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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

DANIEL FUGER and ROSE FUGER,
Plaintiff,

-against-

AMSTERDAM HOUSE FOR CONTINUING CARE RETIREMENT COMMUNITY, INC. and PIKE CONSTRUCTION COMPANY, INC.,
Defendants.

Index No.: 110399/09
Motion Seq.: 001

AMSTERDAM HOUSE CONTINUING CARE RETIREMENT COMMUNITY, INC., s/h/a AMSTERDAM HOUSE FOR CONTINUING CARE RETIREMENT COMMUNITY, INC. and PIKE CONSTRUCTION CO., LLC s/h/a PIKE CONSTRUCTION COMPANY, INC.,
Third-party Plaintiff,

-against-

CAR-WIN CONSTRUCTION, INC.,
Third-party Defendants.

The following papers were read on this motion by defendants/third-party plaintiffs for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Motion sequences 001 and 002 are hereby consolidated for purposes of disposition.

This is a Labor Law action involving a worker's 14-foot fall from a beam. Plaintiff Daniel Fuger (Fuger or plaintiff) filed a summons and complaint on July 22, 2009, alleging that defendants/third-party plaintiffs Amsterdam House For Continuing Care Retirement Community s/h/a Amsterdam House Continuing Care Retirement Community (Amsterdam) and Pike Construction Co., LLC s/h/a Pike Construction Company, Inc. (Pike) (together, Amsterdam-

Pike) are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240(1) and 241(6). Additionally, plaintiff's wife Rose Fuger asserted a derivative claim against Amsterdam-Pike for loss of services. On June 16, 2010, Amsterdam-Pike filed a third-party complaint against Car-Win Construction, Inc. (Car-Win) alleging that the accident was caused by Car-Win's negligence, and that Car-Win is liable to defendants for common-law and contractual indemnity, as well as breach of contract for failure to procure insurance.

In motion sequence 001, Amsterdam-Pike move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for partial summary judgment on the issue of liability on their contractual indemnification claims against Car-Win. In motion sequence 002, Car-Win moves for summary judgment dismissing the plaintiff's complaint and the third-party complaint. Plaintiff cross-moves for partial summary judgment as to liability on his Labor Law § 240(1) claim. Discovery in this matter is complete and Note of Issue has been filed.

BACKGROUND

On November 14, 2008, plaintiff was working on a construction project for Car-Win as a journeyman ironworker. The project involved the construction of a nursing home consisting of five buildings. Amsterdam, owner of the subject property, located at 301 East Overlook Road, Port Washington, New York, hired Pike as contractor to build it. Pike's subcontractor, nonparty Beauce-Atlas, contracted with Car-Win to do steel erection on the site, and plaintiff was engaged in connecting steel beams and columns when he fell off of a beam and 14 feet to the ground below, injuring himself.

Fuger's coworker had just placed a bolt between a column and a beam, to temporarily secure the beam, when Fuger fell while attempting to step to the newly secured beam from another beam (Plaintiff's EBT, at 43-52). The beams were wet with rain, as plaintiff recalled during his deposition while recounting the accident:

"I was down on the ground and it was wet. It was like a misty day

> almost and I was on the ground and I climbed the ladder and I walked across the beam, and I grabbed the column, and I went to swing around and my foot came out from under me. With everything being wet, I wasn't able to hold on and I just went down" (*id.* at 42).

Fuger was not wearing a safety harness and neither were the other workers involved in connecting the beam to the column (*id.* at 45, 62). As a result of the fall, Fuger cut his face and injured his back and ribs (*id.* at 57, 63).

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Centruy-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all

reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

I. Labor Law § 240(1)

Initially, Amsterdam-Pike argue that plaintiff's cross-motion for partial summary judgment as to liability under Labor Law § 240(1) should be dismissed as untimely, as the Court's order from July 13, 2011 set October 11, 2011 as the deadline for making dispositive motions. Car-Win's motion is dated October 5, 2011, while plaintiff's cross-motion was served on November 2, 2011. The Court will consider plaintiffs' cross-motion even though it was made after the deadline for summary judgment motions, as it seeks relief on a similar issue, liability under Labor Law § 240(1), that Car-Win raised in its timely motion (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008]).

Labor Law § 240 (1) provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*see Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in a section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused

plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Here, plaintiff makes a prima facie showing as to liability under the statute by submitting Fuger's own deposition, which shows that his accident arose from a gravity-related risk, and that he did not have adequate protection, such as a tied-off safety harness, to prevent his injuries.

Amsterdam-Pike and Car-Win argue that Fuger's claim under the statute should be dismissed because Fuger was a recalcitrant worker, as he was provided safety devices that he, for no good reason, decided not to use. Both Amsterdam-Pike and Car-Win point to the testimony of John Hamilton (Hamilton), Car-Win's safety monitor on the project. Hamilton testified that, generally, Car-Win provided harnesses to workers (Hamilton EBT, at 17), and that on every project, including the subject one, he gave safety talks once a week (*id.* at 8). Hamilton also testified that, at the safety meetings, he went over when ironworkers were to use safety equipment and where the equipment was on the job site (*id.* at 30-31). Finally, as to when workers were to use safety harnesses, Hamilton testified that Car-Win's fall protection plan was governed by subpart R, entitled "Steel Erection," of the US Department of Labor's Occupational Safety & Health Administration's (OSHA) regulations for construction, Part 1926 (*id.* at 23-24). Further, Hamilton testified that the requirement to tie off safety harnesses under subpart R was not implicated at all below 15 feet, and not implicated for "connectors"[1] below 30 feet:

> "Q: Do you know what the requirements in the Subpart R were for ironworkers regarding tying off and . . . what the criteria were:
> A: Yeah. For a normal ironworker, it's 15-foot, height of 15-foot or

[1] Hamilton was acting as a "connector" on the day of his accident, as he was connecting beams to columns.

more, you had to be tied off, wear a harness and tie off. If you were a connector, you had up to 30 feet before you had to tie off" (Hamilton Deposition, at 9).

Amsterdam-Pike also submit a "Weekly Tool Box Talks" sheet from November 13, 2008, the day before Fuger's accident. The sheet lists the employees who attended, including Fuger, and names "safety related subjects discussed" as: "site safety orientation, fall protection plans, structural steel (subpart "R"), precast – (monitor system), handout sheet from GC." Finally, Amsterdam-Pike point to a portion of Fuger's deposition testimony, in which he says that, generally, a worker should use a safety harness when he is working above 10 feet in the air (Fuger EBT, at 21).

Plaintiffs note that there is no evidence that Hamilton, or any one else, told Fuger to wear any specific safety device. To illustrate this point, plaintiffs submit the deposition testimony of Rocco Depillo (Depillo), Pike's superintendent, who testified that he never told Fuger to wear any specific fall protection:

"Q: Prior to Dan Fuger's accident did you ever have any discussion with him specifically regarding wearing fall protection equipment?

. . .

A: No" (Depillo EBT, at 41).

Additionally, plaintiffs highlight Fuger's own testimony, in which he states that he was never told to wear a safety harness:

"Q: Did anyone tell you specifically to wear a beam buddy while you were up [in] the air?

A: No.

Q: Did anybody ever tell you that you should not be doing what you were doing at the time of the accident?

A: No" (Fuger EBT, at 126).

Plaintiffs also submit a portion of Hamilton's testimony in which he states that Fuger did not need to be tied off, or connected to a safety line, at the height he was working at:

"Q: You mentioned earlier Rocco [Depillo], who was the general contractor's foreman. If Rocco was walking past the location

where Dan Fuger was working and Rocco saw that Dan Fuger wasn't tied off, but that he should have been tied off, did [Depillo] have the authority to tell Dan Fuger to tie off?

A: Yes. But honest, you know, like I said, he was a connector. Danny was a connector, so he really didn't have to be tied off at that height" (Hamilton EBT, at 62-63).

As to Amsterdam-Pike's contention that Fuger knew he should have been wearing fall safety equipment, as he was working above 10 feet from the ground, plaintiffs refer to Fuger's testimony wherein he states that such equipment was not provided to him:

"Q: How many times prior to the occurrence of the accident did you have a conversation with your foreman regarding the lack of a harness?

A: Once.

. . .

Q: What was the sum and substance of that conversation?

A: There were none around" (Fuger EBT, at 148).

Finally, plaintiffs point to Depillo's testimony wherein he testified that he talked to Car-Win's job steward about the absence of fall safety equipment:

"Q: And you raised the issue of the lack of fall protection with him, and he said what to you?

A: It was on the subpart. They weren't high enough. They didn't have to wear it being connectors" (Depillo EBT, at 40).

A worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Here, the Court finds that Fuger was not a recalcitrant worker. In the EBT testimony of Hamilton, Car-Win's safety monitor, he never states that he told Fuger to wear any specific fall-safety equipment. Instead, the testimony of Hamilton and Depillo shows that, in accordance with subpart R of OSHA's Part 1926, Fuger was not required to wear fall-safety equipment, as he was working under 30 feet from the ground. However, "mere compliance with OSHA regulations does not defeat a prima facie showing of Labor Law § 240(1) liability" (*Murray v Arts*

Ctr. & Theater of Schenectady, Inc., 77 AD3d 1155, 1157 [3d Dept 2010] [citation omitted]). Amsterdam-Pike and Car-Win have failed to submit any evidence that would show that Fuger knew he was expected to use fall safety equipment when he was working under 30 feet from the ground. As such, Amsterdam-Pike and Car-Win fail to rebut plaintiffs' prima facie showing, and plaintiffs are entitled to partial summary judgment as to liability under Labor Law § 240(1).

II. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d

675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Amsterdam-Pike argue that they are entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims as they did not exercise supervisory control over Fuger's work. In support of this argument, they submit Fuger's deposition testimony, in which Fuger states that Depillo, Pike's superintendent, never gave him any instruction as to how to do his job (Fuger EBT, at 34).

Plaintiffs argue in opposition that Pike had actual notice that Fuger was not wearing fall-safety protection. This, however, is not relevant as Fuger's accident arose from the method and manner in which he performed his work, rather than from a defect on the jobsite. Alternatively, plaintiffs argue that Pike had the authority to stop Fuger's work, and to order that he wear a safety harness and tie off. However, "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" (*Biance v Columbia Washington Ventures, LLC,* 12 AD3d 926 [3d Dept 2004] [citation omitted]). As such, plaintiffs fail to rebut Amsterdam-Pike's showing of entitlement to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims. Accordingly, the branches of Amsterdam-Pike and Car-Win's motions seeking dismissal of those claims are granted.

III. Labor Law § 241(6)

Labor Law § 241(6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to

'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241[6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241(6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241(6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Initially, plaintiffs abandon various Industrial Code regulations listed in the complaint and bill of particulars, such as 12 NYCRR 23-1.5, 12 NYCRR 23-1.17, 12 NYCRR 23-5, 12 NYCRR 23-6, 12 NYCRR 23-7, 12 NYCRR 23-1.7(e)(2), 12 NYCRR 23-1.8(c)(2), 12 NCYRR 23-1.15, 12 NCYRR 23-1.16(a-f), and 12 NYCRR 23-1.24. While Amsterdam-Pike address each of these in its moving papers, plaintiffs ignore them. As such, plaintiffs' allegations relating to these regulations are dismissed as abandoned (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]).

Plaintiffs contend that Amsterdam-Pike violated 12 NYCRR 23-1.7(d), which provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Amsterdam-Pike argue, without providing supporting case law, that this regulation was

not intended to cover an ironworker working at elevation where the beam he is traversing is not a working surface, but the work itself. Plaintiffs respond by citing to cases in which courts have upheld the viability, at various procedural stages, of Labor Law § 241(6) claims predicated on 12 NYCRR 23-1.7(d) where the various accidents were, plaintiffs contend, analogous to Fuger's accident. In *George v Huber Hunt & Nichols* (242 AD2d 954, 954 [4th Dept 1997]), for example, the Court upheld denial of the defendant's summary judgment motion as to the plaintiff's Labor Law § 241(6) claim based on a violation of 12 NYCRR 23-1.7(d) where the plaintiff was injured while attempting, at elevation, to move from a vertical to a horizontal beam (*see also Doyne v Barry, Bette & Led Duke*, 246 AD2d 756, 759 [3d Dept 1998] [upholding denial of summary judgment where worker was injured when he slipped on bar joists on a roof, as "we cannot say that the bar joists . . . did not qualify as an 'elevated working surface' within the meaning of 12 NYCRR 23-1.7(d)]; *Smith v Fayetteville-Manlius Cent. School Dist.*, 32 AD3d 1253, 1254 [4th Dept 2006] [granting plaintiffs leave to amend their bill of particulars to allege a violation of 12 NYCRR 23-1.7(d) where the plaintiff slipped off of a wet ladder]).

In reply, Amsterdam-Pike cite *McGrath v Lake Tree Vil. Assoc.* (216 AD2d 877 [4th Dept 1995]). In *McGrath*, a worker was injured when he walked over a five-foot dirt pile while carrying a 24-foot scaffold pick from a truck to a building under construction, the Court held that 12 NYCRR 23-1.7(d) did not apply, as it did "not apply to the dirt pile condition" (*id.* at 878).

It is well established that 12 NYCRR 23-1.7(d) is sufficiently specific to serve as a predicate to Labor Law § 241(6) liability (*see e.g. Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1st Dept 1998]). Here, given the broad interpretation given to 12 NYCRR 23-1.7(d) by Courts in *George, Doyne,* and *Smith,* this Court cannot say as matter of law that the beam Fuger slipped from was not an "elevated working surface" under the regulation. One important difference between the beams Fuger fell from, and the dirt pile in *McGrath*, is that Fuger was

difference between the beams Fuger fell from, and the dirt pile in *McGrath*, is that Fuger was working on the beams, rather than walking over them on his way to the work site (216 AD2d at 877). Accordingly, there is a question of fact as to the regulation's applicability, and the branches of Amsterdam-Pike and Car-Win's motions seeking dismissal of plaintiffs' Labor Law § 241(6) claim are denied.

IV. Contractual Indemnification

The contract between Beauce-Atlas and Car-Win provides the following indemnification provision:

> "To the fullest extent permitted by law, the [Car-Win] shall defend, indemnify, and hold harmless Beauce-Atlas, [Amsterdam], [Pike] . . . from and against all claims, damages, losses and expenses, including attorneys' fees, arising out of, relative to, or resulting from the performance of Work and/or Subcontractor's operations under this Agreement, including but not limited to any claim, damages, loss or expense (1) attributed to bodily injury, sickness, disease or death . . . and (2) caused in whole or in part by any act or omission of the Subcontractor . . ." (Beauce-Atlas/Car-Win Agreement, ¶ 10 [A]).

The provision is triggered, as Fuger's accident arose from Car-Win's work on the project. In order for a claim to "arise out" of a party's work, there must be a showing that "a particular act or omission in the performance of such work [was] causally related to the accident" (*Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 [1st Dept 2007] [internal quotation marks and citation omitted]). There is no question that in these circumstances, where a Car-Win employee slipped off of a beam, that the accident arose out Car-Win's work.

Car-Win argues that Pike is not entitled to indemnification, as Pike was negligent. However, for the reasons discussed above, in section II, Pike was not negligent as a matter of law. As such, Amsterdam and Pike are entitled to contractual indemnification, including attorney's fees, from Car-Win.

CONCLUSION

Accordingly, it is

ORDERED that defendants/third-party plaintiffs Amsterdam House For Continuing Care Retirement Community s/h/a Amsterdam House For Continuing Care Retirement Community and Pike Construction Co., LLC s/h/a Pike Construction Company, Inc.'s motion for summary judgment (sequence 001) is granted to the extent that plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed; defendants/third-party plaintiffs are granted summary judgment as to liability on their contractual indemnification claims against third-party defendant Car-Win Construction, and the remainder of the motion is otherwise denied; and it is further,

ORDERED that third-party defendant Car-Win Construction's motion for summary judgment (sequence 002) is granted to the extent that plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed, and the remainder of the motion is denied; and it is further,

ORDERED that plaintiffs' cross-motion for partial summary judgment against defendants/third-party plaintiffs Amsterdam House Continuing Care Retirement Community s/h/a Amsterdam House For Continuing Care Retirement Community and Pike Construction Co., LLC s/h/a Pike Construction Company, Inc. as to liability under Labor Law § 240(1) is granted; and it is further,

ORDERED that plaintiffs' shall serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

Dated: 4-25-13

Enter:

PAUL WOOTEN J.S.C.

FILED

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

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

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