SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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GEORGE LATORRE and YOLANDA LATORRE,

Plaintiffs,

Index No. 154200/12

-against-

BFP ONE LIBERTY PLAZA CO., LLC, ICON INTERIORS, INC., CLEARY GOTTLIEB STEEN & HAMILTON, LLP, and ELITE METALS, LLC,

Defendants.

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BFP ONE LIBERTY PLAZA CO., LLC, ICON INTERIORS, INC. and CLEARY GOTTLIEB STEEN & HAMILTON, LLP,

Third-Party Plaintiffs,

-against-

PREFERRED SPRINKLER & MECHANICAL CORP.,

Third-Party Defendant.

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BFP ONE LIBERTY PLAZA CO., LLC, ICON INTERIORS, INC. and CLEARY GOTTLIEB STEEN & HAMILTON, LLP,

Second Third-Party Plaintiffs,

-against-

ELITE METALS, LLC,

Second Third-Party Defendant.

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Ellen M. Coin, J.:

This action arises out of a fall at a construction site at a building located at One Liberty Plaza, New York, New York (Building). Plaintiff George LaTorre alleges that while he was

installing sprinklers at the site, he was injured after tripping and falling over prefabricated segments of stairs (stringers) positioned on a dolly. He and his wife[1] brought this action against the building owner (defendant BFP One Liberty Plaza Co. LLC [BFP]), the construction manager (defendant Icon Interiors, Inc. [Icon]), the tenant of the premises (defendant Cleary Gottlieb Steen & Hamilton, LLP [Cleary]) and the supplier of the stair components (defendant Elite Metals, LLC [Elite]).

Defendants BFP, Icon and Cleary brought a third-party action against plaintiff's employer, Preferred Sprinkler & Mechanical Corp. (Preferred), and a second third-party action against Elite.

In motion sequence 003 Elite moves pursuant to CPLR 3212 for summary judgment dismissing the amended verified complaint, the second third-party complaint, and all cross-claims. Preferred cross-moves for summary judgment dismissing the claims pursuant to Labor Law sections 240 and 241(6) asserted in the third-party complaint.[2] Plaintiff cross-moves to amend his bill of

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[1]Plaintiff Yolanda LaTorre discontinued her claim by filing a notice of discontinuance dated July 10, 2012 prior to service of the original summons and complaint. However, plaintiff's counsel thereafter served the original summons and complaint on all parties and did not file his amended complaint until November 11, 2013. Although plaintiff's counsel did not precisely follow the procedure required by CPLR 3217, at this time it is clear that Yolanda LaTorre is no longer a party to this action and that her claim for loss of services has been abandoned.

[2]Preferred's cross-motion, brought against BFP, Icon and Cleary, and not against Elite, the original moving party, is not a true cross-motion. *Kershaw v Hospital for Special Surgery*, 114

particulars to assert additional sections of the Industrial Code.

In motion sequence 004 defendants BFP, Icon and Cleary move for summary judgment dismissing the complaint and all cross-claims; and against Elite and Preferred for indemnification, assumption of their defense and for their attorneys' fees.

Motion sequences 003 and 004 are consolidated for purposes of this decision.

Deposition Testimony

Plaintiff testified that on June 23, 2011, he was on a ladder installing sprinklers in the elevator lobby of the 39th floor of the Building. He was the foreman on the job site, and had been working there for about a week before his accident. Although his amended verified complaint alleges that he fell while descending the ladder (¶ 19 at 3), he testified at deposition that prior to the accident he had already descended the ladder and reached the floor before the accident occurred. Plaintiff folded the ladder and took a small step backwards, when he tripped on stringers stored on a dolly, and fell. His ladder fell on top of him. Plaintiff claims that the stringers were not at that location five minutes earlier when he first set up his ladder. (Affirmation of Eric N. Bailey dated July 22, 2016; ex. N

AD3d 75, 87-88 (1st Dept 2013). However, in the absence of objection or any allegation of prejudice to plaintiff, the court will determine Preferred's cross-motion. *Id.*, 114 AD3d at 88.

at 26-27, 46-50, 93, 107, 120, 150-151, 152-153, 163). Plaintiff did not see or hear anyone move the dolly into position before he stepped off the ladder; there was too much noise from tile being sawed, and from welding, tacking and the sound of hammer guns (id., 98-99). He did not see the dolly until after his fall (id., 148, 166).

John Constant, of Elite's parent company, testified that prior to plaintiff's accident he observed one or two stringers lying flat on dollies, six inches from the wall in the elevator lobby, awaiting installation. Flooring contractors were working at one end of the corridor.

Richard Hallaran, foreman for Elite Metals on the renovation, testified that there were occasions when his workers would temporarily place materials to be used on a particular day somewhere and then have to move them later. He also stated that Icon's project superintendent, Ted Woods, would direct Elite as to where to store delivered materials. He stated that he would never give anyone from another company permission to move Elite's material.

Richard Scamenek, Elite's project manager, testified that upon delivery the contractor (Icon) directed Elite where to store the stringer sections due to their size. Icon employees would clear up discarded materials, moving gang boxes. Ted Woods told Scamenek that if Elite left something chained in the area, Icon

would cut the chain and move the materials. Further, he testified that Elite moved dollies daily (Scamenek dep. At 35, 74, 83, 86-7).

The Complaint

The verified amended complaint alleges two causes of action: (1) for negligence; and (2) for violation of Sections 200, 240 and 241(6) of the Labor Law, including violations of Industrial Code sections 12 NYCRR 23-1.5(a),(e)(1)(2); 2.1(a)(1)(2)(b).

The Bills of Particulars

Plaintiff's Verified Bill of Particulars dated September 4, 2012 recited the same violations of the Labor Law and Industrial Code as those alleged in the amended verified complaint. (Affirmation of Norman E. Frowley dated September 2, 2016; ex.B). His proposed "Supplemental Verified Bill of Particulars III" alleges the additional violations of Industrial Code "Section 23-1.7(e)(1) and (2)." (Id., ex. E).

Legal Analysis

Plaintiff's cross-motion to amend

None of the parties oppose so much of plaintiff's cross-motion as seeks to amend his bill of particulars to assert new and additional violations of the Industrial Code. Accordingly, his cross-motion is granted.

Labor Law § 240

It is uncontested that plaintiff's accident occurred after

he had descended his ladder and did not result from an elevation-related hazard. Plaintiff does not attempt to defend so much of his second cause of action as relies upon Labor Law § 240. Accordingly, this aspect of his second cause of action is dismissed as against all of the defendants.

To the extent that this Labor Law section is the predicate for claims in the Third-Party Complaint against Preferred and in the Second Third-Party Complaint against Elite, such claims are dismissed, as are all cross-claims predicated on this section.

Common law negligence and Labor Law § 200

BFP, Icon and Cleary seek summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them. The owner, tenant and general contractor may not be held liable under common law negligence or Labor Law § 200 for injuries arising from a dangerous condition in the absence of evidence that such party actually created the dangerous condition or had actual or constructive notice of it. (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]). Similarly, Elite, as a subcontractor, stands in the shoes of the owner and general contractor, and is subject to the same standard. (*Id.*).

Plaintiff testified that the stringers were not present five minutes before his accident, when he ascended his ladder. There is no evidence in the record that BFP, Icon, Cleary or Elite were on notice of the presence of the stringers on the dolly at the

location where plaintiff fell. Thus, plaintiff's claims for common law negligence and violation of Labor Law § 200 fail. (*Matter of 91st Street Crane Collapse Litigation*, 133 AD3d 478, 479 [1st Dept 2015]). As a consequence, all cross-claims relying on these theories fail as well.

Plaintiff now argues that the "dangerous condition" for which BFP, Icon and Cleary are liable was the overcrowded condition of the elevator lobby where the accident occurred, a condition to which Elite contributed by storing its stringers on dollies there. Plaintiff cites deposition testimony that Icon's superintendent, Ted Woods, directed subcontractors as to where delivered materials were to be placed. Further, he claims that as a result of Woods' directions, the elevator lobby was so crowded that it narrowed to permit passage only of a hand truck or dolly, and that any change in the position of materials would create a tripping hazard.

However, the proximate cause of plaintiff's accident was not general overcrowding in the lobby, but the placement of the dolly over which he tripped. Plaintiff's allegation of crowded materials is too attenuated from the accident itself to support his claims of negligence and violation of Labor Law § 200 against these defendants. (*Vazquez v Takara Condominium*, 145 AD3d 627, 628 [1st Dept 2016]; *Da Silva v KS Realty, L.P.*, 138 AD3d 619, 620 [1st Dept 2016]; *Misirlakis v East Coast Entertainment*

Props., Inc., 297 AD2d 312, 312-313 [2nd Dept 2002]). As these claims are dismissed, all cross-claims and third-party claims relying on them are also dismissed.

Violation of Labor Law § 241(6)

Labor Law § 241(6) requires owners and contractors to provide adequate safety protection for workers and to comply with the specific rules and regulations promulgated by the Commissioner of Labor. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). This duty is nondelegable, and the injured plaintiff need not show that the defendant exercised control or supervision over the worksite in order to demonstrate his right to recovery (*White v Sperry Supply & Warehouse Inc.*, 225 AD2d 130, 133-134 [3rd Dept 1996]). "To sustain a cause of action under this provision, however, 'a plaintiff must show that the defendant breached a regulation containing specific commands and standards as opposed to one that merely incorporates the general common-law standard of care.'" (*Id.*, 225 AD2d at 134 [citations omitted]).

In support of his claim under this statute plaintiff now relies, pursuant to his Supplemental Verified Bill of Particulars III, on Industrial Code Section 23-1.7, subsections (e)(1) and (2). They provide as follows:

(e) Tripping and other hazards.

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

According to plaintiff's own testimony, the area in which he was working and injured was thirty feet long by twelve feet wide (LaTorre deposition at 24). If the size of the room were the only factor, then there would be no question that it was not a passageway. (*See e.g. Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 607 [1st Dept 2015]; *Coaxum v Metcon Constr., Inc.*, 93 AD3d 403 [1st Dept 2012][work area is not a passageway]; *Canning v Barneys N.Y.*, 289 AD2d 32, 34 [1st Dept 2001]).

However, plaintiff testified that all of the material for the renovation was consolidated in the elevator lobby where he fell: milk crates with the electricians' material, rolls of cable, a bucket of sand for tiling, gang boxes of the various trades. He claimed that there was "a clear path in between all the materials; so, made it where you could walk with a dolly and hand-truck, you had a pathway and everything was pretty much stacked up. So, he had an opening; so, basically, all I did was take my ladder, walked through the opening." (Frowley Aff. in

Opposition Oct. 13, 2016, ex. B at 23, 32-34, 38-41). LaTorre also testified that he felt that the area should have been cleared of materials, "but, you had the path...." (Id. at 101). Plaintiff stated that the issue of everybody's material being consolidated in the elevator lobby was raised in a briefing by the foreman of the job. (Id. at 102).

Thus, although the elevator lobby was clearly a working area, plaintiff creates an issue of fact with his testimony that the crowded materials narrowed it to a passageway in which he worked. (*Pereira v New School*, 148 AD3d 410, 412 [1st Dept 2017][issue of fact as to whether accident occurred in a "passageway"]; *Aragona v State*, 147 AD3d 808 [2nd Dept 2017]; *Lois v Flintlock Const. Serv., LLC*, 137 AD3d 446, 447 [1st Dept 2016]). Accordingly, summary judgment on the issue of application of 12 NYCRR 23-1.7(e)(1) must be denied.

However, 12 NYCRR 23-1.7(e)(2), regarding working areas, does not apply here. Stringers on a dolly awaiting installation do not constitute "scattered material" within the meaning of the regulation. (*Cumberland v Hines Interests Ltd. Partnership*, 105 AD3d 465, 466 [1st Dept 2013]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Kinirons v Teachers Ins. & Annuity Assn. Of Am.*, 34 AD3d 237, 238 [1st Dept 2006]). This claim, all cross-claims and all third-party claims relying on it are dismissed.

Contractual indemnity against Elite

While BFP, Icon and Cleary seek summary judgment on their claim for contractual indemnification against Second Third-Party Defendant Elite, they failed to produce any contracts in their moving papers. Elite, in opposition, produced its indemnification dated December 1, 2010, the November 17, 2010 Blanket Insurance Indemnity Agreement, and the contract between Elite and Icon dated August 31, 2010. BFP, Icon and Cleary produced the indemnities only upon reply.

The December 1, 2010 indemnification by Elite and the November 17, 2010 indemnity agreement specifically name only Icon as the indemnified party. Elite also agreed to hold harmless "owner, owner's consultants, the building landlord, and their directors, officers, employees, agents and representatives" (Affirmation of Eric N. Bailey dated December 2, 2016, ex. B; Affirmation of Eileen R. Fullerton dated December 9, 2016, ex. A).

However, "[a]n agreement to indemnify must be 'strictly construed'...there must be an 'unmistakable intention' to indemnify" (*Goldwasser v Geller*, 279 AD2d 297, 297 [1st Dept 2001]). Since only Icon is named in the indemnifications, the motion for summary judgment of BFP and Cleary for contractual indemnification from Elite is denied. (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 627 [1st Dept 2015]). Searching the record,

summary judgment is granted dismissing the claims of BFP and Cleary for contractual indemnity as against Elite.

Elite contends that its indemnity of Icon applied only prospectively. It relies on the language in the Blanket Insurance Indemnity Agreement (NYSCEF. Doc. No. 181, ¶5), which sets forth the requirements for all contracts entered into subsequent to that agreement. However, the indemnity Elite issued on its letterhead on December 1, 2010 in favor of Icon was not so time-limited. In it Elite agreed to indemnify Icon from "all claims, damages, losses and expenses...**arising out of [Elite's] work**...." (Bailey Aff. dated Dec. 2, 2016, ex. B [emphasis added]). It is uncontested that Elite was engaged in the stairway project for Icon at the time of plaintiff's accident on June 23, 2011. Thus, the indemnity applies.

Elite also contends that the indemnity contained in its contract with Icon limited its exposure to its own "negligent acts or omissions" (Bailey Aff., ex. C). However, its December 1, 2010 indemnity, set forth above, expanded the scope of its indemnification of Icon.

While this court has dismissed plaintiff's claim of negligence against Icon, pursuant to the indemnity of December 1, 2010, Icon is entitled to full indemnity for the remaining statutory claim against it, to the extent the claim arises out of Elite's work (*Brown v Two Exchange Plaza Partners*, 76 NY2d 172,

180-181 [1990]; *Giangarra v Pav-Lak Contracting, Inc.*, 55 AD3d 869, 871 [2nd Dept 2008][absent negligence, General Obligations Law § 5-322.1 not a bar to enforcement of contractual indemnification for vicarious liability under Labor Law § 241(6)]).

Contractual Liability against Preferred

As noted, in support of their cross-motion against Preferred for contractual indemnification, BFP, Icon and Cleary failed to produce the contract on which they sought to rely. On reply they offer the Blanket Insurance Indemnity Agreement that Preferred executed, together with the letter of Preferred's carrier, Harleysville Preferred Insurance Company (now known as Nationwide).

Of course, the insurance company's letter binds only the carrier (which is not a party to this action), not Preferred. The Blanket Insurance Indemnity Agreement, identical to that executed by Elite, names only Icon. Thus, to the extent that it is effective, only Icon is indemnified, and only to the extent that plaintiff's injury arises out of Preferred's work.

It is therefore

ORDERED that the motion of defendant and second third-party defendant Elite Metals LLC (1) to dismiss the First Cause of Action, and so much of the Second Cause of Action as alleges

violation of Labor Law §§ 200 and 240 of the Amended Verified Complaint is granted, and the First Cause of Action and so much of the Second Cause of Action of the Amended Verified Complaint as alleges violation of Labor Law §§ 200 and 240 are dismissed as against defendant Elite Metals LLC; (2) to dismiss so much of the Second Cause of Action of the Amended Verified Complaint as alleged violation of Labor Law § 241(6) based upon violation of 12 NYCRR 23-1.7(e)(2) is granted and the claim is dismissed as against defendant Elite Metals LLC; and (3) to dismiss so much of the second third-party complaint and all cross-claims based on alleged negligence, violation of Labor Law §§ 200 and 240, and the portion of Labor Law § 241(6) predicated on violation of 12 NYCRR 23-1.7(e)(2) is granted and such claims and cross-claims are dismissed as against defendant Elite Metals LLC; and the balance of the motion is denied; and it is further

ORDERED that the cross-motion of plaintiff George LaTorre to amend his bill of particulars is granted; and it is further

ORDERED that the cross-motion of third-party defendant Preferred Sprinkler & Mechanical Corp. to dismiss the claim asserted pursuant to Labor Law § 240 in the Third-Party Complaint is granted, as is so much of its cross-motion as sought dismissal of all claims in the Third-Party Complaint arising out of alleged violation of Labor Law § 241(6) based on violation of 12 NYCRR 23-1.7(e)(2); such claims are dismissed; and the balance of the

cross-motion is denied; and it is further

ORDERED that the court grants so much of the motion of defendants BFP One Liberty Plaza Co. LLC, Icon Interiors, Inc., and Cleary Gottlieb Steen & Hamilton LLP as sought dismissal of (1) the First Cause of Action of the verified amended complaint, the portions of the Second Cause of Action predicated on Labor Law §§ 200 and 240 of the verified amended complaint, and (2) so much of the Second Cause of Action as alleged violation of Labor Law § 241(6) predicated on violation of 12 NYCRR 23-1.7(e)(2), and (3) dismissal of all cross-claims predicated on those claims; and the First Cause of Action of the verified amended complaint and the portions of the Second Cause of Action of the Verified Amended Complaint predicated on Labor Law §§ 200 and 240 are dismissed as against defendants BFP One Liberty Plaza Co., LLC, Icon Interiors, Inc., and Cleary Gottlieb Steen & Hamilton, LLP, as is the portion of the Second Cause of Action of the Verified Amended Complaint alleging violation of so much of Labor Law § 241(6) as is based on violation of 12 NYCRR 23-1.7(e)(2), together with all cross-claims predicated on those portions of the verified amended complaint; and it is further

ORDERED that so much of the motion of Third-Party Plaintiffs and Second Third-Party Plaintiffs BFP One Liberty Plaza Co. LLC, Icon Interiors, Inc. and Cleary Gottlieb Steen & Hamilton, LLP as sought summary judgment upon their contractual indemnification

claims against Third-Party Defendant Preferred Sprinkler & Mechanical Corp. and Second Third-Party Defendant Elite Metals, LLC is granted to the extent that the claims seek contractual indemnification in favor of Icon Interiors, Inc. for claims arising out of the work of each such indemnitor, and the balance of the motion is denied; and it is further

ORDERED that the claims of Third-Party Plaintiffs BFP One Liberty Plaza Co., LLC and Cleary Gottlieb Steen & Hamilton, LLP for breach of contractual indemnity as against Third-Party Defendant Preferred Sprinkler & Mechanical Corp. in the First and Fourth Causes of Action of the Third-Party Complaint are dismissed; and it is further

ORDERED that the claims of Second Third-Party Plaintiffs BFP One Liberty Plaza Co., LLC and Cleary Gottlieb Steen & Hamilton, LLP for breach of contractual indemnity as against Second Third-Party Defendant Elite Metals, LLC in the First and Second Causes of Action of the Second Third-Party Complaint are dismissed.

ENTER:

Dated: September 12, 2017

Ellen M. Coin, A.J.S.C.