

Graziano v Source Bldrs. & Consultants, LLC

2016 NY Slip Op 33019(U)

April 6, 2016

Supreme Court, Suffolk County

Docket Number: 12-4264

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

INDEX No. 12-4264

CAL. No. 14-020060T

**ORIGINAL
WHEN BLUF**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

APR 12 2016

PRESENT:

HON. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 2-10-15 (004)
MOTION DATE 4-7-15 (005, 006, 007)
MOTION DATE 4-14-15 (009)
MOTION DATE 5-26/15 (010)
ADJ. DATE 11-10-15
Mot. Seq. #004- MotD #008- MD
#005- MotD #009- MotD
#006- MG
#007- MD

-----X
GUY GRAZIANO,

Plaintiff,

- against -

SOURCE BUILDERS & CONSULTANTS, LLC,
VICTIMS INFORMATION BUREAU OF
SUFFOLK, INC., ROLAND'S ELECTRIC, INC.,

Defendants.

-----X
SOURCE BUILDERS & CONSULTANTS, LLC,

Third-Party Plaintiff,

- against -

VENTRE FIRE PROTECTION, INC., CAPITAL
FIRE SPRINKLER CO., OF L.I., LLC and
CAPITAL FIRE SPRINKLER CO. OF L.I. LLC
d/b/a VENTRE FIRE PROTECTION INC,

Third-Party Defendants.

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Graziano v Source Builders
 Index No. 4264/12
 Page 2

VICTIMS INFORMATION BUREAU OF
 SUFFOLK, INC.,

Second Third-Party Plaintiff,

- against -

CAPITAL FIRE SPRINKLER d/b/a VENTRE
 FIRE PROTECTION,

Second Third-Party Defendant.

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 VARRIALE, LLP

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X

Upon the following papers numbered 1 to 198 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15, 16-27; Notice of Cross Motion and supporting papers 28-45, 46-59, 60-82, 83-96; Answering Affidavits and supporting papers 97-109, 110-120, 121-124, 125-128, 129-132, 133-134, 135-136, 137-139, 140-142, 143-145, 146-169; Replying Affidavits and supporting papers 170-171, 172-173, 174-175, 176-177, 178-179, 180-181, 182-184, 185-186, 187-188, 189-190, 191-192, 193-198; Other Memoranda of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (004) by defendant/third-party plaintiff Victims Information Bureau of Suffolk County, Inc., the motion (005) by defendant/third-party plaintiff Source Builders & Consultants, LLC, and the cross motions (006, 007, 008 and 009) by defendant Roland's Electric, Inc., plaintiff Guy Graziano, and third-party defendant Capitol Fire Sprinkler Co. of L.I., LLC, are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant/third-party plaintiff Victims Information Bureau of Suffolk County, Inc. for, inter alia, summary judgment dismissing the complaint and all cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by defendant/third-party plaintiff Source Builders & Consultants, LLC, for, inter alia, summary judgment dismissing the complaint and the cross claims against it is granted to extent indicated herein and is otherwise denied; and it is

ORDERED that the cross motion by Roland's Electric, Inc. for summary judgment dismissing the complaint and all cross claims against it is granted to extent indicated herein and is otherwise denied;

ORDERED that the cross motions by plaintiff Guy Graziano for partial summary judgment in his favor on the issue of liability as to his Labor Law §240(1) claim are denied; and it is

ORDERED that the motion by third-party defendant Capitol Fire Sprinkler Co. of L.I., LLC for, inter alia, summary judgment dismissing the cross claims and third-party claims against it is granted to extent indicated herein, and is otherwise denied.

Graziano v Source Builders
Index No. 4264/12
Page 3

Plaintiff Guy Graziano commenced this action to recover damages for personal injuries allegedly sustained on January 5, 2012, when he fell from a makeshift scaffold while attempting to install new sprinkler heads in the space above the drop ceiling in a hallway of a warehouse owned by defendant/third-party plaintiff, Victims Information Bureau of Suffolk County, Inc. ("VIBS"). The makeshift scaffold was comprised of a loose piece of plywood board placed across the top of the hallway's parallel walls. The accident allegedly occurred when plaintiff tripped over an electrical conduit wire while he was attempting to shimmy the scaffold board backwards along the hallway walls, and fell through the drop ceiling to the ground. VIBS allegedly hired defendant/third-party plaintiff Source Builders & Consultants, LLC ("Source Builders"), as the general contractors for the project. At the time of the accident plaintiff was employed by third-party defendant Capitol Fire Sprinkler Co. of L.I., LLC, d/b/a Ventre Fire Protection, Inc. (herein collectively referred to as "Ventre Fire"), a subcontractor hired by Source Builders to modify the warehouse's existing sprinkler system. Defendant Roland's Electric, Inc. ("Roland's Electric"), was retained by Source Builders to perform electrical and HVAC related services, and Levenbaum Associates, Inc., served as the project's architect. By way of an amended complaint, plaintiff alleges causes of actions against the defendants based upon common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6).

Defendants joined issue and asserted cross claims against each other for indemnification, contribution, and breach of contract. Shortly thereafter, plaintiff discontinued his action against Levenbaum Associates. On November 7, 2012, Source Builders commenced a third-party action against Ventre Fire. In its answer to the third-party complaint, Ventre Fire denied the claims against it and asserted counterclaims against Source Builders and cross claims against Roland's Electric. Subsequently, VIBS commenced a second third-party action against Ventre Fire. Ventre Fire answered the second third-party action, denying the claims against it and asserting counterclaims against VIBS.

VIBS now moves for summary judgment dismissing the complaint against it on the grounds plaintiff's conduct was the sole proximate cause of the accident, and that he recalcitrantly refused to use available safety equipment that would have prevented the accident. VIBS further argues that plaintiff's claims under the common law and Labor Law §§241 (6) and 200 should be dismissed, as it never controlled or supervised the manner or method of plaintiff's work, and he failed to allege the violation of any specific applicable sections of the Industrial Code. Alternatively, VIBS seeks summary judgment on its cross and third-party claims, arguing that its contracts with Source, Ventre Fire, and Roland's Electric all require contractual indemnification where, as in this case, the accident arose from their acts or omissions at the worksite.

Source Builders partially opposes VIBS' motion and moves for summary judgment dismissing plaintiff's complaint on nearly identical grounds. It further asserts that it is entitled to conditional summary judgment on its third-party contractual indemnification claim against Ventre Fire, since Ventre Fire exclusively controlled the means and methods of plaintiff's work and provided the materials and equipment he utilized during the project. Ventre Fire partially opposes both motions and seeks dismissal of the cross and third-party claims asserted against it, arguing that there is no evidence it intended to be bound by the unsigned subcontract which required it to indemnify Source Builders for plaintiff's injuries, that such third-party claims would, in any event, be barred by the Workers' Compensation Law, and that Source Builders was actively negligent in causing the subject accident. Ventre Fire joins the codefendants in seeking summary dismissal of the complaint.

Roland's Electric partially opposes VIBS's motion and cross-moves for dismissal of the complaint against it on the grounds plaintiff's conduct was the sole proximate cause of the accident, and that it neither controlled nor supervised plaintiff's work or created any inherently dangerous condition at the subject property. Roland's Electric also seeks dismissal of the cross claims against it, arguing that it was in no way responsible for plaintiff's accident.

Graziano v Source Builders
Index No. 4264/12
Page 4

Plaintiff opposes the motions and cross-moves for partial summary judgment in his favor on the issue of liability as against Source Builders. Plaintiff argues that the makeshift scaffold in question did not provide him adequate protection, and that Source Builders failed to supply him with any other safety device designed to prevent him from falling, such as side rails, harnesses, safety nets, or anchors. Plaintiff further asserts that liability under Labor Law §241(6) is established where, as in this case, 12 NYCRR 23-5 (j)(1), requiring that scaffolds be fitted with safety railings, has been violated. With respect to his Labor Law §200 claim, plaintiff argues that Source Builders should be held liable, because the accident arose out of the method and manner of his work, and Source Builders possessed the authority to direct and control such work. By way of a separate motion, plaintiff also moves for partial summary judgment on the issue of liability as against VIBS and Roland's Electric, arguing that, as owner of the building, VIBS had a nondelegable duty to ensure he was provided with adequate safety equipment and a safe place to work. Additionally, plaintiff contends that he should be granted partial summary judgment against Roland's Electric, as it was Roland's Electric's negligence in permitting the loose electrical wires to be left draped over the wall partitions in the hallway ceiling.

In opposition, the defendants argue that plaintiff failed to meet his prima facie burden on the motion. VIBS and Source Builders argue that plaintiff failed to prove his prima facie entitlement to summary judgment on his Labor Law §§240 (1) and 241(6) claims, because he failed to demonstrate that his own conduct was not the sole proximate cause of the accident. They further argue that they did not have authority or control over the methods or manner of plaintiff's work, and that they did not have actual or constructive notice of the alleged dangerous condition that caused his accident. Roland's Electric asserts that it did not have authority or control over the methods or manner of plaintiff's work, that it neither created nor had actual or constructive notice of the alleged dangerous condition, and that plaintiff's own conduct was the sole proximate cause of 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 performed (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240(1) requires that safety devices, such as scaffolds, be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see Beesimer v Albany Ave/Rte. 9 Realty*, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]).

Further, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law §240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). Liability does not attach where a plaintiff's conduct is the sole proximate cause of his or her own injuries, such as where adequate safety devices were readily available at the work site and the plaintiff knew he or she was expected to use them but for no good reason chose not to do so or misused them (*see Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 885 NYS2d 28 [1st Dept 2009]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554, 814 NYS2d 589 [2006]).

In addition, where an employer has made available adequate safety devices and an employee has been instructed to use them, such employee may not recover under the statute where his or her violation of the instructions was the sole proximate cause the accident (*see Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 790 NYS2d 74 [2004]). In such cases, an employee is said to be a recalcitrant worker. To assert this

Graziano v Source Builders
Index No. 4264/12
Page 5

defense, an employer must have specifically instructed the employee to use the safety device (*see Zong Mou Zou v Hai Ming Const. Corp.*, 74 AD3d 800, 902 NYS2d 610 [2d Dept 2010]). Once an employer provides such instruction, it does not have a continuing duty to insist that a recalcitrant worker use the equipment provided to him (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102 [1985]).

Labor Law §241(6) requires owners and general contractors to provide adequate protection and safety for workers by complying with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; *see Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). To recover damages based on an alleged violation of Labor Law § 241(6), a plaintiff must establish the violation of a specific applicable section of the Industrial Code, and that such violation was a proximate cause of his or her injuries (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816. 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery cannot be had unless it is shown that the party to be charged had the authority to supervise or control the performance of the plaintiff's work (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317, 445 NYS2d 127 [1981]). By contrast, when a premises condition is at issue, a defendant may be held liable if they either created the dangerous condition that caused the accident or had actual or constructive notice of its existence (*see Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]).

To establish a prima facie case of negligence under the common law, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*see Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Conneally v Diocese of Rockville Ctr.*, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]). While a property owner has a duty to maintain the property in a reasonably safe manner (*see Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]), there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*see Atehortua v Lewin*, 90 AD3d 794, 935 NYS2d 102 [2d Dept 2011]; *Capozzi v Huhne*, 14 AD3d 474, 788 NYS2d 152 [2d Dept 2005]). Although the question of whether a condition is hidden or open and obvious is generally for the finder of fact to determine, the court may determine that a risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion (*see Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331 [2001]).

Here, plaintiff failed to establish his prima facie entitlement to partial summary judgment on any of his Labor Law or common law negligence claims, as he failed to eliminate significant triable issues from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Significantly, plaintiff testified that his supervisor specifically instructed him to place a scaffold board across the parallel walls of the hallway to gain access to the sprinkler pipes in the gap between the roof and drop ceiling, because the drop ceiling grids were too narrow to be traversed by way of a ladder. Plaintiff further testified that he did not make any complaints about the condition of the electrical wiring above the drop ceiling prior to his accident, and that he was in the process of shimmying the scaffold board while simultaneously walking backwards along the top of a hallway wall, when he tripped over an electrical wire. In contrast, plaintiff's supervisor, Joseph Ventre, testified that he warned plaintiff that the only safe way to access the pipes above the drop ceiling was by using the ladders provided by Ventre Fire, that he personally demonstrated how the ladders should be used to gain access through the grid ceiling, and that he was sure that the method he demonstrated to plaintiff could be used even with the smaller ceiling grids described by plaintiff. Indeed, Ventre

Graziano v Source Builders
Index No. 4264/12
Page 6

testified that plaintiff continuously complained that the use of the ladders to gain access through the drop ceiling was too labor intensive, and that he defiantly retrieved the scaffold board from Ventre Fire's equipment shop and impermissibly used it at the worksite. Additionally, both plaintiff and Joseph Ventre testified that Ventre Fire possessed the sole authority to control the method and manner of plaintiff's work, that no other contractor at the worksite exercised such control, and that plaintiff exclusively relied on Ventre Fire to supply him with all the materials and equipment he used during the project.

Viewing such evidence in the light most favorable to the non-moving party, triable issues have been raised as to whether plaintiff recalcitrantly defied his supervisor in utilizing the scaffold board rather than the ladders given to him, whether the ladder provided him adequate protection for the purposes of accessing the ceiling pipes and installing the new sprinkler heads and, if so, whether plaintiff's conduct, including his attempt to move the scaffold board further down the hallway by shimmying it along the surface of the parallel hallway walls, was the sole proximate cause of the accident. Indeed, it must be determined whether plaintiff's conduct, rather than any alleged violation of the Labor Law statute or breach of a common law duty, was the sole proximate cause of the accident (*see Grove v Cornell Univ.*, 17 NY3d 875, 933 NYS2d 635 [2011] [triable issue as to whether adequate safety devices were provided or whether plaintiff's conduct was the sole proximate cause of accident, preclude summary judgment on his Labor Law §240(1) claim]; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 [4th Dept 2015] [neither party eliminated triable issues as to whether plaintiff's conduct was the sole proximate cause of the accident or whether he was comparatively negligent in relation to his Labor Law 241 (6) claim]; *Nalepa v South Hill Bus. Campus, LLC*, 123 AD3d 1190, 998 NYS2d 245 [3d Dept 2013] [triable issue as to whether plaintiff was the sole proximate cause of the accident also precludes summary judgment on his Labor Law §§241(6), 200, and common law negligence claims]; *see also Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 970 NYS2d 13 [1st Dept 2013]; *Plass v Solotoff*, 5 AD3d 365, 773 NYS2d 84 [2d Dept 2004]).

With respect to the branch of plaintiff's motions seeking partial summary judgment on his Labor Law §241 (6) claim predicated on the alleged violation of 12 NYCRR 23-5.1 (j) (1), which requires that all scaffolds more than seven feet tall be equipped with safety railings, the court notes that this provision is inapplicable, since plaintiff's own testimony indicates that he had stepped off the makeshift scaffold and was walking on the surface of the hallway wall prior to the accident. Based on the foregoing, plaintiff also failed to establish his prima facie entitlement to summary judgment on his common law negligence and Labor Law §200 claims, as his own testimony raises significant triable issues as to whether his own conduct, rather than a defective condition, caused his accident, or whether anyone other than his employer controlled the means and methods of his work, such that they could determine his safety practices. Therefore, both of plaintiff's motions seeking partial summary judgment on the issue of liability with respect to the claims contained his complaint are denied.

Since triable issues exist as to plaintiff's recalcitrance, and whether his own conduct was the sole proximate cause of the accident, the court denies the branches of the motions by VIBS, Source Builders, and Ventre Fire seeking dismissal of plaintiff's Labor Law §240 (1) claim (*see Grove v Cornell Univ.*, *supra*; *Fazekas v Time Warner Cable, Inc.*, *supra*). The defendants, nevertheless, established their entitlement to summary judgment dismissing plaintiff's claims under Labor Law §241 (6) by demonstrating that plaintiff failed to allege the violation of any specific applicable sections of the Industrial Code. Notably, 12 NYCRR 23-1.5, which addresses the general responsibilities of employers and protection from general hazards, is insufficiently specific to sustain a Labor Law §241 (6) claim (*see Gasques v State of New York*, 15 NY3d 869, 910 NYS2d 415 [2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684). 12 NYCRR 23-1.7 (2)(3), cited in plaintiff's bill of

Graziano v Source Builders
Index No. 4264/12
Page 7

particulars, does not exist, and, even construing the claim as referring instead to 12 NYCRR 23-1.7, which protects against general hazards, that section also is insufficiently specific for the purposes of setting forth a Labor Law §241 (6) claim. 12 NYCRR 23-1.16 (a) - (f), which sets standards for the use of safety belts, harnesses, tail lines, and lifelines, also is inapplicable under the circumstances of this case, as it is undisputed that plaintiff was not provided with any of these devices (*see Clavijo v Universal Baptist Church*, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]; *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]). Inasmuch as plaintiff was not utilizing a step ladder or working on a roof at the time of the accident, 12 NYCRR 1.21 (e)(3) and 12 NYCRR 1.24, which relate to the use of a stepladder or work performed on top of a roof, are equally inapplicable (*see Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003, 645 NYS2d 195 [4th Dept 1996]). Further, as noted above, 12 NYCRR 23-5.1 (j) is inapplicable to the facts of this case, as plaintiff's own testimony indicates that he had already stepped off the scaffold and was walking on the top of one of the hallway walls at the time of the accident. With respect to the alleged OSHA violations asserted by plaintiff, it is well established that such violations cannot serve as predicates for Labor Law §241 (6) claims (*see Cun-En Lin v Holy Family Monuments, supra*; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]). Accordingly, the applications by VIBS, Source Builders, and Ventre Fire for summary judgment dismissing plaintiff's claims under Labor Law §241 (6) are granted.

The defendants also established their prima facie entitlement to summary judgment dismissing plaintiff's claims under the common law and section 200 of the Labor Law. As stated above, plaintiff's own submissions include unrefuted testimony that Ventre Fire supplied all of his equipment and possessed the sole authority to control the methods and manner of his work. Moreover, contrary to plaintiff's assertions regarding the alleged control by VIBS or Source Builders, evidence that an owner's representative or a general contractor's worksite superintendent coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition, is insufficient to establish the type of control required for liability under the common law or Labor Law §200 (*see Martinez v 342 Prop. LLC*, 89 AD3d 468, 932 NYS2d 454 [1st Dept 2011]; *Dos Santos v STV Engineers, Inc.*, 8 AD3d 223, 778 NYS2d 48 [2d Dept 2004]).

Furthermore, the adduced evidence establishes that the electrical wires installed by Roland's Electric above the drop ceiling were open and obvious, integral to the ongoing renovation, and did not comprise an inherently dangerous condition (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745 [2006]; *Wendell v Sylvan Lawrence Co.*, 279 AD2d 383, 720 NYS2d 24 [1st Dept 2001]; *Isola v JWP Forest Elec. Corp.*, 267 AD2d 157, 691 NYS2d 492 [1st Dept 1999]). In particular, plaintiff testified that he did not make any complaints about the electrical wiring, and that he worked around the wiring on other occasions during the project, including when he installed other sprinkler heads in the same hallway. Moreover, Roland's Electric submitted an affidavit by Preston Quick P.E., which states, among other things, that based on his professional experience, inspection of the premises, and review of applicable electrical codes, the presence of metal conduit cables on the top of partition walls located inside unoccupiable space above suspended ceilings during and after construction is a normal and expected condition in commercial buildings such as the premises in question. Although the question of whether a condition is dangerous or open and obvious is generally for the finder of fact to determine, the

Graziano v Source Builders
Index No. 4264/12
Page 8

court may determine that a risk is open and obvious and not inherently dangerous as a matter of law where, as in this case, clear and undisputed evidence compels such a conclusion (*see Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331; *see also Atehortua v Lewin*, 90 AD3d 794, 935 NYS2d 102). Therefore, none of the defendants could be said to have breached any duty to plaintiff making them liable under Labor Law §200 or the common law (*see Solomon v City of New York, supra; Isola v JWP Forest Elec. Corp., supra*). Plaintiff's opposition, which consists of conclusory assertions contained in affidavits by his co-workers regarding the placement and safety of electrical wiring throughout the building, failed to raise any significant triable issue (*see Zuckerman v City of New York*, 497 NYS2d 557, 404 NE2d 718 [1980]). Accordingly, the branches of the motions by VIBS, Source Builders, Roland's Electric and Ventre Fire seeking dismissal of plaintiff's common law and Labor Law §200 claims are granted.

Turning to the branches of the motions by defendants for conditional summary judgment on their cross claims and third-party claims against each other, a party seeking common law indemnification must prove not only that it was free of negligence, but also that the proposed indemnitor negligently contributed to the cause of the accident for which the indemnitee is liable to the injured party by virtue of some obligation imposed by law (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). Contribution or apportionment among tortfeasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tortfeasors share responsibility for an injury (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 516 NYS2d 451 [1987]). "Although the right of apportionment may arise from a duty owed directly to the injured party or to the party seeking contribution, the critical requirement for apportionment is that the breach of the duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*see DiMarco v New York City Health & Hosps. Corp.*, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]; *see also Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]).

As it has already been determined that Roland's Electric did not control the method or manner of plaintiff's work or create any inherently dangerous condition such that it could be said to have negligently contributed to the cause of the subject accident, the branch of its motion for summary judgment dismissing the cross claims against it for contribution and/or common law indemnification is granted (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]; *Barto v NS Partners, LLC*, 74 AD3d 1717, 906 NYS2d 664 [4th Dept 2010]; *Delahaye v Saint Anns School*, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; *DiMarco v New York City Health & Hosps. Corp.*, 187 AD2d 479, 480, 589 NYS2d 580). The court also grants the branch of the motion by Ventre Fire seeking dismissal of the cross and third-party claims against it for common law indemnification and contribution, as it is undisputed that plaintiff, who was employed by Ventre Fire at the time of the accident, did not suffer a grave injury as that term is defined by the Workers' Compensation Law (*see Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8 [2008]; *Flores v Lower East Side Serv. Ctr.*, 4 NY3d 363, 795 NYS2d 491 [2005]; *Barclay v Techno-Design, Inc.*, 125 AD3d 1168, 4 NYS3d 329 [3d Dept 2015]; *Henderson v Gyrodyne Co. of Am., Inc.*, 123 AD3d 1091, 1 NYS3d 199 [2d Dept 2014] [Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a grave injury]). Furthermore, where, as in this case, the court has already determined that neither VIBS nor Source Builders were actively negligent in causing plaintiff's injuries, such that their liability under Labor Law §240 (1), if any, for the happening of the subject accident is vicarious or statutory only, the branch of their motions seeking dismissal of the cross claims against them for contribution and/or common law indemnification is granted (*see Mikelatos v Theofilaktidis*, 105 AD3d 822, 962 NYS2d 693 [2d Dept 2013]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25).

Graziano v Source Builders
Index No. 4264/12
Page 9

As for the third-party and cross claims for contractual indemnification, the construction agreement between VIBS and Source Builders provides, in pertinent, part as follows:

To the fullest extent permitted by law and the regulations, contractor shall indemnify and hold harmless owner . . . from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals, and all court or arbitration or other dispute resolution costs), arising out of or relating to the performance of the work, provided that any such claim . . . is attributable to bodily injury . . . but only to the extent caused by any negligent act or omission of Contractor, Subcontractor, any Supplier or any individual or entity employed by any of them to perform any of the work, or anyone for those acts, any of them may be liable.

The insurance procurement provision of the contract further required that Source Builders obtain insurance which included as additional insureds the "Owner and Engineer, and any other individuals or entities identified in the Supplementary Conditions, all of whom shall be listed as additional insureds." VIBS also entered a separate contract with Roland's Electric containing identical indemnification and insurance requirements. Following Source Builders' acceptance of Ventre Fire's bid for employment as a subcontractor on the project, it forwarded a copy of a subcontract to Ventre Fire which also contained a virtually identical indemnification agreement. Nonetheless, Joseph Ventre testified that the subcontract was never signed, and that he did not receive a copy of the unsigned contract until after Ventre Fire had commenced its work on the project.

Initially, the court notes that notwithstanding Ventre Fire's failure to endorse the subcontract between itself and Source Builders containing the indemnification agreement, VIBS and Source Builders submitted evidence demonstrating through the conduct of the parties that Ventre Fire intended to be bound by such agreement (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc.*, 6 NY3d 371, 812 NYS2d 435 [2006]; *Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d 652, 653, 978 NYS2d 334 [2d Dept 2014]; *Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720, 721, 917 NYS2d 687 [2d Dept 2011]; *LMIII Realty, LLC v Gemini Ins. Co.*, 90 AD3d 1520, 935 NYS2d 412 [4th Dept 2011]). Significantly, Joseph Ventre testified that although neither himself nor Norman Rijo signed the subcontract agreement, Ventre Fire performed all its work according to the terms of such agreement. Additionally, Mr. Ventre testified that he had received and reviewed the agreement before plaintiff's accident, that he believed it was in force at the time of said accident, and that he regarded the bid proposal as a distinct document submitted for the purpose of securing the subcontract agreement. According to Mr. Ventre, it was customary for Ventre Fire to obtain insurance certificates insuring the owner of the construction site before commencing work on a project, and that such a certificate was secured in relation to the subject project.

With respect to VIBS' and Source Builders' contractual indemnification claims, although a court may render a conditional judgment on the issue of contractual indemnity (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]), where, as in this case, the indemnification agreements are triggered only "to the extent [the accident is] caused by any negligent act or omission of Contractor, Subcontractor . . . or any individual or entity employed by any of them," any grant of summary judgment on the contractual indemnification claims must be conditioned upon a finding of Ventre Fire's negligence for the happening of the accident (*see Mohammed v Silverstein Props., Inc.*, 74 AD3d 453, 900 NYS2d 878 [1st Dept 2010]; *Hirsch v Blake Hous., LLC*, 65 AD3d 570, 884 NYS2d 141 [2d Dept 2009]; *Rivera v Urban Health Plan, Inc.*, 9 AD3d 322, 781 NYS2d 316 [1st Dept 2004]; *Crimi v Neves Assocs.*, 306 AD2d 152, 761 NYS2d 186 [1st Dept 2003]; *Zeigler-Bonds v Structure Tone*, 245 AD2d 80, 81, 664 NYS2d 799 [1997]). Accordingly, VIBS is granted summary judgment on its cross and third-party claims for contractual indemnification against Source Builders and

[* 10]

Graziano v Source Builders
Index No. 4264/12
Page 10

Ventre Fire, pending a determination of Ventre Fire's negligence for the happening of the accident. Source Builder is likewise granted summary judgment on its third-party claim for contractual indemnification against Ventre Fire, pending a determination of Ventre Fire's negligence for the happening of the accident.


Since VIBS entered a separate agreement with Roland's Electric, and it has been determined that neither Roland's Electric nor anyone employed directly or indirectly by it, negligently caused plaintiff's accident, such that the indemnification clause was triggered, the branch of VIBS' motion seeking conditional summary judgment on its contractual indemnification cross claim against Roland's Electric is denied (*see Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 4 NYS3d 230 [2d Dept 2015]; *Mikelatos v Theofilaktidis, supra*). Conversely, the branch of Roland's Electric's motion for summary judgment dismissing VIBS contractual indemnification cross claim against it is granted.

As to the cross and third-party claims by VIBS and Source Builders for summary judgment on their breach of contract claims, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652, 922 NYS2d 101 [2d Dept 2011]). Although VIBS and Source Builders submitted evidence that their agreements required Ventre Fire and Roland's Electric to procure additional insured coverage on their behalf, in opposition the defendants submitted proof that they obtained such insurance.

In particular, Roland's Electric and Ventre Fire both submitted proof that their insurance policies contained a blanket endorsement for contractually designated additional insureds. Such coverage is sufficient proof to establish that a defendant has complied with all its contractual obligation to procure additional insured coverage (*see Perez v Morse Diesel Int'l, Inc.*, 10 AD3d 497, 782 NYS2d 53 [1st Dept 2004]; *Garcia v A&P*, 231 AD2d 401, 647 NYS2d 2 [1st Dept 1996] [defendant satisfied its contractual obligation to procure insurance for a co-defendant by obtaining a policy with an automatic additional insured endorsement]). However, since Roland's Electric only submitted such proof in its opposition to the motions by VIBS and Source Builders, rather than affirmatively on its summary judgment motion, Roland's Electric didn't meet its prima facie burden on the branch of its motion seeking dismissal of the breach of contract claim by VIBS and Source Builders (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 476 NE2d 642 [1985]).

Similarly, while VIBS showed that Source Builders was contractually required to obtain insurance naming VIBS as an additional insured, in opposition Source Builders submitted evidence that it procured such insurance on VIBS's behalf. Therefore, triable issues exist with respect to the parties' respective breach of contract claims based on the alleged failure to procure them additional insurance coverage. Furthermore, to the extent that VIBS or Source Builders contend that they have been denied a defense pursuant to the parties' insurance obligations, the proper remedy is to commence a declaratory judgment action against the respective insurers based upon their rights as additional insureds (*see Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 647 NYS2d 2 [1996]). Accordingly, the branches of the motions by VIBS and Source Builders seeking summary judgment on their breach of contract claims are denied.

Dated: APR 06 2016


A.J.S.C.

APR 12 2016

 FINAL DISPOSITION X NON-FINAL DISPOSITION