SC 9/23/13 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

----------X

LAURO TAMA,

Plaintiff,

-against -

GARRISON STATION PLAZA, INC., GARRISON'S LANDING ASSOCIATION, INC., GARRISON YACHT CLUB, INC. and SEGNIT WELDING, INC.,

Defendants.

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GARRISON YACHT CLUB INC.,

Third-Party Plaintiff,

- against -

RANDALL S. KING,

Third-Party Defendant

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DECISION & ORDER

Index No.764/13

Sequence No. 1-3

Motion Date: 6/3/13

LUBELL, J.

The following papers were considered in connection with **Motion Sequence 1** by defendant and third-party plaintiff Garrison Yacht Club, Inc. for an Order granting summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212, or in the alternative, granting default judgment against third-party defendant pursuant to CPLR 3215; **Motion Sequence 2** by defendant Garrison's Landing Association, Inc. for an order, pursuant to CPLR 3212, granting summary judgment and dismissing plaintiff's complaint and all cross-claims asserted as against defendant, or in the alternative, if that relief is denied, granting summary judgment enforcing Garrison's Landing Association's right to indemnification and contribution from Garrison Yacht Club, Inc., and for such other and further relief that the Court deems just and proper, and **Motion**

Sequence 3, the cross motion by plaintiff for an order granting plaintiffs summary judgment pursuant to CPLR 3212 on the issue of liability, against the defendants pursuant to Labor Law 240(1) and 241(6), together with such other and further relief as the Court may deem just and proper.

MOTION SEQUENCE 1

PAPERS	**NUMBERED**
NOTICE OF MOTION/MEMORANDUM OF LAW	1
AFFIDAVIT IN SUPPORT/EXHIBITS A-E	2
AFFIDAVIT IN SUPPORT/EXHIBITS A-B	3
AFFIRMATION/EXHIBITS A-T	4

MOTION SEQUENCE 2

PAPERS	**NUMBERED**
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-J	5

MOTION SEQUENCE 3

PAPERS	**NUMBERED**
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-B	6
AFFIRMATION IN OPPOSITION	7
REPLY/RESPONSE AFFIRMATION/EXHIBIT A	8
SUPPLEMENTAL AFFIDAVIT	9

Plaintiff, Lauro Tama, brings this negligence and Labor Law §§200, 240(1) and 241(6) action against defendants Garrison Yacht Club, Inc. (the "Club"), Garrison's Landing Association, Inc. ("Garrison's Landing") and non-appearing defendant Segnit Welding Inc. ("Segnit") in connection with personal injuries sustained by plaintiff on July 23, 2011, when, while under the employ of third-party defendant, Randall S. King, Jr. ("King"), he was injured while performing construction work at a dock leased by the Club from Garrison's Landing (the "Premises") which entailed the removal of an old dock and piers and the construction of a new dock and piers.[1] The two appearing co-defendants have cross-claimed against the other for indemnification and contribution in the event judgment is entered against them. In turn, the Club brings the above captioned third-party action against King, who plaintiff is precluded from suing by virtue of their employer/employee relationship, and for common law contribution and indemnification. As of the motion submission date, King has yet to appear and is in default.

Plaintiff was injured when, while standing in a boat

[1] The case has since been discontinued with prejudice against defendant Garrison Station Plaza, Inc.

positioned approximately one foot from the location where a post was being driven into the river bed in connection with the construction of the Club's new docking area, plaintiff was injured when an allegedly improperly secured hammer (or iron) of a pile driver apparatus being operated by King fell and struck plaintiff's foot.

Common Law Negligence / Labor Law §200

Defendants' respective motions for summary judgment in their favor on plaintiff's common law negligence and Labor Law §200 causes of action are granted. There is no opposition to these moving defendants' prima facie showing that they neither created nor had actual or constructive knowledge of a dangerous condition that caused the accident (see Mendoza v. Highpoint Assoc. IX, LLC, 83 AD3d 1 [1st Dept 2011]) or that they exercised any supervisory control over the underlying project (see Giambalvo v. Chemical Bank, 260 AD2d 432 [2d Dept 1999]; see also, Ortega v. Puccia, 57 AD3d 54 [2d Dept 2008]).

Ownership

> Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents (see Labor Law §§ 240[1]; 241[6]; Guclu v. 900 Eighth Ave. Condominium, LLC, 81 A.D.3d 592, 593, 916 N.Y.S.2d 147). A party is deemed to be an agent of an owner or contractor under the Labor Law when it has the "'ability to control the activity which brought about the injury'" (Guclu v. 900 Eighth Ave. Condominium, LLC, 81 A.D.3d at 593, 916 N.Y.S.2d 147, quoting Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863–864, 798 N.Y.S.2d 351, 831 N.E.2d 408; see Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317–318, 445 N.Y.S.2d 127, 429 N.E.2d 805). A lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law (see Guclu v. 900 Eighth Ave. Condominium, LLC, 81 A.D.3d at 593, 916 N.Y.S.2d 147; see also Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 320, 880 N.Y.S.2d 879, 908 N.E.2d 869).

(Alfonso v. Pac. Classon Realty, LLC, 101 AD3d 768, 770 [2d Dept 2012]; see also Lopez-Dones v. 601 W. Assoc., LLC, 98 AD3d 476,

478-79 [2d Dept 2012]).

Since, here, there is no genuine dispute that the Club, the lessee of the premises, contracted to have work performed for its benefit at the Premises and had the right to control same, it is deemed an "owner" within the meaning of the Labor Law.

Since such a determination does not necessarily exonerate the fee owner, the Court will proceed to address Garrison's Landing's position.

Garrison's Landing's reliance on Morton v. State of New York (15 NY3d 50 [2012]) for its position that there is no nexus between it and plaintiff such that liability may not be imposed against it as "owner" is misplaced. A nexus exists by virtue of Garrison's Landing's lease of the Premises to the Club which, in turn, hired plaintiff's employer to perform work at the Premises (Morton v. State, 15 NY3d 50, 57 [2010] citing Sanatass v. Consol. Inv. Co., Inc., 10 NY3d 333, 340 [2008]).

> [P]recedents make clear that so long as a violation of the statute proximately results in injury, [a landlord's] lack of notice or control over the work is not conclusive — [which] is precisely what is meant by absolute or strict liability in this context [citation omitted]. [The Court of Appeals] ha[s] made perfectly plain that even the lack of "any ability" on the owner's part to ensure compliance with the statute is legally irrelevant [citation omitted]. Hence, [a landlord] may not escape strict liability as an owner based on its lack of notice or control over the work ordered by its tenant.

(Sanatass v. Consol. Inv. Co., Inc., 10 NY3d 333, 340 [2008]).

CPLR §240(1)

Labor Law §240(1) reads:

> 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.

However,

> . . . not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501).
>
> . . . Even "a violation of [Labor Law §240 (1)] cannot 'establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury' " (Rocovich v Consolidated Edison Co., 78 NY2d 509, 513, quoting DeHaen v Rockwood Sprinkler Co., 258 NY 350, 353).
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> . . .
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> . . . [F]or section 240 (1) to apply [in a falling object case], 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 (see, e.g., Pope v. Supreme-K.R.W. Constr. Corp., 261 AD2d 523; Baker v Barron's Educ. Serv. Corp., 248 AD2d 655).

(Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 267-68 [2001]) or that the object otherwise "required securing for the purposes of the undertaking" (Outar v City of New York, 5 NY3d 731 [2005]).

Here, upon review and consideration of defendants' motion and plaintiff's cross-motion for summary judgment on the section 240(1) claim, including their experts' submissions, the Court finds that there are material questions of fact that preclude the issuance of summary judgment in favor of either party including but not limited to whether the iron was properly secured to the crane via a nylon line, or whether there was operator error in the use of an otherwise proper and adequate machine which caused the premature lowering of the iron.

As such, all motions for summary judgment addressed to section 240(1) are denied.

Labor Law §241(6)

Section 241(6) of the Labor Law provides, in pertinent part:

> All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 6. 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract

> for but do not direct or control the work, shall comply therewith.

A Labor Law §241(6) claim is properly advanced where plaintiff asserts a provision of the Industrial Code containing concrete specifications that the defendant allegedly violated (Donovan v. S & L Concrete Constr. Corp., Inc., 234 A.D.2d 336, 337 [1996]; see also Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 [1993]). Where same is established, there exists vicarious liability on behalf of an owner (Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 351 [1998]). The cited Industrial Code provisions must contain specific positive commands, not general regulatory criteria such as "adequate," "effective" and "proper" (Ross, 81 N.Y.2d at 501-504).

While the Court is satisfied that plaintiff has sufficiently advanced Industrial Code violations, as circumscribed in his cross-motion/opposition papers, the Court finds that there are material questions of fact which preclude summary judgment in favor of either party including, but not limited to, whether any violation eventually established was the cause of plaintiff's injuries.

The Club's Motion for Default Judgment against King

The Club's motion for a default judgment against non-appearing King is granted for the reasons therein advanced. The entry of judgment is necessarily stayed pending a determination of liability, if any, against the Club in the main action.

Garrison's Landing's Motion for Summary Judgment against the Club

The indemnification provision in the lease between Garrison's Landing and the Club provides that the Club is responsible for any loss not caused by Garrison's Landing's negligence and for any loss, liability, or claim arising out of the Club's use and operation of the Premises.

Garrison's Landing Association's motion for summary judgment upon its claim for indemnification and contribution from Garrison Yacht Club, Inc. is granted.

> [A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be

> indemnified therefor (see General Obligations Law § 5-322.1; Reynolds v. County of Westchester, 270 AD2d 473 [2000]).

(Cava Const. Co., Inc. v. Gealtec Remodeling Corp., 58 AD3d 660, 662 [2d Dept 2009]).

Here, since plaintiff has failed to come forward with sufficient evidence in admissible form in response to Garrison's Landing's prima facie showing that it was free from negligence with regard to the underlying accident, summary judgment on the cause of action for contractual and common law indemnification is warranted (see Castrogiovanni v. Corporate Prop. Invs., 276 AD2d 660 [2000]; see Naughton v. City of New York, 94 AD3d 1 [1st Dept 2012]).

Correspondingly, any cross-claims by the Club against Garrison's Landing are likewise dismissed, there being no question of fact properly raised regarding same in response to its prima facie showing of entitlement to judgment in its favor as a matter of law.

To any further extent, the motions are denied.

The parties are to appear for a Status Conference on September 23, 2013 at 9:30 AM.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
August 27 , 2013

S/ _____
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