe construction practices which he might observe. Norman Creek hired Major Construction to perform the masonry work at the site. Mr. Concilio reviewed Major Construction's scope of work, but he did not direct Major Construction's workers on the methods of their work. Mr. Concilio testified that Major Construction's owner and a foreman were on site daily. Norman Creek also hired Total Safety as site safety manager for the project. Al Parmet of Total Safety as well as Tritel employees were at the site everyday. During conversations Mr. Concilio was present for, Tritel would sometimes direct the trades to move or change things. Total Safety held safety meeting at the site once a week. With regard to safety netting, Mr. Concilio testified that vertical netting was installed at windows and other openings in the facade.

Mr. Concilio further testified that on the day of plaintiff's accident, various trades were working at the site including masons from Major Construction. A material hoist was erected on the job site. A mobile scaffold was erected at the site by plaintiff's employer Superior Scaffolding once the building reached 10 floors for the Major Construction's workers that were required to work at higher floor levels. Mr. Concilio was on the job site at the time of plaintiff's accident. He learned of plaintiff's accident and went to the accident location and had an opportunity to go to the sidewalk bridge where plaintiff had been struck by a falling brick. Mr. Concilio noted the presence of the scaffold and attendant equipment in the vicinity and also a small piece of brick which was pointed out to him as having struck the plaintiff. He did not know where the brick came from and was not sure of how it had fallen. Mr. Concilio testified that he often saw Superior Scaffolding employees "jumping" the scaffold to higher floors. Sometimes this involved swinging of ropes which became entangled in safety lines, but he did not know if this could cause bricks to fall. Mr. Concilio never observed any loose bricks being used by Major Construction employees to level the courses of masonry which they were installing on the facade. The

material/personnel hoist was operated by a laborer employed by Norman Creek.

Stephen Weiss, Jr., one of the two members of Norman Creek, testified that Norman Creek contracted with Tritel for the work at the site. The contract required Norman Creek to provide the appropriate materials and services to construct the hotel and to include an appropriate safety plan. Included within the contract between Norman Creek and Tritel was the work which was ultimately performed by Major Construction as the masonry subcontractor. The masonry work, which was performed solely by Major Construction, included concrete block work, exterior brick facade work and the application of a stucco-like finish and also required specific scaffolding to be furnished for the use of Major Construction. Major Construction entered into a written contract with Norman Creek to perform the masonry work. A separate agreement was entered into for the material hoist at the job site but Mr. Weiss could not recall the name of the entity which supplied the hoist or whether it was retained by Norman Creek or Flintlock. The material hoist was operated by a Norman Creek employee. The scaffolding supplied by Superior Scaffolding was installed to enable the masons to do their facade brickwork and was there for no other purpose. Norman Creek's contractual responsibilities for the site included 90% of the work required. Norman Creek subcontracted out the actual construction activities including the masonry work contracted for by Major Construction. Norman Creek reviewed the work of Major Construction and the work of the other subcontractors on the job site as required.

Mian Fayeez, President of Major Construction, testified that he prepared a proposal to perform masonry work on the project to install all face brickwork which was to be supplied by the general contractor to install concrete block work, to install glazed blocks to be furnished by the general contractor, to apply Thorocoat to certain wall areas and to furnish scaffolding. The scaffolding furnished by Major Construction on this project was pipe scaffolding. The contract was signed by Mr. Fayeez on behalf of Major Construction with Norman Creek. Frank Concilio was the site superintendent employed by Flintlock on this job. Mr. Fayeez testified that Mr. Concilio gave instructions to all the workers at the site. The equipment and material required by Major Construction's workers to install the brick and block work on the job were taken to the appropriate floor levels using the materials/personnel hoist operated by the general contractor. The bricks were stored at a central location on each floor or as directed by the general contractor and then brought by wheelbarrows by Major Construction employees to the wall locations at the facade of the building where they were to be installed. Major Construction workers would remove the brick from the wheelbarrows and pass them through window openings

to the masons, who worked off a movable scaffold, which they operated to raise and lower as they moved from floor level to floor level. This would have included the scaffold furnished by the plaintiff's employer. Major Construction's supervisor, Sohill Akhtar, who was at the job site full time, advised Mr. Fayeez of everything that was going on at the site and was authorized to attend to any complaints by the general contractor's representative, Mr. Concilio. Major Construction never moved any vertical netting from the building in the course of its work.

Rukesh Patel testified on behalf of Brisam that he was the owner's representative at the site. He did not observe the bricks being applied at the subject premises. Brisam hired HCS Construction Services, which entity engaged Tritel. Tritel engaged the general contractor Norman Creek/Flintlock pursuant to a contract between Tritel and Norman Creek. Candice Colucci testified on behalf of Tritel and was employed as an executive project manager for Tritel. She was the executive project manager at the Brisam hotel. Ms. Colucci also verified that Norman Creek was hired as the general contractor pursuant to a contract between Tritel and Norman Creek. A safety plan was generated by Norman Creek because "it was required of them." Total Safety was the site manager and they were supposed to be hired by Norman Creek. The Total Safety contract indicates that Flintlock actually engaged this contractor. She was unaware of any violations issued by the Department of Buildings at this site as Tritel did no Department of Building filings for this job. One violation was produced which was issued to Flintlock in February 2004 indicating that the safety netting was not properly maintained. No violations were issued directly to Tritel and they were not notified of any. Tritel was engaged as a liaison between the general contractor, the owner and professionals such as the architect and engineer. They did not hire subcontractors and their approval was not required in connection with the engagement of the subcontractors. They did not have the authority to stop the work if any unsafe work practice was observed. Ms. Colucci further testified that Tritel did not supervise, direct or control the work of the subcontractors and that Norman Creek delegated that responsibility. Norman Creek was also responsible for the means and methods of the subcontractors' work which included ensuring that the masonry subcontractor employed proper materials in the performance of their work and that the bricks were properly secured and adhered to the facade of the building. Norman Creek supervised the daily construction, safety meetings, project meetings and generated daily reports and minute meetings.

The Law

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: "[a]ll 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... 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." Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York , 716 N.Y.S.2d 50 (1st Dept. 2000). Not every gravity-related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491 (1995). With respect to the application of Labor Law §240(1), "[a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence of inadequacy of a safety device of the kind enumerated in the statute. Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259 (2001). Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute

liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment. However, an implicit precondition to this 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. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 N.Y. 2d at 317. When the work giving rise to these duties has been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Thus, the authority to supervise and control the work operates to transform the subcontractor into a statutory agent of the owner or construction manager and the agent then becomes fully liable to indemnify the owner for any damages assessed against the owner or general contractor. Kelly v. Diesel Construction Division of Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

Labor Law §241(6) concerns reasonable and adequate protection and safety through the worksite. Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor to comply with the regulations promulgated by the Commissioner of the Department of Labor that mandate compliance with concrete specifications in the Industrial Code. Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993). In order to plead a violation of Labor Law §241(6), plaintiff must allege a specific violation of the New York State Industrial Code. Plaintiff has withdrawn his claim pursuant to Industrial Code 12 NYCRR 23-5.1, 12 NYCRR 23-5.3 and 12 NYCRR 23-5.18. However, plaintiff in his motion seeks leave to supplement his Bill of Particulars to allege a violation of 12 NYCRR 23-2.1(a)(2).

Labor Law §200 codifies the common law duty imposed on owners and contractors to exercise reasonable care in providing construction site workers with a safe place to work. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 (1998). Since it is a codification of common law negligence, negligence principals apply, including a notice requirement upon any defendant for any alleged defective condition. Kennedy v. McKay, 446 N.Y.S.2d 126 (2d Dept. 1982). Liability of an owner or general contractor arises only when it has exercised supervision and control over the subcontractor's methods and has actual or constructive notice of the dangerous condition. Combs v. New York State Electric and Gas Corp., 82 N.Y.2d 876 (1993).

Brisam and Tritel Motion

Brisam and Tritel move for summary judgment seeking dismissal of the plaintiff's Labor Law claims and the cross-claims of co-defendants. Brisam and Tritel also seek contractual and common law indemnification as against Norman Creek, Flintlock and Major Construction. Although Brisam and Tritel did not have a written agreement with Flintlock, the agreement between Tritel and Norman Creek provides that Norman Creek was responsible for the safety of all operations at the site and the work of any subcontractor. Normal Creek agreed to indemnify Brisam and Tritel for all claims and expenses, including attorney's fees, and also agreed to procure insurance naming both as additional insureds. That same provision was part of the Major Construction subcontract with Norman Creek. Flinklock, acting as the general contractor on the site, had the responsibility for safety which includes maintenance of the netting and was issued a violation by the Department of Buildings on the day of the accident. Flintlock also hired Total Safety, the safety contractor, which entity regularly performed safety inspections at the site. No representative from Brisam or Tritel was on site on the day of the accident. Neither supervised, directed or controlled the activities of the construction personnel who performed daily construction.

Brisam and Tritel argue that plaintiff's Labor Law §240 claim must be dismissed as the accident did not occur under circumstances involving a hoisting or securing device enumerated in the statute; Labor Law §241(6) must be dismissed as plaintiff failed to cite any applicable Industrial Code; and Labor Law §200 must be dismissed as there is no active negligence on the part of Tritel or Brisam, neither were on notice of any dangerous condition as to the brick and they did not supervise, direct or control the work. In addition, they argue that since there is no active negligence on their part, they are entitled to common law indemnity as against Major Construction, Flintlock and Norman Creek and contractual indemnity from Norman Creek and Major Construction.

Brisam as owner of the building did not control the work site or the work that plaintiff was engaged in at the time of the accident. Without this authority to control the activity producing the injury, Brisam cannot be liable for the actual damages to plaintiff. Norman Creek/Flintlock, a joint venture in connection with the work, stands in the shoes of the owner of the building as it contracted for the work to be done at the site. "Section 240 of the Labor Law imposes liability upon "owners" but does not define the term. Looking to the legislative history for guidance, it is immediately apparent that the owner was the party who had the prime

contract with the general contractor and who, as titleholder, would receive the benefit of the work and who thus had an interest in completing it. The owner, jointly with the general contractor, would have the right to choose the subcontractor and to coordinate and supervise the work. Since the goal of the statute was to protect workmen, vicarious liability was imposed on owners in the hope that they would enforce their right to choose responsible and safety-conscious subcontractors as well as their right to impose safety measures on those subcontractors." Sweeting v. Board of Co-op Educational Services, 443 N.Y.S.2d 910 (1st Dept. 1981). See also Frierson v. Concourse Plaza Associates, 592 N.Y.S.2d 309 (1st Dept. 1993) ("The 'owners' who are contemplated by the Legislature under Labor Law § 240(1) are those parties with a property interest who hire the general contractor.)

The purpose of Section 240(1) is to protect workers by placing the ultimate responsibility for worksite safety on the owner and general contractor instead of the worker's themselves. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 500 (1992). 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. Rocovich v. Consolidated Edison Co. 78 N.Y.2d 509 (1991). The Court of Appeals has held that the duty imposed 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." Id. at 513. Section 241(6) also provides that the statutory duty is nondelegable and does not require that the owner exercise supervision or control over the worksite before liability attaches. Id. at 501- 502.

Brisam and Tritel argue that plaintiff's Labor Law §240(1) should be dismissed pursuant to the Court of Appeals case of Narducci where the plaintiff was injured by a falling piece of glass and the Court held that plaintiff could not recover because the glass that injured him was part of the pre-existing building structure and was a general hazard rather than a hazard specifically addressed by the Scaffold Law. The Court noted that plaintiff was not injured by an object that was being hoisted or secured, or due to an elevation related-risk. With respect to falling objects, the Scaffold Law applies where the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured. "Thus, for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute." Narducci, 96 N.Y.2d at 268. It has been recognized that the falling object is one that must pose an elevation risk of the kind that would be addressed by the safety devices of

the kinds enumerated in the statute. See, Bednarczyk v. Vornado Realty Trust, 881 N.Y.S.2d 51 (1st Dept. 2009).

Here, Brisam and Tritel failed to eliminate all questions of fact as to whether the brick that struck plaintiff was an object that required securing for the purposes of the undertaking being performed. See, Gonzalez v. TJM Construction Corp. 928 N.Y.S.2d 344 (2d Dept. 2011). In Gonzalez, the plaintiff was a mason who was working on a building renovation project. Plaintiff's employer, the masonry subcontractor, had been hired by the general contractor to restore and reinforce the facade of the building which included the removal and replacement of loose bricks from the building's facade. The plaintiff was inside the building on the ground floor next to a window that had been removed talking to his foreman, when according to the plaintiff, a brick fell from "out of nowhere" and struck him causing him injuries. The Appellate Court held that the construction manager "failed to eliminate all triable issues of fact regarding its contention that the brick that struck plaintiff was not an object that required securing for the purposes of the undertaking pursuant to Labor Law §240(1)." Gonzalez, 928 N.Y.S.2d at .

The facts of Gonzalez are analogous to the instant matter. Thus, there are questions of fact that preclude dismissal of plaintiff's Labor Law §240(1) claim. See also Luongo v. City of New York, 899 N.Y.S.235 (1st Dept. 2010)(Unlike Narducci where there was no §240(1) liability because the object that fell, a window, was part of the "pre-existing building structure as it appeared before the work began", here the opposite is true. The jack and metal plates that struck plaintiff were not part of the "pre-existing structure" and clearly needed to be secured); Boyle v. 42nd St. Dev. Project, Inc., 835 N.Y.S.2d 7 (1st Dept. 2007) (Defendants' assertion that the claim was properly dismissed because rod that struck plaintiff was not being hoisted or secured at the time of the accident is without merit since it is based on a misreading of Narducci that "plaintiff must show that the object fell, while being hoisted or secured". The glass in Narducci did not qualify as the type of falling object contemplated in the statute because it was not an integral part of the renovations. Narducci does not stand for the proposition that an object must fall at the precise moment of being secured during the work process in order for the statute to apply.) Thus, "falling object" liability under the statute is not limited to objects that are in the process of being hoisted or secured. See, Quattrocchi v. F.J. Sciame Construction Corp., 11 N.Y.3d 757 (2008).

Plaintiff claims a violation of Labor Law 241(6), Industrial Code 23-2.1 which provides, in pertinent part, "(a) Storage of material or equipment. (2) Material and equipment shall not be stored upon any

floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." There is also a question of fact as to whether this Code was violated. However, the Labor Law §200 must be dismissed as against Brisam and Tritel as there is no evidence of active negligence on the part of Tritel or Brisam, or evidence that they were on notice of any dangerous condition as to the brick, and they did not supervise, direct or control the work.

With respect to Brisam and Tritel's branch of the motion seeking contractual and common law indemnification, the contract between Brisam, Tritel and Norman Creek provides that:

> To the fullest extent permitted by law, the Subcontractor [Norman Creek] shall indemnify and hold harmless the Owner [Brisam], Contractor [Tritel]... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work... but only to the extent caused by the negligent acts or omissions of the Subcontractor, sub-subcontractors, anyone directly or indirectly employed by them or anyone for who acts they may be liable...

The contract also provides as follows:

> The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with the safety plan annexed hereto as exhibit "E" - safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property.

The contract between Major Construction and Norman Creek provides that:

> To the fullest extent permitted by law, the Sub-subcontractor [Major Construction] shall indemnify and hold harmless the Owner [Brisam], Contractor [Tritel], the Subcontractor [Norman Creek]... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Sub-Subcontractor's Work... but only to the extent caused by the negligent acts or omissions of the Sub-Subcontractor, subcontractors, anyone directly or indirectly employed by them or anyone for who acts they may be liable...

The party seeking contractual indemnification must prove itself free from negligence because to the extent that its negligence contributed to the accident, it cannot be indemnified. Cava Construction Co., Inc. v. Gealtec Remodeling Corp., 871 N.Y.S.2d 654 (2d Dept. 2009). A party seeking common-law indemnification must prove not only that it was free of negligence, but also that the proposed indemnitor negligently contributed

to the cause of the accident for which the indemnitee is liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty to keep its premises in a reasonably safe condition. Lewis-Moore v. Cloverleaf Tower Housing Development Fund Corp., 810 N.Y.S.2d 70 (1st Dept. 2006) citing 17 Vista Fee Associates v. Teachers Ins. and Annuity Ass'n of America, 693 N.Y.S.2d 554 (1st Dept. 1999) (The principle of "implied indemnification" permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. In the classic case, implied indemnity permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer. The party that has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of implied indemnification. To be entitled to implied indemnification, the owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought.)

Here, there is no evidence that Brisam and Tritel directed, supervised or controlled the work site or the work that plaintiff was engaged in. Plaintiff testified that he was never instructed or supervised by anyone from Brisam. There is no evidence that Brisam or Tritel had any responsibility for the safety operations at the site or the work of any subcontractor. Further, there is no evidence that Brisam or Tritel were present at the site or supervised, directed or controlled the activities of the construction personnel who performed daily construction. Thus, Brisam and Tritel are entitled to indemnification from Norman Creek/Flintlock pursuant to the indemnification clause in the contract. Under the contract, Norman Creek agreed to indemnify both Brisam and Tritel for all damages "resulting from performance of the Subcontractor's Work" or the work of "anyone directly or indirectly employed by them or anyone for whose acts they may be liable." Brisam and Tritel are also entitled to indemnification from Major Construction. Pursuant to the Indemnification section of the contract between Norman Creek and Major Construction, Major Construction agreed to indemnify the owner and general contractor or a subcontractor only to the extent that plaintiff's injuries occurred as a result of Major Construction's negligence. Major Construction procured insurance for the additional insureds pursuant to that contract. Accordingly, in the event plaintiff recovers on his Labor Law 240(1) and 241(6) claims against defendants, Brisam and Tritel are entitled to contractual and common law indemnification from Norman Creek and Major Construction.

Major Construction's Motion

Major Construction moves for summary judgment seeking dismissal of the plaintiff's complaint and the cross-claims arguing that Labor Law §240(1) does not apply as it was not an owner or general contractor. Major Construction also argues that Labor Law §241(6) does not apply to it as there is no evidence that it violated any specific Industrial Code regulation. Additionally, Major Construction argues that plaintiff cannot show that the falling brick resulted from its actions or negligence.

Major Construction's motion must be denied. Major Construction's argument that Labor Law §240(1) does not apply to it as it was a subcontractor is without merit. Section 240(1) was intended to impose liability on contractors, owners and their agents. When duties regarding worksite safety are delegated to a third party, that third party then obtains the concomitant authority to supervise and control the work and becomes a statutory agent of the owner or general contractor. Kelly v. Diesel Construction Division of Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

The testimony of plaintiff raises an issue of fact as to whether the bricks were improperly stored or secured by Major Construction employees. Major Construction was the only bricklayer or masonry contractor at this construction site. In addition, plaintiff testified that immediately prior to ascending to the 9th floor to work on the scaffold, he observed masons working on the scaffolding at or around the 9th floor. He also testified that before getting on the scaffold, he observed loose bricks sitting on the windowsill on the 9th floor and on the scaffolding itself.

Moreover, pursuant to its contract with Norman Creek, Major Construction was responsible for supervising its own work. The contract states that "[t]he Sub-Subcontractor [Major Construction] shall supervise and direct the sub-subcontractor's work." The contract also required Major Construction to "take reasonable safety precautions with respect to the performance of the sub-contract." There is a question of fact as to whether Major Construction violated its requirements under the contract. Major Construction employees had a duty to secure their work site and clean up their materials.

With respect to plaintiff's claim pursuant to Labor Law §241(6), plaintiff claims a violation of Industrial Code 23-2.1 which provides, in pertinent part, "(a) Storage of material or equipment. (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or

stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Based on the plaintiff's testimony, there is also a question of fact as to whether Major Construction violated this section of the Industrial Code.

With respect to plaintiff's claim pursuant to Labor Law §200, Major Construction's motion is also denied. There is a question of fact as to whether Major Construction was negligent. There is some evidence of active negligence on the part of Major Construction and evidence that they were on notice or should have been on notice of a dangerous condition as to the bricks that plaintiff testified he observed on the scaffold. Additionally, Major Construction supervised, directed and control the work pertaining to masonry.

Norman Creek/Flintlock's Motion for Dismissal

Norman Creek (and Flintlock move to dismiss plaintiff's complaint arguing that plaintiff cannot show that the subject brick was being hoisted or secured when it fell as required by Labor Law §240(1). Norman Creek further argues that none of the Industrial Code violations plaintiff alleges were violated pursuant to Labor Law §241(6) apply to it. Norman Creek also argues that plaintiff's Labor Law §200 claim must be dismissed because it did not supervise plaintiff's work.

Norman Creek's application to dismiss plaintiff's Labor Law §240(1) and Labor Law §241(6) claim is denied for the reasons stated in the denial of Brisam and Tritel's motion. With respect to dismissal of plaintiff's Labor Law §200 claim, there are questions of fact as that preclude summary judgment. Plaintiff testified that when he arrived at the work site, he had to report to the foreman of the site, Frank. Plaintiff further testified that Frank instructed the masons to leave the area so that plaintiff would be able to perform his work. Plaintiff also testified that Frank would tell him what to do from time to time and told him to wear a hard hat and gloves. Frank Concilio testified that his general duties were to ensure that the various contractors on the site were doing their work correctly and safely and he had the authority to stop any unsafe construction practices which he might observe. Norman Creek also hired Total Safety as site safety manager for the project. The contract for the work required Norman Creek to include an appropriate safety plan.

This testimony raises an issue of fact as to whether Norman Creek, to some extent, supervised, directed and control the work that was being performed. Moreover, it was Norman Creek's responsibility to ensure that the work was being done safely. There is also a question of fact as to whether Norman Creek was on

notice or should have been on notice of a dangerous condition as to the bricks that plaintiff testified he observed on the scaffold.

Norman Creek's Motion for Contractual Indemnification

Norman Creek moves for an Order granting it contractual indemnification against Major Construction on the grounds that the Contract and Agreement of Indemnity between Norman Creek and Major Construction contains an indemnification clause by which Major Construction agrees to hold Norman Creek harmless as to this claim. Norman Creek argues that these indemnification clauses should be enforced inasmuch as the work which caused plaintiff's injuries was supervised by Major Construction and because Norman Creek was not negligent in connection with plaintiff's accident.

The party seeking contractual indemnification must prove itself free from negligence because to the extent that its negligence contributed to the accident, it cannot be indemnified. Cava Construction Co., Inc. v. Gealtec Remodeling Corp., 871 N.Y.S.2d 654 (2d Dept. 2009). To any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor. Reynolds v. County of Westchester, 704 N.Y.S.2d 651 (2d Dept. 2000). In the instant case, there is a genuine issue of material fact as to whether Norman Creek is free from negligence precludes summary judgment on it claim seeking contractual indemnification.

Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment on his Labor Law §240(1) claim against Brisam as owner of the building and against Tritel, Flintlock and Norman Creek as general contractors arguing that plaintiff was engaged in protected activity at that time of his accident. Plaintiff also moves for summary judgment as against Major Construction under the doctrine of res ipsa loquitor. Plaintiff concedes that his claims pursuant to Industrial Code 12 NYCRR 23-5.1, 12 NYCRR 23-5.3 and 12 NYCRR 23-5.18 under Labor Law §241(6) are inapplicable to the claims herein and withdraws those claims. However, plaintiff seeks leave to supplement his Bill of Particulars to allege a violation of 12 NYCRR 23-2.1(a)(2).

Plaintiff's motion for summary judgment on his Labor Law §240(1) claim is denied. See, Gonzalez, 928 N.Y.S.2d at 346(Court properly denied that branch of plaintiff's motion which was for summary judgment on the issue of liability against the general contractor and the construction manager holding that

plaintiff failed to establish all questions of fact as to whether the brick that struck him was an object that required securing for the purposes of the undertaking being performed).

With respect to plaintiff's res ipsa loquitur claim against Major Construction, when a specific cause of an accident is unknown, the doctrine of res ipsa loquitur permits an inference of negligence to be drawn from the very occurrence of a certain type of accident and defendant's relation to it. Pavon v. Rudin, 679 N.Y.S.2d 27 (1st Dept. 1998) citing Kambat v. St. Francis Hospital, 89 N.Y.2d 489, 494 (1997) Res ipsa loquitur creates a prima facie case of negligence sufficient for submission to the jury which is permitted but not required to infer negligence. Id. citing Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 226 (1986). In order to satisfy the standard for res ipsa loquitur, plaintiff must establish: first, that the event is of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and, third, it must not have been due to any voluntary action or contribution on the part of the plaintiff. Ebanks v. New York City Transit Authority, 70 N.Y.2d 621, 623 (1987).

It is important to note that the res ipsa doctrine permits an inference of negligence which the jury is free to accept or reject. Tora v. GVP AG, 819 N.Y.S.2d 730 (1st Dept. 2006). The only instance where summary judgment must be granted to plaintiff on the res ipsa theory is "when the plaintiff's circumstantial proof is so convincing and defendant's response is so weak that the inference of defendant's negligence is inescapable." Morejon v. Rais Construction Co., 7 N.Y.3d 203, 209 (2006) The doctrine of res ipsa loquitur can be applied even if more than one defendant is in a position to exercise exclusive control over the agency or instrumentality; The permissible inference of negligence is grounded on the remoteness of any probability that the negligent act was caused by someone other than the defendant. Wen-Yu Chang v. Woolworth Co., 601 N.Y.S.2d 904 (1st Dept. 1993).

In the instant matter, plaintiff makes a showing sufficient to as to the first and third prong. The only issue is with respect to showing that the bricks were within the exclusive control of Major Construction. The exclusive control requirement does not necessitate such control by Major Construction at the time of the accident but plaintiff must show that the instrumentality had not been improperly handled by some third party, or its condition otherwise changed, after control was relinquished by the defendant. In any case where it is clear that it is at least equally probable that the negligence was that of another, the Court must direct that plaintiff has

not proved his case. Corcoran v. Banner Super Market, 19 N.Y.2d 425 (1967).

Here, Major Construction's arguments do not contradict a finding that the brick that struck plaintiff was within its exclusive control. The only workers employing the use of bricks at this site were the masons from Major Construction. Prior to plaintiff going on the scaffold, he had observed two masons on the scaffold. Major Construction's argument that plaintiff has failed to eliminate the possibility of other causes is without merit. The argument that other trades, including electricians, plumbers, masons, carpenters were working at the site on the date of plaintiff's accident is unavailing as the contention that one of these other workers could have come in contact with the brick that injured plaintiff is speculative. To rely on res ipsa loquitur, plaintiff need not conclusively eliminate the possibility of all other causes of the injury, so long as the evidence affords a rational basis for concluding that it is more likely than not that the injury was caused by the defendant's negligence. Bonura v. KWK Associates, 770 N.Y.S.2d 5 (1st Dept. 2003) citing Kambat, 89 N.Y.2d at 494.. See also, Dermatossian, 67 N.Y.2d at 227 ("This requirement does not mean that the possibility of other causes must be altogether eliminated but that their likelihood must be so reduced that the greater probability lies at defendant's door.")

The only evidence on this issue is that Major Construction worked with the bricks. There is no evidence that anyone else came in contact with the bricks. There is no evidence that any of these other workers from the other trades were observed to have had any contact with the bricks or to have been in the vicinity of the bricks. That coupled with plaintiff's uncontroverted testimony that he saw two masons on the scaffold before he began to work on it and that there were two bricks unsecured on the scaffold when he got on it shows exclusive control on the part of Major Construction. Major Construction failed to submit any evidentiary proof in admissible form to rebut the permissible inference of negligence. See, O'Connor v. 72 St. E. Corp., 637 N.Y.S.2d 412 (1st Dept. 1996).

Based on the evidence presented, a finding of res ipsa loquitur against Major Construction is warranted.

This constitutes the decision and Order of this Court.

Dated: March 13, 2012

Hon. Alison Y. Tuitt