

Wunderlich v Turner Constr. Co.

2016 NY Slip Op 30616(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 157126/12

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

DECISION AND ORDER

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PATRICK WUNDERLICH and ANGELA WUNDERLICH,

Index No.: 157126/12
Motion Seq. Nos. 005
and 006

Plaintiffs,

-against-

TURNER CONSTRUCTION COMPANY, SAFWAY
SERVICES, LLC, MULVEY CONTRACTING, INC.,
MSG HOLDINGS, LP, AND LVI ENVIRONMENTAL
SERVICES, INC.,

Defendants.

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LVI ENVIRONMENTAL SERVICES INC.,

Third-party Plaintiff,

-against-

IRWIN SEATING COMPANY,

Third-party Defendant.

-----X
JOAN KENNEY, J.S.C.:

In a case involving a worker who was injured while installing a platform at Madison Square Garden, defendants Turner Construction Company (Turner) and MSG Holdings, L.P. (MSG), as well as third-party defendant Irwin Seating Company (Irwin) (together, the Turner defendants) move jointly, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against Turner and MSG, as well as the third-party complaint (motion seq. No 006). Plaintiff Patrick Wunderlich cross-moves for partial summary judgment against Turner and MSG as to liability on his Labor Law § 240 (1) claim, as well as for leave to amend the complaint to allege that defendants violated an additional Industrial Code provision. Defendant Mulvey

Contracting, Inc. (Mulvey) also moves for summary judgement dismissing all claims and cross claims as against it (motion seq. No. 005). The motions are consolidated for disposition.

BACKGROUND

On September 10, 2010, plaintiff Patrick Wunderlich (plaintiff) was injured while working on a renovation project at Madison Square Garden. Plaintiff, while working for nonparty Wellington, was installing an ADA platform when he tripped over a threaded rod (which is also referred to as a metal seat anchor) and fell. More specifically, plaintiff was carrying a detached leg of the handicap platform – he approximated the leg to be 10 feet long and between 30 and 40 pounds – down stairs in the area where he was installing the platform, when: “I rolled my ankle on a threaded rod sticking about – sticking out about two and a half, three inches out of the riser, and came down on my knee and back” (plaintiff’s tr at 86).

The threaded rod was left behind after the demolition of a seating area performed by defendant LVI Environmental Services (LVI). Matt Hyde (Hyde), the superintendent for Turner, which was the general contractor on the project, testified that only LVI participated in the demolition of the subject seating area and that the threaded rod should have been removed during the demolition (Hyde tr at 22, 41, 77-78).

Turner hired Irwin to manufacture and install new seating in the area where LVI removed the old seats. Irwin, in turn, hired Wellington, plaintiff’s employer, to install the seating. Nonparty Irwin Seating, an entity related to Irwin, hired Mulvey, by verbal agreement, to help Wellington install the seating.

Plaintiff filed the complaint in October 2012, alleging defendants’ liability under Labor Law §§ 240 (1) and 241 (6), as well Labor Law § 200 and common-law negligence. Plaintiff’s wife, Angela Wunderlich, also brings derivative claims for loss of her husband’s services.

DISCUSSION

I. Labor Law § 200 and Common-law Negligence

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” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, “liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). “General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed” (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor “is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, “whether [a defendant]

controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

A. The Turner Defendants

The Turner defendants argue that the threaded bolt falls into the methods and materials category. This argument is counterintuitive, since the threaded bolt was a permanent feature of the structure that was supposed to have been removed by LVI, the demolition contractor. However, the Turner defendants rely on history more than logic, citing two First Department cases, *Dalanna v City of New York* (308 AD2d 400 [1st Dept 2003]) and *O'Sullivan v IDI Constr. Co., Inc.*, (28 AD3d 225 [1st Dept 2006], *aff'd* 7 NY3d 805) which held, respectively, that a protruding bolt and a protruding electrical pipe were "method and materials" hazards. In *O'Sullivan*, the Court held that the dangerous condition was caused by a failure "to safeguard workers against the tripping hazard" created by a protruding electrical pipe that was an integral part of plaintiff's concrete work (28 AD3d at 226). In *Dalanna*, the Court found that plaintiff's employer failed to remove a bolt that was temporarily installed for the subject project, and the dangerous condition was, accordingly, caused by the method of plaintiff's work.

In both *O'Sullivan* and *Dalanna*, the dangerous conditions were created by the work of the plaintiff's employer. In our case, neither the plaintiff himself, nor his employer, Wellington, caused the dangerous condition. Unlike *O'Sullivan*, it was not incumbent on plaintiff or his employer to cover the threaded bolt because the threaded bolt was not an integral part of the job. Unlike *Dalanna*, it was not the responsibility of plaintiff or his employer to remove the danger-causing bolt, but instead, it was the responsibility of the demolition contractor. Thus, it is clear that a protruding threaded bolt whose presence on the jobsite was not caused by the method or

materials of plaintiff's work is a dangerous condition. Accordingly, it is immaterial whether defendants had supervisory control over plaintiff's work.

Here, the Turner defendants fail to make a prima facie showing because they submit no evidence that they lacked notice of the defective condition.¹ Even if they had, there would certainly be a question of fact as to whether they had constructive notice of the threaded bolt (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [holding that "(c)onstructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition"]). Accordingly, the branch of the Turner defendants' motion that seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claims against them is denied.

B. Mulvey

As plaintiff does not oppose Mulvey's application, it has abandoned its Labor Law § 200 and common-law negligence claims against it (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [holding that failure to address a claim indicates an intent to abandon it as a basis for liability]).

II. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

"All contractors and owners and their agents . . . 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."

¹ While it would appear that Irwin is not responsible under section 200, as it was neither the general contractor nor the owner, the Turner defendants make no arguments specific to Irwin and, thus, fail to make a prima facie showing of entitlement to judgment on its behalf.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

A. The Turner Defendants

The Turner defendants argue that plaintiff's claims under Labor Law § 240 (1) should be dismissed because there was no statutory violation, as the subject accident did not involve a risk arising from a physically significant elevation difference. Plaintiff, in opposition, does not address Labor Law § 240 (1). Typically, this would signify that plaintiff has abandoned his claim under this section (*see Perez*, 123 AD3d at 520). However, plaintiff seeks partial summary judgment under this section in its cross motion.

Plaintiff argues that Turner and MSG violated the statute by failing to provide him with adequate safety devices, such as a forklift or a pallet jack. In support, plaintiff offers the transcript of Irwin's Don Nestor (Nestor), who testified speculatively that forklifts are sometimes used to do the kind of work that plaintiff was engaged in (Nestor tr at 50).

Plaintiff's section 240 (1) claim, however, breaks down before we reach the question of proper safety equipment, as plaintiff fails to clear the threshold question of whether his accident

arose from an elevation-related risk. While gravity is, one way or another, involved in every workplace accident, courts have repeatedly held that trip and fall accidents, such as the one plaintiff suffered, do not qualify as the type of risk contemplated by the statute (*see e.g. Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015]; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841 [1994]); *Reyes v Magnetic Constr., Inc.*, 83 AD3d 512 [1st Dept 2011])

In *Nicometi*, where the plaintiff was injured when the stilts he was wearing to perform ceiling insulation slipped on ice, the Court of Appeals dismissed the plaintiff's claims under this section, holding that "regardless of the type of safety device involved, liability arises under Labor Law § 240 (1) only where the plaintiff's injuries are the direct consequence of an elevation-related risk, not a separate and ordinary tripping or slipping hazard" (25 NY3d at 98-99 [internal quotation marks and citation omitted]). The ice in *Nicometi* is analogous to the threaded rod that plaintiff tripped over, except here there was no elevation differential similar to the one created by the stilts in *Nicometi*.

Thus, plaintiff's injuries were not the direct result of an elevation-related risk. Plaintiff's unpersuasive reliance on *Kempisty v 246 Spring St., LLC* (92 AD3d 474 [1st Dept 2012]) does not alter this conclusion. *Kempisty* stands for the proposition that, in the falling object context, a plaintiff can make a prima facie showing of a violation under the statute even if the falling object only fell a short distance (*id.* at 474). It is inapplicable because in *Kempisty* the plaintiff's injury involved a falling object, while here plaintiff's injury involved his own fall (*id.*).

As plaintiff's injuries did not result from an elevation-related risk, there is no liability under section 240 (1). Accordingly, the branch of the Turner defendants' motion seeking dismissal plaintiff's claims under the statute is granted, and the branch of plaintiff's cross motion seeking partial summary judgment under it is denied.

B. Mulvey

Mulvey is correct that it is not a proper Labor Law defendant for purposes of sections 240 (1), as it was neither the property owner, nor the general contractor or the agent of either. Thus, because plaintiff has abandoned its claim and because Mulvey is not a proper defendant, plaintiff's Labor Law § 240 (1) claim must be dismissed as against it.

III. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

“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.”

It is well settled that this statute requires owners and contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists “even in the absence of control or supervision of the worksite” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), “comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action” (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that “[t]he

Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

A. The Turner Defendants

The Turner defendants move to dismiss a number of alleged Industrial Code violations, including ones involving 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-1.7 (f), 12 NYCRR 23-2.1, 12 NYCRR 23-2.1 (a), and 12 NYCRR 23-1.30. However, in opposition, plaintiff only defends 12 NYCRR 23-1.7 (e) (2), 12 NYCRR 23-1.7 (f), and 12 NYCRR 23-2.1 (a) (2). Thus, plaintiff’s allegations under the other Industrial Code regulations are abandoned (*see Kempisty*, 92 AD3d at 475 [1st Dept 2012] [holding that “it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

12 NYCRR 23-1.7 (e) (2) involves “[t]ripping and other hazards” in “working areas” and provides that “[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.” Initially, this regulation is sufficiently specific to serve as a predicate to liability under section 241 (6) (*see e.g. Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 984 [2nd Dept 2014]).

The Turner defendants argue that the provision is not applicable, relying on the affidavit of Bernie Lorenz (Lorenz), its expert, and *Dalanna* (308 AD2d 400). Lorenz opined that:

the subject bolt, which was permanently embedded in the concrete stadia riser, was not dirt, debris, scattered tools or materials or a sharp projection, as provided in New York Industrial Code Section 23-1.7 (e) (2). Plaintiff identified the bolt in the photograph attached hereto as Exhibit “E” as similar to the one that caused his accident. These bolts were permanently embedded in the concrete and were

designed to be in specific areas in the concrete and were designed to be in specific areas in the stadia risers to anchor the seats. They are metal bolts and are clearly not dirt or debris. They also cannot be classified as scattered tools and materials because they were not scattered as they were permanently installed in concrete in specifically measured and designated areas The bolt is also clearly not a sharp projection. Sharp projections in Section 23-1.7 (e) (2) [are] meant to govern projections that extend beyond a surface that are “sharp.” This would include sharp nails, spikes, steel, etc. If this code provision meant to cover all projections, it would not include the term “sharp.” Rather, it would have said “and from all projections.” In this case, the bolt is clearly not sharp Rather, it has a flat end that is not sharp. Therefore, this section does not apply

(Lorenz affidavit, ¶¶ 9-11).

Meanwhile, *Dalanna* held that a protruding bolt, temporarily embedded in the ground, “was not dirt, debris, scattered tools and materials or a sharp projection” and, thus, the regulation was not applicable to the worker’s accident (308 AD2d at 401 [internal quotation marks omitted]).

In opposition, plaintiff argues that the threaded bolt was either debris or a sharp projection, or even a scattered tool, under the regulation. The Turner defendants’ reliance on *Dalanna*, plaintiff argues, is misplaced because in *Dalanna* the subject bolt was installed by the plaintiff’s employer and was not an object that remained after a demolition. This is a crucial distinction, plaintiff argues, because of *Lenard v 1251 Ams. Assoc.* (241 AD2d 391 [1st Dept 1997]).

In *Lenard*, a door stop that was attached to the floor remained after doors and partition walls were dismantled; the Court held that the door stop was both debris and a sharp projection under 12 NYCRR 23-1.7 (e) (2) (*id.* at 393). In doing so, the Court defined “sharp projection” under this regulation as “any projection that is sharp in the sense that it is clearly defined or distinct” (*id.* [internal quotation marks omitted]). The Court found that this broad definition was appropriate, as a matter of construction, since a

much narrower definition was specifically articulated for 12 NYCRR 23-1.7 (e) (1), which limits “sharp projections” to those that “could cut or puncture any person.”

The facts here more closely resemble *Lenard* than *Dalanna*, as the threaded bolt was not installed by plaintiff’s employer and remained after a demolition. Thus, there is, at least, a question of fact as to whether the threaded bolt constituted a “sharp projection,” as that term is construed under the 12 NYCRR 23-1.7 (e) (2). The narrow interpretation of this term promulgated by Lorenz, the Turner defendants’ expert, is clearly contradicted by the Appellate Division in *Lenard*, which defined “sharp projection” as one that is “clearly defined or distinct” (241 AD2d at 393). As there remains a question of fact as to the applicability of 12 NYCRR 23-1.7 (e) (2), the branch of the Turner defendants’ motion that seeks dismissal of plaintiff’s section 241 (6) claim as against them must be denied. For the sake of completeness, however, the court will analyze the two other regulations that plaintiff defends.

12 NYCRR 23-1.7 (f), entitled “Protection from general hazards; Vertical passage” provides: “Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.”

Without citing to any case law, defendants rely on Lorenz’s opinion in arguing that this regulation is inapplicable:

“Plaintiff testified that the area in which he was working at the time of his alleged accident was a working area and not a passage or pathway. Furthermore, Plaintiff testified that he would go up and down the concrete stadia risers when working in the area. Therefore, he was able to access the different areas of the working space by going up the concrete stadia risers. He also claimed to have accessed this

working area by using separate stairs near the aisle. Therefore, Plaintiff had adequate means to access all working areas. Additionally, Plaintiff alleged that he was injured at his working area – not while accessing the working area – and that any use of the stairs was inconsistent with the work he was performing at the time of his alleged incident”

(Lorenz affidavit, ¶¶ 13-14 [internal citations]).

Plaintiff argues that Lorenz defines the regulation too narrowly. Plaintiff relies on *Sponholz v Benderson Prop. Dev.* (273 AD2d 791, 792 [4th Dept 2000]), which involved an unsteady stairway, and held that “[t]here is a triable issue of fact whether defendants provided a safe stairway for plaintiff to use.” Here, however, plaintiff was not on a stairwell, rickety or otherwise. This regulation applies to movement between floors and that is not applicable to plaintiff’s accident, as he was walking over a demolished seating area in a sports arena. Accordingly, plaintiff’s allegations under 12 NYCRR 23-1.7 (f) are dismissed. 12 NYCRR 23-2.1 (a) (2), entitled “Storage of material or equipment” provides:

“Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.”

The Turner defendants rely on Lorenz, who states that “Since the condition that Plaintiff alleged to have caused his accident is a seat anchor bolt that was permanently embedded into the concrete stadia riser and functioned to keep seats in place, it is not building materials or equipment that would be stored.” Here, despite plaintiff’s argument that the threaded bolt could be considered equipment, it is not, and this regulation is plainly inapplicable as it is illogical to require defendants to store a threaded bolt that was

permanently attached to the structure. Accordingly, plaintiff's allegations under 12 NYCRR 23-2.1 (a) (2) are dismissed.

B. Plaintiff's Proposed Allegations Under 12 NYCRR 23-1.7 (e) (1)

Plaintiff seeks to amend the complaint to add a claim that Turner and MSG violated an additional Industrial Code regulation, 12 NYCRR 23-1.7 (e) (1). "It is well established that leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay (*Anoun v City of New York*, 85 AD3d 694, 694 [1st Dept 2011] [internal quotation marks and citation omitted]). However, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted," and "[w]here a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009] [internal citation omitted]).

12 NYCRR 23-1.7 (e) (1), like 12 NYCRR 23-1.7 (e) (2), about which there is a question of fact as to applicability, concerns tripping hazards, but in passageways instead of working areas. It provides: "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered." Here, plaintiff's testimony makes clear that he tripped in the area where he was installing the platform. Thus, as plaintiff's accident took place in a working area rather than a passageway, this proposed amendment to the complaint is plainly without merit. Accordingly, the branch of plaintiff's cross motion that seeks to amend the complaint is denied.

C. Mulvey

Plaintiff's Labor Law § 241 (6) must be dismissed against Mulvey. As discussed above, Mulvey is not a proper Labor Law defendant and plaintiff has abandoned its claims against it.

IV. The Cross Claims Against Mulvey

The record makes clear, and no party disputes, that Mulvey was neither the owner nor the general contractor on this project. As discussed above, plaintiff has abandoned all claims against Mulvey. All that remains, then, are cross claims from the Turner defendants and LVI for indemnification and contribution. As to contractual indemnification, it is clear, since Mulvey was hired orally by nonparty Irwin Seating, that all contractual indemnification claims should be dismissed.

Common-law indemnification is an equitable remedy that "imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). Contribution, which is provided for by CPLR 1401, similarly "is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [internal quotation marks and citation omitted]). Here, in order for Mulvey to liable for contribution or common-law indemnification, there must be a question of fact as to whether Mulvey was negligent.

There is no such question here, where the subject defect was created by a failure to remove a threaded bolt during the demolition process. It is undisputed that Mulvey had no role in the demolition process. LVI, who was involved with the demolition, opposes Mulvey's

motion along with the Turner defendants. Both LVI and the Turner defendants incorrectly assume that the dangerous condition in this case involved the methods and materials of plaintiff's work. However, as discussed above, the dangerous condition was a defect of the premises. Both LVI and the Turner defendants hang their opposition on the contention that there is a question of fact as to whether Mulvey had supervisory control over plaintiff's work. However, as discussed above, that question is immaterial to a Labor Law § 200 and common-law negligence inquiry where the subject condition is a defect in the premises.

Mulvey is not liable under Labor Law § 200, as it was neither an owner nor a general contractor. As for common-law negligence, it is equally plain that Mulvey is not responsible for a defect that it did not cause on a property that it did not own (*see Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005] [outlining the general contours of premises liability]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002] [listing the narrow circumstances, inapplicable here, where a contractor may be liable to a third party in negligence]). As Mulvey was not negligent in plaintiff's accident, all cross claims for common-law indemnification and contribution must be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendant Mulvey Contracting, Inc.'s motion dismissing all claims and cross claims as against it is granted; and it is further

ORDERED that defendants Turner Construction Company, defendant MSG Holdings, L.P., and third-party defendant Irwin Seating Company's joint motion for summary judgment is granted only to the extent that plaintiff's claims under Labor Law § 240 (1) are dismissed; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment and to amend the complaint is denied.

Dated: *April 12, 2016*

ENTER:



Hon. JOAN KENNEY, J.S.C.