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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FRANK and DONNA MARAIO,

Plaintiffs,

Index No. 158486/12

-against-

DECISION/ORDER

L&M 2180, LLC, ROSE ASSOCIATE, INC. and PLAZA CONSTRUCTION CORP.,

Defendants.

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L&M 2180, LLC, ROSE ASSOCIATE, INC. and PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

TSC 2012, LLC and B&R REBAR CONSULTANTS,

Third-Party Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavit in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action to recover damages for injuries allegedly sustained by plaintiff Frank Maraio on September 21, 2012, while performing foundation waterproofing at a construction site. Plaintiffs now move for an Order pursuant to CPLR § 3212

granting partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). Defendants/third-party plaintiffs cross-move for an Order pursuant to CPLR § 3212 granting partial summary judgment dismissing plaintiffs' Labor Law § 200 and common law negligence causes of action and plaintiffs' Labor Law § 241(6) cause of action predicated on violation of Industrial Code provisions § 23-5.1(a) and § 23-5.1(e). By separate notice of motion, third-party defendant TSC 2012, LLC ("TSC") moves for an Order pursuant to CPLR § 3212 granting summary judgment dismissing the third-party complaint. These motions are consolidated for disposition purposes and, for the reasons set forth below, plaintiffs' motion is denied, defendants' cross-motion is granted and third-party defendant TSC's motion is granted in part and denied in part.

The relevant facts are as follows. On September 21, 2012, plaintiff Frank Maraio (hereinafter referred to as "Maraio" or "plaintiff") was performing work at the construction site located at 2182-2192 Broadway, New York, NY (the "Project"). The premises where the Project was being constructed was owned by defendant L&M 2180, LLC ("L&M"). Defendant Rose Associates, Inc. ("Rose") was retained by L&M to be its representative at the Project and defendant Plaza Construction Corp. ("Plaza") was retained to serve as the construction manager for the Project. Plaintiff's employer Civetta Cousins Contracting ("Civetta") was a subcontractor of Plaza. Specifically, Civetta was hired to perform the excavation and construction of the building's foundation that was being erected at the Project. Third-party defendant TSC was also a subcontractor of Plaza. TSC was retained to provide site safety management services for Plaza on the Project. This included daily observations of the entire site, oral and written reporting recommendations regarding safety issues and co-presiding over

weekly safety meetings.

On September 21, 2012, plaintiff was working as a waterproofer at the Project. In order for him to complete his work, he was required to work from the scaffolding that was erected at the Project. Specifically, to reach the walls of the building, plaintiff was required to use the outriggers that were built to connect the scaffolding to the wall. The outriggers consisted of triangular-shaped metal brackets attached to the outside of the scaffold's pipe frame with wooden planks placed on top of those brackets. At the time of his accident, plaintiff alleges that he was walking from one section of the outrigger to the next, which required him to unhook his security harness, when he was caused to trip and fall forward. It is undisputed that the outrigger section plaintiff fell on was missing one of its planks and plaintiff fell through the opening landing on the outrigger one floor below.

Based on the above accident, plaintiffs commenced the instant action asserting claims under Labor Law §§ 200, 240(1) and 241(6) and a claim for common law negligence. Defendants, thereafter, commenced a third-party action against TSC seeking common law and contractual indemnification and contribution. Defendants also assert claims for breach of contract against TSC for failure to procure insurance and failure to perform its services under the contract in a proper and workmanlike manner. All parties now move for summary judgment.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment

as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, as an initial matter, defendants' cross-motion for summary judgment dismissing plaintiffs' Labor Law § 200 and common law negligence causes of action and plaintiffs' Labor Law § 241(6) cause of action predicated on violation of Industrial Code provisions § 23-5.1(a) and § 23-5.1(e) is granted as defendants have made a *prima facie* showing of their entitlement to judgment dismissing these claims and plaintiffs have failed to provide opposition thereto. Indeed, although plaintiffs and TSC have submitted "opposition" to defendants' motion, neither parties' purported opposition papers put forth a single argument and/or fact opposing defendants' motion. Thus, given the absence of opposition, and defendants' *prima facie* showing, defendants' motion is granted in its entirety.

However, plaintiffs' motion for summary judgment is denied on the ground that it is an improper successive summary judgment motion. It is well settled that, "[p]arties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment." *Phoenix Four v. Albertini,* 245 A.D.2d 166, 167 (1st Dept 1997) (internal quotations omitted). Thus, "[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." *Jones v. 636 Holding Corp.*, 73 A.D.3d 409 (1st Dept 2010).

Here, plaintiffs' motion for partial summary judgment cannot be entertained as plaintiffs

previously moved for summary judgment and they have failed to show any newly discovered evidence or other sufficient justification to allow a successive summary judgment motion. Indeed, plaintiffs fail to even address the fact that this is a successive summary judgment motion in their moving papers. Rather, in opposition, plaintiffs contend that the present motion is proper as the so ordered stipulation dated April 14, 2015 authorized plaintiffs to make a successive summary judgment motion. However, this contention is without merit. The stipulation provides in full: "Parties time to move for summary judgment is extended to 90 days from filing of Note of Issue." This general statement did not, contrary to plaintiffs' contention, effectively "wipe the slate clean." Rather, the stipulation merely extended the time to move for summary judgment to the parties who had not yet moved for summary judgment. Thus, plaintiffs' motion for partial summary judgment is denied as procedurally improper.

Additionally, TSC's motion for summary judgment dismissing defendants' third-party claims for breach of contract is denied. Although TSC's notice of motion states that it is moving to dismiss the third-party complaint in its entirety, TSC's motion papers fail to address either of third-party plaintiffs' breach of contract claims. Thus, TSC has failed to make a *prima facie* showing of its entitlement to summary judgment dismissing defendants' breach of contract claims and that portion of its motion must be denied.

However, TSC's motion for summary judgment dismissing defendants' common law contribution and indemnification claims is granted. In *Martinez*, a case remarkably similar to the present one, the First Department unequivocally held that a site safety manager, like TSC, is entitled to summary judgment dismissing all claims for common law contribution and indemnification when it lacks "control over the conduct of work at the project necessary to

impose liability upon it under Labor Law § 200 or common-law negligence." *See Martinez*, 89 A.D.3d 468, 469 (1st Dept 2011); *see also Doherty v. City of New York*, 16 A.D.3d 123, 125 (1st Dept 2005); *FC 80 Dekalb Associates, Inc. v. Site Safety LLC*, 2012 WL 9518014 (N.Y. Sup. Ct., N.Y. Co. 2012). Here, it is undisputed that TSC lacked the necessary control over plaintiff's work to impose liability upon it under Labor Law § 200 or common law negligence. Plaintiff did not supervise or control plaintiff's work at the Project, nor did it have a duty pursuant to its contract with Plaza to correct unsafe work conditions. Thus, like in *Martinez*, TSC is entitled to summary judgment dismissing defendants' claims for common law contribution and indemnification.

Similarly, as in *Martinez*, TSC is also entitled to summary judgment dismissing defendants' claim for contractual indemnification. In *Martinez*, the contract at issue unambiguously limited the site safety manger's indemnity duty to instances of the site safety's negligence. *Martinez*, 89 A.D.3d at 469-470. Thus, as the court already determined that the site safety manger lacked the necessary control over the plaintiff's work, the court held that the site safety manger was also entitled to summary judgment dismissing the general contractor's contractual indemnification claim. *Id.* Here, like in *Martinez*, the contract between TSC and Plaza unambiguously limits TSC's indemnification duty to instances of TSC's "negligent performance of Work." Further, it is undisputed that TSC lacked control over plaintiff's work. Thus, just as in *Martinez*, TSC is entitled to summary judgment dismissing defendant's contractual indemnification claim as well. To the extent defendants contend in opposition that TSC's motion should be denied as there is an issue of fact as to whether TSC was negligent in failing to report that the scaffold plaintiff was working from when his accident occurred lacked a

vertical lifeline, such contention is without merit. Defendants have failed to make any showing that TSC was required to report the lack of a vertical lifeline to defendants pursuant to its duties under the contract. Indeed, defendants themselves argue in opposition to plaintiff's motion for summary judgment that no vertical lifeline was required. Thus, defendants cannot now argue that TSC was negligent in failing to report a safety device they argue was never required in the first instance.

Based on the foregoing, plaintiffs' motion is denied, defendants' cross-motion is granted and third-party defendants' motion is granted in part and denied in part. Thus, it is hereby

ORDERED that plaintiffs' Labor Law § 200 and common law negligence causes of action and plaintiffs' Labor Law § 241(6) cause of action predicated on violation of Industrial Code provisions § 23-5.1(a) and § 23-5.1(e) are hereby dismissed; and it is further

ORDERED that defendants/third-party plaintiffs' claims against TSC for common law contribution and indemnification and contractual indemnification are hereby dismissed. This constitutes the decision and order of the court.

Dated: 10/2/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.