SHORT FORM ORDER

State of New York Supreme Court
Suffolk County I.A.S. Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

Mot. Seq. Nos.: 001 - MG
002 - MD
003 - MD
004 - XMG

x----------x
R. KENNETH BARNARD, as Trustee of the Estate of MICHAEL R. MATHESON and CINDY L. MATHESON,

Plaintiffs,

- against -

MICHAEL S. KRUG, INC., NASSAU SUFFOLK LUMBER & SUPPLY CORPORATION and "JOHN DOE" intended to be the operator of the truck and whose identity is not presently known,

Defendants.
x----------x

x----------x
MICHAEL S. KRUG, INC.,

Third-Party Plaintiff,

- against -

MCM HOMES, INC.,

Third-Party Defendant.
x----------x

INDEX NO.: 23450/2011

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Upon the following papers numbered 1 to 75 read on these motions for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13, 14 - 32 ; Notice of Cross Motion and supporting papers 33-46, 47-59; Answering Affidavits and supporting papers 60-61,62- 63, 64-65, 66- 67, 68-69 ; Replying Affidavits and supporting papers 70-71,72-73, 74-75; Other Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by Defendant Nassau Suffolk Lumber & Supply Corporation, the motion (002) by Defendant/third-party Plaintiff Michael S. Krug, Inc., the cross motion (003) by third-party Defendant MCM Homes, Inc., and the cross motion (004) by Plaintiff R. Kenneth Barnard are consolidated for the purposes of this determination; and it is

ORDERED that the motion by Defendant Nassau Suffolk Lumber & Supply Corporation for summary judgment dismissing the Labor Law claims and related cross claims against it is granted; and it is

ORDERED that the motion by Defendant/third-party Plaintiff Michael S. Krug, Inc. for, inter alia, summary judgment dismissing the complaint against it is denied; and it is

ORDERED that the cross motion by third-party Defendant MCM Homes, Inc. for summary judgment dismissing the third-party claims and cross claims against it denied; and it is

ORDERED that the cross motion by Plaintiff R. Kenneth Barnard for partial summary judgment in his favor on the issue of liability with respect to the Labor Law §240 (1) claim is granted.

Michael Matheson commenced this action to recover damages for injuries he allegedly sustained on November 20, 2010 while working on a project to construct a two story addition to a residence located at 7 Abbington Road, Lloyd Harbor, New York. The accident allegedly occurred when a structural support beam known as a "Better Header" fell and struck Michael Matheson while it was being hoisted via a boom truck to the second floor of the addition. At the time of the accident, Plaintiff was the owner and president of third-party Defendant MCM Homes, Inc. ("MCM"), which had been hired by Defendant/third-party Plaintiff Michael S. Krug, Inc. ("Krug") to perform general framing services. Krug was the general contractor for the project. Defendant Nassau Suffolk Lumber & Supply Corporation ("NSL") was retained by Krug to supply and deliver several support beams to the premises on the day of the accident. By way of his bill of particulars, Plaintiff alleges causes of action against the Defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). The bill of particulars also asserts a derivative claim by Plaintiff's wife, Cindy Matheson, for loss of consortium and reimbursement of medical expenses.

Krug and NSL joined the action asserting various defenses and cross claims against each other. On July 2, 2010, Krug commenced the third-party action against MCM. In its answer MCM asserts counterclaims against Krug and cross claims against NSL. Following joinder, Michael Matheson and Cindy Matheson filed for Chapter 7 bankruptcy protection. Thereafter, by so-ordered stipulation, their bankruptcy trustee, R. Kenneth Barnard, was substituted as Plaintiff in the action. The parties conducted discovery and the note of issue was filed on December 4, 2014.

NSL now moves for summary judgment dismissing the Labor Law claims and related cross claims against it. Although NSL concedes that a triable issue exists as to its common law liability, it argues that the Labor Law claims and related cross claims against it should be dismissed because it was neither an owner, contractor, or agent, and had no authority to control the manner in which Michael Matheson (hereinafter "Matheson") choose to unload the plywood. MCM opposes the motion, arguing that NSL violated the requirement of Labor Law §200 to maintain a safe workplace, because it had actual notice that the header beam was not secured to the boom's fork. MCM also asserts that NSL negligently created the conditions which caused the accident, because its employee continued to lower the header despite protests by MCM's employees to stop. Krug moves for summary judgment dismissing the complaint against it on the ground Plaintiff's own conduct, specifically the manner in which he directed the boom truck operator to lower and place the support header, was the sole proximate cause of his injuries. Alternatively, Krug moves for summary judgment on its third-party claim for common law indemnification against MCM, arguing that it neither controlled, directed or supervised Matheson's work, and that it should be permitted to obtain common law indemnification against MCM where, as in this case, Matheson, the owner, president and sole employee of MCM, failed to obtain workers' compensation insurance to cover his work during the project.

MCM concedes that it is not entitled to the protection of the Workers' Compensation Law under the circumstances of this case. However, it opposes Krug's motion on the basis triable issues exist as to whether Krug, the general contractor for the project, retained actual supervisory control over MCM's work and, if so, whether its negligent conduct of electing to use a boom truck –which, unlike a crane, had no mechanism to secure the header – to hoist the header precipitated the accident. MCM cross-moves for summary judgment dismissing the third-party and cross claims against it, arguing Krug's actual supervision of MCM's work and its negligence in selecting a hoisting method that did not secure the header precludes it from obtaining either common law indemnification or contribution in relation to the accident. MCM further asserts that NSL is precluded from obtaining common law indemnification or contribution against it, since NSL had actual notice of the defective nature of its hoisting mechanism and negligently created the emergency situation that gave rise to the subject accident. NSL opposes MCM's motion on the ground triable issues exist as to whether MCM played a role in determining the method of delivery of the header, and whether the conduct of its employee, Matheson, caused or contributed to the happening of the accident.

By way of a separate motion, Plaintiff cross-moves for partial summary judgment on the Labor Law §240 (1) claim against Krug, arguing that, as the general contractor for the project, Krug should be held liable for Matheson's injuries based on its failure to ensure that the header was secured to the boom when it was being hoisted to second floor of the addition. Krug opposes the motion on the ground Matheson's own conduct, specifically the manner in which he directed the boom truck operator to lower and place the header, was the sole proximate cause of his injuries.

Initially, the court notes that the motion by NSL for summary judgment dismissing the Labor Law claims and related cross claims against it is granted. Labor Law §§ 240 and 241 are expressly limited to "contractors and owners and their agents." Moreover, Labor Law § 200 has been construed to be a codification of common law duties owed by landowners and general contractors to maintain a safe workplace (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 505, 601 NYS2d 49 [1993]). Therefore, as it is undisputed that NSL, which was hired to merely supply and deliver support beam headers to the worksite, was neither an owner, contractor, or agent possessed with the authority to control Plaintiff's work or to enforce safety procedures, the Labor Law claims against it are inactionable (*see* ***Gonzalez v Glenwood Mason Supply Co., Inc.***, 41 AD3d 338, 839 NYS2d 74 [1st Dept 2007]; ***Lopez v Strober King Bldg. Supply Ctrs.***, 307 AD2d 681, 763 NYS2d 176 [3d Dept 2003]; ***Townsend v Nenni Equip. Corp.***, 208 AD2d 825, 618 NYS2d 378 [2d Dept 1994]). In opposition, the assertions by MCM that the conduct of NSL's operator may have caused the accident are insufficient to raise a triable issue warranting denial of the motion to dismiss the Labor Law claims (*see* ***Gonzalez v Glenwood Mason Supply Co., Inc.***, *supra*; ***Lopez v Strober King Bldg. Supply Ctrs.***, *supra*). However, the common law claims and related cross claims are continued against NSL (*see e.g.* ***Brownell v Blue Seal Feeds, Inc.***, 89 AD3d 1425, 932 NYS2d 623 [4th Dept 2011] [Although the Labor Law claims against a steel delivery company were dismissed, the court continued the common law negligence claims against it finding triable issues as to whether the negligence of its loader and operator was a proximate caused the accident]).

Labor Law §240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work being performed at the time of the accident (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The hazards contemplated by Labor Law § 240(1) "are those 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 the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). In cases involving falling objects, a Plaintiff must demonstrate that the object fell while being hoisted or secured, because of the

absence or inadequacy of a safety device of the kind enumerated in the statute (*see* ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 727 NYS2d 37 [2001]; ***Novak v Del Savio***, 64 AD3d 636, 883 NYS2d 558 [2d Dept 2009]). While not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1) (*see* ***Narducci v Manhasset Bay Assoc.***, *supra*), a Plaintiff who is injured by such an object may recover where he or she shows that the object being hoisted required securing for the purposes of the undertaking (*see* ***Quattrocchi v F.J. Sciame Constr. Corp.***, 11 NY3d 757, 866 NYS2d 592 [2008]; ***Narducci v Manhasset Bay Assoc.***, *supra*; ***Novak v Del Savio***, *supra*).

Here, Plaintiff established prima facie entitlement to partial summary judgment on the Labor Law §240 (1) claim by submitting evidence that Krug failed to fulfill its nondelegable duty as the general contractor to ensure that the support header which fell and struck Matheson was secured for the purposes of the undertaking (*see* ***Narducci v Manhasset Bay Assoc.***, *supra*; ***Mora v Boston Props., Inc.***, 79 AD3d 1109, 913 NYS2d 578 [2d Dept 2010]; ***Jock v Landmark Healthcare Facilities, LLC***, 62 AD3d 1070, 879 NYS2d 227 [3d Dept 2009]; ***Gonzalez v Glenwood Mason Supply Co., Inc.***, *supra*; ***Costa v Piermont Plaza Realty, Inc.***, 10 AD3d 442, 781 NYS2d 372 [2d Dept 2004]). Significantly, it is undisputed that Krug was the general contractor for the project, and that the support beam was not secured to the fork of the boom being used to hoist it to the second floor of the addition. Given the nature of the work being performed, there was a significant risk that the unsecured structural header could fall and injure a worker such as Matheson. In opposition, Krug failed to raise a triable issue of fact warranting denial of the motion, as Matheson's conduct cannot be regarded as the sole proximate cause of the accident where, as in this case, he was not provided with appropriate safety devices designed to secure the header to the boom (*see* ***Ortiz v 164 Atl. Ave., LLC***, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; ***Valensisi v Greens at Half Hollow, LLC***, 33 AD3d 693, 823 NYS2d 416 [2d Dept 2006]). Furthermore, once a Labor Law §240 (1) violation has been established, alleged proof of a Plaintiff's contributory negligence will not defeat his prima facie showing (*see* ***Raquet v Braun***, 90 NY2d 177, 184, 659 NYS2d 237 [1997]), and the general contractor will be held liable for such violation whether or not it exercised actual control over the work being performed at the time of the accident (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Jock v Landmark Healthcare Facilities, LLC***, *supra*; ***Costa v Piermont Plaza Realty, Inc.***, *supra*). Therefore, the cross motion for partial summary judgment on the Labor Law § 240(1) claim as against Krug is granted.

In light of the above determination granting partial summary judgment on the Labor Law §240 (1) claim against Krug, the branch of Krug's motion seeking dismissal of the same is denied. With respect to the branch of Krug's motion seeking summary judgment on its third-party common law indemnification claim, as conceded by MCM, it is precluded from asserting the protections of Workers' Compensation Law §11 inasmuch as it failed to procure workers compensation insurance on behalf of the Plaintiff, its sole owner and president at the time of the accident (*see* ***Sarmiento v Klar Realty Corp.***, 35 AD3d 834, 829 NYS2d 134 [2d

Dept 2006]; *see also* Workers' Compensation Law §2 [4]). Moreover, since MCM has a separate and distinct existence apart from Matheson, it cannot avoid Krug's third-party common law indemnification claim (*see* ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; ***Quinlan v Eastern Refractories Co.***, 217 AD2d 819, 629 NYS2d 819 [3d Dept 1995]).

A party seeking common law indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see* ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; ***Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]). Moreover, "common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor 'was either negligent or exclusively supervised and controlled Plaintiff's work site'" (***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 685, 790 NYS2d 25 [2d Dept 2005]).

Here, Krug failed to meet its prima facie burden of establishing that it was not guilty of some negligence beyond statutory liability, as the adduced evidence raises triable issues as to whether Krug was responsible for determining the use of the boom truck rather than a crane to hoist the support header and, if so, whether it exercised more than mere supervisory control over Matheson's work at the time of the accident (*see* ***Creamer v Amsterdam High Sch.***, 277 AD2d 647, 716 NYS2d 452 [3d Dept 2000]; ***Anastasio v Kiska Constr. Corp.-USA***, 263 AD2d 442, 692 NYS2d 696 [2d Dept 1999]; ***Khan v Convention Overlook***, 232 AD2d 529, 648 NYS2d 946 [2d Dept 1996]). Significantly, it is undisputed that Krug was responsible for determining the use of the boom truck to hoist the support header onto the second floor of the addition even when Matheson questioned whether the use of a crane would have been a safer alternative. Under these circumstances, a triable issue exists as to whether Krug's rejection of Matheson's request for a safer alternative means of hoisting the support headers, which may have prevented the subject accident, constituted more than vicarious negligence and exceeds mere statutory liability (*see* ***Khan v Convention Overlook***, *supra*; ***McGlynn v Brooklyn Hospital-Caledonian Hosp.***, 209 AD2d 486, 619 NYS2d 54 [2d Dept 1994]). Furthermore, inasmuch as controlling and supervising a work site has been found to include the provision of safety equipment for a subcontractor's employees, a triable issue also exists as to whether MCM was in exclusive control of the worksite and Matheson's work at the time of the accident (*see* ***Creamer v Amsterdam High Sch.***, *supra*; ***McGlynn v Brooklyn Hospital-Caledonian Hosp.***, *supra*). Accordingly, the branch of Krug's motion seeking summary judgment on its third-party common law indemnification claim against MCM is denied.

Finally, the cross motion by MCM for summary judgment dismissing the third-party claim and the cross claims against it is denied. As noted above, MCM concedes that it cannot avail itself of the protections of the Workers' Compensation Law, since it failed to procure such insurance on behalf of Matheson (*see* ***Sarmiento v Klar Realty Corp.***, *supra*; ***Perri v Gilbert Johnson Enters., Ltd.***, *supra*). Moreover, MCM failed to establish its prima facie entitlement to summary judgment dismissing the third-party claims and cross claims against it, as a triable issue remains as to whether MCM and its who participated in directing NSL's boom operator where, how, and when to lower the support beam were partially at fault for the happening of the accident.

DATED: FEBRUARY 11, 2016
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION