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| <b>Turner v Arcadis U.S. Inc.</b>  |
| 2018 NY Slip Op 30385(U)   |
| February 13, 2018  |
| Supreme Court, Queens County   |
| Docket Number: 702115/12   |
| Judge: Darrell L. Gavrin   |
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## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

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JEFFREY TURNER,

Index No. 702115/12

Plaintiff,

Motion August 9, 2017 &  
Date September 25, 2017

- against-

ARCADIS U.S. INC., MALCOLM PIRNIE, INC.,  
RTKL ASSOCIATES, INC., CH2M HILL, INC.,  
WELSBACH ELECTRIC CORP. and LJ COPPOLA,  
INC.,

Motion  
Cal. No. 146, 123, 168 & 169

Motion  
Seq. No. 8, 9, 10 & 11

Defendants.

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MALCOLM PIRNIE, INC., CH2M HILL, INC. and  
CH2M HILL NEW YORK, INC.,

Third-Party Plaintiffs,

- against -

SKANSKA USA CIVIL NORTHEAST, INC., E.C.C.O.  
III ENTERPRISES, INC., J.F. WHITE CONTRACTING  
COMPANY and SKANSKA USA CIVIL NORTHEAST,  
INC./E.C.C.O III ENTERPRISES, INC./J.F. WHITE  
CONTRACTING CO., A JV D/B/A SEW CONSTRUCTION,

Third-Party Defendants.

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The following papers numbered E131 to E245 read on these motions by defendant, Welsbach Electric Corp. (Welsbach) (Seq. 8); by defendant, LJ Coppola, Inc.(LJ Coppola) (Seq. 9); by defendants, Malcolm Pirnie, Inc. and CH2M Hill NY, Inc., sued here as CH2M Hill, Inc. (MP/CH2M) (Seq. 10); and by third-party defendants, Skanska USA Civil Northeast, Inc., E.C.C.O. III Enterprises, Inc., J. F. White Contracting Company, and Skanska USA Civil Northeast, Inc./E.C.C.O. III Enterprises, Inc./J. F. White Contracting Company, a JV d/b/a Sew Construction (individually and combined as SEW) (Seq. 11), all seeking, among other things, summary judgment dismissing plaintiff's and third-party plaintiffs' complaints, pursuant to CPLR 3212.

|  | <u>Papers<br/>Numbered</u>     |
|--|--------------------------------|
| Notice of Motion - Affirmation - Exhibits..... | E131-E199,<br>E227, E229, E230 |
| Affirmation in Opposition - Exhibits.....      | E228, E231-E241,<br>E 245      |
| Reply Affirmation.....                         | E237-E238,<br>E242-E244        |

Upon the foregoing papers, it is ordered that the instant motions, all for, among other things, summary judgment pursuant to CPLR 3212, are determined as follows:

Plaintiff, a construction worker employed by third-party defendant, Skanska, one of the SEW joint venturers, allegedly sustained serious personal injuries while working at a construction site owned by New York City Department of Environmental Protection (DEP). The owner hired SEW, as general contractor; MP/CH2M, to provide construction management services at the job site; and, as required by New York General Municipal Law § 101 (Wicks Law), Welsbach, as electrical contractor and LJ Coppola, as plumbing/HVAC contractor.

Plaintiff alleges he was seriously injured when, as he attempted to step over a three-foot high concrete “form,” that he and co-workers had fabricated, onto the ground, he placed his right foot on a metal brace on the far side of the form, located “about half way down the form ... put (his) left foot down (intending to step on the ground, and) ... stepped right on the very end of a (wood) four-by-four, and twisted (his) ankle.” Plaintiff commenced this action alleging common law negligence and violations of Labor Law §§ 200, 240 and 241, all alleging that the four-by-four piece of wood constituted a dangerous condition. Defendant, LJ Coppola, filed a cross claim against all other defendants alleging apportionment, contribution, and common-law and contractual indemnification, and against SEW for contractual indemnification and breach of contract for failure to procure insurance. MP/CH2M filed a cross claim against defendants, Welsbach and LJ Coppola, alleging common-law indemnification and contribution. Welsbach filed a cross claim against defendants, MP/CH2M and LJ Coppola, sounding in common-law indemnification and contribution.

Plaintiff discontinued this action against defendants, Arcadis U.S., Inc. and RTKL Associates, Inc., by stipulation, dated October 25, 2012.

The court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is ‘arguable’” [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Stukas v*

*Streiter*, 83 AD3d 18 [2d Dept 2011]). Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

“[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” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

Liability under Labor Law §§ 200, 240 (1) and 241 (6) applies generally to “owners, general contractor, or their agents.” In the case at bar, defendants, Welsbach, LJ Coppola, and MP/CH2M are, concededly, not owners of the premises in question. Plaintiff’s contention that Welsbach and LJ Coppola are to be considered “general contractors,” and, as such, possessed of a non-delegable duty to plaintiff to keep the work area safe, is without merit. Welsbach and LJ Coppola were, under the purview of the Wicks Law, prime contractors, and, “[a]s a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated with the authority to oversee and control the activities of the injured worker” (*Giovanniello v E. W. Howell, Co., LLC*, 104 AD3d 812, 813 [2d Dept 2013]; quoting *Barrios v City of New York*, 75 AD3d 517, 518 [2d Dept 2010]; see *Garcia v Market Assoc.*, 123 AD3d 661 [2d Dept 2014]). Welsbach and LJ Coppola have established, *prima facie*, that they were not in privity of contract with plaintiff’s employer, and that they had not been delegated the authority to, nor did they attempt to control or oversee plaintiff’s activities. In opposition, plaintiff has failed to demonstrate a triable issue of fact in this regard. Additionally, “an entity is not deemed to be an agent of an owner or contractor for purposes of Labor Law § 200 if it lacked sufficient control over the premises and the activity that brought about the injury” (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015], quoting *Navarro v City of New York*, 75 AD3d 590, 592 [2d Dept 2010]; see *Dereveneaux v Hyundai Motor Am.*, 156 AD3d 758 [2d Dept 2017]). Said defendants have, *prima facie*, demonstrated their lack of sufficient control over plaintiff’s activities. In opposition, plaintiff’s conclusory allegations, without evidentiary support, failed to raise a triable issue of fact in rebuttal. Consequently, Labor Law §§ 200, 240 (1) and 241 (6) do not apply to defendants, Welsbach and LJ Coppola, in this action, and the branches of said defendants’ motions to dismiss such causes of action are granted.

Labor Law § 240 (1) protects a worker from “specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured,” and, to be applicable, the harm must flow “directly ... from the application of the force of gravity to an object or person” (*Ross v Curtis Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (see *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658 [2014]), and the duty imposed upon owners, contractors and their agents is non-delegable, rendering them liable regardless of whether they supervise or control the work for failure to provide proper protection from elevation-related hazards (see *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426 [2015]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]).

Liability is imposed where there exists a hazard contemplated under the statute; a failure to utilize a safety device, or the use of an inadequate, safety device enumerated therein; and “plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Wilinski v 334 East 92<sup>nd</sup> Housing Development Fund Corp.*, 18 NY3d 1 [2011]; *Kandatyán v 400 Fifth Realty, LLC*, 155 AD3d 848 [2d Dept 2017]).

“Not every worker who falls at a construction site ... gives rise to the extraordinary protections of Labor Law § 240 (1)” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Where there is no statutory violation, or where a hoisting or securing device of the type enumerated in the statute would not be necessary (see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Garcia v Market Assoc.*, 123 AD3d 661 [2d Dept 2014]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2d Dept 2013]), or where the plaintiff’s actions are the sole proximate cause of his or her own injuries (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712 [2d Dept 2017]); Labor Law §240 (1) will not apply.

“To recover on a cause of action pursuant to Labor Law §240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident” (*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2d Dept 2014]). Such statute is not applicable unless plaintiff’s injuries result from an elevation-related risk and the inadequacy of the safety device (see *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d at 658).

In the case at bar, based upon the evidence presented, defendants, SEW and MP/CH2M, have satisfied their *prima facie* burden of demonstrating that the subject accident did not result from the type of elevation related hazard to which the statute applies (*Parker v 205-209 East 57<sup>th</sup> Street Associates, LLC*, 100 AD3d 607, 609 [2d Dept 2012]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833 [2d Dept 2017]), but was “rather, one of the usual and ordinary dangers of a construction site” (*Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 21

[2d Dept 2016]; see *Toefer v Long Is. R. R.*, 4 NY3d 399 [2005]). Further, plaintiff failed to allege and demonstrate a causal nexus between his injuries and the lack of any prescribed safety device, nor did he provide expert opinion as to “the necessity of any particular safety device to perform the specific task the plaintiff was performing at the time of the accident” (*Carrasco v Weissman*, 120 AD3d 531, 534 [2d Dept 2015]; see *Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280 [2003]). Consequently, the branches of SEW’s and MP/CH2M’s motions seeking summary judgment dismissing plaintiff’s claims under Labor Law § 240 (1) are granted, and such causes of action are dismissed.

Defendants, SEW and MP/CH2M, also sought dismissal of the causes of action against them based upon common law negligence and Labor Law §§ 200 and 241 (6). Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor or agent to provide construction site workers with a safe place to work (see *DeMilo v Weinberg Bros., LLC*, 122 AD3d 895 [2d Dept 2014]; *Nicoletti v Iracane*, 122 AD3d 811 [2d Dept 2014]). To be relieved of liability for injuries, pursuant to Labor Law § 200 or for common-law negligence, where, as here, plaintiff’s accident allegedly arose because a dangerous condition existed on the premises where the work was being performed, a general contractor must make “a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of [it]” (*Costa v Sterling Equip., Inc.*, 123 AD3d 649, 650 [2d Dept 2014]; see *Niewojt v Nikko Const. Corp.*, 139 AD3d 1024 [2d Dept 2016]).

Defendant, MP/CH2M, was a joint venture retained by DEP to provide “construction management services” at this job site, contending that it was responsible for overseeing the construction activities of the contractors for the purpose of assuring compliance with, and conformity to, the plans, specifications and requirements of the contract terms, and good construction practice. MP/CH2M was not an owner or a general contractor, and asserts that the contract between it and DEP did not confer upon MP/CH2M the authority or duty to stop any observed, unsafe work practice of another entity working at the job site. MP/CH2M showed it did not perform any “labor” at the project, besides its observational duties, and was responsible solely to report to DEP any noncompliance with regard to a specific contractor’s or subcontractor’s own safety plan guidelines. The right to generally supervise the work, or even stop the work if a safety violation is noted, or to monitor compliance with contract specifications or safety regulations, is insufficient to impose liability under Labor Law § 200 or common law negligence (see *Derosas v Rosmarin Land Holdings, LLC*, 148 AD3d 988 [2017]; *Messina v City of New York*, 147 AD3d 748 [2d Dept 2017]). Further, without the authority to supervise and control the work of the plaintiff, MP/CH2M did not “fall within the class of those having non-delegable liability as an ‘agent’ under §§ 240 and 241 (*Russin v Picciano*, 54 NY2d 311, 318 [1981]; see *Lamar v Hill*, 153 AD3d 685 [2d Dept 2017]).

In the case at bar, MP/CH2M has submitted sufficient evidence to, *prima facie*, demonstrate entitlement to summary judgment by demonstrating that it did not have the authority to, nor did it, exercise supervisory control over the contractor’s means and methods of performing the construction work which led to plaintiff’s injuries, and that it did not have constructive notice of any unsafe method utilized by plaintiff, or the alleged, subject condition

existing at the accident site (*see Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016]; *Ortega v Puccia*, 57 AD3d 54[2d Dept 2008]). Plaintiff has failed to raise a triable issue of fact in opposition. Consequently, this branch of MP/CH2M's motion is granted, and the Labor Law §§ 241 (6), 200 and common law negligence causes of action against it are dismissed.

As the general contractor of the instant project, SEW would bear a non-delegable duty, pursuant to Labor Law § 241 (6), to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, including plaintiff herein, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2016]). However, SEW was plaintiff's "employer" pursuant to a joint venture agreement at the time of plaintiff's accident.

Workers Compensation Law (WCL) § 11 prohibits third-party common-law indemnification or contribution claims against employers, unless the employee has sustained a "grave injury," or if the claim is based upon a written contract provision, entered into prior to the accident, by which the employer had expressly consented to contribution to, or indemnification of, the claimant (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486 [2004]; *Poalacin v Mall Props., Inc.*, 155 AD3d 900 [2d Dept 2017]). In the case at bar, the injuries claimed by plaintiff in his bill of particulars do not fall within the definition of "grave injury" in the statute. Further, no contract has been proffered in which plaintiff's employer expressly agreed to indemnify MP/CH2M. Consequently, SEW has demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing the common-law indemnity and contribution causes of action against it. In opposition, MP/CH2M has failed to raise a triable issue of fact with regard to the existence of a joint venture or to SEW's proof herein.

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, the motions by defendant, Welsbach Electric Corp. (Seq. 8); by defendant, LJ Coppola, Inc. (Seq. 9); by defendants, Malcolm Pirnie, Inc. and CH2M Hill NY, Inc., sued here as CH2M Hill, Inc. (Seq. 10); and by third-party defendants, Skanska USA Civil Northeast, Inc., E.C.C.O. III Enterprises, Inc., J. F. White Contracting Company, and Skanska USA Civil Northeast, Inc./E.C.C.O. III Enterprises, Inc./J. F. White Contracting Company, a JV d/b/a Sew Construction (Seq. 11), all seeking, among other things, summary judgment dismissing plaintiff's and third-party plaintiffs' complaints, pursuant to CPLR 3212, are granted, and the complaints, and all cross claims, as against each of them are dismissed.

Dated: February 13, 2018

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DARRELL L. GAVRIN, J.S.C.