NEW YORK SUPREME COURT - COUNTY OF BRONX

12-2-2014

PART 20

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

RUSSELL,DIANA

Index №. **0007367/2007**

-against-

Hon..**KENNETH L. THOMPSON** ,

HUDSON RIVER PARK

Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **November 22 2013** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

The motions and cross-motions for summary judgment are hereby consolidated for purposes of decision & disposition. See companion decision + order for outcome.

The foregoing constitutes the decision + order of the Court.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: NOV 18 2014

Hon. _____
KENNETH L. THOMPSON, J.S.C.

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Justice: _____
Dated: _____

Dated: NOV/18/2014

Hon. _____
KENNETH L. THOMPSON, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
DIANA RUSSELL AS THE ADMINISTRATRIX OF THE ESTATE OF JOHN RUSSELL

Index No. **7367/2007**

Plaintiff,

DECISION/ORDER

-against-

Present:
HON. KENNETH L. THOMPSON, JR

HUDSON RIVER PARK TRUST OF NEW YORK
SKANSKA USA INC., and SKANSKA USA BUILDING, INC.,

Defendants, X

HUDSON RIVER PARK TRUST OF NEW YORK,

Third-Party
Index No. 83697/10

Third-Party Plaintiff,

-against-

FORMS & SURFACES, INC.,

Third-Party Defendant X

SKANSKA USA BUILDING, INC.,

Second Third-Party
Index No. 83996/10

Second Third-Party Plaintiff

-against-

FORMS & SURFACES, INC.,

Second Third-Party Defendant, X

The following papers numbered 1-**15** read on this motion, **Summary Judgment**____

No On Calendar of **February 21, 2014**	PAPERS NUMBERED
Notice of Motion-Order to Show Cause- Exhibits and Affidavits Annexed	**1, 3, 3a, 3b, 5, 6, 13**
Answering Affidavit and Exhibits	**2, 4, 9, 15**
Replying Affidavit and Exhibits	**8, 10, 11, 12,** 14
Affidavit	
Pleadings—Exhibits	
Memorandum of Law	**7**
Stipulation—Referee's Report—Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Hudson River Park Trust, (Hudson), moves pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint, all cross-claims and counterclaims as against Hudson, and for an order granting contractual indemnification as against co-defendant,

Forms & Surfaces, Inc., (Forms), and common law indemnification as against co-defendants, Skanska USA Building, Inc., (Skanska), and Forms.

Skanska moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against it. While Skanska did not give notice in its notice of motion that it seeks contractual indemnification from Forms, Skanska and Forms both treat Skanska's motion as one seeking contractual indemnification against Forms.

Forms cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against it.

Plaintiff moves for permission to serve an expert exchange and moves pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law 240(1).

The motion for summary judgment by co-defendant, United Iron Works, Inc., (United), is withdrawn pursuant to a letter dated October 20, 2014.

Defendants'' argue that since plaintiff's cross-motion was made more than 120 days after the note of issue was filed, plaintiff's cross-motion is untimely and should not be considered. However, "[w]hile the cross motion was made more than 120 days after the note of issue was filed and, therefore, was untimely (see *Brill v City of New York*, 2 NY3d 648 [2004]), "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]; see *Whitehead v City of New York*, 79 AD3d 858, 860 [2010]; *Lennard v Khan*, 69 AD3d 812, 814 [2010]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2005]). In such circumstances, the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the merits of the untimely cross motion (see *Grande v Peteroy*, 39 AD3d at 592). Notably, a court, in deciding the timely motion, may search the record and award summary judgment to a nonmoving party (see CPLR 3212 [b])." *Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 A.D.3d 737, 738-739 [2ND Dept 2011]). Accordingly, plaintiff's cross-motion is deemed timely.

This action arose as a result of personal injuries sustained by decedent, John Russell, (Russell), when he attempted to move a dolly that had rectangular metal posts stacked on it and two posts fell on his foot. Since Russell is deceased from causes unrelated to the accident herein, the only other witness to this occurrence is Russell's foreman, Seon Shirley, (Shirley). Both Shirley and Russell were employed by former third third-party defendant United Iron works, Inc. United was a sub-contractor to Forms, on a construction project on a pier. Plaintiff has brought claims of defendants' violation of Labor Law 200, 240 and 241(6).

Shirley has signed two affidavits that were submitted on this motion. The first one is dated September 30, 2013, which was submitted by defendants, while the second Shirley affidavit is dated December 2, 2013, and was submitted by plaintiff. While defendants argue that the affidavits are contradictory and should be disregarded, Shirley's affidavits each omit pertinent averments that are contained in the other affidavit, but do not contradict each other. Shirley avers in the September 30, 2013 affidavit that Russell pulled on the posts to move the dolly which dislodged a metal post which fell onto his foot. In the December 2, 2013 affidavit, Shirley avers that Russell first tried to move the cart by the handle, but since the cart was too heavy he moved to the opposite side of the cart and two metal posts fell on his foot. In the December 2, 2013 affidavit, no cause for the fall of the metal posts was stated. Therefore, there is no direct contradiction in the affidavits, rather, one affidavit has a detail that another affidavit does not. Conversely, the December 2, 2013 affidavit generally has far more details about the accident than the September 30, 2013 affidavit.

SKANSKA, CONSTRUCTION MANAGER OR GENERAL CONTRACTOR

Under the contract between Hudson and Skanska, Skanska's status was defined as an "independent Consultant and not that of a servant, agent or employee of [Hudson]. Accordingly, Consultant shall not hold itself our as, nor claim to act in the capacity of, an officer, agent, employee or servant of [Hudson]." (Page 9 par. 13). Skanska was the construction manager at the construction site.

"Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury (see *Russin v Picciano & Son*, 54 NY2d 311, 317-318 [1981]; see also *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*Russin*, 54 NY2d at 318). Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003])." (*Walls v Turner Constr. Co.*, 4 N.Y.3d 861, 863-864 [2005]).

Skanska never had control over the activity that brought about plaintiff's injury, and is therefore not an agent of the owner for purposes of the Labor Law. (Pramberger transcript pp. 25-28, 70-76).

LABOR LAW 200

> Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury.
>
> *(Comes v. New York State Electric and Gas Corp.*, 82 N.Y.2d 876, 877 [1993])

(citations omitted).

United's foreman was responsible for Russell's supervision. (Rifelli aff. P. 81-86). Skanska directed United's work to the limited extent required to coordinate the work on the construction project. (Rifelli p. 82).

> [M]ere oversight of the timing and quality of the work performed is not equivalent to direct supervision and control and is thus insufficient to support the imposition of liability under Labor Law 200. (*See Gonzalez v United Parcel*

Council, 179 AD2d 550, 551 [1992], *lv denied* 80 NY2d 754 [1992]; *see also Brezinski v Olympia & York Water St. Co.*, 218 AD2d 633, 634-635 [1995]).

(Artiga v Century Management Co., 303 AD2d 280 [1st Dept 2003]).

Accordingly, plaintiff's Labor Law 200 claim is dismissed as is her common law negligence claim. It should be noted that plaintiff's expert's opinion regarding violation of Labor Law 200 was conclusory.

LABOR LAW 241(6)

"A cause of action under Labor Law § 241(6) depends upon a showing of noncompliance with some specific safety standard (see *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993])." (*Carty v. Port Authority of New York and New Jersey,* 32 A.D.3d 732, 733 [1st Dept 2006]).

Of the four Industrial Code regulations plead in plaintiff's Bill of Particulars, plaintiff only argued for retention of two of them, Section 23-1.5 and 23-2.1. "12 NYCRR 23–1.5(a) sets forth an employer's general responsibility for health and safety in the workplace, and is insufficiently specific to support a § 241(6) claim." (*Carty v. Port Authority of New York and New Jersey,* 32 A.D.3d 732, 733 [1st Dept 2006]).

Section, 23-2.1 of the Industrial Code, states that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare."

Shirley averred in both the affidavits that have been submitted that Russell attempted to move the dolly in order to permit another worker from another trade to pass. Whether the area where the accident occurred was a passageway, walkway or other thoroughfare is a question of fact as Shirley's affidavit does not describe the area of the accident in sufficient detail. "Defendant claims this is a room while plaintiff and his expert engineer state that this was a

passageway under 12 NYCRR 23–1.7(e) and 23–21(a)(i)(b). However, neither the Industrial Code nor the plaintiff's expert set forth the means to distinguish between the designation of that area as a room or a passageway; nor does the defendant. This, then is a very significant fact dispute that will have to be decided at trial. " (*Metz v. Marine Estates, LLC,* 20 Misc.3d 1106(A) (Table) N.Y.Sup.,2008.)

In *Marrero v 2075 Holding Co., LLC*, 106 AD3d 408 [1st Dept 2013], two steel beams with a combined weight of 1,000 pounds fell off a cart onto plaintiffs foot. With respect to the *Marrero* plaintiff's Labor Law 241(6) claim, it was considered inapplicable because of a lack an "allegation that the accident occurred in a passageway, walkway, stairway, or other thoroughfare." Id. at 410. Labor Law 241(6) was not inapplicable on the issue of whether transporting the steel beams was "storage" under the statute. With respect to whether the metal posts were safely stored, there is evidence from the foreman, Shirley's affidavit dated December 2, 2013, that the customary industry practice is to secure the load that Russell and Shirley were transporting, and that the lack of securing the load contributed to the happening of plaintiff's injuries.

Accordingly, that branch of defendants' motions that seeks to dismiss plaintiff's Labor Law 241(6) claim is granted to the limited extent of dismissing the following alleged underlying Industrial code violations: 23-1.5, 23-1.7, 23-1.28. Plaintiff's Labor Law 241(6) claim that is based upon a violation of Industrial Code section 23-2.1 remains. While plaintiff's expert opines that Section 23-2.1 was violated, even without consideration of plaintiff's expert's affidavit, Industrial Code Section 23-2.1 would not be dismissed.

LABOR LAW 240

Labor Law 240 provides that "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such

labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

In *Marrero v 2075 Holding Co. LLC,* 106 A.D.3d 408 [1ST Dept 2013], the plaintiff was injured when an A-frame cart holding two 500 pound steel beams fell off the cart as the plywood planks resting on fresh concrete buckled. The steel beams landed on his calf and ankle injuring the plaintiff. "Given the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis (see *McCallister v 200 Park, L.*P., 92 AD3d 927, 928-929 [2d Dept 2012] [elevation differential was within the scope of the scaffold law when a scaffold on wheels fell on the plaintiff who was at the same level as the scaffold, and it traveled a short distance]; *Kempisty v 246 Spring St.,* LLC, 92 AD3d 474, 474 [1st Dept 2012] [an elevation differential cannot be considered de minimis when the weight of the object being hoisted is capable of generating an extreme amount of force, even though it only traveled a short distance]." *Marrero v 2075 Holding Co. LLC,* 106 A.D.3d 408, 409 [1ST Dept 2013]). In the case at bar, the dolly was approximately 14 inches off the ground and the weight estimate varied from 40 to 60 pounds per metal post, for a combined maximum total estimate of 80 to 120 pounds for both of the posts that fell on Russell's foot. The amount of force generated by 120 pounds from a dolly is considerably smaller than the 1,000 pounds that fell from A-frame cart in *Marrero*.

Accordingly, the fall of relatively light posts, 40-60 pounds each from a relatively short distance does not invoke Labor law 240 coverage. It is noted that even if plaintiff's expert's report were considered on this motion, the expert did not render an opinion regarding the amount of force generated by the posts herein.

INDEMNIFICATION

> In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-

> issue and irrelevant (*Brown v Two Exch. Plaza Partners*, supra). In distinction, in the case of common-law indemnification, the one seeking indemnity 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, such as the nondelegable duty imposed by Labor Law § 240 (1) (see, *McDermott v City of New York*, 50 NY2d 211).
>
> (*Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept 1999]).

In the contract between Hudson and Forms, Forms is contractually obligated to indemnify Hudson and the construction manager, Skanska for "all liability for violation of such laws and regulations and shall defend any claims or actions which may be brought against the Owner and its Construction manager as the result thereof. In the event that the Contractor shall fail or refuse to defend any such action, the Contractor shall be liable to the Owner and its Construction Manager for all costs of the Owner and its Construction Manager in defending such claims and all costs of the Owner and its Construction Manager, including reasonable attorney's fees, in recovering such defense costs from the Contractor." (Paragraph 10.2.2.1). Pursuant to section 3.18.1 of the contract, Forms is responsible for all injuries to persons resulting from the work under the contract even if performed by subcontractors of Forms such as United. (Paragraph 3.18.1). While Forms argues that under the contract it must be negligent before it must indemnify Hudson and Skanska, there simply is no contractual language that limits indemnification to negligent acts or omissions by Forms.

Accordingly, Forms is contractually obligated to indemnify both Hudson and Skanska. While Skanska did not notice in its motion for summary judgment that it seeks contractual indemnification from Forms, Skanska's motion was treated by both Skanska and Forms as a motion for contractual indemnification from Forms in favor of Skanska. Moreover, under CPLR 3212(b), the Court can grant summary judgment to a party even if a motion or cross-motion is not made.

With respect to Hudson's common law indemnification claims against Forms and

Skanska, there is no evidence of any negligence on the part of either Forms or Skanska. The harm producing activity was supervised by United, and United's foreman was present during that activity.

PLAINTIFF'S EXPERT

Plaintiff's expert witness' affidavit was not used herein and would not have made a difference in the outcome of the motions if it were used. Plaintiff failed to give defendants sufficient notice of an expert witness. (*Salzo v Bedding Showcase,* 238 A.D.2d 180 [1st Dept 1997]). However, while plaintiff's expert's report was not considered on this motion, the branch of plaintiff's motion that seeks permission to serve an expert exchange is granted to the extent that the plaintiff's expert exchange is deemed timely served for purposes of permitting the plaintiff's expert to testify at trial. The time for defendant's to timely serve an expert exchange is hereby extended to sixty days after notice of entry of this order. Any defendants' expert witness exchange after said date is subject to further judicial order of any judge.

CONCLUSION

The motion of defendant, Hudson River Park Trust, pursuant to CPLR 3212 for summary judgment is granted to the extent of dismissing the plaintiff's common law negligence claims, Labor Law 200 and 240 causes of action and dismissing the alleged industrial code violations except section 23-2.1, and dismissing all cross-claims and counterclaims as against Hudson, and Forms & Surfaces Inc. is to provide contractual indemnification to Hudson River Park Trust. Hudson River Park Trust's claim for common law indemnification as against co-defendants, Skanska USA Building, Inc., and Forms & Surfaces Inc., is denied.

Skanska's motion pursuant to CPLR 3212 for summary judgment is granted to the extent of dismissing the plaintiff's common law negligence claims, Labor Law 200 and 240 causes of action and dismissing the alleged industrial code violations except section 23-2.1, and dismissing all cross-claims as against it, and Forms & Surfaces Inc. is to provide contractual indemnification to Skanska USA Building, Inc.

to Skanska USA Building, Inc.

The motion of defendant, Forms & Surfaces, Inc., pursuant to CPLR 3212 for summary judgment is granted to the extent of dismissing the plaintiff's common law negligence claims, Labor Law 200 and 240 causes of action and dismissing the alleged industrial code violations except section 23-2.1, and dismissing all cross-claims for common law indemnity.

That branch of plaintiff's motion pursuant to CPLR 3212 that seeks summary judgment on her Labor Law 240(1) claim is denied. That branch of plaintiff's motion that seeks permission to serve an expert exchange is granted to the limited extent that the plaintiff's expert exchange is deemed timely served for purposes of permitting the expert to testify at trial. The time for defendant's to timely serve an expert exchange is hereby extended to sixty days after notice of entry of this order. Any defendants' expert witness exchanged after said date is subject to further judicial order of any judge.

The motion for summary judgment by co-defendant, United Iron Works, Inc., (United), is withdrawn pursuant to a letter dated October 20, 2014.

The foregoing shall constitute the decision and order of the Court.

Dated: NOV 18 2014

KENNETH L. THOMPSON JR, J.S.C.