SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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CARLOS LOPEZ-GONZALEZ,

Plaintiff,

-against-

1807-1811 PARK AVENUE DEVELOPMENT CORP., ESF PROPERTY INC. and EASTSIDE FLOOR SERVICES LTD.,

Defendants.

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1807-1811 PARK AVENUE DEVELOPMENT CORP., ESF PROPERTY INC. and EASTSIDE FLOOR SERVICES LTD.,

Third-Party Plaintiffs,

-against-

NAVAC CONSTRUCTION CORP.,

Third-Party Defendant.

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NAVAC CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

LURIG CONSTRUCTION INC. and CALIM FERRIS,

Second Third-Party Defendants.

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DECISION/ORDER

Index No. 151085/2013

Mot. Seq. 012 & 013

Third-Party Index No. 595189/2014

Second Third-Party Index No. 595013/2015

KELLY O'NEILL LEVY, J.:

Motion sequence numbers 012 and 013 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on September 18, 2012, when he fell from a scaffold while working at a construction site located at 101 East 123rd Street, New York, New York (the Premises).

In motion sequence number 012, second third-party defendants Lurig Construction Inc. (Lurig) and Calim Ferris (Ferris) move, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint against them in its entirety.

In motion sequence number 013, defendants/third-party plaintiffs 1807-1811 Park Avenue Development Corp. (Park), ESF Property Inc. (ESF) and Eastside Floor Services Ltd. (Eastside) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against them, and for summary judgment in their favor on the third-party complaint for contractual indemnification and breach of contract for failure to procure insurance against third-party defendant/second third-party plaintiff Navac Construction Corp. (Navac).

BACKGROUND

On the day of the accident, Park owned the Premises where the accident occurred. ESF was the general contractor on a project underway at the Premises, which entailed the construction of a two-story commercial building, for which Eastside was to be the tenant (the Project). ESF hired Navac, plaintiff's employer, to perform masonry work for the Project. While Navac supplied materials and scaffolding for the Project, it subcontracted the actual masonry work to Lurig and Ferris. Eastside was the flooring subcontractor for the Project.

Previously, in motion sequence number 008, plaintiff moved for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants (the Prior Motion). By decision and order dated August 26, 2016 (the Prior Order), this court granted plaintiff's motion as against Park and ESF only, finding that Park and ESF had failed to provide plaintiff with sufficient safety devices to protect him from falling. In motion sequence number

014, Park and ESF moved the court for leave to reargue the Prior Motion. Park and ESF's motion for leave to reargue the Prior Motion was denied.

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that he was working at the Premises as a laborer on the day of the accident. His work included moving materials, such as brick and cement, for use by the bricklayers. He often worked from the roof of the building, or from the top of the metal scaffolding, which surrounded the building. Plaintiff recalled that it was windy and drizzling on the day of the accident.

Plaintiff testified that, on the day of the accident, he was tasked with bringing brick and cement to a bricklayer, who was positioned at the top of the scaffold. Plaintiff was not provided with any personal safety gear for the work, such as a harness or lifeline.

Later, as it was raining, plaintiff was instructed to attach a tarp to the top of the scaffold so that the bricklayers could keep working, despite the weather. The installation of the tarp required that an additional piece of metal scaffold pipe be attached to the top of the scaffold. Plaintiff testified that, in order to attach the pipe, it was necessary for him to first remove the scaffold's guardrail. After the railing was removed, and while he was attempting to fit the first additional metal pipe into the scaffolding, the piece of metal pipe "pushed [him]," causing him to fall through the gap in the scaffold and to the ground (plaintiff's tr at 83).

Plaintiff's Affidavit

In his affidavit, plaintiff stated that he worked for Navac on the day of the accident. That day, he was instructed by his foreman, Calim Ferris, to "work on top of [a] 40 foot high scaffold to receive materials from a worker on the roof and hand those materials to the bricklayer working on the façade and parapets" (plaintiff's aff at 2). Because it was raining, Ferris "gave [him] a

tarp and told [him] and a co-worker to erect it over the top of the scaffold as a protective cover . . ." (*id.*). To install the tarp, they were "required to first remove the [scaffold's] railing, which [they] did" (*id.*).

Plaintiff maintained that he "was never given any fall protection or other safety equipment while working at that job site," such as safety belts or harnesses (*id.*). Further, "[e]ven if [he] had a harness, there was no anchorage point, tail line and/or lifeline to hook up to" (*id.* at 3).

Deposition of Gerald Flynn (President of Eastside and Owner of ESF and Park)

Gerald Flynn testified that, on the day of the accident, he was the president of Eastside, as well as an owner and shareholder of ESF and Park. He explained that Park was a holding company, which owned the property upon which the Premises was being built. In addition, ESF served as the general contractor for the Project, and Eastside was the flooring contractor. ESF subcontracted the Project's masonry work to Navac. Navac's duties on the Project included, among other things, site safety and housekeeping. Flynn was not familiar with Lurig.

Flynn asserted that he was rarely at the Project, and that he was not at the Premises on the day of the accident. However, an ESF employee, Tim O'Donnell, was regularly present at the Premises. Flynn was unsure whether O'Donnell had any safety duties at the Project. Flynn maintained that ESF did not provide safety equipment for any of the workers at the Project.

Deposition Testimony of Thomas Briody (Navac's Owner)

Thomas Briody testified that he was Navac's owner on the day of the accident, and that Navac was the masonry subcontractor on the Project. While Navac supplied materials and scaffolding for the Project, it subcontracted the actual masonry work to Lurig, which was owned by Ferris.

Briody testified that he personally erected the scaffold at issue in this case. In addition, Navac was in charge of scaffold safety at the Project, as well as the removal of debris resulting from the masonry work. To that end, Briody employed a laborer, Richard McIlwaine, who was present at the site every day, to remove said debris.

Briody explained that, as Lurig's work on the Project was nearly complete, plaintiff was set to be let go from Lurig three days before the accident. Therefore, Briody hired plaintiff to help McIlwaine clear debris at the Premises. In addition to working for Navac, plaintiff also assisted Ferris and the other bricklayers, as needed.

Briody testified that, when he was not present at the Property, Ferris supervised plaintiff's work on the Project. During his deposition, Briody was presented with a copy of the Workers Compensation C-2 report regarding plaintiff's accident. He confirmed that the report indicated that Ferris was plaintiff's supervisor. Briody also acknowledged that he had reviewed and signed the C-2 report.

Briody testified that the only safety harness available at the site was the one that he kept for his personal use and protection. He also noted that, even if a harness was available, on the day of the accident, there were no lifelines or anchorage points for a worker to hook it to.

Deposition Transcript of Calim Ferris (Lurig's Owner)

Ferris testified that, on the day of plaintiff's accident, he was Lurig's owner. He explained that Navac hired Lurig to serve as the masonry subcontractor for the Project. Ferris asserted that Lurig was hired to lay bricks solely on the west side of the building, and that plaintiff's accident occurred on the east side of the building. In addition, Ferris did not employ any workers on the east side of the building. That said, Ferris did not witness plaintiff's

accident, because it happened on the other side of the building from where he was working at the time of the accident.

Ferris further testified that plaintiff never worked for him either prior to or on the day of the accident. In addition, Ferris did not supervise plaintiff or direct plaintiff's work.

Deposition Transcript of Richard McIlwaine (Navac's Employee)

Richard McIlwaine testified that, at the time of the accident, he was employed by Navac as a laborer. His duties primarily consisted of clearing masonry debris from the job site. McIlwaine maintained that Briody was the only person who directed his work, and that he never worked from the scaffold. Although he was present at the Premises at the time of the accident, he did not witness it. McIlwaine also testified that he did not know plaintiff, nor did he know who hired plaintiff.

Deposition Transcript of Timothy O'Donnell (ESF's Employee)

Timothy O'Donnell testified that, on the day of the accident, he functioned as ESF's "eyes and ears" at the Project (O'Donnell tr at 10). Specifically, ESF hired him to "facilitate between the owner, PCA, design build, and just to coordinate logistics" (*id.* at 57). He testified that he did not direct plaintiff's work.

O'Donnell explained that, while he was present at the Premises at the time of plaintiff's accident, he did not witness plaintiff's fall and had no personal knowledge regarding what happened. After interviewing a few people regarding what happened, he prepared a report of the incident.

DISCUSSION

"[T]he 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 demonstrate the

absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

The Labor Law § 240 (1) Claim

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim as against them. As discussed above, the Prior Order granted plaintiff summary judgment as to liability on the Labor Law § 240 (1) claim as against Park and ESF. However, the Prior Order denied plaintiff summary judgment as against Eastside, because "plaintiff [had] not sufficiently established that Eastside, the flooring contractor on the Project, had anything to do with the accident" (Prior Order at 6).

In support of the instant motion for summary judgment to dismiss said claim against them, defendants raise a single argument; namely, that plaintiff was the sole proximate cause of his accident. That said, in the Prior Order, the court addressed defendants' sole proximate cause argument, and rejected it. As noted in the Prior Order,

> "[D]efandants have failed to refute plaintiff's testimony that, while working at a height, he was not provided with a harness, a safety line and an anchorage point to tie off to, so as to protect him from falling once the scaffold's railing was necessarily removed.

* * *

> "In any event, any alleged misuse of the scaffold on plaintiff's part goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ['Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries']; *Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996]). '[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.*, 1 NY3d at 290)
>
> "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 [internal quotation marks and citations omitted]' (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002])."

(Prior Order, at 9-10).

Thus, as defendants' sole proximate cause argument fails, and as they offer no other argument in support of their motion to dismiss the Labor Law § 240 (1) claim against them, defendants are not entitled to summary judgment dismissing said claim.

The Labor Law § 241 (6) Claim

Defendants move for summary judgment seeking dismissal of the Labor Law § 241 (6) claims against them. 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 of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

While plaintiff has alleged multiple Industrial Code violations in his complaint and bill of particulars, plaintiff only opposes that branch of defendants' motion seeking dismissal of those parts of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.7 (d), 23-1.15, 23-1.16 (b) and 23-5.1 (j). Accordingly, the unaddressed Industrial Code provisions are deemed abandoned, and defendants are entitled to summary judgment dismissing those abandoned provisions (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Initially, section 23-1.7 (d) is sufficiently specific to sustain a cause of action under Labor Law § 241 (6) (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541 [1st Dept 2013]).

Here, section 23-1.7 (d) does not apply to the facts of this case. While plaintiff testified that the scaffold was slippery, he does not allege that his accident was caused due to slipping. Rather, plaintiff fell because he was not provided with the proper safety equipment to prevent him from falling (*see Annicaro*, 98 AD3d at 544).

Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (d).

Industrial Code 12 NYCRR 23-1.16 (b)

Industrial Code 12 NYCRR 23-1.16 (b) provides:

> "Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet."

Section 23-1.16 (b) is sufficiently specific to sustain a cause of action under Labor Law §241 (6) (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]).

Section 23-1.16 (b) applies only in instances where a worker was, in fact, provided with a safety belt or harness (*Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006]). Here, it is undisputed that plaintiff was never provided with said equipment.

Thus, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b).

Industrial Code 12 NYCRR 23-1.15 and 23-5.1 (j)

Industrial Code 12 NYCRR 23-5.1 (j) provides, as relevant:

> "(1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule)."

Industrial Code 12 NYCRR 23-1.15 provides, as relevant:

> "Whenever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows:
>
> (a) A two inch by four inch horizontal wooden hand rail, not less than 36 inches nor more than 42 inches above the walking level, securely supported by two inch by four inch vertical posts at intervals of not more than eight feet.
>
> (b) A one inch by four inch horizontal midrail."

These sections, when coupled together, are sufficiently specific to sustain a cause of action under Labor Law §241 (6) (*see Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]).

Defendants argue that sections 23-5.1 (j) and 1.15 were not violated because the scaffold was equipped with a guardrail. In opposition, plaintiff argues that these provisions apply, because, while the scaffold was equipped with a hand rail, it lacked a midrail, as required by the provision.

Here, as the record is devoid of any evidence regarding whether the scaffold contained a midrail, questions of fact remain as to this issue.

Thus, defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on an alleged violation of sections 23-1.15 and 23-5.1 (j).

The Common-Law Negligence and Labor Law § 200 Claim

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them. 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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). 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 premises (*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 [1st Dept 2005]).

Here, the accident was caused when plaintiff removed the scaffold's guardrail so that he could hang the tarp. Accordingly, plaintiff's claims implicate the means and methods of plaintiff's work. "Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to

supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Indeed, establishing liability under Labor Law § 200 "requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]).

Defendants argue that they are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them, because they did not supervise or direct plaintiff's work. To that effect, O'Donnell testified that he did not control the means or methods of any subcontractor's work at the Premises. In addition, McIllwaine, a Navac employee like plaintiff, testified that Briody was the only person who directed his work at the Project.

In opposition, plaintiff puts forth only that O'Donnell, ESF's employee, was tasked with overseeing the entire project, and that O'Donnell had the authority to stop work in the event that he observed an unsafe condition. However, importantly, general supervisory control is insufficient to impute liability under section 200, as even where an entity "may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Island Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

Thus, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Defendants' Third-Party Claim For Contractual Indemnification Against Navac

Defendants move for summary judgment in their favor on the third-party claim for contractual indemnification against Navac. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the

language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also, Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Additional Facts Relevant To This Issue

The agreement between ESF and Navac, entitled the "GC Agreement" (the GC Agreement), includes an indemnification provision, which states, in pertinent part:

> "To the fullest extent permitted by law, the Trade Contractor [Navac] shall defend, indemnify and hold harmless the Owner and all of their consultants including, but not limited to PCA Design and their design consultants, IM Consulting, and any related entities (as well as their respective shareholders, officers, directors and employees), the Owner/Landlord, Architect, Architect's consultants, and agents and employees of any of them, from and against any and all claims . . . including but not limited to attorney's fees arising out of or resulting from performance of the Work, provided that such claim, loss or expense is attributable to bodily injury . . . caused in whole or in part by any acts or omissions of the Trade Contractor, anyone directly or indirectly employed by the Trade Contractor, or anyone for whose acts they may be liable. . ."

(notice of motion, exhibit L, the GC Agreement at 4).

Here, plaintiff, an employee of Navac, was injured when he fell off the scaffold, which was provided and erected by Navac. Therefore, the accident arose out of Navac's work.

Accordingly, pursuant to the subject indemnification provision, Navac owes indemnification to Park, as the "Owner," and ESF, as Park's "agent or employee."

As to Eastside, the record reflects that it is a tenant of the Owner, and the indemnification provision does not require that Navac indemnify tenants of the Owner. In addition, as the record is unclear as to which entity hired Eastside to provide the flooring for the Project, a question of fact exists as to whether Eastside was an "agent or employee" of Park, and thus entitled to coverage under the indemnification provision.

Thus, Park and ESF are entitled to summary judgment in their favor on the third-party claim for contractual indemnification against Navac, and Eastside is not entitled to the same.

Finally, while defendants move for summary judgment in their favor on the third-party claim against Navac for breach of contract for failure to procure insurance, defendants do not present any argument in support of said claim.

Thus, defendants are not entitled to summary judgment in their favor on the third-party claim for breach of contract for failure to procure insurance as against Navac.

Navac's Second Third-Party Claims Against Lurig and Ferris

Lurig and Ferris move for summary judgment dismissing the second third-party complaint against them. In the second third-party complaint, Navac asserts causes of action against Lurig and Ferris for contribution and common-law indemnification, contractual indemnification and breach of contract for failure to procure insurance.

Initially, Navac does not oppose the dismissal of those claims sounding in contractual indemnification and breach of contract for failure to procure insurance. Indeed, the contract between Navac and Lurig does not contain indemnification or insurance procurement provisions.

Thus, Lurig and Ferris are entitled to summary judgment dismissing those claims as against them.

In addition, Navac offers no feasible explanation or argument as to why it is entitled to contribution and common-law indemnification from Ferris, in his personal capacity.

Thus, Ferris is entitled to summary judgment dismissing the common-law indemnification and contribution claims as against him.

As to Navac's second third-party contribution and common-law indemnification claims against Lurig, "[c]ontribution 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 quotations 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,* 259 AD2d at 65).

Lurig argues that it is entitled to dismissal of the contribution and common-law indemnification claims against it because it was not guilty of any negligence that caused or contributed to plaintiff's accident. Ferris testified that the accident occurred on the opposite side of the building from where Lurig employees were working at the time of the accident. In addition, Ferris testified that he had never met or directed plaintiff.

In opposition, Navac argues that Lurig is not entitled to dismissal of said claim because, at a minimum, a question of fact exists regarding whether Lurig supervised plaintiff's work at the

Project. Briody, Navac's owner, testified that Ferris supervised plaintiff when Briody was not present at the Premises. Briody also testified that he listed Ferris as plaintiff's supervisor on the Workers Compensation C-2 report.

However, while a question of fact may exist with regard to whether Ferris supervised plaintiff, Navac has not put forth any evidence to show that said supervision was negligent (*Perri,* 14 AD3d at 684-685).

Thus, Lurig is entitled to summary judgment dismissing the second third-party claim for contribution and common-law indemnification against it.

The court has considered Navac's remaining arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of defendants/third-party plaintiffs' 1807-1811 Park Avenue Development Corp., ESF Property Inc. and Eastside Floor Services Ltd's (collectively, defendants) motion (motion sequence 013), pursuant to CPLR 3212, for summary judgment dismissing the complaint against them is granted to the extent of dismissing the Labor Law § 241 (6) claim as against defendants, except with respect to those claims predicated upon alleged violations of Industrial Code sections 12 NYCRR 23-1.15 and 12 NYCRR 23-5.1 (j); and dismissing the common-law negligence and Labor Law § 200 claims as against defendants; and these claims are dismissed as against defendants, and the motion is otherwise denied; and it is further

ORDERED that the part of defendants/third-party plaintiffs' motion (motion sequence 013), pursuant to CPLR 3212, for summary judgment in their favor on the third-party claim for

contractual indemnification as against third-party defendant Navac Construction Corp. is granted with respect to defendants/third-party plaintiffs 1807-1811 Park Avenue Development Corp. and ESF Property Inc. only, and the motion is otherwise denied; and it is further

ORDERED that second third-party defendants Lurig Construction Inc. (Lurig) and Calim Ferris's (Ferris) motion (motion sequence 012), for summary judgment dismissing Navac's second third-party complaint against them is granted, and the second third-party complaint is dismissed as against Lurig and Ferris with costs and disbursements to them, as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of Lurig and Ferris; and it is further

ORDERED that the remainder of the action shall continue, and

The remaining parties are further reminded that there is an appearance in this matter in the Early Settlement Conference Part on June 9, 2017, at 9:30 A.M.

This constitutes the decision and order of the court.

Dated: June 6, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.