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SHORT FORM ORDER

INDEX No. 11-16760
CAL. No. 13-01193OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 7-31-13 (#001)
MOTION DATE 10-8-13 (#002)
MOTION DATE 11-15-13 (#003)
ADJ. DATE 11-21-13
Mot. Seq. # 001 - MG
002 - MG
003 - MD

---X

FRANCIS SHAUGHNESSY,

Plaintiff,

- against -

HUNTINGTON HOSPITAL ASSOCIATION d/b/a HUNTINGTON HOSPITAL, AXIS CONSTRUCTION CORP., ENERGYWISE, INC., and HVAC, INC.,

Defendants.

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HUNTINGTON HOSPITAL and AXIS CONSTRUCTION CORP.,

Third-Party Plaintiffs,

- against -

ENERGYWISE, INC., HVAC, INC., and COMMERCIAL INSTRUMENTATION SERVICES, INC.,

Third-Party Defendants.

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JAMES J. MCCRORIE, P.C.
Attorney for Plaintiff
500 N. Broadway, Suite 151
Jericho, New York 11753

TORINO & BERNSTEIN, P.C.
Attorney for Defendants/Third-Party Plaintiffs
Huntington Hospital Association and Axis Construction
200 Old Country Road, Suite 220
Mineola, New York 11501

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendant/Third-Party Defendant
Energywise, Inc.
150 East 42nd Street
New York, New York 10017

ANDREA G. SAWYERS, ESQ.
Attorney for Defendant/Third-Party Defendant
HVAC, Inc.
3 Huntington Quadrangle, Suite 102S
P.O. Box 9028
Melville, New York 11747

BARRY, MCTIERNAN & MOORE
Attorney for Third-Party Defendant Commercial Instrumentation
2 Rector Street, 14th Floor
New York, New York 10006

Upon the following papers numbered 1 to 72 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10, 11-27 ; Notice of Cross Motion and supporting papers 28-47, ; Answering Affidavits and supporting papers 48-51, 52-54, 55-56, 57-61, 62-65 ; Replying Affidavits and supporting papers 66-67, 68-69, 70-72 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Francis Shaughnessy, the motion by defendant/third-party defendant HVAC Inc., and the cross motion by defendant Energywise Inc. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Francis Shaughnessy for partial summary judgment in his favor on the issue of liability is granted; and it is

ORDERED that the motion by defendant/third-party defendant HVAC Inc. for, inter alia, summary judgment dismissing the complaint against it is denied; and it is

ORDERED that the cross motion by defendant Energywise Inc. for summary judgment on its cross claim against HVAC Inc. for contractual indemnification is granted.

Plaintiff Francis Shaughnessy commenced this action to recover damages for personal injuries allegedly sustained on May 26, 2010, when he fell from a ladder while performing renovations at Huntington Hospital, which is owned by defendant/third-party plaintiff Huntington Hospital Association. At the time of the accident plaintiff was installing copper refrigeration pipes in the ceiling of the hospital's catheter lab. The ladder on which plaintiff was standing allegedly shifted beneath him, causing him to fall and injure himself. As a part of a hospital-wide renovation, Huntington Hospital hired defendant/third-party plaintiff Axis Construction Corp. ("Axis") as the general contractor for the project. Axis then hired a number of subcontractors for the project, including defendant Energywise Inc. ("Energywise"), which allegedly was hired to perform, among other things, renovations to the hospital's heating, ventilation and air conditioning system. Energywise subcontracted its work to defendant/third-party defendant HVAC Inc. ("HVAC"), which further subcontracted its work to plaintiff's employer, third-party defendant Commercial Instrumentation Services, Inc. ("CIS"). By way of an amended complaint, plaintiff alleges causes of action against defendants for common law negligence and premises liability, and for violations of Labor Law §§ 200, 240 (1), and 241(6). Issue was joined and Huntington Hospital and HVAC asserted cross claims against the co-defendants for common law and contractual indemnification, contribution, and breach of contract. Thereafter, Huntington Hospital and Axis both brought a third-party action against Energywise, HVAC and CIS alleging similar causes of action.

Plaintiff now moves for partial summary judgment on his Labor Law §240 (1) claim, arguing defendants failed to ensure that he was provided with a secured ladder and adequate safety equipment at the time of his accident. Huntington Hospital and Axis oppose the motion on the ground triable issues exist as to how the accident occurred and whether plaintiff's own conduct was the sole proximate cause of his injuries. Specifically, Huntington Hospital and Axis assert that plaintiff provided inconsistent accounts of the accident to nonparty witnesses, and that such accounts raise a triable issue as to whether plaintiff fell off the ladder because he improperly leaned against plastic sheets covering an adjacent wall while pushing refrigeration tubes through the ceiling. By way of a separate motion, HVAC moves for summary judgment in its favor dismissing plaintiff's claims predicated on common law negligence and violation of Labor Law §200, dismissing the cross claims and third-party claims against it, and for conditional judgment on its cross claims against Axis for common law indemnification. HVAC argues, inter alia, that plaintiff's claims against it under the common law

and Labor Law §200 should be dismissed, as it did not control or supervise his work at the time of the alleged accident, and it neither created nor had actual or constructive notice of any alleged dangerous condition. HVAC further asserts it is entitled to conditional summary judgment on its cross claim against AXIS for common law indemnification, since its liability, if any, would be vicarious, and no triable issues exist as to whether AXIS negligently directed laborers to overlap the floors with plastic sheeting in the area where plaintiff placed his ladder prior to the accident. Plaintiff and AXIS both oppose HVAC's motion on the ground a triable issue exist as to whether HVAC had the authority to supervise plaintiff's work at the time of the accident. AXIS further asserts that the existence of such an issue precludes, as premature, the branch of HVAC's motion for conditional summary judgment on is common law indemnity claims.

Energywise cross-moves for conditional summary judgment on its cross claims for contractual indemnification and breach of contract against HVAC, arguing HVAC is contractually required to indemnify it where, as here, plaintiff's injuries arose from his work, and Energywise was free of any negligence and did not control such work. HVAC opposes the motion on the basis the indemnification provision of the parties' agreement was not triggered, since plaintiff's accident was not caused by its negligence or the negligence of anyone directly or indirectly employed by it. HVAC specifically asserts that the accident was caused by AXIS, since its supervisor directed laborers to place plastic sheets, which overlapped on to the floor beneath the ladder from which plaintiff fell. AXIS partially opposes Energywise's motion, arguing triable issues exist as to whether there was plastic sheeting on the floor beneath plaintiff's ladder, and, if so, whether plaintiff's own conduct of leaning his body weight against the plastic covered wall while standing on the ladder was the sole proximate cause of the accident. AXIS further asserts that a triable issue exists as to whether HVAC is subject to liability under Labor Law §200 since it was indirectly in charge of plaintiff's work, having hired his employer, CIS, to perform electrical services at the worksite.

"Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (***Bland v Manocherian***, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; *see* ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). Thus, a statutory violation is established where a ladder collapses, slips or otherwise fails to perform its safety function of supporting a worker (*see* ***O'Connor v Enright Marble & Tile Corp.***, 22 AD3d 548, 802 NYS2d 506 [2d Dept 2005]; ***Morin v Machnick Bldrs.***, 4 AD3d 668, 669-670, 772NYS2d 388 [3d Dept 2004]; ***Wasilewski v Museum of Modern Art***, 260 AD2d 271, 688 NYS2d 547 [1st Dept 1999]). Further, section 240 (1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 NE 2d 133 [1948]). Moreover, an owner, contractor or agent who breaches this duty may be held liable in damages regardless of whether it had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]).

During his examination before trial, plaintiff testified that the ladder on which he was standing at the time of the accident was a six foot A-frame ladder which had been fully opened. Plaintiff testified that he did

not notice any visible defects in the ladder prior to the accident. However, he testified that he made several complaints that the plastic sheets used to cover the walls were also covering sections of the floor where the ladders had to be erected to perform work. Plaintiff testified that he observed ladders resting on the plastic sheets slide as people were attempting to climb on them, and that he specifically complained to Axis' supervisor, Dennis Savage, who informed him that nothing could be done because use of the plastic sheets was a project requirement. Plaintiff testified that he was pushing piping into the ceiling of the catheter lab when he felt the ladder slip from beneath him. He further testified that his body fell into the wall behind him before he slid to the floor below. Additionally, plaintiff testified that the ladder was unsecured, and that he was not provided with any other safety equipment to prevent him from falling.

During his examination before trial, Dennis Savage testified that he was Axis's construction supervisor for the project, and that his duties consisted of, among other things, overseeing the subcontractors and the safety of the worksite. He testified that the plastic sheets were used to avoid dust damage to the hospital, that the use of the sheets was a requirement for the project, and that Axis instructed laborers working on the project how the sheets should be installed. Savage testified that he personally instructed the labor foreman that the sheets should be trimmed at their base and taped to the floor no more than five inches from the walls.

Here, plaintiff established, prima facie, his entitlement to partial summary judgment on the issue of liability by submitting evidence that the unsecured ladder on which he was standing failed to perform its safety function when it shifted, causing him to fall to the floor and injure himself (*see* ***Gonzalez v AMCC Corp.***, 88 AD3d 945, 931 NYS2d 415 [2d Dept 2011]; ***LaGiudice v Sleepy's Inc.***, 67 AD3d 969, 890 NYS2d 564 [2d Dept 2009]; ***Nudi v Schmidt***, 63 AD3d 1474, 882 NYS2d 731 [3d Dept 2009]; ***Ricciardi v Bernard Janowitz Constr. Corp.***, 49 AD3d 624, 853 NYS2d 373 [2d Dept 2008]; ***Orellano v 29 E. 37th St. Realty Corp.***, 292 AD2d 289, 740 NYS2d 16 [1st Dept 2002]). "Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence–enough to raise a fact question–that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 289,771 NYS2d 484 [2003]; *see* ***Morin v Machnick Bldrs.***, *supra*; ***Squires v Robert Marini Bldrs***., 293 AD2d 808, 809, 739 NYS2d 777 [3d Dept], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

In opposition, Huntington Hospital and Axis failed to raise any triable issues warranting denial of the motion. The mere fact that no one witnessed the accident does not warrant denial of the motion (*see* ***Masiello v Belcastro***, 237 AD2d 335, 655 NYS2d 57 [2d Dept 1997]), and speculation concerning the cause of the accident based on inadmissible hearsay by nonparty witness Christopher Moro is insufficient to create an issue of fact (*see* ***De Rocha v Old Spaghetti Warehouse***, 207 AD2d 978, 617 NYS2d 89 [4th Dept 1994]). Furthermore, speculation that plaintiff's conduct was the sole proximate cause of his injuries is without merit, where, as here, it is undisputed that the ladder was unsecured and no other safety devices were provided to plaintiff (*see* ***Evan v Syracuse Model Neighborhood Corp.***, 53 AD3d 1135, 862 NYS2d 425 [4th Dept 2008]; ***Morris v Mark IV Constr. Co.***, 203 AD2d 922, 923, 611 NYS2d 68 [4th Dept 1994]; *see also* ***Mingo v Lebedowicz***, 57 AD3d 491, 493, 869 NYS2d 163 [2d Dept 2008]). Accordingly, the motion by plaintiff Francis Shaughnessy for partial summary judgment on his Labor Law §240 (1) claim is granted.

As for the branch of HVAC's motion seeking summary judgment dismissing plaintiff's claims under the common law and section 200 of the Labor Law, having granted plaintiff partial summary judgment on his Labor Law §240 (1) claim, the court need not address HVAC's arguments concerning the validity of the Labor Law §§200. Plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic (*see* ***Auriemma v Biltmore Theatre, LLC***, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]; ***Yost v Quartararo***, 64 AD3d 1073, 883 NYS2d 630 [3d Dept 2009]; ***Argueta v Pomona Panorama Estates, Ltd.***, 39 AD3d 785, 835 NYS2d 358 [2d Dept 2007]; ***Squires v Robert Marini Builders, Inc.***, 293 AD2d 808, 739 NYS2d 777 [3d Dept 2002]; ***Torino v KLM Constr., Inc.***, 257 AD2d 541, 685 NYS2d 24 [1st Dept 1999]). Accordingly, the branch of HVAC's motion for summary judgment dismissing plaintiff's claims under the common law and section 200 of the Labor Law is denied.

As to the branch of HVAC's motion for, inter alia, conditional summary judgment on its indemnification claim against Axis, a party seeking common-law indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; ***Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]) or, in the absence of any negligence, that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (***Benedetto v Carrera Realty Corp.***, 32 AD3d 874, 874, 822 NYS2d 542 [2d Dept 2006]). Although HVAC's liability, if any, under Labor Law §240 (1) would be statutory, it failed to make a prima facie showing that Axis was actively negligent in causing the accident or that it possessed the authority to direct, supervise, and control the work giving rise to the injury (*see* ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]). Further, since triable issues remain as to whether HVAC, which subcontracted its work to CIS and shared employees, had the authority to control the safety of plaintiff's work, the branch of its motion for summary judgment dismissing the common law indemnification claims against it is denied.

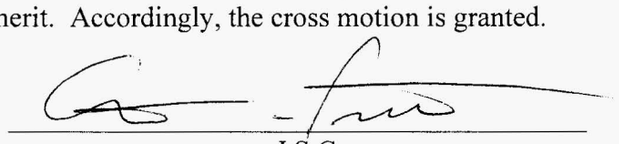
Turning to Energywise's cross motion for conditional summary judgment on its cross claims for contractual indemnification and breach of contract against HVAC, a party's right to contractual indemnification depends upon the specific language of the contract (***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; *see* ***Reyes v Post & Broadway, Inc.***, 97 AD3d 805, 949 NYS2d 141 [2d Dept 2012]), and will not be enforced "unless the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (*see* ***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 491-492, 549 NYS2d 365 [1989]). Further, an indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence (*see* ***Brown v Two Exch. Plaza Partners***, 76 NY2d 172, 179, 556 NYS2d 991 [1990]; ***Grant v City of New York***, 109 AD3d 961, 972 NYS2d 86 [2d Dept 2013]; ***Giangarra v Pav-Lak Contr., Inc.***, 55 AD3d 869, 866 NYS2d 332 [2d Dept 2008]) and its liability is merely imputed or vicarious (*see* ***Ostuni v Town of Inlet***, 64 AD3d 854, 881 NYS2d 678 [3d Dept 2009]; ***Potter v M.A. Bongiovanni, Inc.***, 271 AD2d 918, 707 NYS2d 689 [2000]). The parties' agreement states, in pertinent part, as follows:

> To the fullest extent provided by law, the sub-contractor, including any sub-subcontractor, shall indemnify and hold harmless the Contractor and Owner against any claims, damages, losses and expenses, including legal fees, arising out of or resulting from performance of subcontracted work to the extent caused in whole or part by the Sub-contractor or anyone directly or indirectly employed by them, including any loss suffered by an employee of the contractor, subcontractor, sub-subcontractor or independent contractor.

The agreement further requires that HVAC and any sub-subcontractor it hires "shall procure, carry and maintain workers' compensation and employers' liability insurance covering all of its employees, and contractor's general liability coverage, including products-completed operations and contractual liability, in the minimum amount of $1,000,000 per occurrence."

Here, Energywise established, prima facie, its entitlement to summary judgment on its contractual indemnification claim against HVAC by demonstrating that plaintiff's injuries arose from his work, and that its purported negligence under Labor Law §240 (1) would be vicarious (*see* ***Brown v Two Exch. Plaza Partners***, *supra*; ***Palomeque v Capital Improvement Servs., LLC***, 102 AD3d 934, 958 NYS2d 602 [2d Dept 2013]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Tapia v Mario Genovesi & Sons, Inc.***, 72 AD3d 800, 899 NYS2d 303 [2d Dept 2010]). In opposition, HVAC failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Significantly, HVAC does not contend that Energywise's negligence caused the accident, or that it was responsible for providing plaintiff with safety equipment. Rather, HVAC asserts that neither it nor CIS caused the accident, since it was Axis which instructed laborers to install plastic sheeting on the walls of the lab. However, such assertions are irrelevant where, as here, plaintiff has established that he was provided with an unsecured ladder in violation of Labor Law §240(1) (*see* ***Evan v Syracuse Model Neighborhood Corp.***, *supra*; ***Morris v Mark IV Constr. Co.***, *supra*). For the same reason, the court finds Axis's assertions regarding the existence of a triable issue as to whether plaintiff's conduct was the sole proximate cause of the accident to be without merit. Accordingly, the cross motion is granted.

Dated: March 28, 2014



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION