

Banegas v Farrell Bldg. Co., Inc.

2014 NY Slip Op 31858(U)

July 15, 2014

Supreme Court, Suffolk County

Docket Number: 10-32008

Judge: Arthur G. Pitts

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This opinion is uncorrected and not selected for official publication.

ORDERED that this motion (003) by defendant/third-party plaintiff, Farrell Building Company, Inc. a/k/a Farrell Builders for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiff's complaint and granting summary judgment in its favor as against the third-party defendants for common-law and contractual indemnification and breach of contract is determined herein; and it is further

ORDERED that this cross motion (004) by plaintiff for an order pursuant to CPLR 3212 (e) granting him partial summary judgment on his third and fourth causes of action for violations of Labor Law §§ 240 (1) and 241 (6), respectively, is granted solely as to his third cause of action for violation of Labor Law § 240 (1) and is otherwise denied; and it is further

ORDERED that this cross motion (005) by third-party defendants T & S Drywall, Timothy Lobianco d/b/a T & S Drywall Contracting and Steven Stawinczy d/b/a T & S Drywall Contracting for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the third-party complaint and all cross claims as against them is determined herein.

This is an action to recover damages for injuries allegedly sustained by plaintiff on June 17, 2010 at approximately 2:50 p.m. when he fell approximately 15 feet from a plank that had been placed between two ladders to form a makeshift scaffold. At the time of the accident, plaintiff was working for T & S Drywall as a spackler and was spackling walls. Defendant Farrell Building Company, Inc. a/k/a Farrell Builders had hired T & S Drywall. The accident occurred in the foyer of premises known then as "Lot 7" located at 28 Fortune Cookie Lane, Hampton Bays, New York.

By his complaint, plaintiff alleges a first cause of action for common-law negligence, a second cause of action for violation of Labor Law § 200, a third cause of action for violation of Labor Law § 240, a fourth cause of action for violation of Labor Law § 241, a fifth cause of action for violation of applicable sections of the Industrial Code (23 NYCRR) by failing to provide plaintiff with a proper scaffold, and a sixth cause of action for violation of applicable sections of the Occupational Safety and Health Administration (29 CFR 1926 et seq). In his second supplemental bill of particulars, plaintiff alleges that sections 23-1.5, 23-1.11, 23-1.21 and 23-5 of the Industrial Code were violated.

Farrell Building Company, Inc. a/k/a Farrell Builders commenced a third-party action against T & S Drywall, Timothy Lobianco d/b/a T & S Drywall Contracting and Steven Stawinczy d/b/a T & S Drywall Contracting for common-law indemnification, contribution, contractual indemnification, and breach of contract for failure to procure insurance for its benefit. The Court's computerized records indicate that the note of issue in this action was filed on August 21, 2013.

Defendant/third-party plaintiff, Farrell Building Company, Inc. a/k/a Farrell Builders (Farrell) now moves for summary judgment dismissing the complaint. Farrell asserts that it is entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims inasmuch as the accident was caused by the manner in which plaintiff performed his work, plaintiff admittedly brought his own ladders, plank, hand tools and stilts to the work site and set up the two unsecured ladders and plank to serve as a scaffold, and Farrell had no authority to supervise or control the means or methods of plaintiff's work nor any notice of the manner in which the work was performed. As to the Labor Law §§ 240 and 241 claims, Farrell asserts that it is entitled to the homeowner's exemption inasmuch as Farrell Building Company, Inc. was the owner of the subject premises building the single family home for Debra Farrell, the sister of the company's owner, the house did

not serve any commercial or business purpose for Farrell or render it income, and Farrell did not direct or control plaintiff's work. Farrell further argues that it cannot be liable under Labor Law § 240 as plaintiff's own negligent actions in failing to use available blue pipe scaffolding, failure to request a taller ladder from his supervisor, and failing to either nail a two-by-four into the floor to steady the ladder or to instruct one of his crew members to hold the extension ladder in place while he was sanding the ceiling were the sole proximate causes of his injuries. With respect to Labor Law § 241 (6), Farrell asserts that the Industrial Code sections alleged by plaintiff are either too general or inapplicable to the circumstances of this action.

Farrell's submissions in support of the motion include the pleadings, plaintiff's bills of particulars, a bargain and sale deed dated March 2, 2010 deeding the subject property to Farrell Building Company, Inc., and the deposition transcripts of plaintiff, Patrick Landers, Gregg J. Farrell, Joseph Farrell Jr. on behalf of Farrell Building Company, Inc., Timothy Lobianco, and Steven Stawniczy s/h/a Steven Stawinczy, and the subcontractor and hold harmless agreements dated April 15, 2010 between Farrell and T & S Drywall.

Plaintiff cross-moves for partial summary judgment in his favor on his third and fourth causes of action for violations of Labor Law §§ 240 (1) and 241 (6), respectively. He asserts that Farrell was not only owner of the subject house but general contractor of its construction as well as at least four or more houses in said subdivision as evidenced by the submitted deed dated March 2, 2010 and the deposition testimony of Gregg Farrell, Farrell's project manager. In addition, plaintiff asserts that Farrell, as owner and contractor/builder, clearly directed and controlled the work at the subject house, that Farrell failed to provide plaintiff with any safety devices pursuant to Labor Law § 240 (1) such as safety railings or hand rails on the plank or a safety belt or life line, that Farrell's failure to provide safety devices proximately caused plaintiff's injuries, and that plaintiff was not the sole proximate cause of his injuries. Although alluded to in Gregg Farrell's deposition testimony, plaintiff argues that there is no evidence that a scaffold was available on the premises, that plaintiff was directed to use it or told where it was located. With respect to Labor Law § 241(6), plaintiff asserts that 12 NYCRR §§ 23-1.5, 23-1.21 (b)(4)(ii),(iv), (v), (e)(4), 23-5.1 (b), (c)(2), (j), 23-5.2, and 23-5.3 (e) were violated. Plaintiff also argues that Farrell is not entitled to the homeowner's exemption inasmuch as it does not apply to a commercial enterprise and Farrell controlled and directed the construction of the house.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Plaintiff testified at his deposition that prior to the accident he was sanding the ceiling of the ground floor entrance of the house and that his scaffold equipment consisted of a 24-foot extension ladder and an eight-foot A-frame ladder with a 16-foot long, approximately one foot wide aluminum plank placed between them but not attached to the ladders. He explained that he supplied said equipment from his van, and that he had obtained the A-frame ladder, extension ladder and plank from a previous employer. In addition, plaintiff testified that his brother Wilfredo assisted him in setting up the ladders and plank at approximately 2 p.m., he came down from the plank at approximately 2:30 p.m. to go to another location, and then returned to the ladders and plank at approximately 2:40 p.m. He stated that the 24-foot extension ladder was on the first floor leaning against, but not attached to, the wall, the eight-foot A-frame ladder was on the second floor and that the plank placed between them was approximately five feet below the ceiling. The 24-foot extension ladder had rubber on its base but no locks. Plaintiff also stated that no one advised him to set up the ladders and plank in said fashion. Plaintiff explained that he was reaching for a drywall sanding sponge while standing on the middle of the plank facing the rear of the house, when the 24-foot extension ladder slid on the wood floor toward the rear of the house, and he and the plank fell to the ground. Plaintiff further stated that he only received instructions from "Pat" when he started working, at this house, that he did not attend any meetings at this job site prior to his accident, that he was not wearing a safety harness and that his employer did not provide him with one, and that he did not use any safety lines or fencing or netting. Plaintiff further testified that neither Greg Farrell "in charge of Farrell" nor Joseph Farrell oversaw any of the work at the subject home prior to plaintiff's accident, and that plaintiff reported to "Pat" who, in turn, reported to "Steve."

Patrick Landers testified at his deposition that he was foreman of T & S Drywall on the date of plaintiff's accident, that he supervised approximately six to eight employees, that his job duties involved checking to make sure that materials were present prior to the start of the work and thereafter checking to make sure that the work was "coming out properly and make sure there were no problems or issues," and that Steven Stawniczy hired the employees based on experience. Plaintiff was one of approximately six spacklers. In addition, he testified that T & S Drywall began working at the Fortune Cookie Lane job site two days prior to plaintiff's accident and did not supply any equipment, the employees provided their own equipment, which he listed as stilts, an extension ladder, an A-frame ladder, a plank, and hand tools. Although he was not present at the subject house on the day of the accident, he was present the previous day when he gave instruction to put "tape on the walls and get the house first coated [with spackling]" and confirmed that the necessary equipment was present at the job site. Mr. Landers stated that on the day of plaintiff's accident, no one was acting as the foreman in his place nor was anyone acting as supervisor for the spackle crew but earlier in the day at a different job site he told them "to finish second coating the house." He also stated that plaintiff was the head of the spackle crew. According to Mr. Landers, he had previously seen scaffolding planks placed on ladders at other job sites run by Farrell Building as well as other companies. Mr. Landers further testified that he later learned that plaintiff's extension ladder had slipped on the finished floors. He indicated that standard operating procedure required someone to hold the ladder on finished floors. To his knowledge, no safety devices existed at the job site or were provided by T & S Drywall or Farrell to prevent a fall from an elevated scaffold.

Gregg J. Farrell testified at his deposition that at the time of plaintiff's accident he was project manager for Farrell, which involved overseeing construction of the residential homes at this site including coordinating and overseeing the trades, that his brother Joseph Farrell was owner of the company, and that the company owned the lot on which the subject house was being constructed. According to Gregg J. Farrell, at the time of

plaintiff's accident. Farrell owned three of the approximately 16 lots comprising the residential subdivision and later acquired two more lots that were in foreclosure and another lot or two thereafter. In addition, he testified that there were regular meetings, approximately once a month, of project managers on construction site safety, that he was present at the site on the morning of plaintiff's accident and had probably inspected the inside of the subject house. He did not recall ever seeing plaintiff on a raised plank or platform, and that if he had seen a plank being used as a platform between an extension ladder and an A-frame ladder, he would have asked the workers to dismantle it as it was unsafe. Gregg Farrell added that he had spoken to plaintiff's employer about this unsafe practice many times. He also testified that within two days prior to the accident, Farrell did not provide any equipment to workers at the job site to reach elevated heights, and that subcontractors brought their own materials to the job site and were required to provide safety equipment to their own employees. According to Gregg Farrell, at the time of plaintiff's accident white oak flooring had been installed but there was no finish. He explained that the floor would be sanded and stained at the end of the job. Gregg Farrell stated that Steve Pryzby, vice president of Farrell, hired subcontractors. He also stated that the subject house was being built for his sister to reside in.

At his deposition, Joseph Farrell, Jr. testified that he is president/owner of Farrell, that he and Steve Stawniczy executed a subcontractor agreement with respect to building the subject home, that Farrell owned the home at the time of plaintiff's accident and that it was being built for his sister. He did not recall walking through the subject home while plaintiff was working. According to Joseph Farrell, Jr., T & S Drywall could not work for them if they did not forward proof of insurance coverage and noted that he knew Steven Stawniczy since approximately 1997 and had hired him approximately 100 or 80 times. He added "I use him all the time."

Timothy Lobianco testified at his deposition that he was part owner of T & S Drywall with Steven Stawniczy at the time of plaintiff's accident, that he had never been inside the subject house prior to plaintiff's accident, that he did not supervise the spacklers, including plaintiff, and that Patrick Landers supervised the spacklers.

Steven Stawniczy testified at his deposition that T & S Drywall had no employees, just subcontractors and that plaintiff was a spackling subcontractor, that his supervisor Pat Landers would stop on the jobs and make sure that the work was being completed, and that he was not present at the time of plaintiff's accident. In addition, he testified that T & S Drywall did not provide plaintiff with any equipment but if plaintiff had called, the company would have provided him with anything he needed. Mr. Stawniczy also testified that if he did not have Workers' Compensation or liability insurance, Farrell would not let him work at the job site and that he sent proof of said insurance to Farrell prior to working on the subject home. He admitted to signing the subcontractor and hold harmless agreement at Farrell's office while Debra Farrell was present stating that when he signed it, the document was undated and that his was the first signature.

At her deposition, Debra Farrell-Reeder testified that the Farrell Family Trust owns the subject house and that she is not a trustee of said trust. In addition, Ms. Farrell-Reeder testified that Farrell uses a standard two-page subcontractor and hold harmless agreement and that it is signed by subcontractors at Farrell's office. She explained that Farrell's common practice in 2010 was to require subcontractors to sign a blanket hold harmless agreement because to require subcontractors to sign one for each specific project they were working on would have resulted in voluminous documents. She also testified that Steven Stawniczy had been and continued to be regularly hired by Farrell for many years.

A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from dangerous or defective conditions of the premises, or the manner in which the work is performed (*see Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646, 909 NYS2d 80 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). Further, in rare cases, both theories of liability may be implicated (*see Reyes v Wentworth Mgt. Corp.*, 83 AD3d 47, 50-52, 919 NYS2d 44 [2d Dept 2011]; *see also Forssell v Lerner*, 101 AD3d 807, 808, 956 NYS2d 117 [2d Dept 2012]). The subject accident was caused by the manner in which the plaintiff was performing his work (*see Moran v Janowski*, 276 AD2d 605, 714 NYS2d 723 [2d Dept 2000]).

Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Where, as here, a plaintiff's claim arises out of alleged defects or dangers in the methods or materials of the work, to prevail on a Labor Law § 200 cause of action, the plaintiff must show that the defendant "had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646, 909 NYS2d 80 [2d Dept 2010]). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684, 913 NYS2d 684 [2d Dept 2010][internal quotation marks omitted]; *Klimowicz v Powell Cove Assocs., LLC*, 111 AD3d 605, 975 NYS2d 419, 420-422 [2d Dept 2013]).

Inasmuch as the adduced evidence shows that Farrell neither directed nor controlled the method or manner in which plaintiff conducted his work, nor had notice that the ladders were placed in a dangerous position, Farrell established, prima facie, its entitlement to summary judgment dismissing the causes of action based on Labor Law § 200 and common-law negligence (*see Loreto v 376 St. Johns Condominium, Inc.*, 15 AD3d 454, 790 NYS2d 190 [2d Dept 2005]). Plaintiff failed to raise an issue of fact in opposition. Therefore, Farrell's request for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

Labor Law §§ 240 (1) and 241, which impose certain nondelegable safety duties upon "contractors[,] owners and their agents," specifically exempt "owners of one and two-family dwellings who contract for but do not direct or control the work." (*see Parise v Green Chimneys Children's Services, Inc.*, 106 AD3d 970, 971, 965 NYS2d 608 [2d Dept 2013]). The homeowner's exemption was enacted to protect those who, lacking in business sophistication, would not know or anticipate the need to obtain insurance to cover them against liability (*see Miller v Shah*, 3 AD3d 521, 522, 770 NYS2d 739 [2d Dept 2004]; *see also Van Amerogen v Donnini*, 78 NY2d 880, 882, 573 NYS2d 443 [1991]; *Zamora v Frantellizzi*, 45 AD3d 580, 581, 846 NYS2d 196 [2d Dept 2007]). The homeowner's exemption does not apply, however, where "[t]he aim of the construction [is] to further a commercial enterprise" such as constructing a new home for sale (*see Morgan v Rosselli*, 9 AD3d 417, 419, 780 NYS2d 629 [2d Dept 2004]; *see also Landon v Austin*, 88 AD3d 1127, 931 NYS2d 424 [3d Dept 2011]; *Andreas v Catskill Mountain Lodging, LLC*, 60 AD3d 604, 875 NYS2d 141 [2d Dept 2009]; *Lawless v Kera*, 259 AD2d 596, 687 NYS2d 169 [2d Dept 1999]). The "site and purpose" test

is “employed on the basis of the homeowners’ intentions at the time of the injury underlying the action and not their hopes for the future” (*Allen v Fiori*, 277 AD2d 674, 675, 716 NYS2d 414 [3d Dept 2000]; see *Lenda v Breeze Concrete Corp.*, 73 AD3d 987, 903 NYS2d 417 [2d Dept 2010]; *Dineen v Rechichi*, 70 AD3d 81, 888 NYS2d 834 [4th Dept 2009]; *Morgan v Rosselli*, 23 AD3d at 356-357, 804 NYS2d 763).

Here, the construction company Farrell was the owner of the property as of the date of the accident for purposes of Labor Law § 240 (1), was constructing the subject house at the same time that it was constructing other houses on site, and cannot avail itself of the homeowner’s exemption (see *Pastella v R.S. Hulbert Builders, Inc.*, 305 AD2d 998, 758 NYS2d 741 [4th Dept 2003]). Although the owner of Farrell, Joseph Farrell, Jr., emphasizes that the subject home was intended as his sister’s residence and that the company received no remuneration for the construction, Farrell’s position is distinguishable from those cases in which the company that owns the property is not a construction company (see *Parise v Green Chimneys Children’s Services, Inc.*, *supra*; *Fernez v Kellogg*, 2 AD3d 397, 767 NYS2d 864 [2d Dept 2003]; *Telfer v Gunnison Lakeshore Orchards*, 245 AD2d 620, 664 NYS2d 493 [3d Dept 1997]) or the party seeking the exemption is not the contractor actively involved in the construction but rather a family member or co-tenant (see *Morocho v Marino Enters. Contr. Corp.*, 65 AD3d 675, 885 NYS2d 99 [2d Dept 2009]). To extend the exemption to a construction company and its owners “who hardly are lacking in sophistication or business acumen such that they would fail to recognize the necessity to insure against the strict liability imposed by the statute” would run contrary to the legislative intent of the exemption (see *Van Amerogen v Donnini*, 78 NY2d 880, 573 NYS2d 443, 444 [1991]). Therefore, Farrell has failed to establish, *prima facie*, that it is entitled to the protection of the homeowner’s exemption.

“Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 929 NYS2d 556 [2011]). “To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Lopez–Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479, 949 NYS2d 165 [2d Dept 2012]; see *Morocho v Plainview–Old Bethpage Cent. School Dist.*, 116 AD3d 935, 984 NYS2d 120, 122 [2d Dept 2014]).

Plaintiff established his *prima facie* entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim through deposition testimony that the makeshift scaffold failed to provide plaintiff with proper protection for the work being performed, that this failure was a proximate cause of his injuries, and that no safety devices were provided that might have prevented the accident (see *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101, 945 NYS2d 324 [2d Dept 2012]; *Gonzalez v AMCC Corp.*, 88 AD3d 945, 931 NYS2d 415 [2d Dept 2011]). Even if as Farrell asserts, plaintiff was an independent contractor, not under Farrell’s supervision and control, and furnished his own equipment, Farrell is not absolved of liability under Labor Law § 240 (see *Karnes v Saratoga Pine Ridge Inc.*, 241 AD2d 810, 661 NYS2d 84 [3d Dept 1997]). Also, even if a blue pipe scaffold was available to plaintiff based on the foreman’s deposition testimony that he had seen such a scaffold one day prior to plaintiff’s accident, there is no evidence that plaintiff had been instructed to utilize said scaffold or other safety devices or to avoid using his plank and ladders (see *Durmiaki v International Bus. Machines Corp.*, 85 AD3d 960, 925 NYS2d 628 [2d Dept 2011]; *Beamon v Agar Truck Sales, Inc.*, 24 AD3d 481, 808 NYS2d 232 [2d Dept 2005]). Farrell failed to raise a triable issue of fact as to whether plaintiff’s conduct was the sole proximate cause of the accident, and failed to establish its *prima facie*

entitlement to summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as asserted against it (see *Hai-Zhong Pang v LNK Best Group, Inc.*, 111 AD3d 889, 976 NYS2d 139 [2d Dept 2013]; *Saldivar v Lawrence Dev. Realty, LLC*, *supra*; *Gonzalez v AMCC Corp.*, *supra*). Based on the foregoing, plaintiff's motion for summary judgment as against Farrell on the issue of liability under Labor Law § 240 (1) is granted (see *Tabickman v Batchelder St. Condominiums By the Bay, LLC*, 52 AD3d 593, 859 NYS2d 721 [2d Dept 2008]).

“To recover under Labor Law § 241(6), a plaintiff must establish the violation in connection with construction, demolition or excavation, of an Industrial Code provision which sets forth specific, applicable safety standards” (*Wein v Amato Props., LLC*, 30 AD3d 506, 507, 816 NYS2d 370 [2d Dept 2006]; see *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 800, 965 NYS2d 156 [2d Dept 2013]). However, “[c]ontributory and comparative negligence are valid defenses to a section 241(6) claim; moreover, breach of a duty imposed by a rule in the Code is merely some evidence for the factfinder to consider on the question of a defendant's negligence” (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]; *Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839, 842, 891 NYS2d 418 [2d Dept 2009]).

Farrell correctly asserts that 12 NYCRR § 23-1.5 merely sets forth a general standard of care for employers, and thus cannot serve as a predicate for liability pursuant to Labor Law § 241(6) (see *Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]). In addition, Farrell correctly asserts that 12 NYCRR § 23-1.11 concerning lumber and nail fastenings is inapplicable to the subject circumstances (see *Morgan v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 50 AD3d 866, 855 NYS2d 671 [2d Dept 2008]). Therefore, plaintiff's Labor Law § 241 (6) claims based on the aforementioned Industrial Code sections are dismissed.

However, contrary to Farrell's assertions, plaintiff's failure to specifically identify 12 NYCRR §§ 23-5.1, 23-5.2, and 23-5.3 in his complaint or bill of particulars rather than merely listing 12 NYCRR § 23-5 is not fatal to his claim (see *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 975 NYS2d 65 [2d Dept 2013]; *Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 927 NYS2d 87 [2d Dept 2011]; *D'Elia v City of New York*, 81 AD3d 682, 916 NYS2d 196 [2d Dept 2011]; *Galarraga v City of New York*, 54 AD3d 308, 863 NYS2d 47 [2d Dept 2008]). Farrell failed to demonstrate it was prejudiced by plaintiff's late identification of the aforementioned Industrial Code sections concerning scaffolds in opposition to Farrell's motion for summary judgment and in support of his own cross motion (see *Gonzalez v Perkan Concrete Corp.*, *supra*; *Jara v New York Racing Assn., Inc.*, *supra*).

12 NYCRR §§ 23-5.1(b), (c), (j), 23-5.2, and 23-5.3 (e) set forth specific, rather than general, safety standards for scaffolds, and are sufficient to support a Labor Law § 241(6) cause of action (see *Klimowicz v Powell Cove Assocs., LLC*, 111 AD3d 605, 975 NYS2d 419 [2d Dept 2013]; *Latchuk v Port Auth. of New York and New Jersey*, 71 AD3d 560, 896 NYS2d 356 [1st Dept 2010]). Farrell did not establish either that said Industrial Code provisions were inapplicable to the facts of this case, or that the alleged violation of those provisions was not a proximate cause of the damages alleged or that their requirements were satisfied (see *id.*; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]).

Here, the proffered evidence indicates that Farrell may have violated specific provisions of the Industrial Code. However, there is also evidence that plaintiff may have been comparatively negligent in, among other things, leaning the extension ladder against the wall without obtaining the assistance of his co-workers to hold it in place, and using two ladders of mismatched height to form such a makeshift scaffold such that plaintiff failed to establish his entitlement to judgment as a matter of law on the issue of liability under Labor Law § 241(6) (see *Riffo-Velozo v Village of Scarsdale*, *supra*; *Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607, 874 NYS2d 562 [2d Dept 2009]; *Edwards v C & D Unlimited*, 295 AD2d 310, 311, 743 NYS2d 876 [2d Dept 2002]; *Amirr v Calcagno Constr. Co.*, 257 AD2d 585, 586, 684 NYS2d 280 [2d Dept 1999]; *Drago v New York City Tr. Auth.*, 227 AD2d 372, 373, 642 NYS2d 83 [2d Dept 1996]). In addition, Farrell's request for summary judgment dismissing plaintiff's Labor Law § 241(6) claims is denied inasmuch as Farrell failed to make an affirmative showing that plaintiff's ladders complied with the firm-footing requirement of 12 NYCRR § 23-1.21(b)(4)(2) (see *Estrella v GIT Indus., Inc.*, 105 AD3d 555, 963 NYS2d 110 [1st Dept 2013]). Inasmuch as there is conflicting deposition testimony as to whether the floors of the subject house were finished and thus slippery so as to prevent the use of blocks and nails to secure the ladders, issues of fact are raised.

Farrell also seeks (003) summary judgment on its third-party complaint asserting that the third-party defendants' supervisor solely supervised, directed and controlled plaintiff's work such that Farrell is entitled to common-law indemnification, that it is entitled to contractual indemnification pursuant to the terms of its subcontractor agreement with T & S Drywall, and that it is entitled to summary judgment on its breach of contract claim for failure to procure insurance pursuant to the terms of the subcontractor agreement.

The third-party defendants oppose Farrell's motion and cross-move (005) for summary judgment dismissing the third-party complaint and all cross claims. They contend that inasmuch as plaintiff received and accepted Workers' Compensation benefits and plaintiff did not sustain a "grave injury" pursuant to Workers' Compensation Law § 11, Farrell's common-law contribution and indemnification claims should be dismissed. T & S Drywall notes that the Notice of Decision of the Workers' Compensation Board filed on October 7, 2011 concerning plaintiff, submitted herein, indicates his employer to be T & S Drywall and the carrier to be the State Insurance Fund. In addition, they contend that it is unclear whether the subcontractor and hold harmless agreement, of which two signed versions were provided by Farrell during discovery, one undated and unnotarized and another dated and notarized, was actually entered into prior to plaintiff's accident for its contribution and indemnification terms to be enforceable under Workers' Compensation Law § 11. T & S Drywall further contends that even if the agreement itself is enforceable under Workers' Compensation Law § 11, Farrell's contractual indemnification claims should also be dismissed as unenforceable under General Obligations Law § 5-322.1(1), based on the deposition testimony of Gregg Farrell, because Farrell cannot be indemnified for its own negligence in overseeing the construction and enforcing safety precautions. They argue that Farrell had the authority to control the activity which caused the condition that resulted in plaintiff's injury. Moreover, T & S Drywall argues that they secured appropriate insurance coverage from Atlantic Casualty Insurance Company prior to plaintiff's accident warranting dismissal of Farrell's breach of contract claim. T & S Drywall's submissions include the deposition transcript of Debra Farrell-Reeder, the subcontractor and hold harmless agreements, the Notice of Decision of the Workers' Compensation Board, and the Atlantic Casualty Insurance Company policy naming Farrell as an additional insured.

Farrell contends in opposition that T & S Drywall did not have any employees based on the deposition testimony of Steven Stawniczy such that it is not entitled to the protections of Workers' Compensation Law

§ 11. In addition, Farrell contends that there is no question that Steven Stawniczy signed the subcontractor and hold harmless agreement, and although he could not recall during his deposition the date that he signed said agreement, he did not dispute or disagree with the date written on said document of April 15, 2010, and even testified that every company requires a hold harmless agreement. Farrell notes the deposition testimony of Debra Farrell-Reeder that subcontractors were not required to execute new agreements with each new job site.

The law is well settled that “primary jurisdiction with respect to determinations as to the applicability of the Workers’ Compensation Law has been vested in the Workers’ Compensation Board and that it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board” (*Botwinick v Ogden*, 59 NY2d 909, 911, 466 NYS2d 291 [1983]; see *Konior v Zucker*, 299 AD2d 320, 320-321, 749 NYS2d 86 [2d Dept 2002]). Moreover, the determination of the Workers’ Compensation Board concerning whether an employer-employee relationship exists is conclusive and binding on the courts (see *O’Rourke v Long*, 41 NY2d 219, 391 NYS2d 553 [1976]; *Konior v Zucker*, *supra*). Section 11 of the Workers’ Compensation Law provides that an employee may not sue his or her employer, and it also precludes third-party actions for contribution and indemnification against the plaintiff’s employer unless there is evidence of a “grave injury” (see *Konior v Zucker*, *supra*).

Here, the Workers’ Compensation Board made the conclusive and binding determination that plaintiff was employed by T & S Drywall, despite contrary deposition testimony herein, and there is no evidence in the record that plaintiff suffered a grave injury under the Workers Compensation Law such that T & S Drywall made a prima face showing of entitlement to summary judgment dismissing Farrell’s common-law contribution and indemnification claims asserted against them, and no triable issue of fact was raised in opposition (see *Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]; *Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642, 934 NYS2d 432 [2d Dept 2011]; *Konior v Zucker*, *supra*). In addition, T & S Drywall is entitled to summary judgment dismissing Farrell’s breach of contract claims as the proffered evidence demonstrates that Farrell was named as an additional insured on a commercial liability policy issued by Atlantic Casualty Insurance Company to T & S Drywall effective on the date of plaintiff’s accident (see *Stellar Mechanical Services of New York, Inc. v Merchants Ins. of New Hampshire*, 74 AD3d 948, 903 NYS2d 471 [2d Dept 2010]; *Storms v Dominican College of Blauvelt*, 308 AD2d 575, 765 NYS2d 882 [2d Dept 2003]; compare *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]). Farrell’s argument that the fact that Atlantic Casualty Insurance Company has denied coverage for the subject accident demonstrates that T & S Drywall failed to obtain the requisite insurance coverage pursuant to the terms of the subcontractor agreement is insufficient to raise an issue of fact. Farrell provides no evidence that the reason for the denial of coverage was related to any such failure. Based on the foregoing, Farrell’s third-party claims for common-law contribution and indemnification and breach of contract for failure to procure insurance are dismissed.

A party is entitled to contractual indemnification when the intention to indemnify is “clearly implied from the language and purposes of the entire agreement and the surrounding circumstances” (*Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744, 849 NYS2d 658 [2d Dept 2008]; see *Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668, 670, 863 NYS2d 477 [2d Dept 2008]). Here, with respect to the subcontractor and hold harmless agreement, although one version was undated and both versions did not specify the work to be done or the location of the work, both versions did specify the party to be indemnified, were executed by both parties, and the deposition testimony of the parties revealed the existence of an ongoing relationship in

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which T & S Drywall had agreed to indemnify Farrell (*compare Torres v LPE Land Dev. & Constr., Inc., supra*). Notably, Steven Stawniczy of T & S Drywall did not challenge at his deposition the date of the dated version of the subcontractor and hold harmless agreement, admitting that he signed it when Joseph Farrell, Jr. was not present. Moreover, the mere fact that Debra Farrell-Reeder then Debra J. Mulgrew, who now resides in but does not have a financial interest in the subject house, notarized said document does not render the agreement unenforceable (*see generally Kelly v Licciardi*, 21 AD3d 452, 799 NYS2d 824 [2d Dept 2005]). Therefore, the subcontractor and hold harmless agreement dated April 15, 2010 is enforceable (*see Hopes v New Amsterdam Restoration Group, Inc.*, 83 AD3d 784, 921 NYS2d 143 [2d Dept 2011]).

The right to contractual indemnification depends upon the specific language contained in the contract (*see Kielty v AJS Constr. of L.I., Inc.*, 83 AD3d 1004, 1006, 922 NYS2d 467 [2d Dept 2011]; *Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 742-743, 887 NYS2d 215 [2d Dept 2009]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). Here, the hold harmless agreement provided that, “[t]o the fullest extent permitted by law,” T & S Drywall was required to indemnify Farrell with respect to all claims arising from work performed by T & S Drywall, but only to the extent the injury or damage was caused by T & S Drywall (*see Kielty v AJS Constr. of L.I., Inc., supra*). Such an agreement does not violate the General Obligations Law if it authorizes indemnification to the fullest extent permitted by law (*see Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849, 852, 889 NYS2d 630 [2d Dept 2009] [internal citations omitted]). Farrell is entitled to indemnification from T & S Drywall based on said indemnification agreement inasmuch as Farrell established that it was free from negligence in contributing to the happening of the accident (*see* General Obligations Law § 5-322.1; *Hopes v New Amsterdam Restoration Group, Inc., supra*). The proffered evidence revealed that Farrell undertook general duties to oversee the work and to ensure compliance with safety regulations, which is insufficient to raise a triable issue of fact as to whether Farrell was negligent and, therefore, not entitled to contractual indemnification (*see Reisman v Bay Shore Union Free Sch. Dist.*, 74 AD3d 772, 902 NYS2d 167 [2d Dept 2010]). Therefore, Farrell is entitled to summary judgment on its contractual indemnification claim against T & S Drywall, and T & S Drywall’s request for summary judgment dismissing said claim is denied.

Dated: July 15, 2014



 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION