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

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GARY HARRIGAN and KATHY HARRIGAN,

Index No. 156824/2014

Plaintiffs,

-against-

G-Z/10UNP REALTY, LLC, LEND LEASE (US) CONSTRUCTION LMB, INC., GENIE INDUSTRIES, INC. and UNITED RENTALS (NORTH AMERICA), INC.,

Defendants.

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UNITED RENTALS (NORTH AMERICA), INC.,

Third-Party Plaintiff, Third-Party Index No. 595582/2015

-against-

COORDINATED METALS, INC.,

Third-Party Defendant.

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Kenney, J.:

Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a union ironworker on January 13, 2014, when, while operating a scissor lift at a construction site located at 50 UN Plaza, New York, New York 10017 (the Premises), the scissor lift toppled, causing him to fall and sustain injuries.

In motion sequence number 001, plaintiffs Gary Harrigan (plaintiff) and Kathy Harrigan move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendants G-Z/10UNP Realty, LLC (GZ10) and Lend Lease (US) Construction LMB, Inc. (Lend Lease).

In motion sequence number 002, defendant/third-party plaintiff United Rentals (North America), Inc. (URNA) moves, pursuant to CPLR 3212, for summary judgment dismissing the

complaint and all cross claims against it, as well as for summary judgment in its favor on the third-party claims against third-party defendant Coordinated Metals, Inc. (Coordinated).

In motion sequence number 003, defendant Genie Industries, Inc. (Genie) moves, pursuant to CPLR 3212, for summary judgment dismissing the negligence claim as against it.

In the complaint, plaintiffs allege claims sounding in common-law negligence and Labor Law §§ 200, 240 (1), 241 (6), as well as derivative claims by Kathy Harrigan for, inter alia, loss of services and loss of consortium, against all defendants.[1] In their answers, defendants GZ10 and Lend Lease cross-claimed against all other defendants for contribution and common-law indemnification. URNA and Genie cross-claimed against GZ10 and Lend Lease for contribution and common-law indemnification. URNA initiated a third-party action against third-party defendant Coordinated for contractual indemnification and breach of contract for failure to procure insurance.

BACKGROUND

On the day of the accident, the Premises was owned by GZ10. GZ10 contracted with Lend Lease to serve as a contractor and construction manager on a project underway at the Premises which entailed the construction of a 50-story building (the Project). Lend Lease hired plaintiff's employer, Coordinated, an ironwork subcontractor, to install the first floor storefront at the Premises. Coordinated entered into an agreement with defendant URNA, an equipment rental company, for the rental of two scissor lifts for use on the Project. The scissor lift at issue in this action, model no. GS-3232 (the Lift), was manufactured by Genie, a designer and manufacturer of construction equipment.

Plaintiff's Deposition Testimony

[1] The consolidated motions do not address the claims of Kathy Harrigan.

During his deposition, plaintiff testified that, on the date of the accident, he was working at the Premises as a foreman for Coordinated, in charge of three workers. To perform his work, plaintiff regularly utilized the Lift.[2] The Lift and all plaintiff's safety gear was provided by Coordinated.

Plaintiff testified that he was not trained in the use or operation of scissor lifts while on the Project. However, he had used scissor lifts regularly over the course of his lengthy career as a member of his union, and he felt familiar with the general use and operation of such equipment. At his orientation, Lend Lease required him to sign papers notifying him that he was required to attend a safety class conducted by the lift rental company. However, no class was offered or conducted. Plaintiff did attend weekly toolbox meetings conducted by Coordinated, which covered topics ranging from general site safety to project goals. He also attended weekly foreman meetings held by Lend Lease.

Although he was aware that OSHA required workers to be certified in machine operation, plaintiff did not seek to become certified on the Lift because "if you stop and get certified on every machine, you know, you wouldn't have time to get the job done" (plaintiff's tr at 390). Plaintiff also explained that scissor lifts have compartments built into the equipment that contain operator's manuals, and that the Lift had such a compartment. However, he never checked the Lift's compartment for a manual, nor did he read one. In addition, although he was aware that the scissor lift had warning labels and decals regarding its safe operation and use, he did not read them.

Plaintiff further testified that, on January 13, 2014, he was approached by Kristen Malone, an employee of the Project's architect. Malone needed to photograph structural details

[2] A review of the record reveals that the Lift is a rectangular piece of equipment that consists of a four-wheeled base upon which sits a scaffold-like platform. The platform can rise to a height of 32 feet and holds two occupants. The Lift is operated directly from the platform.

on a section of the building worked on by Coordinated. The section was located approximately 20 feet in the air. In order to reach the area, it was necessary for plaintiff to move the Lift approximately 500 feet. Plaintiff then parked the Lift with one wheel slightly up on a piece of plywood that was covering a three-foot "void" in the concrete floor (*id.* at 121-122), that plaintiff termed a "ramp." Specifically, plaintiff recalled, "I knew that my left front tire was just barely on the ramp . . . . It is about one inch on to that plywood" (*id.* at 123). Plaintiff maintained that he felt that the Lift "was stable and safe . . . . In my twenty years experience . . . it is fine." (*id.* at 292-293). When asked how he knew that the scissor lift was stable, plaintiff testified that he could tell by "[j]ust standing in the machine and feeling it, with my experience, you can tell if the machine is not moving and that it is stable and it feels safe" (*id.* at 320).

After parking the Lift, plaintiff exited it and assisted Malone onto the platform of the machine. He then returned to the Lift. Plaintiff explained that he engaged the Lift's hydraulic lift and the Lift's platform began to rise. At approximately 17 feet up, the Lift tilted to the right and toppled to the ground. Plaintiff and Malone fell along with the Lift.

Plaintiff testified that, in his experience, scissor lifts were typically equipped with tilt alarms, which would stop the lift from rising further in the event that the equipment was at risk of tilting/toppling. However, at the time of the accident, the tilt alarm on the Lift did not go off. Plaintiff further testified that he did not know whether the Lift had outriggers (stabilizers). In any event, even if he had known that the Lift was so equipped, he would not have deployed the outriggers because "the rig was stable and safe and it felt fine . . . [and he] didn't hear any alarms, the machine did not stop and it felt like any other day [he] was using it" (*id.* at 412).

Deposition Testimony of Guy Zammit (Coordinated's Field Superintendent)

Guy Zammit testified that he was the field superintendent for Coordinated on the day of the accident. His duties included running Coordinated's field operations. In addition, Zammit was plaintiff's supervisor. Although he was on site on the date of the accident, he left before it occurred. When he returned to the Premises after learning of the accident, he witnessed paramedics treating plaintiff and observed the Lift lying on its side. At this time, he did not hear any alarms coming from the machine.

Zammit asserted that he was responsible for selecting the GS-3232 model of scissor lift for the Project. He prefers the GS-3232 because it comes equipped with outriggers and an automatic leveler, which, if utilized, offer additional safety and stability. Like plaintiff, he never read the Lift's operator's manual or had any formal training in operating the Lift, as he just "figured it out" (Zammit tr at 131). Zammit could not recall whether he informed plaintiff that the Lift was equipped with outriggers or automatic leveling features. Zammit testified that, while he believed plaintiff was sufficiently certified for the operation of the Lift, he later learned that none of Coordinated's employees was so certified.

With respect to the safety features of scissor lifts in general, Zammit explained that scissor lifts will not raise unless they are on level surfaces. To that effect, "the machine wouldn't go up if the machine senses it's not correct . . . [b]ecause the sensor will not let it go up. It's going to know it's out of level." (*id.* at 109). He further testified that operating the scissor lift with just one wheel on a ramp would be taking "a chance" (*id.* at 108), also noting that "[y]ou know it's not right . . . . You know you are not supposed to do that" (*id.* at 134). He maintained that it is unsafe to operate a scissor lift with only three of four wheels in contact with the ground. If he had witnessed the Lift being operated in that manner, he would have stopped its operation (*id.* at 163).

Deposition Testimony of Kenneth Solter (Lend Lease's Senior Superintendent)

Kenneth Solter testified that he was Lend Lease's senior superintendent on the day of the accident. He explained that Lend Lease was the construction manager for the Project. Lend Lease hired Coordinated to install the first floor storefront at the Premises.

Solter testified that Lend Lease did not direct the means, method or manner of plaintiff's work (Solter tr at 18-20). In fact, other than scheduling matters, Lend Lease had no involvement with plaintiff's work or the operation of the Lift. Rather, Lend Lease was merely responsible for the Project's scheduling. Specifically, Solter stated, "We schedule . . . . I don't actually tell workers to go up and put that bolt in . . . all I do is work with [them] to schedule space available to [them]" (*id.* at 17).

Solter testified that he observed plaintiff operating a scissor lift prior to the date of the accident. He did not know whether plaintiff was certified in the operation of scissor lifts. It was not his job to inquire. He also testified that workers are told during orientation that they should not operate machines that they are not licensed to operate.

Solter also testified that he was present at the Premises on the date of the accident. While he did not see the Lift fall over, afterwards he witnessed it lying on its side. Shortly after the accident, he directed an employee of Lend Lease to retrieve the operator's manual from the compartment on the Lift, which was brought to him directly (*id.* at 83-84).

Deposition Testimony of Barry Davis (URNA's District Manager)

Barry Davis testified that he served as URNA's district manager on the day of the accident. He testified that URNA rented the Lift to Coordinated for use on the Project. He maintained that all rental equipment delivered to customers included operator's manuals.

He explained that URNA typically offers hands-on and computerized safety training for all equipment that they rent to contractors. However, he was unaware as to whether URNA provided such training to Coordinated's workers, or whether such training had been requested. Davis noted that most customers do not request said training, because they are already familiar with the use of the equipment.

Deposition Testimony of Jason Berry (Genie's Product Safety Manager)

Jason Berry testified that he was Genie's product safety manager on the day of the accident, as well as an employee of Genie's parent company, Terex. Berry was involved in the design of certain components that are used on the GS-3232 scissor lift, as well as the design of its operator's manual. He testified that the GS-3232 must be on level ground when used, as it has no tolerance for use on unlevel ground. He further explained that the GS-3232 has a single axel system, meaning that when one wheel is elevated, then its opposite wheel will elevate, as well. In order to aid in stability, the GS-3232 has an auto-level function, wherein outriggers, when utilized, will automatically level the machine.

Berry explained that, during the development of the GS-3232, the machine underwent several ANSI tests to ascertain whether it would stay upright when at a tilt. Specifically, the GS-3232 was subject to a "depression test," wherein the lift is extended to 22 feet and then driven so that one wheel enters into a four-inch depression in the ground. In order to pass the test, the machine must stay upright. The GS-3232 passed this test in development. The GS-3232 was also tested for stability while placed on a five-degree slope, with all four wheels on the ground. The GS-3232 passed this test in development, as well. It should be noted, however, that the GS-3232 did not undergo a test that would rate the stability of the GS-3232 when one of the wheels is elevated off the ground, as under the circumstances of the instant case.

According to Berry's testimony, the GS-3232 is capable of operating at heights of up to 22 feet without the utilization of the outriggers. Berry also asserted that the GS-3232's outriggers were visible to the naked eye.

Affidavit of Les Knoll, P.E. (Plaintiff's Expert)

In his expert affidavit, Les Knoll stated that he is a mechanical engineer, specializing in product failure analysis. Knoll attended the post-accident inspection of the Lift, and he found that "all functions and safety devices were found to operate correctly" (Knoll aff at 4). He concluded that the accident was caused when the left front wheel of the Lift rode up the incline, leaving the right front wheel suspended and unsupported. Notably, Knoll does not mention the height of the subject incline. However, photographic evidence provided by GZ10 and Lend Lease shows that the portion of the plywood that the Lift was parked on at the time that it tipped over was only approximately one inch in height (GZ10's and Lend Lease's opposition, exhibits A and B, photographs). Knoll concluded that the accident would have been avoided if the outriggers have been utilized to stabilize the Lift.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein,* 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied

(*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim (motion sequence numbers 001 and 002)

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants GZ10 and Lend Lease. Defendant URNA moves for summary judgment seeking dismissal of said claim against it.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD3d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensini v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use,

or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]).

To prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning, Inc.*, 90 NY2d 219, 224-5 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 261 [1st Dept 2004]).

Initially, as owner of the Premises where the accident occurred, GZ10 may be liable for plaintiff's injuries under Labor Law § 240 (1). It should also be noted that Lend Lease does not dispute that it was the general contractor for the Project. Therefore, Lend Lease may also be liable under the Labor Law.

However, it must be determined whether URNA, as the equipment rental company, is an "agent" under the Labor Law, so as to also be liable for plaintiff's injuries.

> "When the work giving rise to these [Labor Law] duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241."

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Nascimento v Bridgehampton Constr. Corp,* 86 AD3d 189, 193 [1st Dept 2011] citing *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990] [an entity becomes a statutory agent under the Labor Law when it has been "delegated the supervision and control either over the specific work area involved or the work which [gave rise] to the injury"]).

Here, the accident was allegedly caused due to the Lift's failure to stay upright when plaintiff parked it on a one-inch incline. URNA, as the rental company, merely supplied the Lift

and did not design or manufacture it. In addition, while, as UNRA asserts, the Lift came equipped with a manual and contained warning labels, plaintiff chose not to read them. Further, URNA did not direct or supervise plaintiff's operation of the Lift. As such, URNA cannot be considered an agent for the purposes of the Labor Law.

Thus, as URNA is not a proper Labor Law defendant, URNA is entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it. Therefore, the remainder of the discussion of these claims will be in regard to GZ10 and Lend Lease's liability only.

Plaintiff has established a prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim against GZ10 and Lend Lease, by showing that the Lift that he was working on at the time of the accident was a safety device for the purposes of the statute, and that it "failed to provide adequate protection for the elevation-related work he was performing" (*Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009]).

"Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]); *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [Labor Law § 240 (1) liability established where makeshift scaffold failed to protect the plaintiff from falling]; *McCann v Central Synagogue*, 280 AD2d 298, 300 [1st Dept 2001]; *Kash v McCann Real Equities Devs*, 279 AD2d 432, 432 [1st Dept 2001]) ["Since the scissors lift did not prevent plaintiff from falling, defendants are liable under section 240 (1)"]).

In addition, construction sites are, by their very nature, often uneven and often strewn with debris, temporary coverings and inclines like the one at hand. Therefore, the fact that the Lift toppled over merely because one wheel was situated on a very slight one-inch incline

establishes that the Lift was not a proper safety device for the task at hand. "'[T]he availability of a particular safety device [here, the Lift] will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

In opposition to plaintiff's motion, GZ10 and Lend Lease argue that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because at least a question of fact exists as to whether plaintiff was the sole proximate cause of his accident. Where a plaintiff's own actions are the sole proximate cause of his accident, there can be no liability under Labor Law § 240 (1) (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.* 36 AD3d at 1188; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Specifically, GZ10 and Lend Lease argue that plaintiff was solely at fault because he chose to place the Lift in a manner in which one wheel was partially on a slight elevation. In

addition, they argue that plaintiff also failed to properly train himself in the operation of the Lift or read the Lift's manual or warnings. Further, they argue that plaintiff failed to utilize all of the safety features of the Lift, like the outriggers.

In any event, all of these actions on the part of plaintiff go to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, as the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]).

Where the "owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 (1st Dept 2002] [internal quotation marks omitted] (citing *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see also Celaj v Cornell*, 144 AD3d 590, 590 [1st Dept 2016] [the plaintiff's failure to use a locking wheel and plaintiff's movement of a scaffold while standing on it was evidence of comparative negligence]).

To the extent that GZ10 and Lend Lease argue that plaintiff has failed to identify a particular defect in the Lift, such argument is unavailing. A plaintiff is not required to demonstrate that the safety device was defective. Rather, "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent [a safety device] from

slipping or to protect plaintiff from falling were absent" (*Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016] [internal quotation marks and citation omitted]; *Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011] [failure to identify defect in pulley did not defeat entitlement to summary judgment]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333 [1st Dept 2008] [plaintiff not required to identify defect in ladder to make a prima facie showing of entitlement to judgment under Labor Law § 240 (1)]); *Fitzsimmons v City of New York*, 37 AD3d 655, 656 [2d Dept 2007] [falling crane that injured plaintiff establishes prima facie entitlement to judgment].

Finally, GZ10 and Lend Lease have not come forward with any evidence demonstrating that plaintiff was recalcitrant in that he was specifically instructed to use any specific safety device and refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against GZ10 and Lend Lease.

The Labor Law § 241 (6) Claim (motion sequence numbers 001 and 002)

Plaintiff also moves for partial summary judgment in his favor as to liability on his Labor Law § 241 (6) claim against GZ10 and Lend Lease. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored,

> [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers . . ." (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d at 501). However, to trigger the protections of Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Initially, plaintiff's complaint and bill of particulars do not specifically allege any Industrial Code provisions that were allegedly violated. Despite this oversight, plaintiff now asserts for the first time that defendants GZ10 and Lend Lease violated several sections of Industrial Code provision 23-9, entitled "Power-Operated Equipment." Specifically, plaintiff relies on section 23-9.2 (general requirements), subsection (a) (maintenance), and section 23-9.6 (aerial lifts), subsections (a) (1) (iii) and (a) (4) (equipment inspection). More specifically, the cited subsections of 23-9.6 (a) discuss the inspection of "ropes, sheaves and leveling devices."

GZ10 and Lend Lease argue that plaintiff's failure to plead specific Industrial Code provisions is fatal to the Labor Law § 241 (6) cause of action. However, in fact, "a failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2d Dept 2013]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]).

In any event, the provisions cited by plaintiff are either not sufficiently specific to support a Labor Law § 241 (6) claim, or they do not apply to the facts of this case. Thus,

plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against GZ10 and Lend Lease.

The Common-Law Negligence and Labor Law § 200 Claims (motion sequence number 002)

URNA moves for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it. 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'" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [citation omitted]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by the contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the work site (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202-203 [1st Dept 2005]).

"Under either liability standard, the common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200 (1), has also been extended to include the tools and appliances [like the Lift in the instant matter] without which the work cannot be performed and completed" (*Chowdhury v Rodriguez*, 57 AD3d 121, 128-129 [2d Dept 2008]). It is "well settled that the duty to provide a safe place to work is not breached when the injury arises out of

a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.,* 16 NY2d 136, 145 [1965]). For example, "[i]f the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance, but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency" (*id.* at 146 [internal citations omitted]).

Accordingly, where a defendant provides the worker with a piece of defective equipment, it must be shown that said defendant either created or had actual or constructive notice of the defective condition (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2d Dept 2013]; *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Navarro v City of New York,* 75 AD3d 590, 592 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d at 131).

Initially, while URNA claims that it did not owe plaintiff any duty of care, "[a] party injured as a result of a defective product may seek relief against the product manufacturer or others in the chain of distribution if the defect was a substantial factor in causing the injury" (*Rabon-Willimack v Robert Mondavi Corp.,* 73 AD3d 1007, 1008 [2d Dept 2010]).

In opposition, plaintiff argues that URNA, as a casual seller, had a duty to plaintiff to provide warnings of certain defects in the scissor lift that were not readily discernable and that URNA breached that duty. In response, URNA argues that there were sufficient warnings on the scissor lift, but that plaintiff never read the warnings, or the operator's manual.

Notably, a plaintiff asserting a claim for failure to warn must "adduce proof 'that the user of a product would have read and heeded a warning had one been given'" (*Reis v Volvo Cars of N. Am., Inc.,* 73 AD3d 420, 423 [1st Dept 2010], quoting *Sosna v American Home Prods.,* 298 AD2d 158, 158 [1st Dept 2002]). An admission that one did not read the available warnings

"severs the causal connection between the alleged failure to warn and the accident" (*id.* citing *Sosna v American Home Prods.*, 298 AD2d at 158 and *Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1st Dept 1998]; *see also Williams v River Place II, LLC*, 145 AD3d 589, 589 [1st Dept 2016] [upholding dismissal of common-law negligence cause of action because "[p]laintiff failed to show that the warnings on the saw and in the manual — warnings that he did not read — were insufficient or that their insufficiency was a proximate cause of the accident"]).

Here, photographic evidence presented to the court shows that the Lift was equipped with several conspicuously placed warning labels that address the function and operation of the Lift, including warnings regarding tipping and use of the Lift on level ground. Further, plaintiff clearly and consistently testified that he did not read the warning labels on the Lift, or the operator's manual prior to the use of the Lift. Therefore, any purported insufficiencies in the warnings cannot have been a substantial factor in bringing about his injury (*Guadalupe v Drackett Prod. Co.*, 253 AD2d at 378; *Williams v River Place II, LLC*, 145 AD3d at 589).

In addition, it is alleged that the accident occurred because plaintiff drove the lift up on the subject incline. Therefore, it can be said that the accident was also due to the means and methods of plaintiff's work. In order to find an owner or his agent liable under Labor Law § 200 for defects arising from a subcontractor's means or methods, it must be shown that the agent exercised some supervisory control over the injury-producing work (*Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [Labor Law § 200 liability does not attach where the plaintiff was injured as he was lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into the method of moving the beam]). Here, there is no evidence in the record establishing that URNA directed or supervised plaintiff's operation of the Lift.

Thus, URNA is entitled to dismissal of the common-law negligence and Labor Law § 200 claims as against it.

GZ10 and Lend Lease's Cross Claims for Contribution and Common-Law Indemnification Against URNA (motion sequence number 002)

URNA moves for summary judgment dismissing the cross claims of GZ10 and Lend Lease, which sound in common-law contribution and indemnification. "Contribution 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 [2d Dept 2003] [internal quotation marks and citations omitted]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity 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'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In opposition to URNA's motion, GZ10 and Lend Lease fail to set forth evidence that any negligence on the part of URNA contributed to the cause of plaintiff's accident. Thus, URNA is entitled to dismissal of its contribution and common-law indemnification claims as against it.

URNA's Third-Party Contractual Indemnification Claims Against Coordinated (motion sequence number 002)

URNA moves for summary judgment in its favor on the third-party claim for contractual defense and indemnification against Coordinated. Initially, as plaintiff was an employee of Coordinated at the time of the accident, Workers' Compensation Law § 11 is relevant.

Workers' Compensation Law § 11 sets forth, in pertinent part, as follows:

> "An employee shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Here, in the bill of particulars, plaintiff does not assert a grave injury as contemplated by the Workers' Compensation Law. In any event, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013] [internal quotation marks and citation omitted]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

Additional Facts Relevant To This Issue

Coordinated rented the Lift from nonparty United Rentals Location #P42 (UR#P42), pursuant to a rental agreement (the Agreement).

The Agreement includes an indemnification provision, which states, in pertinent part, as follows:

> "3. INDEMNITY / HOLD HARMLESS: To the fullest extent permitted by law, Customer [Coordinated] agrees to indemnify, defend and hold United, and any of its respective officers, agents, servants or employees and affiliates, parents and subsidiaries harmless from and against any and all liability, claims, loss, damage or costs (including but not limited to attorneys' fees . . .) arising out of or related to the operation, use, possession, or rental of the Equipment"

(URNA's notice of motion, Exhibit A, the Agreement, ¶ 3).

In the Agreement, the term "United" is defined as "the corporate subsidiary of United Rentals Inc. identified on the first page of the Rental Agreement from whom the Customer has rented the Equipment" (*id.*). With that said, as UR#P42 is the entity identified on the first page of the Agreement, the term "United" in the subject indemnification provision refers to UR#P42.

Here, in support of its third-party motion for contractual indemnification of Coordinated, URNA argues that, because it fulfilled its duties under the contract to provide equipment to Coordinated, Coordinated owes it defense and indemnification pursuant to the indemnification provision of the Agreement. However, as Coordinated argues, a question of fact remains as to whether it owes URNA contractual defense and indemnification pursuant to said indemnification provision because URNA was not a party to the Agreement, and URNA has not established that it was an officer, agent, servant, employee, affiliate, parent or subsidiary of UR#P42.

URNA's Third-Party Breach of Contract Claims For Failure to Procure Insurance against Coordinated (motion sequence number 002)

URNA moves for summary judgment in its favor on its third-party claim for breach of contract for the failure to procure insurance against Coordinated.

The Agreement contains the following insurance procurement provision:

> "18. Customer agrees to maintain and carry at customer's sole cost the following insurance; . . . (c) Commercial general liability insurance ('CGL') (providing coverage equal to or greater than the standard ISO CG 00 01 12 04 form) for any property damage, bodily injury or personal or advertising injury arising out of the maintenance, operation, possession or use of the Equipment with combined single limits of insurance not less than $2 million per occurrence and $4 million in the aggregate. Customer shall obtain insurance policies that provide or are endorsed to provide that all insurance required hereunder is primary and non-contributory to any other insurance maintained by United. United shall be named as an Additional Insured for liability insurance and additional loss payee for property insurance"

(*id.*, ¶ 18).

As discussed previously, the Agreement is between nonparty UR#P42 and Coordinated. Moreover, the insurance procurement provision requires Coordinated to procure insurance naming UR#P42, and not defendant URNA, as an additional insured.

Thus, URNA is not entitled to summary judgment in its favor on its claim for breach of contract for the failure to procure insurance as against Coordinated.

The Negligence Claim Against Genie (motion sequence number 003)

Genie moves for summary judgment dismissing the negligence claim as against it.[3]

In support of its motion to dismiss said claim, Genie argues that the Lift was reasonably safe as designed and that sufficient manuals and warnings were provided. In addition, Genie argues that plaintiff was the sole proximate cause of his injuries in that he chose not to read the Lift's manuals or warnings, nor did he obtain proper training in the Lift's operation.

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[3] In its motion, Genie does not request the dismissal of the Labor Law causes of action as against it.

In opposition, plaintiff argues that Genie failed to establish that the Lift was free from defects in light of the fact that the Lift's tilt alarm failed to sound when the Lift was subjected to a tilt sufficient enough to cause it to topple over (*see Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d at 1008 ["'if a defendant comes forward with any evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect' to defeat the motion"], quoting *Schneidman v Whitaker Co.*, 304 AD2d 642, 643 [2d Dept 2003]).

In response, Genie asserts that the Lift is intended to be utilized on only firm and even surfaces. In addition, Genie maintains that the slight, one-inch incline that the Lift was subjected to was too minor in nature to activate the tilt alarm. Here, as the slight, one-inch incline was sufficient to cause the Lift to topple, a question of fact remains as to whether the tilt alarm was negligently designed and whether said design defect caused the accident. Thus, Genie is not entitled to dismissal of the negligence claim as against it.

The court has reviewed the remaining contentions of the parties and finds them to be unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiffs Gary and Kathy Harrigan's motion (motion sequence number 001) for partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendants G-Z/10UNP Realty, LLC and Lend Lease (US) Construction LMB, Inc., is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of defendant United Rentals (North America), Inc.'s (URNA) motion for summary judgment seeking dismissal of the complaint and all cross-claims against (motion sequence number 002) it is granted, and the complaint and all cross-claims are

dismissed as to URNA with costs and disbursements to URNA as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of URNA; and it is further

ORDERED that the part of URNA's motion for summary judgment in its favor on the third-party claims for contractual indemnification and breach of contract for failure to procure insurance (motion sequence number 002) is denied; and it is further

ORDERED that Genie Industry, Inc.'s motion for summary judgment in its favor seeking dismissal of the negligence cause of action as against it (motion sequence number 003) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 2/28/17

ENTER:

J.S.C.
JOAN M. KENNEY
J.S.C.