

Gayle v Demks, Inc.

2013 NY Slip Op 30157(U)

January 22, 2013

Sup Ct, Suffolk County

Docket Number: 10-22592

Judge: Arthur G. Pitts

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ORDERED that the cross motion by defendant Tritec Building Company, Inc. for summary judgment dismissing plaintiff's complaint, and alternatively for an order dismissing all cross-claims interposed against it is determined as follows; and, it is further

ORDERED that the cross motion by defendant DEMKS, Inc. for summary judgment dismissing plaintiff's complaint and all cross-claims and counter-claims interposed against it is determined as follows.

This is an action to recover damages for injuries allegedly sustained by plaintiff on May 4, 2009 at approximately 4:30 p.m. during the course of his employment in a commercial building under construction located at 21 Bennett Avenue, East Setauket, New York ("the premises"). Plaintiff claims that he was injured while lifting an electrical panel, weighing approximately 600 pounds. At the time of the incident, plaintiff was an electrician employed by Trade Source, an employment agency. Defendant, KBM Electrical Contracting Corp. ("KBM"), a subcontractor, had hired plaintiff through Trade Source to work at the site. Defendant, DEMKS, Inc. ("Demks"), was the owner of the premises, which had a written contract with defendant Tritec Building Company, Inc. ("Tritec"), obligating it to act as the construction manager. As such, Tritec hired defendant KBM to perform electrical work at the site pursuant to a written contract.

Defendant KBM now moves for summary judgment dismissing the complaint and all cross-claims interposed against it on the grounds that plaintiff lacks capacity to sue, asserting that the action is barred by the Workers' Compensation Law because plaintiff was a "special employee" of KBM and was injured during the course of that employment. In support of its motion for summary judgment, the defendant submits, *inter alia*, copies of the pleadings, plaintiff's bill of particulars as to the request of defendant KBM, and deposition transcripts of plaintiff and of KBM by Chris Parmentieri.

The testimony of plaintiff revealed that he had been working at the job site owned by defendant Demks for approximately 3 months prior to the accident and was supervised by "George" who worked for defendant KBM. Plaintiff indicated that George gave him all of his instructions regarding whatever electrical work he was to do, and that no one from defendant Tritec ever told him how to do his job or gave him instructions on where to work on any given day. Plaintiff never spoke with anyone from Tritec or with anyone who claimed to be an owner of the property while at the job site. Each week plaintiff would give George a time sheet, which plaintiff had completed, to be signed by him as plaintiff's job site supervisor. Plaintiff stated that although he had worked for KBM through Trade Source on prior occasions ("for days here and there"), he was never hired directly by KBM.

At the time of the accident, plaintiff alleges that George had asked him to stay late in order to install a 600 volt electrical panel which was approximately 5 feet tall by 30 inches wide, normally weighing in the vicinity of 600 pounds. (He generally worked until 3:30 p.m. and the accident occurred at 4:30 p.m.). Plaintiff maintained that a hoist, lift, or pulley would usually be used to lift a panel such as that, but since the pulley located thereat was not working properly, George told him "let's give it a manpower shot" so he and George "gave it a try, a shot". He contends that as he and George were lifting the panel box, they had it approximately 2 feet from the floor when it leaned over on him and his arm "popped out".

Chris Parmentieri testified that he is the president and a shareholder of defendant KBM (his wife is the other shareholder), and that, as such, he signed a contract with Tritec for electrical work to be done at the premises owned by defendant Demks. He believed that the contract required KBM to provide all of the necessary equipment for the electrical installations on the premises. He stated that KBM hired independent contractors through Trade Source for electrical work to be done at the job site. Mr. Parmentieri testified that George Degroot was consistently at the job site and would be called a “foreman”. George would have made the determination on site as to what equipment was necessary to hoist material. However, Mr. Parmentieri maintained that a pulley would be needed for the installation of the electrical panel box, as a result of a combination of factors including the weight of the box and its positioning relative to the walls and other cabinets. He contended that he or KBM provided a pulley, which was available at the job site, although no trapeze was at the site. Mr. Parmentieri did not know if a hoist was at the site but knew that a hi-lo was not provided since the flooring of the building would not support its weight. (It was his understanding that any equipment necessary to hoist material for installation pursuant to KBM’s contract with Tritec had to be provided by KBM.) Therefore, a pallet jacket was used instead to lift equipment, including electrical panels, but it only lifts to about 18 inches.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Workers’ Compensation Law §§ 11 and 29 (6) provide that the receipt of workers’ compensation benefits is the exclusive remedy recoverable by a worker from his/her employer for losses suffered as a result of an injury sustained in the course of employment (*see Gaynor v Cassone Leasing*, 79 AD3d 967, 914 NYS2d 241 [2d Dept 2010]; *Slikas v Cyclone Realty*, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]; *Dulak v Heier*, 77 AD3d 787, 909 NYS2d 743 [2d Dept 2010]). These exclusivity provisions have been extended to shield persons or entities other than the injured plaintiff’s direct employer from suit, including special employers (*see Dulak v Heier*, *supra*). Thus, an injured person who receives workers’ compensation benefits from his or her general employer is barred from maintaining a personal injury action against his or her special employer (*see Gaynor v Cassone Leasing*, *supra*; *Franco v Kaled Mgt. Corp.*, 74 AD3d 1142, 903 NYS2d 512 [2d Dept 2010]).

A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer (*see Slikas v Cyclone Realty, supra*). "A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557, 578 NYS2d 106 [1991] [internal citations omitted]; *see Slikas v Cyclone Realty, supra*; *Samuel v Fourth Ave. Assoc.*, 75 AD3d 594, 906 NYS2d 67 [2d Dept 2010]; *Franco v Kaled Mgt. Corp.*, *supra*; *Smith v Delta Intl. Mach. Corp.*, 69 AD3d 840, 893 NYS2d 580 [2d Dept 2010]). The central question is whether there is a "working relationship with the injured plaintiff sufficient in kind and degree so that the third party, or the third party's employer, may be deemed plaintiff's employer" (*Fung v Japan Airlines Co.*, 9 NY3d 351, 359, 850 NYS2d 359 [2007]; *Smith v Delta Intl. Mach. Corp.*, *supra*).

While no one factor is determinative in deciding whether or not a special employment relationship exists, "a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson v Grumman Aerospace Corp.*, *supra* at 558; *Dulak v Heier, supra*; *Franco v Kaled Mgt. Corp.*, *supra*). Other relevant factors include who is responsible for the payment of wages, who furnishes the worker's equipment, who had the right to hire and discharge the worker, and whether the work being performed was in furtherance of the special employer's or the general employer's business (*see Pena v Automatic Data Processing*, 73 AD3d 724, 900 NYS2d 393 [2d Dept 2010]; *Slikas v Cyclone Realty, supra*; *Franco v Kaled Mgt. Corp.*, *supra*). A person's status as a special employee is generally a question of fact, but may be determined as a matter of law where particular, undisputed critical facts compel the conclusion that there is no triable issue of fact (*see Pena v Automatic Data Processing, supra*; *Slikas v Cyclone Realty, supra*; *Franco v Kaled Mgt. Corp.*, *supra*; *Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 885 NYS2d 314 [2d Dept 2009]).

The defendant KBM established its *prima facie* entitlement to summary judgment dismissing the complaint based on the exclusivity provisions of the Workers' Compensation Law. The evidence submitted was sufficient to demonstrate, as a matter of law, that the plaintiff was KBM's special employee (*see e.g., Pena v Automatic Data Processing, supra*; *Slikas v Cyclone Realty, supra*; *Dulak v Heier, supra*; *Samuel v Fourth Ave. Assoc., supra*; *Franco v Kaled Mgt. Corp., supra*; *Smith v Delta Intl. Mach. Corp., supra*; *Weitz v Anzek Constr. Corp., supra*; *Wesley v Long Island Power Auth.*, 294 AD2d 355, 741 NYS2d 712 [2d Dept 2002]; *compare, Gaynor v Cassone Leasing, supra*; *Allgaier v Town of Brookhaven*, 6 AD3d 638, 775 NYS2d 546 [2d Dept 2004]). In this regard, the evidence presented indicates that, at the time of the incident, plaintiff was employed and paid by Trade Source, but that he was working under the supervision and direction of KBM, and performing work in furtherance of the subcontractor KBM's contract with Tritec to do the electrical work at Demk's premises. KBM controlled plaintiff's hours of work, the method, manner, and details of the work he was to accomplish, and provided the equipment he was to use in furtherance of his job. Since plaintiff has failed to come forth with evidence showing that KBM did not determine the manner, details, and ultimate result of plaintiff's work, including but not limited to the control, direction, supervision, and furnishing of equipment (in fact, plaintiff's deposition testimony shows that KBM did determine each of those essential factors), he has

failed to show that a material issue of fact exists sufficient to require a trial on the issue of his status as a "special employee". Accordingly, that portion of KBM's motion which requests that the complaint against it be dismissed is granted.

Defendant Tritec and defendant Demks cross move for orders granting summary judgment dismissing the complaint and all cross-claims interposed against each of them for common law and contractual indemnification and for attorneys fees. In support of their motions each submits copies of the pleadings, the bill of particulars relative to their demand for same, and transcripts of depositions of plaintiff, defendant KBM by Chris Parmentieri, defendant Demks by Ken Stafford, and defendant Tritec by Ken Abrami. Additionally, each submits copies of the contract dated December 14, 2007 between defendant Tritec and defendant Demks and the contract dated February 19, 2009 between defendant Tritec and defendant KBM.

The deposition of Ken Stafford, on behalf of defendant Demks, revealed that Demks hired Tritec to act as a general contractor to construct a commercial building upon its property located at 21 Bennett Avenue, East Setauket, New York. Mr. Stafford, the manager of Demks, stated that he oversaw the bills that Demks was paying for construction of the building and that his understanding was that Tritec hired sub-contractors to perform work at the premises. He averred that the bills from Tritec were on Tritec letterhead and encompassed work done by sub-contractors, although Demks never paid the sub-contractors directly. Mr. Stafford alleged that Demks employees, representatives, and agents did not meet any sub-contractors at the job site, did not provide any equipment for the project, did not have authority to stop work or dangerous activity, and that it ceded complete control of the work site to defendant, general contractor, Tritec. Additionally, Mr. Stafford stated that Tritec hired the other contractors (the subs) on the work site and that Tritec had the power to fire them.

Ken Abrami testified that at the time of plaintiff's alleged accident he was employed as a Vice President of Field Operations for defendant Tritec. He stated that Tritec was a construction manager for the construction of the commercial building for defendant Demks at 21 Bennett Avenue, East Setauket, New York. He contended that a construction manager and a general contractor are "two separate things", and that a construction manager is retained by an owner of property to manage the construction project through an open book type format, whereas a general contractor has a "closed book" where the owner does not see the costs of the sub-contractors and "whatnot". In any event, he indicated that Tritec solicited bids from sub-contractors which were transparent to the owner, defendant Demks, which had input concerning the acceptance or declination of the bids. Tritec would then contract individually with the sub-contractors including defendant KBM. Tritec did have a full time superintendent who was on the job site each day and who was to ensure that the individual trades were compliant with safety rules, staffing with proper manpower, and that their work was being done in accordance with contract plans and specifications. Mr. Abrami averred that Tritec did not provide equipment or safety equipment for construction, but that the sub-contractors provided their own equipment and safety equipment.

As he understood the contract between Tritec and Demks, Mr. Abrami testified that it was Tritec's responsibility to manage everything in the process, such as the means and the methods of construction and to pass the responsibility for the individual trades down to the individual trade contractors. He indicated that

it was his understanding that Demks did not provide any safety or construction equipment for the construction workers on the job site and that Tritec did not provide braces, pulleys, hoists, trapezes, scaffolds, ladders, or other devices which could have prevented plaintiff's injuries. Mr. Abrami testified that Rick Delgiorno, Tritec's superintendent for the job, supervised sub-contractors' work by making sure they were in compliance with safety regulations, that work was being put in place in accordance with plans and specifications, and that they had sufficient manpower to meet the work schedule, but that Delgiorno did not direct the work, nor did Tritec control the work being performed. Finally, the witness claimed that Article 4.1.15 of the contract required the sub-contractor to bring its own safety equipment.

Pertinent portions of the December 14, 2007 contract between defendant owner Demks and defendant construction manager Tritec state as follows:

9.3.4.1 To the fullest extent permitted by law, the Owner shall defend, indemnify and hold harmless the Construction Manager, its consultants, agents, officers and employees for all expenses, loss, damages, claims, including reasonable attorneys fees, ~~arising out of~~, *including* the negligent acts, errors or omissions of the Owner, its consultants, contractors or anyone acting on its behalf. It is expressly understood that Owner shall not be required to indemnify Contractor, its Consultants, agents, officers or employees arising out of Labor Law or statutory violations, negligent acts, errors or omissions of any subcontractor hired by Construction Manager excepting those cost obligations contained in 6.1.6.9 and 6.1.8.2..

9.3.4.2 To the fullest extent permitted by law, the Construction Manager shall defend, indemnify and hold harmless the Owner, its consultants, agents, officers and employees for all Labor Law or statutory violation, expense, loss, damages, claims, including reasonable attorneys fees, ~~arising out of~~, *including* the negligent acts, errors or omissions of the Construction Manager, its consultants, subcontractors or anyone acting on its behalf excepting those cost obligations contained in 6.1.6.9 and 6.1.8.2..

Pertinent portions of the February 19, 2009 contract between defendant construction manager Tritec and defendant KBM, the electrical contractor, state as follows:

§4.3.1 The subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor shall comply and with [*sic*] applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property...Failure on the part of the Contractor to stop unsafe practices by the Subcontractor shall in no way relieve the Subcontractor of its obligation to maintain a safe work site.

§4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, 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 under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions and/or statutory violation of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

§4.6.2. In claims against any person or entity indemnified under this Section 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

§15.3 To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, Contractor, its Consultants, agents, officers and employees for all expenses, loss, damages, claims, including reasonable attorneys fees, arising out of the negligent acts, errors or omissions and/or statutory violation of the Subcontractor, its Subcontractor's [*sic*] or anyone acting on its behalf.

Plaintiff alleges causes of action against defendants for common-law negligence and for violations of Labor Law §§200, 240 (1), and 241 (6). In addition, in his bills of particulars, plaintiff alleges that the following provisions of the Industrial Code were violated: 12 NYCRR §§23-1.5 (a), 23-1.7 (a)(1), (a)(2), 23-5.1, 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.18, 23-6.1 (b), (c)(1), (c)(2), (d), (e)(1-4), (f)(1), (f)(2), (g), (h), (i), (j)(1), (j)(2), 23-6.2 (a)(1), (a)(2)(i), (a)(3)(i-iii), (a)(4)(i), (a)(4)(iii), (b), (c), (d)(1-3), and 23-6.3(a). Each of the defendants assert cross claims against each of their co-defendants alleging negligence on the others' behalf, common-law and contractual indemnification obligations, and breach of contract. By way of its motion KBM, and by way of their cross motions Tritec and Demks, seek summary judgment dismissing the cross claims asserted against each other and granting their claims of indemnification and attorneys fees.

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their “agents” (Labor Law §§ 200 [1], 240 [1], 241). A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (*Linkowski v City of New York*, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; see *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331-332, 804 NYS2d 103 [2d Dept 2005]). The determinative factor is whether the party had “the right to exercise control over the work, not whether it actually exercised that right” (*Williams v Dover Home Improvement*, 276 AD2d 626, 626, 714 NYS2d 318 [2d Dept 2000]; see *Bakhtadze v Riddle*, 56 AD3d 589, 590, 868 NYS2d 684 [2d Dept 2008]). Inasmuch as Demks was the owner and Tritec was the general contractor (construction manager) at the site, both are subject to the Labor Law statutes.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (see *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Rojas v Schwartz*, 74 AD3d 1046, 903 NYS2d 484 [2d Dept 2010]). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 or based on common-law negligence if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the condition (see *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, there can be no recovery against the owner or general contractor under Labor Law § 200 or common-law negligence unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (see *id.*). Although property owners often have general authority to oversee the work’s progress, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 or common-law negligence (see *id.*).

Clearly, plaintiff has failed to show that Demks as owner or Tritec as construction manager had supervisory control or that they controlled the performance of plaintiff’s work. It is evident from the testimony of all of the parties, that both defendant Demks and defendant Tritec had general supervisory authority at the work site and simply oversaw and inspected the work of the subcontractors. Thus, as no liability can be had against either of them for common-law negligence or for a breach of Labor Law §200, all such claims and cross-claims asserted are dismissed.

Labor Law § 240 (1) requires that building owners and contractors: “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 statute imposes absolute liability on building owners and contractors whose failure to “provide proper protection to workers employed on a construction site” proximately causes injury to a worker (see *Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 935 NYS2d 551 [2011]; *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490, 634

NYS2d 35 [1995]; *Henry v Eleventh Ave., L.P.*, 87 AD3d 523, 524, 928 NYS2d 72 [2d Dept 2011]). The type of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate “scaffold, hoist, stay, ladder or other protective device” would have “shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 895 NYS2d 279 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49 [1993] [emphasis removed]; see *Salazar v Novalex Contracting Corp.*, 2011 WL 5827987, 2011 N.Y. Slip Op. 08446 [NY Nov 21, 2011]). “Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)” (*Treu v Cappelletti*, 71 AD3d 994, 997, 897 NYS2d 199 [2d Dept 2010]; see *Poracki v St. Mary’s Roman Catholic Church*, 82 AD3d 1192, 1194, 920 NYS2d 233 [2d Dept 2011]).

The testimony of Chris Parmentieri for KBM indicates clearly that a properly working pulley (or hoist) was needed to help lift the electrical panel which was being installed by plaintiff at the job site. Based on plaintiff’s testimony, the only pulley available was not functioning properly and no other evidence was offered to show that plaintiff’s actions were the sole cause of his injuries. Accordingly, a question of fact exists as to the statutory liability to be imposed by Labor Law § 240 (1) against defendants Demks (as owner), Tritec (as construction manager/general contractor), and KBM and summary judgment as to any claims or cross claims based upon a violation of said statute is denied.

Labor Law § 241 (6) provides: “All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.” Labor Law § 241(6) “imposes a nondelegable duty of reasonable care upon owners and contractors ‘to provide reasonable and adequate protection and safety’ to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; see *Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (see *Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, *supra*; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 530, 601 NYS2d 49; *Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; *D’Elia v City of New York*, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]). The interpretation of an Industrial Code regulation and the determination as to whether a particular condition comes within the scope of the regulation generally present questions of law for the court (see *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; *Messina v City of New York*, 300 AD2d 121, 752 NYS2d 608 [1st Dept 2002]; *Penta v Related Cos.*, 286 AD2d 674, 730 NYS2d 140 [2d Dept 2001]). Plaintiff alleges in his bill of particulars violations by defendants of the following sections of the Industrial Code: 23-1.5 (a), 23-1.7 (a)(1), (a)(2), 23-5.1, 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.18, 23-6.1 (b), (c)(1), (c)(2), (d), (e)(1-4), (f)(1), (f)(2), (g), (h), (i), (j)(1), (j)(2), 23-6.2 (a)(1), (a)(2)(i), (a)(3)(i-iii), (a)(4)(i), (a)(4)(iii), (b), (c), (d)(1-3), and 23-6.3(a).

As defendants correctly contend, sections 23-1.5, 23-1.7 (a)(1), 23-1.7 (a)(2), and 23-6.1(b) are general safety standards and are an insufficient predicate for Labor Law § 241 (6) liability (see *Hricus v*

Aurora Contrs., 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; *Sajid v Tribeca N. Assoc.*, 20 AD3d 301, 799 NYS2d 33 [2005]; *Maldonado v Townsend Ave. Enters.*, 294 AD2d 207, 741 NYS2d 696 [2002]; *Cardenas v American Ref Fuel Co.*, 244 AD2d 377, 664 NYS2d 453 [2d Dept 1997]). The evidence submitted established that sections 23-5.1, 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.18, which all pertain to the use of a type of scaffold, sections 23-6.1 (c)(1), (c)(2), (d), (e)(1-4), (f)(1), (f)(2), (g), (h), (i), (j)(1), (j)(2) which pertain to the operation of hoists, sections 23-6.2 (a)(1), (a)(2)(i), (a)(3)(i-iii), (a)(4)(i), (a)(4)(iii), (b), (c), (d)(1-3) which pertain to the use of rigging, ropes, and chains for hoists, and section 23-6.3(a) which requires that bucket hoists be designed by a professional engineer are not applicable to the facts of this case (*see Vicari v Triangle Plaza II*, 16 AD3d 672, 793 NYS2d 430 [2d Dept 2005]). Accordingly, as plaintiff has not shown that any specific applicable provision of the Industrial Code was violated, all causes of action asserted by him pursuant to Labor Law § 241 (6) are dismissed.

Defendant Demks contends that it is entitled to common-law and contractual indemnification from Tritec and from defendant KBM while defendant Tritec contends that it is entitled to common-law and contractual indemnification from defendant KBM. “The right to contractual indemnification depends on the specific language of the contract” (*Canela v TLH 140 Perry St.*, 47 AD3d 743, 744, 849 NYS2d 849 [2d Dept 2008]). “An owner of premises who is held liable based solely on its status as owner pursuant to the absolute liability provided for in Labor Law § 240(1) is entitled to both common law and, if it has been agreed to, contractual indemnification” (*Mangano v American Stock Exch.*, 234 AD2d 198, 199, 651 NYS2d 494, 496 [1st Dept 1996]). Plaintiff’s “special” employer, KBM, expressly agreed to provide indemnification to Tritec and to KBM pursuant to its February 19, 2009 contract with Tritec. Tritec, the construction manager, expressly agreed to provide indemnification to Demks pursuant to its December 14, 2007 contract, for its negligence or that of one of its subcontractors.

Here, Demks established its *prima facie* entitlement to judgment as a matter of law on its cross claims for contractual indemnification against Tritec and KBM by demonstrating, through a copy of the contracts, that it was entitled to contractual indemnification against Tritec and KBM (*see Lugo v Austin-Forest Assoc.*, 99 AD3d 865, ___ NYS2d ___ [2d Dept 2012]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 [1st Dept 2009]). Since the within motion for summary judgment against plaintiff was granted dismissing plaintiff’s cause of action alleging common-law negligence and violations of Labor Law §§ 200 and 241 (6), defendants Demks can only be held liable for violating Labor Law §§ 240 (1) based on its status as owner of the premises, and is entitled to contractual indemnification (*see Mangano v American Stock Exch., supra*).

With respect to Demks’ cross claim for common-law indemnification against Tritec and KBM, in order to establish a claim for common-law indemnification, a party is required to prove not only that it was not negligent, but also that the proposed indemnitor was responsible for negligence that contributed to the accident or, in the absence of any negligence, exercised actual supervision or control over the work giving rise to the injury (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]). Here, Demks established its *prima facie* entitlement to judgment as a matter of law on its cross-claim for common-law indemnification against KBM since the evidence submitted established that the plaintiff’s accident was caused by the negligence of KBM and that KBM exercised actual supervision and control over the plaintiff’s work (*see id.*; *Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 [2d Dept

Gayle v Demks, Inc.

Index No. 10-22592

Page No. 11

2012]). In light of Demks' *prima facie* entitlement to summary judgment on the issue of KBM's liability on its cross-claim for common-law indemnification, the branch of its motion seeking summary judgment on such cross-claim is granted. Tritec's representative testified that it was to ensure that the sub-contractors were in compliance with the applicable safety regulations, thus it may be established that it was negligent in so doing. Thus, a question of fact exists with regard to Tritec's negligence in ensuring that its sub-contractors were in compliance with applicable safety regulations, therefore summary judgment in favor of Demks on its cross-claim for indemnification from Tritec is denied.

However, Tritec and KBM are not entitled at this juncture to summary judgment or even conditional summary judgment on their third-party claims for contractual indemnification against each other inasmuch as there are issues of fact as to whose negligence, if any, caused plaintiff's accident (*see McAllister v Construction Consultants L.I., Inc., supra; see also Dalvano v Racanelli Constr. Co., Inc.*, 86 AD3d 550, 926 NYS2d 658 [2d Dept 2011]). Since the testimony of Abrami for defendant Tritec revealed that part of Tritec's superintendent's responsibilities were to make sure that the subcontractors were in compliance with safety regulations, there are questions of fact as to whether they were negligent in failing to insure that defendant KBM was performing the electrical work with required safety devices. Additionally, despite the dismissal of plaintiff's complaint against defendant "special" employer KBM, in terms of the cross-claims for indemnification, there remain questions of fact as to negligence on the part of KBM in failing to provide a properly functioning pulley or hoist to assist in the installation of the electrical panel. Accordingly, those portions of the motions of Tritec and KBM which request summary judgment on their common-law and contractual indemnification claims are denied.

Dated: January 22, 2013



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION