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| Golovashchenko v Telentos Constr. Corp. |
| 2017 NY Slip Op 31696(U) |
| August 11, 2017 |
| Supreme Court, New York County |
| Docket Number: 116388/2010 |
| Judge: Carol R. Edmead |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

-----X
LEONID GOLOVASHCHENKO and OLENA
GOLOVASHCHENKO,

Index No.: 116388/2010

Plaintiffs,

-against-

TELENTOS CONSTRUCTION CORPORATION and
DORMITORY AUTHORITY OF THE STATE OF
NEW YORK and THE CITY OF NEW YORK,

Defendants.

-----X
TELENTOS CONSTRUCTION CORPORATION and
DORMITORY AUTHORITY OF THE STATE OF
NEW YORK,

Third-Party Index No.:
590406/2011

Third-Party Plaintiffs,

-against-

A.S.A.R. INTERNATIONAL CORP.,

Third-Party Defendant.

-----X
A.S.A.R. INTERNATIONAL CORP.,

Fourth-Party Plaintiff,

-against-

DYNA CONTRACTING, INC.,

Fourth-Party Defendant.

-----X
A.S.A.R. INTERNATIONAL CORP.,

Fifth-Party Plaintiff,

-against-

LIRO GROUP, a subsidiary of LIRO CONSULTING
ENGINEERS,

Fifth-Party Defendant.

-----X
Edmead, J.:

This is an action to recover damages for personal injuries allegedly sustained by an asbestos removal worker on November 13, 2009, when he was struck by a loose plywood plank that blew off a wheelbarrow/dolly, while working at a construction site located on the roof of the Bird S. Coler Hospital on Roosevelt Island, New York (the Premises).

Defendants Telentos Construction Corporation (Telentos), Dormitory Authority of the State of New York (DASNY) and the City of New York (the City) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any and all cross claims against them, as well as for summary judgment in their favor on the third-party claim for contractual indemnification against third-party defendant/fourth-party/fifth-party plaintiff A.S.A.R. International Corp. (ASAR).

Plaintiffs Leonid Golovashchenko (plaintiff) and Olena Golovashchenko cross-move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against defendants, as well as for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Telentos.

BACKGROUND

On the day of the accident, the City and DASNY owned the Premises where the accident occurred. Telentos served as the general contractor on a project underway at the Premises, which entailed the renovation of its roof and parapet walls, as well as the removal of asbestos from the

roof (the Project). Telentos hired fourth-party defendant Dyna to perform the brick and roofing work, and it hired plaintiff's employer, ASAR, to remove the asbestos.

Plaintiff's First Deposition

At his first deposition, which was held on February 11, 2010 (First Deposition), plaintiff testified that he was hired by ASAR to remove asbestos from the roof of the Premises. Plaintiff explained that he was injured when, while returning to his work area after retrieving some materials, he was struck in the head by a single sheet of plywood that had been lying across the top of a "four-wheel barrow"/dolly (First Deposition, tr at 10). Plaintiff described the plywood as measuring approximately "[t]en feet by five feet" (*id.* at 11). The plywood was half an inch thick. At the time of the accident, ASAR's other workers were inside various asbestos containment tents located on the roof.

Plaintiff's Second Deposition

During plaintiff's second deposition, which was held on June 6, 2012 (Second Deposition), plaintiff testified that he only took direction from his ASAR foreman. He explained that, on the day of the accident, there were at least six asbestos containment tents at the Premises, which were comprised of plastic sheets, set up on the roof. Typically, because the conditions on the roof were "windy," the ASAR foreman attached pieces of plywood to the tents in order to protect the plastic from tearing when it was hit by gusts of wind (Second Deposition, tr at 73).

At the time of the accident, a piece of plywood was lying across a dolly, so as to create a platform for the transport of bags of asbestos. Plaintiff testified that he had used the dolly "as [he] was told to do so," and that, in the past, his supervisor had instructed him to "put plywood on that dolly to transport plywood" (*id.* at 79). Plaintiff also testified that the piece of plywood

“was always there” (*id.* at 82). Plaintiff described the piece of plywood as not being attached to the dolly in any way. Plaintiff explained that the plywood was placed on the dolly because the dolly didn’t “have the original base there” (*id.* at 83, 117). When he worked for ASAR four years earlier, that same dolly still had its original platform, which consisted of wooden boards bolted to the dolly. Prior to the day of the accident, plaintiff never experienced any problems with the dolly or the piece of plywood, and he never made any complaints regarding the same.

Plaintiff testified that the accident occurred when the piece of plywood flew off the dolly and struck him. He noted that, on the morning of the accident, he had heard about a wind advisory on the radio, discussing it later with his supervisor and a union representative. When asked if the plywood that struck him was the same plywood that was typically used by ASAR workers, plaintiff replied, “Yes” (*id.* at 78). Plaintiff acknowledged that window contractors also used plywood on the job. However, when he was asked if the plywood that struck him could have belonged to them, plaintiff responded, “no, plywood like this big size struck me” (*id.* at 84).

Plaintiff’s Third Deposition

During his third deposition, which was held on September 12, 2013 (Third Deposition), plaintiff testified that an ASAR employee was responsible for placing the subject piece of plywood on the dolly. Plaintiff explained that he knew that ASAR owned the dolly, because he remembered it from a previous job that he worked on for ASAR. Plaintiff also maintained that he “never saw such a dolly at any other company” (Third Deposition, tr at 15). Plaintiff also knew that it was an ASAR employee who placed the plywood on the dolly, “[b]ecause A.S.A.R. worked in that area. Nobody else was there” (*id.* at 16). Plaintiff further explained that “[a]t the time [his] accident happened, the dolly was placed at a different area on the roof, far away from

where [other] people were working,” and “far away from where those people were doing their job. A totally different area of the roof” (*id.* at 17). Plaintiff never observed any of the workers performing the window and brickwork using the subject dolly.

Plaintiff asserted that the general contractor had an investigator at the Premises that “would come, look, and go” (*id.* at 37). However, he never spoke to that investigator about the dolly either before or after the accident.

Deposition Testimony of Andrzej Szczech (ASAR’s Vice-President and Project Manager)

Andrzej Szczech testified that he was ASAR’s vice-president and project manager on the day of the accident. Szczech explained that ASAR, a company specializing in asbestos abatement, was hired to work on the Project by Telentos, the general contractor. On the day of the accident, ASAR’s duties included removing asbestos from certain portions of the roof. While he was not sure whether any other companies were working on the roof on the day of the accident, he was generally aware that another company was hired to replace part of the building’s parapet wall.

Szczech testified that plaintiff was injured when he was struck by a piece of plywood that originated from a dolly which was used “[t]o transfer the [asbestos] bags from the work area” (Szczech tr at 48). At first, he testified that he was not sure who owned the subject dolly and piece of plywood. However, later in his deposition, Szczech acknowledged that ASAR owned dollies that were similar in appearance to the dolly at issue in this case.

Szczech also explained that, due to the risks associated with asbestos contamination, other contractors were not allowed in areas where ASAR was performing its asbestos removal work, “plus 25 feet” (*id.* at 78). In fact, when asked which entities had access to the roof while

ASAR was performing its work, Szczech replied, “Basically, nobody” (*id.*). He also asserted that ASAR work areas were “cordoned off” when work was being performed (*id.* at 80). In addition, employees of other contractors were not allowed to use any of ASAR’s equipment.

Deposition Testimony of Tommy Demoneris (Telentos’s President)

Tommy Demoneris testified that DASNY hired Telentos, a general contractor, to renovate the roof and parapet walls at the Premises. This work included the removal of asbestos from the roof. Pursuant to their subcontracts, ASAR was hired to perform asbestos abatement, and Dyna was hired to perform brick and roofing work at the Premises. Demoneris testified that he did not know who owned the dolly involved in the accident. While Telentos owned dollies, it did not provide dollies for use on the Project, because all of the work was subcontracted out to other companies. In addition, he was unaware of any complaints about the dolly or the dolly’s platform.

Demoneris testified that only ASAR workers were allowed to be present in the asbestos containment areas while the asbestos removal work was in progress. After asbestos removal work was completed, a “clearance report” was necessary before any roofing work could continue (Demoneris tr at 72). Typically, there was at least a two-hour gap between the asbestos removal work and the resumption of the roofing work.

Demoneris also testified that it was Telentos’s responsibility to check the weather and determine whether work could proceed on any given day. If inclement weather was forecasted, he would contact the appropriate subcontractors to discuss whether work would proceed. Ultimately, Telentos had the authority to prohibit work in the event of “wind gusts and rainy weather,” because wind could blow around “anything that is light” (*id.* at 33-34). That said, there

was never a circumstance where he called off work due to inclement weather.

Affidavit of Ricardo Caballos (ASAR Asbestos Worker)

In his affidavit, Ricardo Caballos stated that he was employed as an ASAR asbestos removal worker on the day of the accident. He stated that “there was only [one] green dolly on the rooftop, and it was owned and used by ASAR” (defendants’ notice of motion, exhibit Q, Caballos aff). In addition, “[o]nly ASAR workers were allowed to use [the dolly]” (*id.*). The ASAR workers used the dolly to move bags of asbestos. In addition, while ASAR workers were performing their asbestos abatement work, no other contractors were allowed in the area “because of the danger of airborne asbestos . . . and the need for special protective gear when working with asbestos” (*id.*).

Caballos explained that, “[s]hortly before the accident, ASAR workers were using the dolly to move plywood to the asbestos containment tents in order to brace them, because the wind had become strong” (*id.*). He maintained that ASAR workers were responsible for placing the subject plywood on the dolly prior to the accident. He surmised that the plywood that struck plaintiff “could have been a piece of plywood that had been lying on top of the green dolly and was then lifted off by a strong gust of wind” (*id.*).

The Accident Reports

The C-2 report, DASNY’s incident report and ASAR’s accident report all stated that plaintiff was injured when he was struck by a piece of plywood that had been picked up by a strong gust of wind.

The Weather Report and Telentos’s Daily Field Report

A certified weather report, prepared by plaintiffs’ expert, Sam DeAlba, a consulting

meteorologist for Weather Works, LLC (the Weather Report), states that the weather forecast on the morning of the accident included: “Northwest winds 20-30 MPH with gusts up to 40 MPH. Chance of rain near 100 percent” (plaintiffs’ notice of cross motion, exhibit N, the Weather Report). In addition, the Weather Report stated that, at the time of the accident, “maximum sustained winds ranged between 30-35 MPH with peak gusts of 40-47 MPH” (*id.*).

In addition, Telentos’s daily field report (the Field Report) for the day of the accident stated, “Rain No Work” (plaintiffs’ notice of cross motion, exhibit K, the Field Report).

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]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). 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 Against Defendants

Defendants move to dismiss the Labor Law § 240 (1) claim against them. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept

1983)), provides, in relevant part:

“All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“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 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

“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]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the 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, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, plaintiffs do not oppose that part of defendants' motion seeking to dismiss the Labor Law § 240 (1) claim against them. Thus, defendants are entitled to dismissal of said claim.

The Labor Law § 241 (6) Claim Against Defendants

Plaintiffs cross-move for summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against defendants. Defendants move for summary judgment dismissing said claim 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 on “owners and contractors to ‘provide reasonable and adequate protection and safety’ for workers” (*Ross*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, 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.* at 503-505).

Although plaintiffs list multiple alleged violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code section 23-1.28 (a), which refers to the maintenance of hand-propelled vehicles, like the dolly in the instant case, plaintiffs do not address those alleged Industrial Code violations in their opposition to defendants’ motion, and, thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant’s summary judgment motion dismissing the

wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned)). As such, defendants are entitled to summary judgment dismissing those parts of the Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.28 (a)

Initially, “[a]lthough the first sentence of Industrial Code (12 NYCRR) § 23-1.28 (a), requiring hand-held propelled vehicles to be maintained in good repair, is a general directive that cannot serve as a predicate for liability under Labor Law § 241 (6), the second sentence of 12 NYCRR 23-1.28 (a), providing ‘[h]and -propelled vehicles having damaged handles or any loose parts shall not be used,’ sets forth a sufficiently specific, positive command, the violation of which may serve as a predicate for plaintiff[s’] cause of action pursuant to Labor Law § 241 (6)” (*Garcia v 95 Wall Assoc., LLC*, 116 AD3d 413, 413 [1st Dept 2014] [internal citations omitted]).

That said, defendants argue that section 23-1.28 (a) does not apply to the facts of this case, because the piece of plywood that struck plaintiff was not a loose part, but rather, an additional item that was not part of, or integral to, the dolly itself. However, as plaintiffs argue, as the dolly’s original platform was missing, and, as it was necessary for the dolly to possess a platform in order to do its job, the subject piece of plywood functioned as an integral part of the dolly. In addition, this makeshift platform, which plaintiff described as always being present on the dolly, was loose and unsecured at the time of the accident, as evidenced by the fact that it was picked up by the wind and blew into plaintiff.

Thus, plaintiffs are entitled to summary judgment in their favor as to liability on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.28 (a). Accordingly, defendants are not entitled to summary judgment dismissing the same.

The Common-Law Negligence and Labor Law § 200 Claims Against Defendants

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Plaintiffs cross-move for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims as against Telentos. 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] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

“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: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

“Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a

Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work").

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; see also *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [common-law negligence and Labor Law § 200 claims dismissed where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Initially, as plaintiff does not oppose that part of defendants' motion which seeks to dismiss the common-law negligence and Labor Law § 200 claims against the City and DASNY,

these defendants are entitled to dismissal of said claims against them. Therefore, the common-law negligence and Labor Law § 200 discussion will be addressed in regard to Telentos only.

As discussed previously, the accident occurred because the piece of plywood that struck plaintiff was not properly secured to the dolly. As a result, when hit by a gust of wind, it flew off the dolly, striking plaintiff. Therefore, the accident was caused due to the means and methods of the work and will be analyzed accordingly.

A review of the record reveals that Telentos did not control the subject work that caused the accident, i.e., the securing of the plywood to the dolly. To that effect, ASAR owned the subject dolly, and it was one of ASAR's workers who was responsible for placing the plywood on the dolly without first properly securing it against the wind. In addition, not only did ASAR solely direct plaintiff's work, but due to the dangerous nature of airborne asbestos, no other employees were allowed anywhere near ASAR's work areas while its asbestos abatement work was underway.

Nevertheless, "there exists sufficient record evidence to present a triable issue of fact on whether [Telentos] had control over the methods of [the ASAR workers] in the sense that [Telentos] had the ability to coordinate the work activity of [those workers] . . . [and it] had the capacity to exclude [the ASAR workers] from working [on the roof]" in the event of inclement weather (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998]).

While it is acknowledged that occasional gusts of wind are to be expected in roof areas, questions of fact exist as to whether Telentos was negligent in that it knew or should have known that the weather conditions on the roof at the time of the accident were severe enough to put plaintiff's safety at risk, and whether it's failure to prohibit work on the roof, in light of said

weather conditions, caused and/or contributed to the accident.

Thus, plaintiffs are not entitled to summary judgment in their favor as to liability on the common-law negligence and Labor Law § 200 claims against Telentos, and Telentos is not entitled to dismissal of said claims against it.

The Loss of Consortium Claim Against Defendants

Defendants also move to dismiss plaintiff Olena Golovashchenko's derivative claim against them for loss of consortium, arguing that they do not bear any liability for plaintiff's accident, and "any . . . derivative claim for loss of consortium must fall once the primary claim of negligence fails" (*Maddox v City of New York*, 108 AD2d 42, 49 [2d Dept 1985] *affd* 66 NY2d 270 [1985]; *see also Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]). Notably, in opposition, plaintiffs do not oppose or even address that part of defendants' motion seeking to dismiss said claim.

Thus, defendants are entitled to dismissal of the loss of consortium claim against them.

Defendants' Third-Party Claim for Contractual Indemnification Against ASAR

Defendants move for summary judgment in their favor on the third-party claim for contractual indemnification against ASAR. "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 Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish

that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Additional Facts Relevant to this Issue:

Pursuant to an indemnification provision (the Indemnification Provision) contained in an agreement, dated October 22, 2009, between Telentos and ASAR (the Agreement), ASAR agreed to defend and indemnify defendants from any and all claims arising out of ASAR’s work, to the extent that ASAR’s negligence was at the root of those claims. Specifically, the Indemnification Provision states, in pertinent part, as follows:

“To the fullest extent permitted by law, [ASAR] shall defend, indemnify and hold harmless [Telentos], [ASAR’S] other subcontractors . . . the owner [the City] and their agents, consultants and employees [DASNY] (the indemnitees) from all claims for bodily injury and property damage that may arise from the performance of [ASAR’S] work to the extent of the negligence attributed to such acts or omissions by [ASAR], [ASAR’s] subcontractor or anyone employed directly or indirectly by any of them or anyone whose acts any of them may be liable”

(Defendants’ notice of motion, exhibit R, the Agreement, section 7).

Here, as discussed previously, ASAR’s negligence in failing to properly secure the platform to the dolly was a proximate cause of the accident. As there is no evidence that any negligence on the part of the City and/or DASNY caused or contributed to the accident, pursuant to the Indemnification Agreement, these defendants are entitled to contractual indemnification from ASAR.

However, as questions of fact exist as to whether any negligence on the part of Telentos caused or contributed to the accident, Telentos is not entitled to contractual indemnification from

ASAR at this time.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the parts of defendants Telentos Construction Corporation (Telentos), Dormitory Authority of the State of New York (DASNY) and the City of New York's (the City) (collectively, defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the loss of consortium claim, the Labor Law § 240 (1) claim and those parts of the Labor Law § 241 (6) claim that were abandoned, as well as the common-law negligence and Labor Law § 200 claims against DASNY and the City of New York, are granted, and these claims are dismissed as against these defendants; and it is further

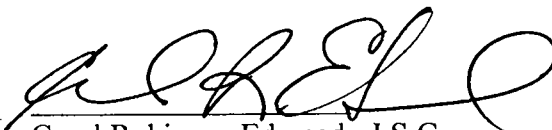
ORDERED that the part of defendants' motion for summary judgment in their favor on the third-party claim for contractual indemnification against third-party defendant/fourth-party/fifth-party plaintiff A.S.A.R. International Corp. is granted as to DASNY and the City only, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiffs Leonid Golovashchenko and Olena Golovashchenko's cross motion, pursuant to CPLR 3212, for summary judgment in their favor as to liability on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.28 (a) is granted, and the motion is otherwise denied; and it is further

ORDERED that counsel for defendant Dormitory Authority of the State of New York shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: August 11, 2017

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.