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3/31/15
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Index Number : 108890/2011
WALLS, EDWARD
vs
CITY UNIVERSITY OF NEW YORK
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 004

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
APR 01 2015
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
MAR 31 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 3/24/15
MAR 24 2015

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2

EDWARD WALLS and PEGGY WALLS,

Plaintiffs,

-against-

TURNER CONSTRUCTION COMPANY, NEW YORK STATE DORMITORY AUTHORITY and FIVE STAR ELECTRIC CORP.,

Defendants.

DECISION & ORDER
Index No. 108890/2011
Motion Sequences 004 & 005

TURNER CONSTRUCTION COMPANY and NEW YORK STATE DORMITORY AUTHORITY,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590035/2012

FIVE STAR ELECTRIC CORP. and ENCLOS CORP.,

Third-Party Defendants.

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

MOT. SEQ. 004 PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs. 1 - 10)
ANSWERING AFFIDAVITS	3,4,5
REPLY AFFIDAVITS	6,7

MOT. SEQ. 005 PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs. A- R)
ANSWERING AFFIDAVIT	3 (Exs. A - C)
ANSWERING AFFIDAVIT	4
MEMORANDUM OF LAW	5
REPLY AFFIDAVITS	6

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Motion sequences bearing the numbers 004 and 005 are hereby consolidated for disposition.

In this personal injury action, defendants/third-party plaintiffs Turner Construction Company ("Turner") and Dormitory Authority of the State of New York i/s/h/a New York State Dormitory Authority ("DASNY") (hereinafter collectively "movants") move, pursuant to CPLR 2221, for leave to reargue their prior motion for summary judgment, decided by the Court on April 25, 2014, and, upon reargument, granting their motion for summary judgment pursuant to CPLR 3212 dismissing the complaint as against them, and granting summary judgment in their favor on their contractual indemnity claim in the third-party action (mot. seq. no. 004). Defendant/ third-party defendant Five Star Electric Corp. ("Five Star") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint as against it (mot. seq. no. 005).

BACKGROUND

Plaintiff Edward Walls, an ironworker employed by third-party defendant Enclos Corp. ("Enclos"), was injured on April 13, 2011 while working on a construction site at John Jay College, a division of The City University of New York ("CUNY").[1] The premises were owned by DASNY, and Turner was the general contractor on the project. Plaintiff was allegedly struck by an improperly placed electric heater installed by Five Star.

Plaintiff commenced this action on August 2, 2011, alleging negligence and violations of Labor Law §§ 200, 240 and 241 (6). Turner and DASNY then brought a third-party action against

[1]The claims against CUNY were discontinued on January 12, 2012.

Five Star for contribution, common-law indemnity, contractual indemnity and failure to procure insurance, and against Enclos for contractual indemnity and failure to procure insurance. The contribution claim is based on the argument that any problems relating to the heater were the result of Five Star's negligence. On November 14, 2013, plaintiff and his wife, plaintiff Peggy Walls, were granted leave to add Five Star as a direct defendant and to amend the caption in the original action.

Testimony

The court's decision dated April 25, 2014 contains the relevant deposition testimony of plaintiff Walls; Christopher J. Rice, Five Star's general foreman; and Shane Wilborne, Enclos's general foreman. Bremner affirmation, mot. seq. 004, exhibit 1. The full transcripts of these depositions are annexed to the Bremner affirmation as exhibits C, E, G and I, and to the Eckert affirmation, mot. seq. 005, as exhibits H, I, J and K.

TURNER AND DASNY'S MOTION FOR LEAVE TO REARGUE – MOT. SEQ. 004

Reargument Standard

A motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *William P.Pahl Equip.*

Corp. v. Kassis, supra at 27. On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th ed) succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

Discussion

In a previous motion (mot. seq. 002), Turner and DASNY moved to dismiss plaintiffs' claims as against them under Labor Law §§ 200, 240 (1) and 241 (6), and for common law negligence. This court granted the motion to the extent of dismissing the Labor Law § 200 and common-law negligence claims as against DASNY alone; dismissing the Labor Law § 240 (1) claim as against both movants; and dismissing the Labor Law § 241 (6) claim as against both movants except for the alleged violation of 12 NYCRR 23-1.30.

Additionally, movants, as third-party plaintiffs, requested partial summary judgment in their favor on the third-party complaint, seeking contractual indemnification against Five Star and Enclos. Because they were not found free of liability, movants were denied partial summary judgment on the third-party complaint.

Reargument Regarding Allegations In The Complaint

Movants seek reargument and, upon reargument, the granting of summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against Turner, and the Labor Law § 241 (6) claim as against both movants. This Court determined that the Labor Law § 241 (6) claim was viable based on the alleged violation of Industrial Code § 23-1.30. Upon

dismissal of the balance of the complaint as against them, movants request partial summary judgment in their favor on the third-party complaint.

Movants contend that the court misapprehended or overlooked several issues of law and fact, particularly referencing two statements in the decision, one concerning what plaintiff may have seen prior to the accident (a reason for denying dismissal of the common-law negligence and Labor Law § 200 claims as against Turner), and the other the evidentiary value of certain photographs in the record (the reason for denying the Labor Law § 241 [6] claim as against both movants). Movants maintain that, once the decision on liability is corrected, summary judgment on the third-party complaint would be warranted.

Plaintiff's accident occurred when his head struck an electric heater temporarily installed at eye level in a straight corridor at the construction site where he was working.[2] Movants question the court's finding that plaintiff "said that he never saw the heater on the way in." Movants refer to plaintiff's acknowledgment that he passed by the heater on his way down the corridor, and hit it on his way back: "I did pass it the first time." Pltf. tr at 47. They add this to his recollection that he saw heaters bolted to the ceiling on other floors of the construction site. *Id.* at 48. Movants then attempt to shape these two pieces of plaintiff's testimony into an admission that he saw the heater when he first traversed the corridor. However, when plaintiff was asked at his deposition, "You saw the heating unit between you and Mr. Ambrose [his coworker]?", he answered, "No, not until I hit it. I didn't see it at all." *Id.* at 41. The court thus paraphrased plaintiff's statement accurately and did not misapprehend his testimony in this regard. Reargument is thus denied on the claims for common-law negligence and violation of Labor Law § 200.

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[2] The length of the corridor was never established, but plaintiff testified that he was separated from his coworker by 10 to 15 feet at some point. Pltf. tr at 40, 41, 50.

This court's refusal to dismiss the Labor Law § 241 (6) claim as against both movants was based on the alleged violation of Industrial Code § 23-1.30, which requires that

> "[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

At his deposition, plaintiff stated that there was "hardly" any lighting in the corridor where the incident occurred. Pltf. tr at 53. Christopher Rice, Five Star's foreman, testified that one 100-watt bulb every 15 feet was a typical arrangement on a job site, but no one offered evidence about the actual lighting in the first-floor corridor at the time of the alleged accident.

Although photographs of the purported site of the incident were submitted with the motion (Bremner affirmation, mot. seq. 004, exhibits D and F), movants contend that this court was mistaken when it stated, at page 15 of its decision, that "[n]ot enough information is known about the photographs submitted by defendants to allow them to serve as conclusive proof that the scene was sufficiently lit at the time of the incident." Movants assert that the testimony of Shane Wilborne, Enclos' foreman, "confirms that the photographs were taken on the day of the accident and are accurate representations of the conditions of the heater and the hallway at that time." Bremner affirmation, at ¶ 51. In fact, Wilborne agreed that "the heater appear[ed] to look as it does in the exhibits that you have been shown, the photographs" (Wilborne tr at 45-46), and that the photographs were taken in his presence, "probably couple of hours after" the incident. *Id.* at 98. When plaintiff was shown the same photographs, he was unable to confirm that they showed the accident site. "I can't say. Possibly. I don't know. I don't really recall the corridor." Pltf tr at 55.

The motion for leave to reargue is thus granted to the extent of reconsidering the sufficiency of the photographs. This court was aware of Wilborne's testimony, and the statement on page 15

of the order that "[n]ot enough information is known about the photographs submitted by defendants to allow them to serve as conclusive proof that the scene was sufficiently lit at the time of the incident" is inaccurate.

Upon reargument, however, Turner and DASNY's motion to dismiss the Labor Law § 241 (6) claim as against them is denied. Although there is a basis for admitting the photographs as accurate contemporary representations of the accident site, the issue of the adequacy of the lighting remains unresolved. It is insufficient for movants to state flatly that the photographs "depict the heater hung in an open hallway *with adequate lighting* for it to be visible from a distance to a worker traversing the hallway and making reasonable use of his or her senses" (*emphasis added*). Bremner affirmation, at ¶ 53. However, they did not address the quantitative standard of Industrial Code § 23-1.30, which was the factual issue this court intended to point out on page 15 of its prior order.

Plaintiff was dismissive of the lighting in the corridor: "not in this one hardly at all." Pltf tr at 53. Rice testified regarding Five Star's "general rule of a [100-watt] lamp every fifteen feet," and insisted that this was followed at the job site. Rice tr at 70. However, there is no evidence that this lighting was in fact in place in the ground floor corridor and, if it was, whether it met the requirements of Industrial Code § 23-1.30. Wilborne was asked only one vague question about the lighting in the corridor where plaintiff was injured: "that light kind of at the end of the corridor, kind of right in the middle of the photograph, would [it] be in the area under the grand staircase?" Wilborne tr at 45. No one referred to the standard of Industrial Code § 23-1.30 when describing the actual lighting in the corridor on the date of the incident. This information cannot be discerned from the photographs. The adequacy of the lighting, and the possible violation of the Industrial Code in this regard, remain material issues of fact in dispute, and cannot be resolved by summary judgment. "The proponent of a motion for summary judgment must demonstrate that there are no material

issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Therefore, the motion to dismiss the Labor Law § 241 (6) claim as against both movants is denied.

Reargument Regarding Allegations In The Third-Party Complaint

Leave to reargue Turner's motion to dismiss the Labor Law § 200 and common-law negligence claims against it is denied. Leave to reargue the Labor Law § 241 (6) claim is granted, and upon reargument, the motion to dismiss the Labor Law § 241 (6) claim as against both movants is denied. Accordingly, the issue of movants' liability in connection with plaintiff's accident remains undetermined. Contrary to this court's holding, however, the fact that no finding of liability has been made against DASNY and Turner does not preclude those entities from obtaining a conditional order of summary judgment on their claims for contractual indemnification against Five Star and Enclos. Since the indemnification agreements executed by DASNY and Turner do not require those entities to be indemnfied for their own negligence, the contracts are not violative of General Obligations Law § 5-322.1. Thus, that branch of the motion seeking reargument of this court's decision on the third-party complaint is granted and, upon reargument, Turner is granted a conditional order of summary judgment against Five Star and Enclos to the extent that it was not negligent. *See Cerverizzo v City of New York*, 116 AD3d 469 (1st Dept 2014); *Cuomo v 53rd and 2nd Assocs.*, 111 AD3d 548 (1st Dept 2013). Since this court has already dismissed the common law negligence and Labor Law § 200 claims against DASNY, that entity is entitled to summary judgment on its contractual indemnification claims against Five Star and Enclos. *See Johnson v Chelsea Grand E., LLC*, 124 AD3d 542 (1st Dept 2015).

Although Five Star asserts that it is not required to indemnify DASNY AND Turner because the architectural plans regarding used at the site were defective, thus relieving it of its contractual obligation to indemnify, there is no proof of such a problem with the architectural plans, such as an expert affidavit, in the papers.

FIVE STAR'S SUMMARY JUDGMENT MOTION – MOT. SEQ. 005

Discussion

In its April 25, 2014 decision, the court denied without prejudice Five Star's motion (motion sequence 003) for summary judgment dismissing the complaint and the third-party complaint as against it. Because plaintiffs' motion to amend the complaint to include Five Star as a direct defendant was still pending when motion sequence 003 was submitted, the other parties did not address the issue of Five Star as a direct defendant. The court, therefore, directed that "Five Star will have to submit a new motion if it wishes to be dismissed from the underlying action, allowing the other parties an opportunity to present their positions on the matter."

Now, Five Star moves to dismiss the complaint, because it claims that it is not subject to New York's Labor Law, as it was not the owner, general contractor or their agent on the construction project, and it was not negligent. Five Star was a prime contractor with DASNY for electrical work on the CUNY project. Bremner affirmation, mot. seq. 004, exhibit H. At Turner's recommendation, Five Star executed a change order with DASNY for the installation of "temporary electric heaters . . . to provide temporary electrical heating during the December 2010-April 2011 Winter Season." Eckert affirmation, mot. seq. 005, exhibit N. Plaintiff was injured when he walked into one of these heaters, mounted on the ceiling of a ground floor corridor.

The amended complaint, joining Five Star as a direct defendant, claimed that Five Star, along

with Turner and DASNY, was "negligent in failing to properly safeguard the unsafe condition at the jobsite," and violated Labor Law §§ 200, 240 and 241 (6). Five Star is identified as having entered into a contract with DASNY, CUNY and/or Turner "to perform work, labor and services at the aforementioned premises." Amended verified complaint, ¶¶ 13-15. Five Star argues that it was a prime contractor to DASNY, not a property owner or general contractor on the CUNY project, and, therefore, cannot be charged with the indicated Labor Law violations.

> "As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker."

Barrios v City of New York, 75 AD3d 517, 518 (2d Dept 2010).

Plaintiffs oppose only Five Star's "motion to dismiss the common law negligence claims" against it." Weir affirmation, mot. seq. 005, ¶ 4. Plaintiffs do not challenge the motion to the extent that it seeks to dismiss allegations against Five Star based on Labor Law §§ 240 and 241 (6). Therefore, these claims are dismissed. *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 (2d Dept 2010) (Plaintiff's cause of action "is not properly before this Court, since she abandoned that claim by failing to oppose the branch of the defendant's motion which was to dismiss it").

What remains is the issue of negligence – was Five Star negligent in the placement of the heater in the ground floor corridor, did it reasonably warn of the heater's low-hanging position and/or did it provide adequate illumination in the ground floor corridor? A defendant may be liable for damages in tort if, "while engaged affirmatively in discharging a contractual obligation, [it] creates an unreasonable risk of harm to others." *Church v Callanan Indus.*, 99 NY2d 104, 111 (2002). Five Star quotes *Hunter v Perez Interboro Asphalt Co.* (237 AD2d 214, 215 [1st Dept 1997]): "conformance with contract specifications would insulate the contractor from liability." Yet,

it relies only upon Rice's testimony that it conformed to contract specifications in regard to the heaters and the lighting at the job site.

Rice testified that "Turner would walk around and see if there was a spot that they felt was cold and ask us to install on the spot heaters." Rice tr at 30. While he claimed that he never received any complaints about the height of the heaters, knew of no other accidents involving the heaters, and never moved or repositioned any of the heaters until they were removed entirely, Rice said that he "brought it [the lowered height of the ground floor heater] to Turner's attention." *Id.* at 43. He said that Turner "accepted it." *Id.* at 76. He admitted that there was no discussion of fire codes or building codes in regard to placement of the heaters, and that he was not familiar with any that might pertain. *Id.* at 73. Thus, Five Star's responsibility for locating and installing the heater remains to be determined.

Rice stated that Five Star placed "caution tape" on every heater that it installed, although he was unable to confirm that he had seen caution tape on the heater at issue. *Id.* at 66. The tape was utilized "[s]o people could see that these were heaters, and heaters are hot and people can understand they are heaters, and the lines were 480-volt." *Id.* at 80. He explained that Five Star was "not asked to hang tape from it. I hung tape to make it safer." *Id.* at 86. When shown a photograph of the purported accident site, he was only able to identify the knot remaining on one corner of the heater, of four, where the yellow caution tape had been affixed. *Id.* at 84-85. No more tape remained on the heater. Five Star admittedly understood the danger presented by the heaters, and how it responded is open to dispute.

Turner and DASNY argue against dismissal of plaintiff's Labor Law § 241(6) claim against Five Star. However, plaintiff has waived this claim argument. Therefore, there is no need for this Court to consider Turner and DASNY's arguments relating to this issue.

In conclusion, summary judgment on the claims of Five Star's alleged negligence is inappropriate at this time. Five Star's motion to dismiss the complaint as against it is denied. Consequently, the third-party action as against it cannot be dismissed without a finding that it is not liable for plaintiff's injuries.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendants/third-party plaintiffs Turner Construction Company and Dormitory Authority of the State of New York i/s/h/a New York State Dormitory Authority, pursuant to CPLR 2221 (d), for leave to reargue the decision of the court, dated April 25, 2014 (mot. seq. 004), is granted with respect to that branch of the motion which sought summary judgment pursuant to Labor Law § 241 (6) and, upon reargument, the motion for summary judgment dismissing the Labor Law § 241 (6) claim is denied; and it is further,

ORDERED that the motion by defendant/third-party plaintiff Turner Construction Company,, pursuant to CPLR 2221 (d) (mot. seq. 004), is granted to the extent that the branch of the motion seeking reargument of its motion seeking contractual indemnification is granted and, upon reargument, said movant is entitled to conditional summary judgment on its contractual indemnification claims against Five Star and Enclos; and it is further,

ORDERED that the motion by defendant/third-party plaintiff Dormitory Authority of the State of New York i/s/h/a New York State Dormitory Authority, pursuant to CPLR 2221 (d) (mot. seq. 004), is granted to the extent that the branch of the motion seeking reargument of its motion

seeking contractual indemnification is granted and, upon reargument, said movant is entitled to conditional summary judgment on its contractual indemnification claims against Five Star and Enclos; and it is further,

ORDERED that the motion by defendant/third-party defendant Five Star Electric Corp., pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it (mot. seq. 005) is granted, except that the claim of negligence and the claim pursuant to Labor Law § 200 against it shall continue; and it is further,

ORDERED that the motion by defendant and third-party defendant Five Star Electric Corp., pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint is denied; and it is further,

ORDERED that this constitutes the decision and order of this court.

DATED: March 24, 2015

ENTER:

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT