SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

ANGELO AMANTE and DEBORAH AMANTE,

Plaintiffs,

- against -

PAVARINI MCGOVERN, INC., PAVARINI MCGOVERN, LLC., AB GREEN GANSEVOORT, LLC., and INTERSTATE INDUSTRIAL CORP.,

Defendants.

PAVARINI MCGOVERN, INC. PAVARINI MCGOVERN, LLC., and AB GREEN GANSEVOORT, LLC.,

Third-Party Plaintiffs,

-against-

PETER SCALAMANDRE & SONS, INC.,

Third-Party Defendant.

Index No. 108650/10

Mot. seq. nos. 002, 003

DECISION AND ORDER

Index No. 590607/12

BARBARA JAFFE, J.:

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Plaintiff Angelo Amante, a carpenter employed by third-party defendant Peter Scalamandre and Sons, Inc. (Scalamandre) at an excavation site, fell into an on-site hole

allegedly sustaining injuries. He and his wife sue defendants for violations of Labor Law §§ 200, 240(1), and 241(6). Defendants Pavarini McGovern, Inc. and Pavarini McGovern LLC. (collectively, Pavarini) and AB Green Gansevoort, LLC. (AB Green) assert cross claims against defendant Interstate Industrial Corp. (Interstate) and commenced a third-party action against Scalamandre for indemnification, contribution, and failure to procure insurance.

Plaintiffs move for an order granting them summary judgment on their Labor Law claims against defendants. Pavarini and AB Green oppose the motion, as does Interstate except as to the Labor Law § 200 claim against Pavarini and AB Green, which it joins.

Pavarini and AB Green cross-move for an order granting them summary judgment against Interstate and Scalamandre on their claims for indemnification and for failure to procure insurance, which Interstate and Scalamandre oppose. Scalamandre moves for an order granting it summary judgment dismissing all of Pavarini's and AB Green's contractual claims against it, which Pavarini and AB Green oppose. In their opposition to Scalamandre's motion, Pavarini and AB Green withdraw their common law and Labor Law claims against Scalamandre.

I. BACKGROUND

AB Green, the owner of premises located at 844 Washington Street in Manhattan, hired Pavarini as its general contractor for the construction of a building. (NYSCEF 120). Pavarini entered into a subcontract with Interstate to perform excavation and foundation work, to install guardrails and maintain perimeter safety fences around the excavation, and to comply with all relevant safety and industrial regulations. Interstate agreed to indemnify Pavarini and AB Green for losses "claimed to have arisen out of its performance or act of omission, or for any accident alleged to have happened in the vicinity" of its work area, and to procure $5 million in liability

insurance on their behalf. (NYSCEF 72, 73, 74). Pavarini also subcontracted with Scalamandre to install a concrete structure. The agreement, as relevant here, contains insurance and indemnity provisions identical to those set forth in the Interstate subcontract. (NYSCEF 78, 79, 96).

On October 24, 2007, during Pavarini's weekly safety meeting in which a representative from Scalamandre was present, Pavarini's safety manager instructed subcontractors not to walk across the excavation site. (NYSCEF 114).

At an examination before trial (EBT) held on April 17, 2012, plaintiff testified as follows: At 5:50 a.m. on October 29, 2007, he entered the excavation site through an unlocked chain link fence on Little West 12th Street, and at 5:55 a.m., fell into an excavation pit which he estimated as 12 to 15 feet deep, thereby injuring himself. While work did not commence until 7 a.m., plaintiff arrived before 6 a.m. as he always did without any objection, to have breakfast and prepare his equipment. His foreman had directed him to enter through the chain link fence. All of the other entrances were closed when plaintiff arrived and it was dark out whenever he arrived early, as it was the morning of his accident. Plaintiff was aware of excavation holes at the site, and on prior occasions, he noticed protective orange netting surrounding some excavation holes. He had a flashlight that morning but did not use it. When shown photographs of various excavation holes at the site, plaintiff was unable to identify the one into which he had fallen. (NYSCEF 67).

At an EBT held on March 14, 2013, Todd Prol, Pavarini's senior project manager, testified that Pavarini managed safety conditions at the site and brought deficiencies to the attention of the subcontractors. He acknowledged having been aware of excavation holes at the site, and that only the area surrounding the site's perimeter fence was lit before the

commencement of the workday. According to Prol, workers often arrived early but he was unaware of anyone arriving before 6 a.m. There were no prohibitions against early arrivals, and Prol did not know when the main gates opened. He also admitted that several subcontractors were involved in the excavation area. (NYSCEF 63).

At an EBT held on March 27, 2013, Leonid Klevitsky, Interstate's project manager, testified that generally, Interstate either barricaded individual excavation holes or installed a perimeter fence around the entire area, determined case by case. He was unaware of the precautions taken at the subject site. (NYSCEF 64).

By affidavit dated March 25, 2013, plaintiff's co-worker maintains that he and plaintiff entered the site sometime between 6:10 and 6:15 a.m., and that the chain link fence was always open for workers arriving early, that there were no lights where plaintiff fell, and that the illumination was approximately one-half to one foot candles. (NYSCEF 49).

By affidavit dated July 24, 2013, plaintiff states that he entered the site at approximately 6:15 a.m., and that he walked toward the carpenter's shanty with a co-worker to have coffee, gather tools, and prepare for work which would commence at 7 a.m. (NYSCEF 50).

II. CONTENTIONS

Plaintiffs contend that AB Green, Pavarini, and Interstate, in failing to provide adequate barriers and lighting at the excavation site, breached their duties, respectively, as owner, general contractor, and subcontractor responsible for safeguarding excavations. (NYSCEF 51, 116). AB Green, Pavarini, and Interstate argue that as plaintiff was injured when the site was closed, the accident does not come within the protection of the Labor Law, and that it may be reasonably inferred that plaintiff's own negligence in crossing the site in the dark was the sole proximate

cause of his injury. (NYSCEF 102, 115). Pavarini and AB Green also contend that their liability to plaintiff is vicarious only, and thus, they are entitled to indemnification from Interstate, who allegedly furnished and supervised the excavation, and from Scalamandre. (NYSCEF 66, 118). Interstate and Scalamandre deny that Pavarini and AB Green are liable only vicariously, and claim that as triable issues exist as to their own negligence, Pavarini and AB Green have not demonstrated their right to indemnification. (NYSCEF 101, 107). Scalamandre denies any liability for Pavarini and AB Green as it did not cause plaintiff's injury. (NYSCEF 113, 119).

III. PLAINTIFFS' MOTION

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). Courts may not assess credibility on a motion for summary judgment, and the facts must be viewed in the light most favorable to the nonmoving party. (*Forrest,* 3 NY3d 314; *Ferrante v Am. Lung Assn.*, 90 NY2d 623, 631 [1997]).

A. Labor Law § 240(1)

1. Is plaintiff protected under the statute?

Before a plaintiff may be entitled to protection under the Labor Law, she must

demonstrate that she falls within the class of persons protected under it. (*See Morton v State of New York*, 13 AD3d 498 [2d Dept 2004], *affd* 15 NY3d 50 [2010]). As relevant here, Labor Law § 240(1) protects those employed in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." That the area in which the plaintiff was injured was not where she focused her work is immaterial (*Hagins v State of New York*, 81 NY2d 921, 923 [1993]), and employees are protected when performing duties ancillary to the statute's enumerated activities (*Prats v Port Auth. of New York and New Jersey*, 100 NY2d 878 [2003]).

Thus, in *Morales v Spring Scaffolding, Inc.*, the Appellate Division, First Department, held that an employee injured due to a fall from a poorly constructed sidewalk bridge used to store equipment while on a lunch break was protected under Labor Law § 240(1), as he would eventually return to work following lunch. (24 AD3d 42, 45-46 [1st Dept 2005]). And, in *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, the court held, citing *Morales*, that the plaintiff, who was injured while exiting a work site after being fired, was protected under Labor Law § 240 because he was still on-site. (100 AD3d 431, 432 [1st Dept 2012]). It may thus be inferred that arriving at a work site constitutes an activity ancillary to the statute's enumerated activity.

However, where an employee is on his employer's property without the knowledge or permission of the employer, he is deemed not employed under the Labor Law. (*Morton*, 13 AD3d at 500). Thus, factual issues as to whether an employee had permission to work on the day of his accident precluded the granting of summary judgment to the employee in *Haque v Crown Hgts. NRP Assoc., LP*, 33 AD3d 864 (2d Dept 2006). A factual issue was also raised in *Wysk v New York City School Constr. Auth.*, namely, whether a work site was officially closed due to

inclement weather. (27 Misc 3d 362, 365-366 [Sup Ct, Queens County 2010], *affd on other grounds*, 87 AD3d 1131 [2d Dept 2011]). There, the court reasoned that holding owners and contractors liable for injuries occurring at a site closed for safety reasons was tantamount to treating them as insurers, a result not contemplated by the Labor Law.

Here, plaintiff was injured as he walked across the excavation site in order to prepare for his work day, activities which are, of course, necessary precedents to performing his work. That the work day had not yet begun is immaterial. (*See also Sullivan v Midtown West A LLC*, 2010 NY Slip Op 32630[U] [Sup Ct, New York County 2010] [rejecting defendants' denial that plaintiff precluded from recovery because accident occurred after work hours]). And there is no evidence that the site was closed to workers. (*Compare Morton*, *Haque*, *Wysk*, *supra*). Consequently, AB Green, Pavarini, and Interstate have failed to raise a triable issue.

2. Liability pursuant to Labor Law § 240(1)

A defendant violates Labor Law § 240(1) when it fails to provide a worker with adequate protection from a reasonably preventable, gravity-related accident. (*Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]). The duty imposed on owners and general contractors is non-delegable and one who breaches it is liable regardless of whether it actually exercised supervision or control over the work. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). As for subcontractors and other third parties, liability attaches only if they were given or had been delegated authority to supervise and control the work at issue, in which case they become statutory agents of the owner or general contractor. (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 292-93 [2003]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

A plaintiff demonstrates *prima facie* entitlement to summary judgment by establishing: 1) a violation of the defendant's duty to provide adequate protection from a preventable, gravity-related accident, and 2) that the violation was a proximate cause of his injury. (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]). A plaintiff asserting a Labor Law § 240(1) claim need not show that he was free from negligence. (*Boyd v Schiavone Constr. Co. Inc.*, 106 AD3d 546 [1st Dept 2013]).

Here, evidence was offered that plaintiff fell into a deep excavation hole, an occurrence which could have been averted by preventing workers' access to the area when dimly lit. Plaintiffs have thus established, *prima facie*, their Labor Law § 240(1) claim.

If, however, the plaintiff's actions constituted the sole proximate cause of his gravity-related injury, he cannot prevail on his Labor Law § 240(1) claim. (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake*, 1 NY3d 280, 287).

Although Pavarini's safety manager warned Scalamandre that workers should not cross the excavation site, no evidence was offered that any warning was conveyed to plaintiff. Thus, absent any evidence that plaintiff knew of the warning or unreasonably disregarded it, his walk through the excavation site cannot be deemed the sole proximate cause of his injury. (*See Nacewicz v R.C. Church of the Holy Cross*, 105 AD3d 402, 403-04 [1st Dept 2013] [in absence of admissible evidence that foreman actually forbade plaintiff to use alternate route and that plaintiff knew he was expected to comply, defendant failed to raise triable issue]; *Eustaquio v 860 Cortland Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012] [in absence of evidence that plaintiff was allowed to use alternate stairway, his decision to use ladder to access roof not sole proximate

cause of fall]).

However, given Prol's and Klevitsky's testimony that other excavators worked in the area, and that plaintiff could not identify the pit into which he fell, a triable issue exists as to Interstate's liability. (*Fraser v Pace Plumbing Corp.*, 93 AD3d 616, 617 [1st Dept 2012] [triable issues demonstrated as to whether subcontractor created hole into which plaintiff fell]; *Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009] [summary judgment denied due to questions of scope of subcontractor's oversight and control of work]).

B. Labor Law § 241(6) claim

Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to comply with the regulations promulgated by the Commissioner of Labor (*Morton*, 15 NY3d at 56), and a claim may be advanced against them based on a specific violation of it (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 495 [1993]). For subcontractors, liability under this section attaches only upon a showing that they possessed authority to supervise and control the work at issue, in which case they become statutory agents of the owner or general contractor. (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Addonisio v City of New York*, 112 AD3d 554 [1st Dept 2013]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 148 [1st Dept 2012]).

Pursuant to Industrial Code § 23-1.7(b)(1):

> Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part [].

Pursuant to section 23-4.2:

> Where no work is being performed in an unattended open excavation which has substantially vertical sides or banks three feet or more in depth, such excavation shall be effectively guarded on all open sides regardless of the location of such excavation. Such

> guarding shall consist of a fence, a barricade or a safety railing constructed and installed in compliance with this Part.
>
> Pursuant to section 21-1.30:
>
> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less that 10 foot candles in any area where persons are required to work nor less that five (5) foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

A violation of the Industrial Code does not, as a matter of law, establish negligence under Labor Law § 241(6) (*Long v Forest-Felhaber*, 55 NY2d 154 [1982]), and in contrast to Labor Law § 240(1), comparative negligence is a cognizable affirmative defense to a claim brought pursuant to Labor Law § 241(6). (*St. Lewis v Town of N. Elba*, 16 NY3d 411 [2011]).

Here, even assuming that plaintiff has established that defendants violated one or more sections of the Industrial Code, plaintiff's decision to walk through a dimly-lit open excavation site without the aid of available illumination raises a triable issue as to his comparative fault in causing his injury. (*See Long*, 55 NY2d at 154 [even if defendant violated § 21-1.30 in failing to illuminate passageway, plaintiff's decision to walk in pitch-black conditions created issue of comparative negligence for jury]; *Drago v New York City Tr. Auth.*, 227 AD2d 372, 373 [2d Dept 1996] [plaintiff's decision to continue working near hanging live electric cable raised triable issue as to comparative negligence on his § 241(6) claim]).

C. Labor Law § 200

Labor Law § 200, the codification of common law negligence, imposes a duty on owners and general contractors to furnish a safe work environment for their workers. (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). However, to be held liable, the defendant must

have authority to control the activity bringing about the injury. (*Id.* at 877; *Russin*, 54 NY2d at 317).

A subcontractor is liable under this section when it has the authority to supervise and control the injury-producing activity, in which case it stands in the shoes of the owner or contractor. (*Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892, 894 [3d Dept 2002]; *see also Urban v No 5 Times Sq. Dev., LLC,* 62 AD3d 553, 554 [1st Dept 2009]). Comparative negligence is a viable defense to liability under Labor Law § 200. (*Jamison v GSL Enterprises, Inc.*, 274 AD2d 356, 361 [1st Dept 2000]; *Drago*, 227 AD2d at 373 [1996]).

Here, defendants raise a triable issue as to plaintiff's negligence. (*See supra*, III.B.).

IV. PAVARINI AND AB GREEN'S CROSS-MOTION

A. Indemnification

General Obligations Law § 5-322.1 voids agreements purporting to indemnify a party for injures resulting, in whole or in part, from its own negligence. (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). However, when liability is statutory only, such as when an owner or contractor is strictly liable under Labor Law § 240(1), the owner or contractor may be indemnified. (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466 [1st Dept 1998]).

Here, although Pavarini was aware of the danger posed by the open excavations, any precautions it took were inadequate to protect workers from falling into excavation pits during early morning hours when it was still dark out. Thus, there exist triable issues as to Pavarini's negligence. That it delegated primary responsibility for maintaining safety in the area to Interstate evidences Pavarini's overall safety responsibilities at the site. (*Cf. Buccini*, 250 AD2d at 467 [by terms of agreement, subcontractor solely responsible for safe performance of work and

there was no evidence of indemnitee's negligence; indemnification proper]).

B. Breach of contract for failure to procure insurance

The elements of a claim for breach of contract are: 1) the existence of a contract between the plaintiff and the defendant, 2) the plaintiff's performance under the contract, 3) the defendant's breach of the contract, and 4) damages. (*US Bank Nat. Assn. v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]). One seeking summary judgment on a party's alleged failure to procure insurance must demonstrate that a provision in the contract required that such insurance be procured and a failure to comply with it. (*Aragundi v Tishman Realty & Const. Co., Inc.*, 68 AD3d 1027, 1029 [2d Dept 2009]).

Here, Pavarini and AB Green offer no proof that either Scalamandre or Interstate failed to procure the requisite insurance. They have, therefore, failed to establish *prima facie* entitlement to judgment on this cause of action. (*See Tingling v C.I.N.H.R., Inc.*, 74 AD3d 954, 955-56 [2d Dept 2010] [movant failed to demonstrate *prima facie* that party breached insurance procurement clause; summary judgment denied]; *Bryde v CVS Pharm.*, 61 AD3d 907, 909 [2d Dept 2009] [same]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003] [same]).

V. SCALAMANDRE'S MOTION

Pavarini instructed Scalamandre to inform its workers not to walk across the excavation site, yet both plaintiff and his co-worker deny being warned. Therefore, triable issues exist as to whether plaintiff's claim arises from Scalamandre's act or omission pursuant to its agreement with Pavarini. (*Bennet v Bank of Montreal*, 161 AD2d 158 [1st Dept 1990], *lv denied* 81 NY2d

704 [1993] [issue of fact as to whether subcontractor's acts or omissions may have caused worker's injury precluded summary judgment]).

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs Angelo Amante and Deborah Amante's motion for summary judgment on their Labor Law § 240(1) claim is granted as to liability only against Pavarini McGovern, Inc., Pavarini McGovern, LLC., and AB Green Gansevoort, LLC, and is otherwise denied; it is further

ORDERED that plaintiffs' motion for summary judgment on their Labor Law § 200 and Labor Law § 241(6) claims is denied in its entirety; it is further

ORDERED, that Pavarini McGovern, Inc., Pavarini McGovern, LLC., and AB Green Gansevoort, LLC's cross motion is denied; it is further

ORDERED, that Pavarini McGovern, Inc., Pavarini McGovern, LLC., and AB Green Gansevoort, LLC's common-law indemnification cause of action against Peter Scalamandre & Sons, Inc., is dismissed as withdrawn; and it is further

ORDERED, that Peter Scalamandre & Sons, Inc.'s motion for summary judgment dismissing the third-party complaint is denied.

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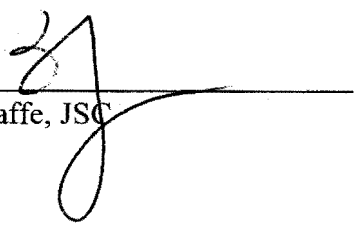

Barbara Jaffe, JSC

DATED: March 19, 2014
New York, New York