Purcell v Visiting Nurses Found. Inc.
2013 NY Slip Op 32110(U)
September 6, 2013
Sup Ct, New York County
Docket Number: 113123/09
Judge: Jeffrey Oing
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 9/10/2013
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING
JUDGE, SUPREME COURT
Justice

PART 48

Purcell, Joseph

-v-

Visiting Nurses

INDEX NO. 113123/2009

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ___, were read on this motion to/for ___

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ___ | No(s). ___

Answering Affidavits — Exhibits ___ | No(s). ___

Replying Affidavits ___ | No(s). ___

Upon the foregoing papers, it is ordered that this motion is

This motion is decided in accordance with the annexed decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ___
FOR THE FOLLOWING REASON(S): ___

FILED
SEP 10 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/6/13

___, J.S.C.
JEFFREY K. OING
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

---x

JOSEPH PURCELL and JANET PURCELL,

Plaintiffs,

-against-

VISTING NURSES FOUNDATION INC. and CAULDWELL-WINGATE, INC.,

Defendants.

---x

VISTING NURSES FOUNDATION INC. and CAULDWELL-WINGATE, INC.,

Third-Party Plaintiffs,

-against-

NORTHEASTERN FABRICATORS, INC., BEYER BLINDER BELLE, ARCHITECTS AND PLANNERS, LLP, and ROBERT SILMAN ASSOCIATES, P.C.,

Third-Party Defendants.

---x

Index No.: 113123/09

Mtn Seq. Nos. 001, 002, 003, 004

Third-Party Index No.: 590593/10

FILED

SEP 10 2013

COUNTY CLERK'S OFFICE
NEW YORK

JEFFREY K. OING, J.:

Procedural Posture

Plaintiff, Joseph Purcell, and his wife, plaintiff Janet Purcell, commenced this action on September 15, 2009 against defendants Visiting Nurses Foundation Inc. ("VNF") and Cauldwell-Wingate, Inc. ("CW").

Defendants filed a third-party complaint against Northeastern Fabricators, Inc. ("NEF"), Beyer Blinder Belle,

Architects and Planners, LLP ("BBB"), and Robert Silman Associates, P.C. ("RSA") on June 30, 2010.

Plaintiffs (Mot. Seq. No. 001) move, pursuant to CPLR 3212, for summary judgment on the first cause of action based on Labor Law § 240[1].

Defendants VNF and CW (Mot. Seq. No. 004) move for summary judgment dismissing the complaint in its entirety against VNF, dismissing that branch of the first cause of action for violations of Labor Law §§ 240[1] and 241[6] against CW, and for summary judgment on CW's third-party claim for contractual indemnification against third-party defendant NEF. NEF cross-moves for summary judgment dismissing defendants' claims for common law contribution and indemnification.

Separately, third-party defendants RSA (Mot. Seq. No. 002) and BBB (Mot. Seq. No. 003), move for summary judgment dismissing the third-party complaint and all cross and counter-claims asserted against them.

Mot Seq. Nos. 001, 002, 003, and 004 are consolidated for disposition.

The Project

Non-party Visiting Nurse Service of New York ("VNS") owns the building at 107 East 70th Street. On August 1, 2008, VNS hired CW as construction manager for a renovation of the

building. CW hired subcontractors, coordinated work at the job site, and monitored job-site safety. Paul DeSimone was CW's senior superintendent at the site. He had the authority to stop work due to unsafe working conditions and walked through the job site on a daily basis.

CW retained NEF as a subcontractor for structural and miscellaneous steelwork. Pursuant to their agreement, NEF agreed to indemnify CW and VNS against "any claim, demand, cause of action ... arising directly or indirectly out of the acts or omissions of [NEF] in the performance of the work, including ... such claims, loss or liability arising under non-delegable duties of [CW] or [VNS]..." (Subcontractor Agreement, Affirmation of Jason Gomes, Ex. H, § 8.3). Further, the contract provides that NEF is an independent subcontractor, with "responsibility for and control over all means and methods, safety precautions and safety procedures" relating to any of NEF's work (Id. at Ex. H, § 13.0).

VNS hired third-party defendant BBB as architect. BBB made periodic site visits to keep VNS updated on the job's progress and "guard [VNS] against defects and deficiencies" (Architectural Contract, Affirmation of Mark Krieg, Ex. H, § 2.7.2). BBB also provided "written or graphic interpretations" of the contract requirements (Id. at § 2.7.3). Pursuant to the terms of the contract, BBB did not control or have responsibility for "the

construction means, methods, sequences or procedures, or for safety precautions and programs" (Id. at § 2.7.2). BBB agreed to indemnify VNS from "all liability, damages, losses, including personal injury and death ... caused by the acts, omissions fault or negligence of [BBB]" (Id. at § 6.5).

BBB hired RSA as a structural engineering consultant (Consulting Agreement, Affirmation of Stephen P. Schreckinger, Ex. T, pg. 1). RSA was to provide, inter alia, surveys of existing conditions in the building, "schematic level framing drawings" for BBB's designs, and "layout, monitor and record probes (made by others)" (Scope of Services, Schreckinger Aff., Ex. T2). The contract specifically excluded "design of all means and methods of construction (e.g., temporary structures such as sheeting, shoring, bracing, and the like)" (Id.). RSA and BBB agreed to mutually indemnify each other for "all damages, liabilities or costs, arising from their own negligent acts, errors and omissions in the performance of their services (Consulting Agreement, Schreckinger Aff., Ex. T2, § 7).

The Accident

On June 4, 2009, CW sent RSA a request for information ("RFI") because workers discovered a piece of steelwork referred to as a C-Channel in the cellar that was not part of the original building plans. The C-Channel supported a terracotta wall, which

DeSimone later testified was not tied back to the building's foundation. RSA responded on June 8, 2009. Geoff Smith, RSA's project engineer, asked CW to probe the beam for details of its dimensions. Following the probe, Smith went to the job site and prepared a field report for BBB noting the C-Channel and RSA's intent to revise the plans for the cellar. On June 25, 2009, BBB sent CW revised plans for room 103, the location of the C-Channel.

On August 7, 2009, CW sent RSA a second RFI regarding the C-Channel. Because the C-Channel was supporting the existing wall in room 103, CW believed that removing it would "compromise the remaining brick wall above" if workers carried out the new framing as written (RFI 88, Pollak Aff. in Opp., Ex. G).

On August 12, 2009, Smith replied and proposed the following solution: workers were to attach an angle iron beneath a new concrete slab and metal deck beneath the old wall, then build up a new wall to the base of the old wall before removing the C-Channel (Id.). DeSimone asked Smith to provide a sketch detailing Smith's proposed solution, and on August 13, 2009 Smith sent him a design schematic detailing his solution (Sketch SKC-8.13, Pollak Aff. in Opp., Ex. G).

DeSimone and Darin Marquez, NEF's project manager, determined that they could not remove the C-Channel via RSA's

proposed method (DeSimone 10/13/11 EBT Tr. at pp. 75-77; Marquez 10/18/11 EBT Tr. at pp. 39-40). They determined that they would proceed by using an angle iron attached directly beneath the terracotta wall and build up the new flooring after removing the C-Channel (Marquez 10/18/11 EBT Tr. at pp. 41-43). Marquez sketched an addition to SKC-8.13 showing the proposed angle (Id. at pg. 45; Annotated Sketch SKC-8.13, Pollak Aff. in Opp., Ex. G).

The parties differ as to what happened next. RSA and BBB claim that they were not involved with the proposed fix. Smith, RSA's project engineer, testified that he did not speak to DeSimone after preparing Sketch SKC-8.13 (Smith 11/3/11 EBT Tr. at pg. 52). Further, no one informed him Sketch SKC-8.13 was impossible to implement (Id.). He first saw the sketch with Marquez's annotation on the day of the accident (Id.). Elizabeth Leber, a partner at BBB, testified that she had never seen the sketch with Marquez's changes before Purcell's accident, nor had she discussed it with either BBB's project manager Aaron Lamport or BBB's construction administrator Kevin Lackey (Leber 12/1/11 EBT Tr. at pp. 72-73). For his part, Marquez testified that he discussed the sketch with DeSimone and Jim Gaffney, NEF's foreman, but did not share it with anyone at RSA (Marquez 10/18/11 EBT Tr. at pp. 46-47).

DeSimone tells a different story. According to his deposition testimony, he and Smith had a field meeting regarding the sketch prior to the accident, at which he told Smith about the proposed new angle iron (DeSimone 10/13/11 EBT Tr. at pp. 138, 141, 155-157). Smith agreed to proceed with the new angle iron under the terracotta wall (Id. at pg. 189). Further, at some point between Smith's issuance of the sketch and the accident, DeSimone met with Lamport, BBB's project manager, and discussed the proposed new angle with him (Id. at pg. 150). NEF installed the angle iron under the terracotta wall sometime before the end of August (Id. at pg. 164). DeSimone claims Smith came to the site and inspected the angle, along with DeSimone and either Gaffney or Marquez from NEF (Id. at pp. 163-165).

DeSimone supplemented his EBT testimony regarding these meetings in his affidavit wherein he states that he and Smith, as well as Lamport and Lackey, BBB's construction administrator, discussed and inspected the angle iron both before and after it was installed (DeSimone Aff., 11/27/12, at p. 2). None of the three objected when DeSimone discussed the new angle (Id.).

On September 8, 2009 Purcell and Gaffney went to room 103, and began removing the C-Channel. Gaffney leaned two unopened A-frame ladders against the wall and began cutting through the C-Channel with an acetylene torch (Purcell 6/3/10 EBT at pp. 89-90,

104-105). No other ladder or scaffold was available (Gaffney 1/6/12 EBT at pp. 126-27). After burning through one side of the C-Channel, Gaffney climbed the second ladder, and cut three-quarters of the way through the beam (Purcell 6/3/10 EBT at pp. 108-109). He then told Purcell to climb up and pull the C-Channel slightly out of the wall so they could attach a roustabout to the beam and lift it out once it had been cut free (Id. at pp. 113-114). There was no spotter and no one else from NEF was present at the time (Id. at pg. 123). After Purcell pulled the C-Channel an inch or two away from the wall the wall collapsed on top of him and knocked him off the ladder (Id. at pg. 125). Gaffney, who at this point was lying on the first floor above Purcell observing the procedure, ran down to the basement room (Gaffney 1/6/12 EBT at pg. 172). He pulled the ladder and other debris off of Purcell and brought him upstairs (Id. at pp. 178-179).

Preliminary Issues

To begin, that branch of RSA's motion for summary judgment to dismiss the third third-party cause of action for contractual indemnification and the fourth third-party cause of action for breach of the agreement to secure liability insurance is granted without opposition, and those claims are dismissed against RSA. Further, that branch of BBB's motion for summary judgment seeking

the same relief is granted without opposition, and those claims are dismissed against BBB. Indeed, the record demonstrates that neither VNF nor CW were parties to BBB's contract with VNS or BBB's contract with RSA.

That branch of defendants' motion for summary judgment dismissing the complaint against VNF is granted without opposition, and the complaint is dismissed against VNF. The record demonstrates that VNF and VNS are separate entities (Entity Information, Pollak Aff. in Opp., Ex. D). VNS is the owner of the building, and VNF has no legal or contractual nexus to this action.

I. Labor Law § 240[1] (Mtn Seq. Nos. 001 and 004)

Section 240[1] requires building owners and contractors to provide adequate "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" to protect construction workers from injury. Specifically, "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" either because of a falling object or because the worker falls (Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011]). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1)

requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (Id. at 7), and whether "a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (Id. at 8). Purcell alleges that he was injured both by a falling object, and by his own fall off the ladder.

With regard to Purcell's "falling object" theory of liability, the record demonstrates that the terracotta wall was not under construction, but, instead, was part of the original structure. NEF installed the angle iron in order to shore up the wall while other work proceeded around it (Marquez 10/18/11 EBT Tr. at pp. 41-43). As the Court of Appeals recently reaffirmed in Wilinski, "the kind of braces referred to in section 240[1] are 'those used to support elevated work sites not braces designed to shore up or lend support to a completed structure'" (Id. at 8 (citing Misseritti v. Mark IV Constr. Co., 86 NY2d 487, 491 [1995])). The wall's collapse, especially given that it was not tied back to the concrete behind it with rebar, is the kind of structural infirmity or peril "a construction worker usually encounters on the job site" (Wilinski, 18 NY3d at 8; Meis v. ELO Organization, LLC, 282 AD2d 211, 212 [1st Dept 2001] ["the dislodging of the ventilation pipe was not attributable to the kind of extraordinary elevation-related risk that the statute was

intended to guard against but was rather the result of a structural infirmity of a sort routinely encountered during construction site work"]). Under these circumstances, the "falling object" theory is inapplicable to the facts of this case.

With regard to Purcell's "falling worker" theory of liability, the record demonstrates that Purcell and Gaffney used A-frame ladders because other ladders or scaffolds were too big for the room (Gaffney 1/6/12 EBT Tr. at pp. 126-127). Purcell testified that the falling brick knocked him off of the ladder. Gaffney testified that upon reaching the basement he had to pull the ladder off of Purcell (Gaffney 1/6/12 EBT at pg. 177).

An improperly secured ladder is a violation of Labor Law § 240[1] (Montalvo v. J. Petrocelli Constr., Inc., 8 AD3d 173, 174 [1st Dept 2004]). Although the record demonstrates that the ladder itself was in working condition, a factual issue exists as to whether it was properly secured in place before Gaffney and Purcell began working given the absence of any testimony in that regard.

Accordingly, to the extent that Purcell's Labor Law § 240[1] claim is based on a "falling worker" theory of liability, both plaintiffs' and defendants' motions for summary judgment on the

first cause of action for violations Labor Law § 240[1] are denied.

II. Labor Law § 241[6] (Mtn Seq. No. 004)

Section 241[6] provides that "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." A plaintiff must allege "a violation of a specific rule or regulation promulgated pursuant to [the statute]" (Wilinski, 18 NY3d at 11-12). Further, the violation must be the proximate cause of the plaintiff's injury (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 351 [1998]).

Plaintiffs allege violations of several sections of Rule 23 of the Industrial Code of the State of New York (12 NYCRR § 23-1, et seq.). In their papers, plaintiffs focus on 12 NYCRR §§ 23-1.21(e)(2) and 23-3.3(c). As such, they are deemed to have abandoned reliance on the other sections of the Industrial Code alleged in the complaint (Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 [1st Dept 2012] ["it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Section 23-1.21(e)(2) provides that "such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked." The First Department has held that section 23-1.21(e)(2) is insufficiently specific to support a section § 241[6] claim, and, as such, it cannot be the basis for plaintiffs' claim here (Croussett v. Chen, 102 AD3d 448 [1st Dept 2013]).

Section 23-3.3(c) provides that:

> During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.

In other words, the section requires continuing inspections to detect hazards created by demolition (Wilinski, 18 NY3d at 12). The work "must 'involve changes to the structural integrity' of a building or structure" (Garcia v 225 E. 57th St. Owners, Inc., 96 AD3d 88, 90 [1st Dept 2012]). As the First Department stated:

> [Section 3.3.(c) has] been construed as [a] specific safety rule designed to protect a worker from the hazards created when a structure is weakened by the 'progress of the demolition.' Thus, 'loosened material' must be material loosened by the 'progress' of demolition. This loosening material might evade notice until it 'fall[s]' or 'collapse[s]' and injures a worker. This does not encompass material which is being loosened deliberately.

Garcia, 96 AD3d at 92.

Here, the removal of a piece of steel supporting a wall is a change to the VNS building's structural integrity. Although the C-Channel is the only material that Purcell and Gaffney "loosened deliberately", that fact does not render section 3.3(c) inapplicable. Here, the construction project contemplated having the terra cotta wall remain in place, and, in order to perform the necessary removal NEF installed the angle iron accordingly. Purcell and Gaffney weakened the wall during the progress of the demolition after which it collapsed on Purcell and knocked him off the ladder. Gaffney testified that the terracotta wall fell because a slab next to the C-Channel was not tied back into the building with rebar (Gaffney 1/6/12 EBT Tr. at pp. 174-176). The slab "wasn't bonded to the wall," and when Purcell pulled on the C-Channel the slab came loose and brought down the wall (Id.).

A factual issue exists as to whether an inspection could have revealed that the wall and slab were only supported by the C-Channel during the demolition process. In any event, Gaffney's, Purcell's, and DeSimone's EBT testimony indicate that no one inspected the work site during the demolition process as required by section 3.3(c). Contrary to defendants' argument, Gaffney was present to do the work, not to conduct the necessary inspections. Under these circumstances, a triable issue of fact

exists as to whether section 3.3(c) was violated, and whether that violation proximately caused Purcell's injuries.

Accordingly, that branch of CW's motion for summary judgment dismissing the first cause of action for violations of Labor Law § 241[6] is denied.

III. Common Law Indemnity and Contribution against RSA and BBB (Mtn Seq. Nos. 002 and 003)

RSA and BBB move for summary judgment dismissing CW's claims for common law indemnity and contribution on the grounds that Labor Law § 240[1] bars any action against them because they did not supervise or control work at the job site, and, in any event, CW and NEF did not follow RSA's and BBB's designs.

Contrary to RSA and BBB's argument, section 240[1] does not bar liability against architects and engineers as a matter of law. The statute provides that the exception to scaffold law liability "shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law ..." (Labor Law § 240[1]).

Here triable issues of fact exist as to RSA and BBB's involvement in the accident. As set forth above, there is sharp dispute as to who knew about the proposed angle iron solution, and who decided to implement RSA's solution out of sequence. Indeed, the record demonstrates that RSA's and BBB's employees not only knew about the angle iron solution, but inspected it and

endorsed it. Further, triable issues of fact exist as to the extent of CW's own negligence in proposing and implementing the angle iron solution.

Accordingly, those branches of RSA's and BBB's motions for summary judgment to dismiss the first third-party cause of action for common law indemnity and the second third-party cause of action for contribution are denied.

IV. Contractual Indemnification against NEF (Mtn Seq. No. 004)

CW seeks summary judgment on its claim for contractual indemnification against NEF. The contract requires NEF to indemnify CW against, inter alia, personal injury arising out of "the acts or omissions of [NEF], in the performance of the work," including claims involving CW's non-delegable duties under Labor Law §§ 240 and 241 (Subcontractor Agreement, Gomes Aff., Ex. H, § 8.3).

A party may seek a conditional indemnification order prior to resolving the main action so long as there are no issues of fact as to that party's active negligence (Callan v. Structure Tone, Inc., 52 AD3d 334 [1st Dept 2008] ["While the parties incorporated saving language in the indemnification clause ... there are issues of fact as to the extent of defendant's liability for causing the worker's injury."]).

Contrary to NEF's argument, the indemnification agreement's language covers all injuries arising from NEF's work, whether NEF was negligent or not. Further, the provision does not violate General Obligations Law § 5-322.1, which prohibits contractors and owners from indemnifying themselves against their own negligence. In that regard, a contractor and/or owner may seek contractual indemnification even where they are partially negligent so long as they only seek indemnification for the acts of other parties (Brooks v Judlau Contr., Inc., 11 NY3d 204, 207 [2008]). In fact, CW and NEF's contract provides that "in the event of joint negligence or fault [by CW or VNS], [NEF] shall provide indemnity for the percentage of negligence or fault attributable to [its actions]," therefore the provision does not violate General Obligations Law § 5-322.1, and is valid and enforceable.

CW argues that no triable issues of fact exist as to its negligence because all it did was "give[] the go ahead to proceed with a plan devised by design professionals". CW, however, owed Purcell a non-delegable duty to ensure a safe workplace under section 241[6] (DaSilva v. C&E Ventures, Inc., 83 AD3d 551, 552 [1st Dept 2011]), and factual issues exist as to whether that duty was breached. Moreover, as noted supra, DeSimone and Marquez came up with the angle iron solution themselves, and may

or may not have shown it to RSA and BBB. Under these circumstances, conditional indemnification would be premature.

Accordingly, that branch of CW's motion for summary judgment on the third third-party cause of action for contractual indemnification is denied.

V. Common Law Indemnity and Contribution against NEF

NEF cross-moves for summary judgment dismissing CW's claims for common-law indemnity and contribution. Workers' Compensation Law § 11 bars claims for indemnification or contribution against an injured plaintiff's employer unless plaintiff suffers "a grave injury."

Here, Purcell complains of "an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). "A brain injury results in 'permanent total disability' ... when the evidence establishes that the injured worker is no longer employable in any capacity" (Rubeis v. The Acqua Club, Inc., 3 NY3d 408, 413 [2004]).

Plaintiff's medical expert, Dr. Aric Hausknecht, examined him on October 22, 2009 (Hausknecht Report, Pollak Affirm. in Opposition to NEF's Cross-Motion, Ex. C). Dr. Hausknecht found that Purcell suffered from headaches, dizziness, a lack of balance, some movement impairment, pain in his limbs, neck, and

back, herniated discs, and various spinal injuries. He ultimately diagnosed Purcell as totally disabled and suffering from post-concussion syndrome and spinal derangement.

Purcell later underwent an independent medical examination by Dr. Brian Greenwald on September 27, 2011 (Greenwald Report, Gomes Aff., Ex. J). Purcell reported that he had headaches that sometimes led to numbness of his right arm, low back pain, pain and numbness in his left arm, anxiety, and some memory problems (Id. at p. 10-11). Dr. Greenwald reported that he had no intracranial injuries on his CT scan, and further tests showed no evidence of brain injury (Id. at p. 14). Dr. Greenwald diagnosed Purcell's symptoms as related to his spinal injuries and stated that he has "no objective evidence of having sustained a traumatic brain injury ... there are no brain injury related issues that limit Mr. Purcell's return to employment including his previous employment" (Id.).

Although headaches, dizziness, and post-concussion syndrome standing alone "do not satisfy the acquired brain injury standard" (Anton v W. Manor Const. Corp., 100 AD3d 523, 524 [1st Dept 2012]), the medical record demonstrates that the medical experts sharply dispute the extent of plaintiff's injuries, and, as such, a factual issue exists as to whether plaintiff sustained a grave injury.

Accordingly, NEF's cross-motion for summary judgment dismissing the first and second third-party causes of action for common law indemnity and contribution is denied.

Accordingly, it is

ORDERED, that Plaintiffs' motion for summary judgment on their first cause of action pursuant to Labor Law § 240(1) is denied; and it is further

ORDERED, that branch of RSA's motion for summary judgment dismissing the first third-party cause of action for common-law indemnity and the second third-party cause of action for contribution is denied; and it is further

ORDERED, that branch of RSA's motion for summary judgment dismissing the third third-party cause of action for contractual indemnification and the fourth third-party cause of action for failure to procure insurance is granted, and those claims are dismissed against RSA; and it is further

ORDERED, that branch of BBB's motion for summary judgment dismissing the first third-party cause of action for common-law indemnity and the second third-party cause of action for contribution is denied; and it is further

ORDERED, that branch of BBB's motion for summary judgment dismissing the third third-party cause of action for contractual indemnification and the fourth third-party cause of action for

[* 22]

failure to procure insurance is granted, and those claims are dismissed against BBB; and it is further

ORDERED, that VNF's motion for summary judgment is granted, and the complaint against it is dismissed; and it is further

ORDERED, that CW's motion for summary judgment dismissing plaintiffs' first cause of action for violations of Labor Law §§ 240(1) and 241(6) and on its third-party claim for contractual indemnification against NEF is denied; and it is further

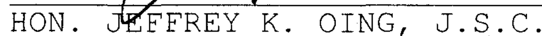
ORDERED, that NEF's cross-motion for summary judgment dismissing the first third-party cause of action for common-law indemnity and the second third-party cause of action for contribution is denied; and it is further

ORDERED, that counsel shall call the Clerk of Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/6/13

HON. JEFFREY K. OING, J.S.C.



JEFFREY K. OING
J.S.C.

FILED

SEP 10 2013

COUNTY CLERK'S OFFICE
NEW YORK