Del Greco v New York City Tr. Auth.
2014 NY Slip Op 33446(U)
November 14, 2014
Supreme Court, Queens County
Docket Number: 17697/2012
Judge: Phyllis Orlikoff Flug

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Phyllis Orlikoff Flug
Justice

IA Part 9

TINO DELGRECO,

Plaintiff(s),

- against -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, LAWRENCE BATTLE, F&S CONTRACTING, LLC, EGG ELECTRIC, INC., LONG ISLAND RAILROAD, THE CITY OF NEW YORK, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, AND GREATER JAMAICA DEVELOPMENT CORPORATION,

Defendant(s)

Index Number 17697 2012

Motion Date June 11 2014

Motion Cal. No. 34 - 37

Motion Seq. No. 4 - 7

The following papers numbered 1 and 2 read on this motion

Notices of Motions - Affidavits - Exhibits	1- 18
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Defendant, Lawrence Battle seeks summary judgment dismissing the complaint, insofar as asserted against him, pursuant to CPLR 3212; **(2)** motion by F&S Contracting Inc. (F&S), for summary judgment dismissing the Labor Law §200 and common law negligence claims against it, and for summary judgment on its claims for contractual indemnification from EGG Electric, Inc. (Egg); **(3)** motion by the Metropolitan Transportation Authority (MTA), Long Island Rail Road Company (LIRR), New York City Economic Development

Corporation (NYCEDC), and Greater Jamaica Development Corporation (GJDC), herein collectively referred to as the "owner defendants", to dismiss the complaint and all cross and counterclaims against them; for summary judgment in their favor on their claims for contractual and common law indemnification against F&S and for contractual indemnification from EGG, and, in the alternative, for a conditional order of contractual and/or common law indemnification from F&S and EGG; and **(4)** motion by plaintiff for summary judgment in his favor on the issue of liability pursuant to Labor Law §240 (1), as to defendants LIRR and F&S and for summary judgment in his favor as against MTA Bus Company and Lawrence Battle pursuant to CPLR 3212.

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained in an accident on September 19, 2011, when a bus owned by the New York City Transit Authority (NYCTA), and operated by Lawrence Battle, collided into a scissor lift on which plaintiff was working. Plaintiff's co-worker, Cesar Cespedes, who was also on the lift at the time of the accident, subsequently died as a result of his injuries and his estate commenced a separate action that has been joined for trial.

The accident occurred under the underpass in the vicinity of Sutphin Boulevard near the intersection of 94th Street, in Jamaica, New York. Long Island Railroad Company (LIRR), is the owner of the subject premises. Greater Jamaica Development Corp. (GJDC), acted as the developer of the LIRR underpass project and retained F&S Contracting, Inc., to act as general contractor on the subject construction project. F&S retained Egg to provide labor and to perform electrical renovation work for the rehabilitation of the LIRR underpass at Sutphin Boulevard. Pride Equipment Corporation rented the subject (new) scissor lift to Egg. The scissor lift was manufactured by JLG. On the date in question, plaintiff was employed by Egg as a Local 3 Union electrician.

In addition to the negligence claims, plaintiff also alleges that defendants violated New York State Labor Law §§200, 240 (1) and 241 (6), in failing to provide plaintiff with proper protection.

Facts

Plaintiff testified, in substance, as follows: in August of 2011, he worked the night shift on the subject project with Egg employees Thomas DeCrescenzo and Cespedes. No foreman was present on the night shift, however there was a "lead guy" which was Thomas DeCrescenzo. Egg provided tow scissor lifts for the job along with equipment including tools, vests and hard hats. The subject scissor lifts have a platform that raises up. Plaintiff used scissor lifts every day at the subject property. The LIRR underpass is situated over Sutphin Boulevard which is a divided road with three lanes of traffic running in opposite

directions. A median separates the six lanes of traffic. In order to perform their work, Egg had to close one lane of traffic.

Egg used orange cones and barrels to close off the lane they were working in. Normally, plaintiff was the "signal guy" with a flag to slow down traffic. Egg would also have a "work" sign or a "work in progress" sign and a stop sign or an orange flag. The orange cones/barrels were placed at an angle so that vehicles would begin to merge into one lane of traffic. When plaintiff acted as the signal guy, he would slow down traffic or stop traffic if the Egg employees needed to switch lanes or bring the lift out. On the night in question, Thomas DeCrescenzo was scheduled to work but did not come to work that evening. Cespedes informed plaintiff that plaintiff would not be a flag man that night and that plaintiff would work up on the lift. After cones were set up in the middle lane of the roadway, plaintiff and Cespedes set up the lift perpendicular to Sutphin Boulevard in the closed middle lane to perform the dome light installation work underneath the underpass. Cespedes decided how to set up the lift on the date of the accident. As the lift was raised approximately fifteen (15) feet in the air and plaintiff and Cespedes were performing the installation work, an MTA Bus company bus operated by Lawrence Battle came into contact with the lift knocking over the scissor lift.

Sherman Roberts testified on behalf of Egg as follows: he was employed as a foreman for Egg at the subject project. Egg provided equipment to its employees for the subject project including harnesses, lanyards, cones, barrels and signs to block traffic. Roberts trained Egg employees on how to operate scissor lifts. In order to shut down traffic lanes for the performance of their work, Egg would use plastic cones and barrels to shut down the lane and would use a flagman in conjunction with shutting down the traffic. Roberts learned after the accident that DeCrescenzo did not show up for work that evening. It was a violation of Egg's procedure for DeCrescenzo not to call in and inform Egg that he was not coming in. Roberts advised Egg employees prior to the subject accident that if someone was absent, they were required to call him. Roberts also informed Egg employees that if someone was absent, they were not to perform work on the scissor lift in the road and that it was essential that three workers perform the night shift.

Roberts testified that he gave instruction to Egg workers in the use of a scissor lift. Roberts also testified that he personally trained Del Greco and Cespedes in the use of the lift at the LIRR project. Egg personnel were working on the lighting underneath the overpass on the night shift because of the heavy traffic in the area during the daytime. Egg did not have an attenuator truck for use in directing traffic. The testimony of all of the witnesses confirm that Egg alone directed, supervised and controlled the means and methods of work on the subject project. No one from F&S directed, supervised or controlled the work of the Egg employees on the night in question.

Motion by Battle

An operator of a motor vehicle traveling with the right-of-way has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles (*see Fried v Misser*, 115 AD3d 910 [2d Dept. 2014]; *Allen v Echols*, 88 AD3d 926, 926 [2d Dept. 2011]; *Pollack v Margolin,* 84 AD3d 1341, 1342 [2d Dept. 2011]; *Bonilla v Calabria,* 80 AD3d 720, 720 [2d Dept. 2011]; *Todd v Godek,* 71 AD3d 872, 872 [2d Dept. 2010]). Here, Battle testified that he observed cones in the right lane of travel and the scaffolding ahead of that, and that he observed that the scaffold was extended in height on wheels. Battle admitted that he did not know the height of the MTA hybrid bus and that he did not know the clearance for the top of the bus in relation to the underside of the overpass. As he passed by the scaffolding, Battled testified, he did not take into consideration the possible clearance of the bus. In fact, he testified, that he first became aware of the accident involving plaintiff and the scaffold a few seconds after he passed the scaffold when "[he] heard a loud bang that was behind [my] bus and [from] what [he] could see in the rear view mirror, it was just a cloud of dust." Battle testified that the bus he was operating had two battery "banks" on the top, with one at the rear and the other towards the middle of the bus. He did not know how high these battery "banks" protruded above the top of the bus. Evidence was submitted indicating that there was damage to the rear battery "bank", suggesting that there was contact between this portion of the bus and the scissor lift on which plaintiff was standing at the time of the accident. Accordingly, Battle failed to demonstrate, prima facie, that he kept a proper lookout and that his alleged negligence did not contribute to the happening of the accident (*see Brandt v Zahner,* 110 AD3d 752 [2d Dept. 2013]; *Topalis v Zwolski,* 76 AD3d 524 [2d Dept. 2010]).

Battle argues, in substance, that since the area was dimly lit, Egg was also negligent in this case as the poor lighting contributed to the subject accident. Since there can be more than one proximate cause of an accident, a movant seeking summary judgment is required to make a prima facie showing that he or she is free from comparative fault (*see Jones v Vialva–Duke,* 106 AD3d 1052 [2d Dept. 2013]; *Mackenzie v City of New York,* 81 AD3d 699 [2d Dept. 2011]; *Bonilla v Gutierrez,* 81 AD3d 581 [2d Dept. 2011]; *Roman v A1 Limousine, Inc.,* 76 AD3d 552 [2d Dept. 2010]). Moreover, Battle's evidence did not establish that Egg's alleged negligence was the sole proximate cause of the accident.

Since Battled failed to demonstrate his prima facie entitlement to judgment as a matter of law, the motion is denied regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]).

Motion by F&S

The motion by F&S for summary judgment dismissing the Labor Law §200 and common law negligence claims against it, and for summary judgment on its claims for contractual indemnification from Egg, is granted.

Labor Law § 200 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 (*see Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876 [1993]; *Haider v Davis,* 35 AD3d 363 [2d Dept. 2006]; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d 847 [2d Dept. 2006]). Where the injury allegedly arises from the means and methods of the work performed, 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 (*see Ferrero v Best Modular Homes, Inc.,* 33 AD3d 847 [2d Dept. 2006]). Where, as here, the challenged methods are those of a subcontractor, and the owner or general contractor exercises no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200 (*see Haider v Davis,* 35 AD3d 363 [2d Dept. 2006]; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d 847 [2d Dept. 2006]). F&S demonstrated, prima facie, that DelGreco's injury was sustained as a result of the manner in which the work was performed, rather than as a result of a dangerous condition at the site, and that F&S did not exercise supervisory control over the work (*see Haider v Davis, supra*; *Ferrero v Best Modular Homes, Inc.,* supra).

In opposition, plaintiff failed to raise a triable issue of fact. Although there is evidence that F&S assumed some general supervisory duties over the entire project, those duties did not rise to the level of supervision or control necessary to hold it liable under Labor Law § 200 (*see Kajo v E.W. Howell Co., Inc.*, 52 AD3d 659 [2d Dept. 2008]). Charles Warshaw testified that Colin McDonough was the F&S supervisor for the project and would be present to make sure the work was done, not to oversee the job. Accordingly, the branch of the motion which is to dismiss the Labor Law §200 and common law negligence claims against it, is granted.

"The right to contractual indemnification depends upon the specific language of the contract" (*George v Marshalls of MA, Inc*., 61 AD3d 925, 930 [2009]; *see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2008]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc*., 61 AD3d at 930; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). In addition, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp*., 58 AD3d 660, 662 [2009]; *see* General Obligations Law § 5-

322.1). Here, F&S met their initial burden of demonstrating its entitlement to contractual indemnification (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). F&S introduced the subcontract agreements between itself and Egg, which included an express indemnification clause in favor of F&S as general contractor, which obligated Egg, "to the maximum extent permitted by law," to indemnify F&S for losses or claim "resulting from, arising out of, or in any manner connected with [Egg's work]" (*see generally Naranjo v Star Corrugated Box Co., Inc.*, 11 AD3d 436, 437-438 [2004]). F&S also demonstrated, prima facie, that it was not negligent by submitting deposition testimony establishing that the plaintiff's alleged injuries were sustained as a result of the methods or materials used in the subcontractors' work, rather than as a result of a dangerous condition at the site, and that F&S did not have authority to exercise supervisory control over the plaintiff's work or the subcontractors' work that allegedly caused his injury (*see Quilliams v Half Hollow Hills School Dist. [Candlewood School]*, 67 AD3d 763 [2009]).

In opposition, Egg failed to raise a triable issue of fact as to whether the contractual indemnification clause should not be enforced. Although an indemnification agreement which purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1, such an agreement does not violate that provision where, as here, it authorizes indemnification only to the extent permitted by law (*see Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849 [2009]). Furthermore, the evidence submitted in opposition to the motion merely established that F&S undertook general duties to make sure that the work was done and to ensure compliance with safety regulations, which is insufficient to raise a triable issue of fact as to whether F&S was negligent and, therefore, not entitled to contractual indemnification (*see Quilliams v Half Hollow Hills School Dist. [Candlewood School]*, 67 AD3d at 763; *Enriquez v B & D Dev., Inc.*, 63 AD3d 780 [2009]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 798 [2007]).

Motion by the MTA/LIRR/NYCEDC/GJDC (the "Owner defendants")

The branch of the motion which seeks to dismiss plaintiff's Labor Law §200 claims and common law negligence claims as asserted against the owner defendants is granted. The owner defendants demonstrated, prima facie, that plaintiff's injuries were sustained as a result of the means and methods used in the injury-producing work, rather than as a result of a dangerous condition at the site, and that the owner defendants did not exercise supervisory control over the said work (*Quilliams v Half Hollow Hills S.D.*, 67 AD3d 763 [2d Dept. 2009]). The plaintiff acknowledged that at the time of the accident he was following the instructions and direction of his foreman. There is no evidence, other than speculation, that the owner defendants were negligent, or that they directed, controlled, or supervised the manner in which plaintiff performed his work or supplied the materials or tools used by the plaintiff.

The branch of the motion which is to dismiss the Labor Law §§240 (1) and 241 (6) claims against the MTA, NYCEDC and GJDC, is granted since these defendants are not "owners" of the subject premises and are not general contractors (*see* Labor Law §§ 200, 240 [1]; *Chiu Wong v City of New York*, 65 AD3d 1000 [2d Dept. 2009]; *Imling v Port Auth. of N.Y. & N.J.,* 289 AD2d 104, 105 [1st Dept. 2001]).

The branch of the motion which seeks to dismiss plaintiff's Labor Law §240(1) claim on the ground that plaintiff was the sole proximate cause of the subject accident, is denied. While the owner defendants also submitted evidence that the plaintiff's injuries could have been prevented if he had been wearing an available safety harness, the owner defendants failed to make a prima facie showing that the plaintiff's alleged negligence in failing to wear the harness was the sole proximate cause of the accident (*see Stolt v General Foods Corp.,* 81 NY2d 918, 920 [1993]; *Wahab v Agris & Brenner, LLC*, 102 AD3d 672 [2d Dept. 2013]; *Moniuszko v Chatham Green, Inc.,* 24 AD3d 638, 639 [2d Dept. 2005]).

The branch of the motion by the owner defendants which is to dismiss plaintiff's claims under Labor Law §241(6), is granted. In support of the alleged claims under 241(6), plaintiff alleges that defendants violated sections 12 NYCRR 23-1.5 and 12 NYCRR 23-1.32. 12 NYCRR 23–1.5 merely establishes a general safety standard that is insufficient to give rise to the nondelegable duty imposed by Labor Law § 241(6) (*see Ferreira v Unico Serv. Corp.,* 262 AD2d 524 [2d Dept. 1999]; *Vernieri v Empire Realty Co.,* 219 AD2d 593 [2d Dept. 1995]); and since there was uncontroverted evidence that defendants never received written notice of an Industrial Code violation, 12 NYCRR 23–1.32 is inapplicable (*Mancini v Pedra Const.*, 293 AD2d 453 [2d Dept. 2002]).

The branch of the motion by the owner defendants which is for contractual indemnification from F&S and Egg is granted. A party is entitled to full contractual indemnification provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also, Hogeland v Sibley, Lindsay & Curr Co.,* 42 NY2d 153, 159 [1977]). The contract between Egg and F&S requires Egg to

> "indemnify and hold harmless *the owner, contractor, architect, architect's consultants and agents and employees* of any of them from and against all claims, damages [. . .] arising out of or resulting from the performance of the subcontractor's work under this subcontract [. . .]".

Here, there is no evidence that the MTA, GJDC or LIRR directed, supervised or controlled the means and methods of F&S', Egg's or plaintiff's decedent's work. In addition, the record indicates that the MTA, GJDC and LIRR were not negligent in any way. Thus liability, if any, on their part would only be statutory. Where liability is solely statutory in nature, a party is entitled to recover under a contract of indemnity (*see Brown v Two Exchange Plaza Partners, et al.*, 76 NY2d 172 [1990]*;Correia v Professional Data Management, Inc., et al.*, 259 AD3d 60 [1999]). In addition, where a party is entitled to indemnification under a contract of indemnity, it is also entitled to its costs, including attorneys' fees, pursuant to the agreement (*see Holt v Welding Services, Inc., et al.*, 264 AD2d 562 [1999]).

The broad form indemnification clause of the contract between the GJDC and F&S provides that the indemnification is triggered if the incident arose out of the acts or omissions, among other things, of the contractor or its subcontractors. Clearly, a claim by workers of its subcontractors, EGG, arises out of the acts or omissions of F&S and or EGG and the MTA, GJDC and LIRR are entitled to be indemnified by F&S, including costs and attorneys' fees.

The broad form indemnification clause of the contract between F&S and EGG provides that the indemnification is triggered if the incident arose out of the work to the extent caused in whole or in part of negligent acts or omissions of EGG or anyone directly or indirectly employed by them. Similarly, a claim by two of its workers related to its work, who only received direction from EGG or EGG employees, arose out of its negligent acts or omissions and the MTA, GJDC and LIRR are entitled to be indemnified by EGG.

Motion by Plaintiff

Plaintiff's motion for summary judgment on his Labor Law §240 (1) claim, is made more than 120 days after the filing of the note of issue, in violation of the terms of the Preliminary Conference Order (*see* CPLR 3212[a]; *Brill v City of New York,* 2 NY3d 648 [2004]; *Fiorino v North Shore Univ. Hosp. At Glen Cove,* 78 AD3d 1116 [2010]). An untimely motion or cross motion for summary judgment may be considered by the court, in the exercise of its discretion, where a timely motion for summary judgment was made on nearly identical grounds (*see Giambona v Hines,* 104 AD3d 807 [2013]; *Joyner–Pack v. Sykes,* 54 AD3d 727 [2008]; *Grande v Peteroy,* 39 AD3d 590, 591 [2007]; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment,* 298 AD2d 540, 542 [2002]). The court will entertain the instant motion since the issues raised in plaintiff's untimely motion are nearly identical to those raised by the estate of Cespedes in their timely motion for summary judgment.

The branch of the motion by plaintiff which is for partial summary judgment on the issue of liability pursuant to Labor Law §240(1) as against LIRR and F&S, is granted. It is well settled that to establish a prima facie violation of Labor Law § 240 (1) a plaintiff must establish that "the statute was violated and that this violation was a proximate cause of his or her injuries" (*Gardner v New York City Tr. Auth*., 282 AD2d 430 [2001], citing *Sprague v Peckham Materials Corp*., 240 AD2d 392, 393 [1997]). The evidence submitted by the plaintiff on his motion for summary judgment established a violation of Labor Law § 240 (1), as he was not provided with proper equipment to perform work at an elevated height (*see, Figueroa v Manhattanville Coll.,* 193 AD2d 778). Plaintiff was only provided with an unsecured lift, which had already been placed at the location where plaintiff was directed to work. The scissor lift was unprotected and unguarded. There were no guards, barriers, flagmen or lighting in place at the construction site at the time of the subject accident.

In opposition, defendants failed to raise an issue of fact whether plaintiff was a recalcitrant worker or the sole proximate cause of his accident (*see Eustaquio v 860 Cortlandt Holdings, Inc.,* 95 AD3d 548 [2012]). The only evidence they submitted was the testimony of the foreman of Egg (Roberts), that Egg provided equipment to its employees for the subject project, including harnesses, lanyards, cones and barrels and signs to block traffic. Roberts also testified that the deceased and plaintiff DelGreco were directed not to work on the project when one of the three men assigned were out, as there were to be three persons working with one serving as the flagman. Even if plaintiff knew that appropriate safety devices were "readily available", there is no evidence that plaintiff "knew he was expected to use" the safety devices for the assigned task. There is no evidence that plaintiff received directions to use any specified safety devices. Nor is there evidence of any "standing order" conveyed to workers, directing them to use safety devices in performing such a task (*see Gallagher v New York Post,* 14 NY3d 83, 88 [2010]). Accordingly, plaintiff is entitled to summary judgment on his § 240(1) claim.

The branch of plaintiff's motion which is for summary judgment on his claims as against MTA Bus Company is denied as this plaintiff did not commence suit against the MTA Bus Company but instead sued the Metropolitan Transportation Authority. While plaintiff argues that the court may, *sua sponte*, pursuant to CPLR 2001, deem the caption amended, changing Metropolitan Authority to MTA Bus Company and ratify and deem all pleadings and papers filed heretofore timely *nunc pro tunc*, this court finds no authority for such action. The Metropolitan Transportation Authority and its subsidiaries must be sued separately, and are not responsible for each other's torts (*Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910 [2d Dept. 2010]; *see Noonan v Long Is. R.R.*, 158 AD2d 392, 393 [1990]; *Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [1984]; Public Authorities Law § 1266 [5]). The fact that MTA Bus Company and the

Metropolitan Transportation Authority have similar names and operate, in part, out of the same address, does not change the legal conclusion that they are two separate entities (*see Smith v Giuffre Hyundai, Ltd.*, 60 AD3d 1040, 1041 [2009]).

Furthermore, "[t]he court's ability to apply CPLR 2001 presupposes that the court has acquired jurisdiction" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR 2001 [citations omitted]). CPLR 2001 cannot be invoked to remedy a jurisdictional defect, since the Court cannot correct an irregularity in a case over which it lacks authority in the first instance (*see Matter of Vetrone v Mackin,* 216 AD2d 839, 841 [3d Dept. 1995]; *see also MacLeod,* 75 AD3d 57 [2d Dept. 2007] [amendment to CPLR 2001 "was not intended to permit a court to excuse a mistake with regard to the commencement of an action ... over which it lacks subject matter jurisdiction"]). Indeed, the Court of Appeals has stated that "delivery of a summons and complaint to the wrong person is a substantial defect" that is not curable under CPLR 2001, rather than a technical error subject to being corrected or disregarded (*Ruffin v Lion Corp.,* 15 NY3d 578, 583 [2010] [internal citations omitted]).

The branch of the motion by plaintiff Del Greco which is for summary judgment on his claims against Lawrence Battle is denied. "[A] plaintiff moving for summary judgment the issue of liability in an action for negligence must eliminate any material issue, not only as to the defendant's negligence, but also as to whether the plaintiff's own comparative negligence contributed to the incident" (*Calcano v Rodriguez*, 91 AD3d 468 [1st Dept 2012]). Based on this holding, a summary judgment motion by a "plaintiff who cannot eliminate an issue as to his or her own comparative fault should simply be denied" (*id.* at 471). Here, a question as to a plaintiff's comparative negligence is raised. The factual issue to be resolved is the *extent* of the plaintiff's culpable conduct; in other words, whether plaintiff's negligence was, indeed, a *substantial* factor in events that led to plaintiff's injuries (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Conclusion

The motion by Battle for summary judgment in his favor is denied.

The motion by F&S for summary judgment dismissing the Labor Law §200 and common law negligence claims against it, and for summary judgment on its claims for contractual indemnification from Egg, is granted.

The branch of the motion by the owner defendants which seeks to dismiss plaintiff's Labor Law §200 claims and common law negligence claims as asserted against the owner defendants is granted. The branch of the motion by the owner defendants which is to dismiss the Labor Law §§240 (1) and 241 (6) claims against the MTA,

NYCEDC and GJDC, is granted. The branch of the motion which seeks to dismiss plaintiff's Labor Law §240(1) claim, is denied. The branch of the motion by the owner defendants which is to dismiss plaintiff's claims under Labor Law §241(6), is granted. The branch of the motion by the owner defendants which is for contractual indemnification from F&S and Egg is granted.

The branch of the motion by plaintiff which is for partial summary judgment on the issue of liability pursuant to Labor Law §240(1) as against LIRR and F&S, is granted. The branch of plaintiff's motion which is for summary judgment on his claims as against MTA Bus Company is denied. The branch of the motion by plaintiff which is for summary judgment in his favor as against defendant Battle, is denied.

November 14, 2014

J.S.C.