SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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NICHOLAS FEMIA,

Plaintiff,

-against-

GOTHAM CONSTRUCTION COMPANY, LLC, 44TH STREET DEVELOPMENT LLC,

Defendants.

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DECISION/ORDER
Index No. 155984/2013

HON. CYNTHIA KERN, J.:

Plaintiff Nicholas Femia commenced the instant action seeking to recover damages for injuries he allegedly sustained while he was working on a construction site. Defendants/third-party plaintiffs Gotham Construction Company, LLC ("Gotham") and 44th Street Development LLC ("44th Street") (hereinafter referred to as the "defendants") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 200, 240(1) and 241(6); on their third-party complaint against third-party defendant Del Turco Bros. Inc. ("Del Turco"); and dismissing Del Turco's counterclaim for contribution. Plaintiff cross-moves for an Order pursuant to CPLR § 3212 granting him summary judgment on his claims pursuant to Labor Law §§ 240(1) and 241(6) and for an Order granting him leave to serve an amended bill of particulars to add a violation of Industrial Code 23-1.28(a) and considering such regulation for purposes of his cross-motion. For the reasons set forth below, both defendants' motion and plaintiff's cross-motion are granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. Plaintiff, a union marble installer, was employed by Del Turco on a construction project located at 550 West 45th Street, New York,

New York (hereinafter referred to as the "Project" or the "building"). Gotham was the general contractor on the Project and 44th Street was the Owner of the Project.

On or about November 3, 2012, plaintiff was transporting granite slabs using A-frame gondola wooden carts which were each carrying about eight slabs of shrink-wrapped granite ranging from eight to twelve feet in length weighting in total about 1400-1600 pounds. The deliveries usually occurred in a loading dock area where a hoist was used to lift and transport the material. However, plaintiff alleges that on that date, the loading dock was occupied and he was instructed to use another entrance to the building that did not have a loading dock and required that each cart be rolled over a flat plywood ramp acting as a bridge over an unfinished sidewalk. On the date of his accident, plaintiff was pushing a cart containing the slabs of granite over the plywood ramp when the cart's wheel got stuck and locked causing caused the cart to tip and fall onto plaintiff and causing the plywood ramp to shift and become unstable. Plaintiff asserts that he quickly braced, caught the tipping cart with his right hand, held it and pushed it up and off his arm and hand to place it upright at which time he felt a pop in his back and shoulder.

Plaintiff testified that he and his coworker on the Project made daily complaints regarding the condition of the carts' wheels and that the wheels often got stuck and locked while the cart was being wheeled. Additionally, William Madsen, Del Turco's foreman, testified that the carts "were old, they're old, they're meant to carry heavy stuff, they're not always in the best shape," that the carts "were beat up" and that they "were not brand-new they would not roll smoothly." Additionally, plaintiff testified that there were often problems with the plywood ramp buckling and not being able to hold the weight of the carts.

Plaintiff also alleges in his pleadings that he was injured a second time in the same day when he was lifting and installing a slab of marble as a countertop. Specifically, plaintiff alleges that as he lifted the marble slab, he was compensating for his back pain and did not lift the marble slab correctly, causing him to sustain injuries.

Plaintiff asserts causes of action for violations of Labor Law §§ 200, 240(1) and 241(6) and common law negligence. Defendants commenced a third-party action against Del Turco asserting causes of action

for breach of contract for failure to procure insurance and contractual indemnification. Del Turco then asserted a counterclaim against defendants for contribution.

The court first turns to plaintiff's cross-motion for summary judgment. As an initial matter, defendants and Del Turco's assertion that plaintiff's cross-motion for summary judgment must be denied on the ground that it is untimely as it was not brought within sixty days of the filing of the Note of Issue as required by this court is without merit. It is well-settled that "[a]n otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion" pursuant to CPLR § 3212(b). *Filannino v. Triborough Bridge and Tunnel Authority*, 34 A.D.3d 280, 281 (1st Dept 2006). "The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion." *Id.* Here, as defendants' timely motion for summary judgment seeks to dismiss, *inter alia*, plaintiff's claims brought pursuant to Labor Law §§ 240(1) and 241(6) and plaintiff's otherwise untimely cross-motion seeks summary judgment on such causes of action, the court will address plaintiff's cross-motion as though it were timely.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to plaintiff's motion for summary judgment on his claim brought pursuant to Labor Law § 240(1). Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, 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 enacted to protect workers from hazards related to the effects of gravity where protective devices are needed either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is "contingent upon the existence of a hazard contemplated in § 240(1) and the failure to use, or the inadequacy of, a safety device" of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 267 (2001). The Court of Appeals has held that "'falling object' liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured." *Quattrocchi v. F.J. Sciame Const. Corp.*, 11 N.Y.3d 757, 758-59 (2008). Additionally, it is well-settled that a lack of an appreciable height differential between the plaintiff and the falling object does not preclude a plaintiff from recovering under Labor Law § 240(1) "when the weight of the [falling] object…is capable of generating an extreme amount of force, even though it only traveled a short distance." *Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 474 (1st Dept 2012). *See also McCallister v. 200 Park, L.P.*, 92 A.D.3d 927 (2d Dept 2012).

In *McCallister*, *supra*, the plaintiff was injured when he was wheeling a scaffold carrying materials weighing approximately 450-550 pounds into a jobsite when two of the wheels of the scaffold broke off and, after trying to maneuver the scaffold without the wheels, the scaffold fell forward onto plaintiff. In holding that the plaintiff made a *prima facie* showing of his entitlement to judgment as a matter of law on his Labor Law § 240(1) claim, the court explained as follows:

> Contrary to defendants' contention, the evidence demonstrated that the plaintiff's injury was the result of an elevation differential within the scope of Labor Law § 240(1). Although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis. Thus, the plaintiff suffered harm that "flow[ed] directly from the application of the force of gravity to the [broken scaffold]")(internal citations omitted).

In the instant action, plaintiff has established his *prima facie* right to summary judgment as to liability on his Labor Law § 240(1) claim against the defendants as he has shown that his accident occurred due to said defendants' failure to provide an adequate safety device to properly transport the heavy marble slabs in violation of Labor Law §240(1). As an initial matter, plaintiff's accident clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto the cart containing heavy marble slabs totaling approximately 1400-1600 pounds as it was being wheeled into the building by plaintiff and his coworker. Moreover, the foregoing activity of an employee working with a cart containing very heavy materials being transported on a construction site is considered the kind of foreseeable risk within the contemplation of Labor Law § 240(1). *See McCallister*, 92 A.D.3d 927. The fact that the cart tipped over while plaintiff was pushing it, causing plaintiff to sustain injuries, is proof that there was a failure to provide an adequate safety device to protect plaintiff while he was transporting heavy materials pursuant to Labor Law § 240(1). Although at the time of plaintiff's accident, there was not a great height differential between the cart and the plaintiff, such differential cannot be considered *de minimis* given the cart and its materials' total weight of 1400-1600 pounds and the force that the cart was able to generate during its descent. Moreover, it is immaterial that the cart and its materials were not being "hoisted" at the time plaintiff's accident occurred as it is well-settled that liability under Labor Law § 240(1) "is not limited to cases in which the falling object is in the process of being hoisted or secured." *Quattrocchi,* 11 N.Y.3d at 758-59.

In opposition, neither defendants nor Del Turco have raised an issue of fact sufficient to defeat plaintiff's motion for summary judgment on his Labor Law § 240(1) claim. Their assertion that plaintiff is not entitled to summary judgment because the cart never actually struck plaintiff or the ground as plaintiff "intentionally reached out to catch it and stop it from falling" is without merit. Plaintiff testified that his right hand was on the side of the cart as it was tipping over and that he was injured in attempting to push the cart back up and right it, which he was able to do. Merely because the cart did not strike plaintiff directly or strike the ground does not preclude plaintiff from recovering pursuant to Labor Law § 240(1) as plaintiff's accident occurred due to a gravity-related risk for which an inadequate safety device was provided.

As this court has granted plaintiff summary judgment on his Labor Law § 240(1) claim based on the allegation that he was injured when he wheeled the cart into the building, that portion of defendants' motion for summary judgment dismissing such claim is denied.

However, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 240(1) claim to the extent such claim is based on the allegation that plaintiff was also injured while lifting and installing countertops at the Project as such activity does not fall within the ambit of Labor Law § 240(1). Specifically, plaintiff has alleged in his pleadings that he was injured as he was lifting and installing one of the marble slabs as a countertop "the wrong way" to compensate for his back pain. However, it is well-settled that "[t]he fact that the plaintiff was injured while lifting a heavy object does not give rise to liability pursuant to Labor Law § 240(1)." *Cardenas v. BBM Constr. Corp.*, 133 A.D.3d 626, 628 (2d Dept 2015).

The court next turns to that portion of plaintiff's motion for an Order granting him leave to serve an amended bill of particulars to add a violation of Industrial Code 23-1.28(a) and his request that the court consider such regulation for purposes of his cross-motion for summary judgment on his claim brought pursuant to Labor Law § 241(6). "Motions to amend or supplement a bill of particulars are governed by the same standards as those applying to motions to amend pleadings" brought pursuant to CPLR § 3025(b). *Scarangello v. State*, 111 A.D.2d 798, 798 (2d Dept 1985). Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

Here, the court finds that plaintiff is entitled to amend his bill of particulars to add a violation of Industrial Code 23-1.28(a) as such amendment is not palpably insufficient or patently devoid of merit. 12 NYCRR 23-1.28(a) requires that "[h]and-propelled vehicles shall be maintained in good repair." Plaintiff testified that the accident occurred when the wheel of the hand-propelled cart he was pushing became stuck and caused the cart to the tip over and that the carts provided on the Project were generally in bad condition

and that the workers often experienced issues with the wheels of the carts. Thus, as such amendment is not palpably insufficient or patently devoid of merit, plaintiff may amend his bill of particulars and the court will consider the violation of said provision for purposes of his cross-motion for summary judgment on his claim brought pursuant to Labor Law § 241(6).

The court next turns to that portion of plaintiff's cross-motion for summary judgment on his claim brought pursuant to Labor Law § 241(6). Pursuant to Labor Law § 241(6),

> 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:
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> (6) 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

In the instant action, the court finds that plaintiff is entitled to summary judgment on his Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.8(a) and (b) as he has established, as a matter of law, that defendants violated said provisions. 12 NYCRR 23-1.8(a) requires that hand-propelled vehicles be maintained in good repair and 12 NYCRR 23-1.28(b) requires that, *inter alia*, the "wheels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles." The First Department has held that "[t]hese requirements are obviously intended to insure that wheels do not collapse or stick causing a vehicle to tip over and injure a worker." *Freitas v. New York City Tr. Auth.*, 249 A.D.2d 184, 186 (1st Dept 1998). Plaintiff testified that his accident occurred when "the wheels [of the cart] locked [be]cause they sucked and [the cart] tipped." Further, plaintiff and Mr. Madsen, Del Turco's foreman,

testified that the wheels of the carts often locked and stuck in place and stopped running freely and that the carts were generally old and in poor condition.

In opposition, defendants have failed to raise an issue of fact to defeat plaintiff's motion for summary judgment on his Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.28(a) and (b) as they have failed to provide any evidence that the cart used by plaintiff was maintained in good repair or that all of the wheels of the cart were free-running. Thus, as the court has granted plaintiff summary judgment, that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim predicated on such provisions is denied.

However, the court finds that defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim to the extent such claim is predicated on the violation of any other Industrial Code provisions asserted by the plaintiff as such provisions do not apply to this action. To the extent plaintiff asserts that he is entitled to summary judgment on his Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(f), such assertion is without merit as the court finds that such provision does not apply. 12 NYCRR 23-1.7(f), entitled "Vertical passage," requires that "[s]tairways, 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." However, there is no evidence that the plywood ramp over which plaintiff wheeled the cart was a vertical passage or that it was provided as a means of accessing working levels above or below ground. Indeed, the evidence in this case establishes that the plywood ramp at issue was flat and not vertical and was merely used as a means of accessing entry to the building from the ground level as the plywood ramp was placed over an unfinished sidewalk.

The court next turns to that portion of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. "Section 200 of the Labor Law 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 N.Y.2d 876, 877 (1993). "Claims for personal injury under the statute and the common law fall into two broad categories:

those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed." *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143 (1st Dept 2012). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." *Id.* at 143-44. "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work." *Id.* at 144.

Initially, defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted to the extent such claim is based on the allegation that the defective wheel on the cart plaintiff was pushing caused his injury or based on the allegation that plaintiff was injured when he was lifting and installing a slab of marble as a countertop. The court finds that the proper standard to apply when analyzing the Labor Law § 200 claim based on such alleged causes of the injury is the "manner and means of the work" standard based on the well-settled case law that such standard must be applied when the injury was caused by the equipment used or method plaintiff used to perform the work. *See Cappabianca*, 99 A.D.3d at 144. In applying such standard, the court finds that defendants have established their entitlement to summary judgment as they have demonstrated that they did not have supervisory control over the work plaintiff was performing at the time he sustained his injuries. Plaintiff testified that while on the Project, he was only supervised by his foreman, Mr. Madsen, and there is no evidence that anyone other than Mr. Madsen supervised or controlled plaintiff's work.

However, defendants' are not entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim to the extent such claim is based on the allegation that the defective and unsecured plywood ramp caused plaintiff's injury separate and apart from the defective cart. The court finds that the proper standard to apply when analyzing the Labor Law § 200 claim based on such alleged cause of the injury is the "defect or dangerous condition" standard as the court finds that the unsecured plywood ramp was a condition which was existing on the Project at the time plaintiff's accident occurred. In applying the "defect and dangerous condition" standard, the court finds that defendants are not entitled to summary judgment as they have

failed to establish that they did not have actual or constructive notice of the dangerous condition. In support of their motion, defendants provide the testimony of Richard Agresta, Gotham's construction superintendent/site safety manager, who testified that Gotham "would never have placed the plywood" over the unfinished sidewalk. However, even if that testimony constituted *prima facie* evidence that Gothan did not create the condition, which it does not, defendants have failed to establish that they did not have notice of the condition. Indeed, Mr. Agresta testified that he recalled seeing the plywood walkway at some point prior to the sidewalk being finished.

The court next turns to that portion of defendants' motion for summary judgment on their third-party claim against Del Turco for contractual indemnification. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2nd Dept 2008).

In the instant action, this court finds that defendants have established their entitlement to summary judgment on their third-party claim against Del Turco for contractual indemnification. The contract between Gotham and Del Turco provides as follows:

> To the extent permitted by law, [Del Turco] shall indemnify, defend, save and hold the Owner, Gotham…harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:
>
> 1. The performance of work by [Del Turco], or any act or omission of [Del Turco];
> 2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where the Work is being performed or in the vicinity thereof (a) while [Del Turco] is performing the Work, either directly or indirectly through his subcontractor(s) or material supplier, or (b) while any of [Del Turco's] property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work; or
> 3. The use, misuse, erection, maintenance, operation or failure of any machinery or equipment (including, but not limited to, scaffolds, derricks, ladders, hoists, rigging supports, etc.) whether or not such machinery or equipment was furnished, rented or loaned by the Owner or Gotham…to [Del Turco].

Here, it is clear from the broad indemnification language in the contract between Gotham and Del Turco

that defendants are entitled to indemnification from Del Turco as plaintiff, a Del Turco employee, has asserted claims arising out of or connected with (1) the performance of the work on the Project by Del Turco; and (2) the use, or failure, of certain equipment, including the plywood ramp and the A-frame cart.

The court next turns to that portion of defendants' motion for summary judgment on their third-party claim against Del Turco for breach of contract based on the failure to procure insurance. Specifically, the third-party complaint alleges that Del Turco was required to procure certain automobile coverage naming defendants as additional insureds and which would cover plaintiff's accident and that Del Turco failed to do so. However, defendants are not entitled to summary judgment on such claim as they have failed to establish, as a matter of law, that Del Turco did not procure the required insurance. Indeed, in support of their motion, defendants merely assert that Del Turco "appears to have failed" to procure the insurance required in their contract but provides no basis for such assertion. Moreover, the fact that Del Turco's insurer may have declined Gotham's request for coverage in this case is not evidence that Del Turco failed to procure insurance.

Finally, that portion of defendants' motion for summary judgment dismissing Del Turco's counterclaim for contribution is denied as defendants have failed to provide any analysis whatsoever pertaining to the dismissal of such counterclaim.

Accordingly, the motions are resolved as set forth herein. This constitutes the decision and order of the court.

Date: 4/5/17

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J.S.C.
HON. CYNTHIA S. KERN
J.S.C.