

Thompson v Macy's East, Inc.
2015 NY Slip Op 32035(U)
June 10, 2015
Supreme Court, New York County
Docket Number: 100381/11
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

EA
6/12/15
JE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice _____

PART _____

Index Number : 100381/2011
THOMPSON, EVERETT

INDEX NO. _____

vs
MACY'S RETAIL HOLDINGS

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

The following papers, numbered 1 to _____, were read on this motion to/for

RECEIVED
JUN 12 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
JUN 12 2015
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/10/15

pgk, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
EVERETT THOMPSON,

Plaintiff,

Index No. 100381/11

-against-

DECISION/ORDER

MACY'S EAST, INC. and MACY'S INC.,

Defendants.

-----X
MACY'S EAST, an Unincorporated Division of Macy's
Retail Holdings, Inc. s/h/a MACY'S EAST INC. and
MACY'S INC.,

Third-Party Plaintiffs,

FILED

-against-

JUN 12 2015

P.I. MECHANICAL CORP.,

**NEW YORK
COUNTY CLERKS OFFICE**

Third-Party Defendant.

-----X
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.....	<u>1,2,3</u>
Answering Affidavits	<u>4,5,6</u>
Replying Affidavits.....	<u>7,8,9</u>
Exhibits.....	<u>10</u>

Plaintiff Everett Thompson commenced the instant action seeking to recover for injuries he allegedly sustained while working on an HVAC system at one of defendants' Macy's East, Inc. and Macy's Inc. (hereinafter collectively referred to as "Macy's") department stores located at 34th Street and Seventh Avenue in Manhattan (the "subject premises"). Plaintiff now moves

for an Order pursuant to CPLR § 3212 granting him summary judgment on his claim pursuant to New York Labor Law (“Labor Law”) § 240(1). Third-party defendant P.I. Mechanical Corp. (“Mechanical”) separately moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party complaint. Macy’s also separately moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff’s complaint and on its third-party claim for contractual indemnification against Mechanical. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. Plaintiff was employed as a mechanic for Mechanical for several years prior to his accident. On or about December 6, 2010, he was dispatched to the tenth floor of the subject premises to make a repair on an HVAC valve that he had installed in April 2010. Specifically, he testified that he was advised by a Macy’s engineer that the valve was making noise and was brought to the tenth floor of the subject premises in order to make the repairs.

Plaintiff testified as follows. In order to fix the problem, he had to remove the actuator, which is the piece of machinery that opens and closes the valve and which weighs more than eighty pounds. In order to access the actuator, plaintiff stood on the second rung from the top of a five-foot A-frame ladder, which was provided by Macy’s. In order to fix the issue, he had to unbolt the actuator and remove it from the pipe so that he could inspect the valve and stem. To do this, he unscrewed the bolts, which were located above him, removed the actuator from the pipe and placed it on top of the horizontal piping adjacent to the work area. While plaintiff was performing the repair work on the valve, the pipe on which the actuator was resting shook and vibrated, due to the water being shut off, which caused the actuator to fall off the pipe and act as

a pendulum, striking plaintiff in the head causing him to lose consciousness and fall off the ladder. When plaintiff came to, he saw the actuator swinging from a greenfield, an armored cable pipe that connects from the actuator to the ceiling and houses the power wires.

The court first turns to plaintiff's motion for an Order pursuant to CPLR § 3212 granting him summary judgment on his claim pursuant to Labor Law § 240(1). 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 Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). 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.*

Pursuant to Labor Law § 240(1),

All contractors and owners and their agents . . . who contract for but do not 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.

Labor Law §240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See*

Rocovich v. Consolidated Edison, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006).

In the instant action, plaintiff has established his *prima facie* right to summary judgment on his Labor Law § 240(1) claim against defendants as he has shown that his accident occurred due to defendants' failure to provide an adequate safety device to prevent the actuator from falling and striking plaintiff in the head, in violation of Labor Law §240(1). As an initial matter, plaintiff's accident clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto the actuator when the pipe on which it was resting vibrated causing the actuator to fall two to three feet hitting plaintiff in the head. Further, it is well-settled that a heavy object falling from above, which then knocks into the claimant, throwing him from the ladder on which he standing, is considered the kind of foreseeable "elevation risk" within the contemplation of Labor Law § 240(1) as it involves both the risk of a falling object and the risk of a fall from an elevation. *See Rzymiski v. Metropolitan Tower Life Ins. Co.*, 94 A.D.3d 629 (1st Dept 2012); *see also Kosavick v. Tishman Constr. Corp. of N.Y.*, 50 A.D.3d 287 (1st Dept 2008). Indeed, the fact that the actuator fell from the pipe on which it was resting and hit plaintiff in the head causing him to fall off the ladder is proof that there was a

failure to provide adequate safety devices to protect plaintiff pursuant to Labor Law § 240(1).

Additionally, plaintiff has affirmed that the only device provided to him by defendants was an A-frame ladder; that he did not see any other device that he could use to perform the work; and that a scaffold would have prevented his injuries as he could have rested the actuator on the platform of such scaffold rather than on the top of the pipe.

In response, defendants have failed to raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment. Their assertion that summary judgment should be denied on the ground that plaintiff was a "recalcitrant worker" because defendants provided him with scaffolds but that he chose not to use them is without merit. To support a "recalcitrant worker" defense, a defendant must show "that the safety device in question was both available and visibly in place at the immediate worksite of the injured employee" and that the employee "deliberately refused to use it." *Powers v. Lino Del Zotto and Son Builders Inc.*, 266 A.D.2d 668 (3d Dept 1999). See also *Gallagher v. New York Post*, 14 N.Y.3d 83 (2010)(granting plaintiff's motion for summary judgment on his 240(1) claim on the ground that "[t]here is no evidence...that [plaintiff] knew where to find the safety devices that [defendant] argues were readily available or that he was expected to use them" and there was no evidence "that [plaintiff] had been told to use such safety devices.") Indeed, it is well-settled that "[t]he mere presence of [safety devices] somewhere at the worksite does not establish 'proper protection.'" *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 524 (1985). See also *Hall v. Cornell Univ.*, 205 A.D.2d 872, 874 (3d Dept 1994)("the mere presence of safety devices at the worksite does not diminish [a] defendant's liability.")

Here, defendants fail to raise an issue of fact as they have failed to provide any evidence

that plaintiff saw the scaffolds or knew of the existence of the scaffolds; that any employee of defendants advised plaintiff of the existence of scaffolds at the worksite; or that plaintiff was instructed or directed to use the available scaffolds at any point and refused to do so. To the contrary, Martin Osbourne, a Macy's HVAC engineer, testified that he escorted plaintiff up to the tenth floor when he arrived on the date of his accident and that he did not have any discussions about equipment with plaintiff nor did he provide plaintiff with any equipment for him to use to perform the work. Further, when asked at his deposition whether there was anything else in the area where plaintiff was working that he could use to get up to the elevation he needed to aside from the ladder, Mr. Osbourne responded that there was not and that Macy's did not have any scaffolds in the vicinity of where plaintiff was working. Additionally, while Kevin Lilly and Joseph Barry, both Macy's HVAC engineers, have affirmed that on the date of plaintiff's accident, Macy's owned two scaffolds which were housed in the tenth floor engine room in the vicinity of the plaintiff, such evidence fails to raise an issue of fact as neither Mr. Lilly nor Mr. Barry have provided any evidence as to whether plaintiff knew of or saw the scaffolds on the date of his accident and that he refused to use them. Thus, as there is no evidence that defendants "provided" plaintiff with the scaffolds and that plaintiff deliberately refused to use said scaffolds, the mere availability of the scaffolds on the tenth floor is insufficient to raise an issue of fact to defeat plaintiff's motion.

Defendants' assertion that plaintiff's motion for summary judgment should be denied on the ground that they are contesting plaintiff's version of the way the accident occurred, specifically that the water being shut off by employees of defendants caused the pipe to vibrate and shake, causing the actuator to fall and strike him, is without merit. It is immaterial what

caused the pipe on which the actuator was resting to shake and vibrate as pursuant to Labor Law § 240(1), it is sufficient that plaintiff suffered a gravity-related injury and that defendants failed to provide the proper safety devices to guard against such injury.

Defendants' assertion that plaintiff's motion for summary judgment should be denied on the ground that there exists an issue of fact as to how the accident occurred, specifically, whether the actuator struck plaintiff at all, is without merit. Indeed, Mr. Osbourne testified that he was at the subject premises when plaintiff's accident occurred and that he was the one who brought plaintiff to the tenth floor so that he could fix the valve at issue. Mr. Osbourne confirmed that he saw that plaintiff removed the actuator from the valve and that it was "just sitting on the top of the pipe, it was not secured at all." Further, Mr. Osbourne testified that following the accident, Mr. Osbourne went to the area where plaintiff was working and saw the actuator hanging and swinging from the ceiling and that it was his understanding that plaintiff was struck by the actuator causing his injuries. Any assertion that plaintiff's injuries were caused by something other than the actuator falling off the pipe and striking him in the head is mere speculation and defendants have not provided any evidence that plaintiff's accident occurred any other way.

The court next turns to defendants' motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint and on its third-party claim for contractual indemnification against Mechanical. As an initial matter, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is denied as this court has already granted plaintiff summary judgment on said claim. However, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted. "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.” *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). “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.’” *Id.*, citing *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). “[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor’s methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation.” *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 504 (1993). “This rule is an outgrowth of the basic common-law principle that ‘an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.’” *Id.*, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299 (1978).

In the instant action, defendants have established their *prima facie* right to summary judgment dismissing plaintiff’s Labor Law § 200 and common law negligence claims on the ground that they did not supervise, direct or control plaintiff’s activities. Plaintiff testified that on the date of his accident, he did not receive any instruction or supervision from an employee of defendants or anyone at all. Further, Mr. Osbourne, a Macy’s HVAC engineer and the employee who escorted plaintiff to the tenth floor on the date of his accident, testified that neither he nor any employee of Macy’s supervised or directed any of the work performed by plaintiff and that once he brought plaintiff up to the tenth floor, he left plaintiff alone to do what he presumed plaintiff knew how to do so that he could take care of other responsibilities he had elsewhere in the building.

In response, plaintiff has failed to put forth any evidence to raise an issue of fact sufficient to defeat defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. Plaintiff's assertion that summary judgment should be denied on the ground that Mr. Osbourne observed plaintiff working on the A-frame ladder at certain times on the date of plaintiff's accident and that he was therefore negligent in causing, allowing and permitting plaintiff to continue working in such a manner is without merit as mere observation of plaintiff's activities without the ability to supervise, instruct or control plaintiff's work is insufficient for liability to attach under Labor Law § 200 or common law negligence.

Additionally, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted. Pursuant to Labor Law § 241(6),

All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

In the present case, defendants have established their *prima facie* right to summary judgment dismissing plaintiff's Labor Law § 241(6) claim as the Industrial Codes relied upon by plaintiff either do not apply or are too general. As an initial matter, defendants are entitled to summary judgment dismissing plaintiff's Section 241(6) claim predicated on 12 NYCRR 23-1.5 as such provision "is too general to support a cause of action for violating Labor Law § 241 (6)." *Kochman v. City of New York*, 110 A.D.3d 477, 478 (1st Dept 2013). Additionally, defendants are entitled to summary judgment dismissing plaintiff's Section 241(6) claim predicated on 12 NYCRR § 23-1.7(a) on the ground that it does not apply. Pursuant to that provision,

(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection.

Here, plaintiff's accident did not occur in an area that is normally exposed to falling material or objects. Indeed, the plaintiff was working in an engine room with a ceiling above him and the actuator only struck him in the head because the pipe on which he placed the actuator shook and vibrated. Thus, 12 NYCRR §23-1.7(a) is inapplicable.

Further, defendants are entitled to summary judgment dismissing plaintiff's Section 241(6) claim predicated on 12 NYCRR § 23-1.21 as said provision does not apply. 12 NYCRR § 23-1.21 provides general requirements for ladders and ladderways. However, although plaintiff was on a ladder at the time of his accident, he has made no allegations of a defect with the ladder or that it was the proximate cause of his accident. Thus, 12 NYCRR § 23-1.21 does not apply here. Additionally, defendants are entitled to summary judgment dismissing plaintiff's Section 241(6) claim predicated on 12 NYCRR § 1.8(c)(1) as said provision does not apply. 12 NYCRR § 23-1.8(c)(1) provides as follows:

Head protection. Every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat.

Here, this court finds that said provision is inapplicable to this case as at the time of his accident, plaintiff was not performing work in an area where there was a danger of being struck by falling objects or materials. He was working in an engine room with a 10 foot ceiling above him. The fact that the actuator fell and struck plaintiff in the head is immaterial as that was due to the nature of how plaintiff was performing the work and not due to the nature of the area in which plaintiff was working.

To the extent plaintiff asserts that summary judgment should be denied as to plaintiff's Section 241(6) claim predicated on 12 NYCRR §§ 23-1.21 and 23-1.8(c)(1) on the ground that defendants failed to move for such relief, such assertion is without merit. Although defendants failed to analyze the dismissal of plaintiff's Section 241(6) claim predicated on these two Industrial Code provisions in their papers, defendants' motion seeks summary judgment dismissing plaintiff's 241(6) claim on the ground that "plaintiff has not alleged any applicable Industrial Code violations which were the proximate cause of plaintiff's injuries...." Thus, as this court has found that said provisions do not apply to this case, defendants are entitled to summary judgment dismissing plaintiff's section 241(6) claim predicated on said provisions.

Additionally, defendants have established their *prima facie* right to summary judgment on their contractual indemnification claim against Mechanical. 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." *Torres v. LPE Land Dev.*

& Constr., Inc., 54 A.D.3d 668 (2d Dept 2008). Here, defendants' motion for summary judgment on their third-party complaint's cause of action for contractual indemnification against Mechanical is granted. Defendants and Mechanical entered into a contract, dated April 1, 2010, for the installation of the valve at issue herein (the "Contract"). Specifically, the Contract required Mechanical "[t]o furnish and install one new motor for existing Bray control valve" (the "Work"). Pursuant to Paragraph 10 of the Contract, Mechanical was obligated to repair all defects to the Work which resulted within two years after completion of the Work. Pursuant to Paragraph 7 of the Contract,

[Mechanical] To the fullest extent permitted by law, agrees to defend, indemnify, and hold harmless [defendants]...from and against any and all liabilities, losses, claims, suits, actions...including defense costs and attorney's fees...arising out of or related to this CONTRACT and/or the Work performed hereunder, whether arising during or after commencement or completion of the Work or services, which are in any manner directly or indirectly caused, occasioned, contributed to, or claimed to be due, in whole or in part, to any negligence or willful misconduct, whether active or passive, of [Mechanical] or anyone for whose acts [Mechanical] may be liable in connection with or incident to this Contract and/or the Work performed....

Based on these contractual provisions, this court finds that defendants are entitled to contractual indemnification from Mechanical. Plaintiff's lawsuit against defendants clearly "arises out of" and is "related" to the Contract and the Work performed thereunder and defendants have claimed that such lawsuit was due, in whole or in part, to the negligence of plaintiff, Mechanical's employee.

To the extent Mechanical asserts that defendants are not entitled to contractual indemnification on the ground that no contract exists for the work performed on the date of plaintiff's accident, such assertion is without merit. Indeed, the Contract makes clear that it

includes any and all repair work on the valve at issue which is needed within two years of completion of the work performed in April 2010. As plaintiff's accident occurred in December 2010, while he was repairing the valve he installed just eight months earlier, this court finds that there was a Contract in place for the work performed by plaintiff on the date of his accident and that the indemnification provision of that Contract applies here.

Finally, the court turns to Mechanical's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party complaint which alleges causes of action for common law indemnification, contractual indemnification and contribution. As an initial matter, that portion of Mechanical's motion for summary judgment dismissing defendants' contractual indemnification claim is denied as this court has already granted defendants summary judgment against Mechanical on their contractual indemnification claim. However, that portion of Mechanical's motion for summary judgment dismissing defendants' common law indemnification and contribution claims is granted without opposition as said claims are barred by Workers' Compensation Law § 11 as plaintiff did not suffer a "grave injury."

Accordingly, it is hereby

ORDERED that plaintiff's motion for an Order pursuant to CPLR § 3212 granting him summary judgment on his claim pursuant to Labor Law § 240(1) is granted; and it is further

ORDERED that Macy's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint is granted only to the extent that plaintiff's Labor Law § 200, common law negligence and Labor Law § 241(6) claims are dismissed; and it is further

ORDERED that Macy's motion for an Order pursuant to CPLR § 3212 granting it summary judgment on its third-party claim for contractual indemnification against Mechanical is

