SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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BRYAN ALLMAN,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION AND CORPORATION OF NEW YORK, AECOM, CRC ASSOCIATES INC., SHELTER ELECTRONIC MAINTENANCE CORP., SHELTER ELECTRONIC ACQUISITION SUBSIDIARY LLC and EUROTECH CNSTRUCTION CORP.,

Defendants.

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DECISION/ORDER

Index No.: 152044/2014

Mot Seqs. 002 and 003

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

MEMORANDUM DECISION

This is an action for personal injury. In motion sequence 002, Plaintiff, Bryan Allman ("Plaintiff"), moves pursuant to CPLR 3212 for summary judgment as to liability on his Labor Law § 240(1) claims as against defendants CRC Associates Inc. ("CRC"), The Port Authority of New York and New Jersey ("Port Authority"), Tishman Construction Corporation, Tishman Construction and Corporation of New York (collectively "Tishman"), Shelter Electronic Maintenance Corp., Shelter Electronic Acquisition Subsidiary LLC (collectively "Shelter") and Eurotech Construction Corp. ("Eurotech") (collectively the "Port Authority Defendants"). In motion sequence 003, CRC moves pursuant to CPLR 3212 for summary dismissal of the Complaint and cross-claims and summary judgment of it cross-claims against Shelter Electronic Maintenance Corp. and Eurotech. Motion sequences 002 and 003 are consolidated for disposition.

Factual Background

Plaintiff claims that on July 17, 2013, he became injured when a sling carrying a bundle of I-beams broke, causing an I-beam to contact his foot and thigh. Port Authority, the owner of the World Trade Center complex, hired Tishman as the construction manager to perform work in the area of the complex where Plaintiff was injured, known as the Vehicle Security Center ("VSC"). The VSC project entailed, among other things, the installation of scanners that move on tracks and scan over the tops of vehicles with x-rays to provide images of the contents of the vehicles. Tishman contracted with Plaintiff's employer, non-party Rapiscan Systems ("Rapiscan"), to supply the scanners. Plaintiff claims that Rapiscan in turn hired CRC to contract for all the labor for the installation of the scanner system and coordinate all the labor for the project (Deutsch Affirmation, ¶38). Next, Plaintiff claims that CRC contracted with Shelter to be the "Construction Manager" of the project and to perform electrical work at the VSC, and that it hired Eurotech to perform non-electrical work at the VSC, including the operation of the forklifts (*id.*, ¶18). Plaintiff also alleges that CRC provided the forklift for the project and that Eurotech employees operated the forklifts (*id.*, ¶19).

Plaintiff alleges that on the date of his accident, I-beams used to construct the scanner system were being transported within the VSC using a forklift. Plaintiff claims that the bundle of I-beams was secured to the forklift using one sling. Plaintiff further claims that as the forklift operator was transporting the I-beams, the bundle ran against a wall, destabilizing the load, and in turn causing the sling to break, resulting in an I-beam contacting him.

Plaintiff filed this action alleging, *inter alia*, claims under Labor Law §§ 200, 240(1) and 241(6). Plaintiff's supplemental bill of Particulars alleges violations of New York State Industrial Code sections: 23-1.0; 23-1.5; 23-1.7; 23-1.8; 23-1.12; 23-1.30; and 23-2.3.

CRC filed the cross-claim against the Port Authority Defendants for contractual and common-law indemnification, contribution and breach of contract for failure to procure insurance. The Port Authority Defendants filed the cross-claim against CRC for indemnification and contribution.

Motion Sequence 002

Plaintiff's Motion

In support of his motion for summary judgment of his claim under Labor Law § 240(1), Plaintiff argues that defendants failed to secure the hoisted I-beam rails on the date of his injury, and their failure to do so was a proximate cause of his injuries.

In support of Plaintiff's argument, plaintiff contends that Port Authority owned the VSC. Plaintiff also argues that Tishman was the construction manager and statutory agent of the Port Authority. Plaintiff further contends that Tishman had supervisory authority to select and control the work of the contractors for the VSC project. Plaintiff argues that the testimony of David Collins ("Collins"), Tishman's Senior Vice President and Site Safety Director, demonstrates that Tishman managed the safety of the VSC. Plaintiff further argues that CRC was the general contractor for the work performed at the VSC, since it was hired by Tishman to contract the labor for the installation of scanner system and that CRC subcontracted with Shelter and Eurotech. Plaintiff also argues that Shelter and Eurotech were agents of CRC.

Next, Plaintiff argues that he was not the sole proximate cause of his injuries, since defendants failed to provide him with the necessary safety devices to secure the I-beams and because Eurotech's employee caused the bundle to contact the wall.

CRC's Opposition

In opposition, CRC argues that it is not a proper defendant under Labor Law §§ 240 and 241(6), since it was not the general contractor for the VSC project. CRC contends that Collins

testified that there was no general contractor for the site. Moreover, CRC argues that it never had personnel on site, and that its only responsibility was to provide the rental forklifts for the VSC project. Additionally, CRC contends that it did not have authority to hire contractors, except for Shelter and Eurotech. CRC further contends that it was hired by Rapiscan to hire union labor, but that it was not responsible for supervising the Eurotech laborers. Moreover, CRC argues that it did not have the authority to enforce safety standards.

Next, CRC contends that it was not responsible for providing materials or safety devices on the VSC site, and that Rapiscan was responsible for providing the devices needed to perform the work.

Finally, CRC argues that Plaintiff was the sole proximate cause of his accident, since he was the person responsible for the oversite of the installation rails, including instructing the forklift operators on how to load the rails to the forklifts. Moreover, CRC argues that Plaintiff decided to secure the rail with the single sling despite the availability of additional security devices.

The Port Authority Defendants' Opposition

In opposition to Plaintiff's motion, the Port Authority Defendants first argue that Plaintiff was the sole proximate cause of his injuries. Specifically, the Port Authority Defendants contend that Plaintiff directed how the rails were to be hoisted. Moreover, Port Authority contends that Plaintiff had access to additional safety equipment. The Port Authority Defendants submit the affidavit of Thomas Oswald ("Oswald"), an employee of Eurotech, wherein he claims that Plaintiff directed him and the forklift operator regarding the transportation of materials in the VSC and that other safety devices were available.

Next, the Port Authority Defendants argue that the height differential that caused Plaintiff's injury is insufficient to present an extraordinary elevation risk under section 240(1).

Moreover, the Port Authority Defendants argue that Eurotech and Shelter are improper defendants, since Plaintiff failed to present evidence that either is a statutory agent of CRC. The Port Authority Defendants contend that the contracts between Shelter and Eurotech and CRC do not indicate that they had supervisory authority over Rapiscan (Plaintiff).

Plaintiff's Reply

In reply, Plaintiff initially argues that he was not the sole proximate cause of his injuries. Plaintiff contends that defendants failed to submit evidence demonstrating that there were other specific safety devices readily available to Plaintiff, and that he was instructed to use such devices, but refused to. Additionally, Plaintiff argues that he did not direct the method by which the forklift operator hoisted the I-beams. Next, Plaintiff argues that he made a *prima facie* showing of defendants' violation of section 240(1), by demonstrating that the forklift was not outfitted with the proper safety devices to secure the bundle of I-beams.

Motion Sequence 003

CRC's Motion

In support of CRC's motion for summary dismissal of Plaintiff's claim under Labor Law § 200/common law negligence, CRC argues that it did not have the authority to control the activity that caused Plaintiff's injury. Next, CRC argues that Plaintiff's claims against it under Labor Law §§ 240(1) and 241(6) should be dismissed, as CRC was not an owner, general contractor, or statutory agent. CRC also argues that as a subcontractor, it did not have a supervisory role over the work at the VSC and that it was not delegated a supervisory role. Next, CRC argues that Plaintiff's claims under section 241(6) should be dismissed because Plaintiff is unable to prove that CRC violated the Industrial Code.

Further, CRC argues that it is entitled to summary judgment of its cross-claims for contractual and common-law indemnification against Shelter and Eurotech. CRC contends that

contracts with both companies had indemnity provisions running to the benefit of CRC. CRC also contends that it was free from negligence, as it did not supervise or control work at the VSC and did not create the condition that caused Plaintiff's injury.

Next, CRC argues that it is entitled to summary judgment of its cross-claim for breach of contract for failure to procure insurance against Shelter and Eurotech, as the agreements required that Shelter and Eurotech procure insurance, but neither party complied with the obligation. CRC contends that it is entitled to attorney's fees because of the breach.

Plaintiff's Opposition

In opposition, Plaintiff contends that CRC was a general contractor or a statutory agent for the purposes of Labor Law §§ 240(1) and 241(6) because it hired subcontractors to perform the work at the VSC and coordinated the performance of that work. Moreover, Plaintiff contends that CRC violated New York Industrial Code sections 9.2(c) and 9.8(b), as CRC overloaded the forklift with multiple I-beam rails at once and by failing to ensure that the I-beams were properly secured. Finally, Plaintiff argues that CRC is liable pursuant to Labor Law § 200, because it had supervisory authority and control the work that caused Plaintiff's accident and that it failed to provide the necessary slings for lifting the I-beam rails, failed to properly rig the I-beams, and permitted more than one I-beam to be lifted at once.

The Port Authority Defendants' Opposition

In partial opposition to CRC's motion, the Port Authority Defendants argue that CRC's motion for summary judgment of CRC's contractual and common law indemnification and breach of contract claims against Shelter and Eurotech should be denied, since there is an issue of fact as to who was required to provide the equipment used at the VSC for the subject project. As to CRC's claim of breach of contract for failure to procure insurance, the PAD argue that Shelter and Eurotech did procure insurance and that, in any event the application is premature, as

CRC has not been found liable for the negligence of Shelter or Eurotech. Further, the Port Authority Defendants argue that CRC's tender was previously accepted by Eurotech consistent with the terms of CRC's agreement with Eurotech.

CRC's Reply

In reply to Plaintiff's opposition, CRC reiterates that it was not a general contractor or statutory agent, since the language of the agreement between Rapiscan and CRC indicates that CRC was not expected or required to provide supervision for the VSC project. Next, CRC argues that Plaintiff's addition of claims under Industrial Code sections 9.2(c) and 9.8(b) assert, for the first time, that CRC is liable for a failure of the forklift itself.

In reply to the Port Authority Defendants' opposition, CRC contends that the respective agreements between CRC and Shelter and Eurotech require them to indemnify CRC for personal injuries in connection with their work, and that they were performing work pursuant to their agreements at the time of Plaintiff's injury. Further, CRC argues that it is entitled to common law indemnification, since Shelter and Eurotech were responsible work at the VSC. Moreover, CRC argues that the contracts CRC entered with Shelter and Eurotech required that the companies provide their own oversight for the work. Finally, CRC argues that it is entitled to summary judgment of its breach of contract claim against Shelter and Eurotech. CRC also contends that while it accepted tender with a reservation of rights, the agreement required that Shelter and Eurotech provide insurance coverage without reservation.

Discussion

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor

(*Friedman v BHL Realty Corp.*, 83 AD3d 510 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR § 3212 [b]; *Sokolowsky*, 101 AD3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Carroll v Radoniqi*, 105 AD3d 493 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342 [1st Dept 1984]; *see also*, *Armstrong v Sensormatic/ADT*, 100 AD3d 492 [1st Dept 2012]).

Labor Law§§ 200, 240(1) and 241(6) Status

The threshold question for Labor Law §§ 240(1) and 241(6) is whether a defendant was an owner, a general contractor, or an agent of either (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To hold a subcontractor or statutory agent of the owner or general contractor absolutely liable for violations of Labor Law sections 240 and 241, there must be a showing that the subcontractor had the authority to supervise and control the work giving rise to the obligations imposed by these statutes (*see e.g., Russin v. Louis N. Picciano & Son*, 54

N.Y.2d 311, 318 [1981] ["When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"]; *Nascimento v. Bridgehampton Const. Corp.*, 86 A.D.3d 189, 192 [1st Dept 2011]). "The determinative factor on the issue of control is not whether [a defendant] furnishes the equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed" (*Everitt v. Nozkowski*, 285 A.D.2d 442, 443-44 [2d Dept 2001]; *see Mathews v. Bank of Am.*, 107 A.D.3d 495, 496 [1st Dept 2013]) [holding that a subcontractor was entitled to summary dismissal of Labor Law § 240(1) claim where there was no evidence that it had the authority to supervise, direct, or control the work plaintiff was performing at the time of her injury]). The duty imposed by Labor Law §§ 240(1) and 241 is nondelegable and a subcontractor who breaches that duty may be held liable in damages regardless of whether they actually supervised or controlled the work (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 500 [1993]; *see Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625, 628 [1st Dept 2012] ["Whether [the subcontractor] actually supervised [the plaintiff] is irrelevant"]).

At the outset, the branch of Plaintiff's motion seeking summary judgment as to liability of his Labor Law § 240(1) as against Shelter and Eurotech is denied, since there is an issue of fact as to whether Shelter and Eurotech had authority to control the activity that caused Plaintiff's injury, i.e., the transportation of the I-beams. Arle, the representative of Eurotech, testified that Rapiscan, and in turn Plaintiff, supervised the transportation of the rails (E-file Doc. No. 49, Dozier Aff., Ex. L, 49:13-19), and that Eurotech did not have authority to direct the means and methods employed to perform Rapiscan's work at the VSC (*id.*, 88:24-89:11). Further, Mishlen, the Vice President of Shelter, testified that while he had the authority to stop the work of

Rapiscan if it was unsafe (E-file Doc. No. 49, Dozier Aff., Ex. K, 99:17-23) and had prepared daily reports regarding the project and submitted them to CRC (*id.*, 78:22-79:9), Rapiscan had decision making authority regarding the transportation of I-beams, and that Shelter did not have authority to control the means and methods of how Rapiscan's work was performed (*id.*, 100:3-5). Additionally, the respective agreements between Shelter and Eurotech and CRC do not show that Shelter or Eurotech had supervisory authority over the work performed at the VSC.

As to CRC, there is no evidence supporting Plaintiff's argument that CRC was a general contractor or statutory agent for the purpose of Labor Law sections 240(1) and 241(6). Instead, the evidence supports the contentions that Rapiscan was the general contractor for the VRC project and that CRC did not have supervisory authority over the project. Patel, the President and owner of CRC, testified that Rapiscan was the general contractor for the VSC project (E-file Doc. No. 47, Deutsch Aff., Ex. G, 29:22-24), and that Rapiscan hired CRC as a subcontractor (*id.*, 30:7-17). The document entitled "Subcontractor Approval Request," wherein Rapiscan is identified as the general contractor and CRC is identified as the subcontractor, buoys Patel's testimony (E-file Doc. No. 49, Dozier Aff., Ex. R).

Additionally, the subcontract between Rapiscan and CRC supports the contention that CRC was not the general contractor for the VSC project and that CRC was not a statutory agent of the Port Authority, Tishman or Rapiscan. Specifically, the subcontract does not indicate that the Port Authority, Tishman or Rapiscan was delegating its performance of the work or authority to supervise and control the work at the VSC to CRC (*compare Keenan v. Simon Prop. Grp., Inc.*, 106 A.D.3d 586, 589 [1st Dept 2013] [holding that the subcontractor defendant was not liable under Labor Law §§ 240(1) and 241(6) since the "subcontract between the project's general contractor and [defendant] did not state, or even reasonably imply, that the general

contractor was delegating its responsibilities for supervising and controlling the work at the project to [defendant]"), *with Naughton v. City of New York*, 94 A.D.3d 1, 10 [1st Dept 2012] *and Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625, 628 [1st Dept 2012] *and Nascimento v. Bridgehampton Const. Corp.*, 86 A.D.3d 189, 193 [1st Dept 2011] [holding that defendant was a contractor under Labor Law § 240(1) and 241(6) where it was "delegated plenary authority over the construction work at the site, which included the authority to supervise and control the work performed by its subcontractors . . . ."]).

Importantly, the subcontract between CRC and Rapiscan clearly designates control of the VSC worksite to Rapiscan. The subcontract indicates that "[a]ll of the on-site activities will be managed and coordinated under Rapiscan supervision" (E-file Doc. No. 49, Dozier Aff., Ex. R, Subcontract, ¶1.0). Under the section entitled "Project Scope," the subcontract states that "[a]ll on-site activities will be supervised by a Rapiscan Project Lead" (*id.*, ¶2.0). In the section entitled "Project Schedule," the subcontract states that "[e]xperienced Rapiscan supervisors will be on-site at all times to direct subcontractor resources" (*id.*, ¶3.0) While the subcontract does state that the subcontractor (i.e., CRC) supervisor on site is required to attend daily meetings, there is no indication that that CRC had any supervisory authority at the worksite. In the proposal letter from CRC to Rapiscan, CRC states that: "CRC Associates Inc, would like to submit the attached unit price proposal to perform the installation work *as directed* by Rapi[]scan Systems . . . ." [emphasis added] (*id.*, Proposal Letter). Under the section entitled "Scope of Work," CRC agrees to: "1. Provide union craftsperson as needed. 2. Provide rental equipment as needed. 3. Provide site supervisor as needed" (*id.*)

Additionally, the testimony demonstrates that Rapiscan had supervisory authority over the work performed at the VSC. Patel, the President of CRC, testified that CRC was not doing

work at the premises on the date of the accident (Deutsch Aff., Ex. G, 34:13-19), and that no one from CRC visited the worksite during the VSC project (*id.*, 15:12-13; 17:6-12). Patel further testified that it was Rapiscan's responsibility as the general contractor for the VSC to discuss safety procedures with the subcontractors (*id.*, 34:3-10). Arle, on behalf of Eurotech, testified that the forklift operators moved the I-beams "[u]nder the direction of the General Superintendent, who was [Plaintiff]" (E-file Doc. No. 49, Dozier Aff., Ex. L, 61:3-8), and that Plaintiff "was addressed to us as being the General Superintendent from Rapiscan who was in charge of staging and taking care of the project" (*id.*, 49:13-19). Mishlen, the Vice President of Shelter, testified that Rapiscan had the authority to direct the means and methods of the work performed at the VSC (E-file Doc. No. 49, Dozier Aff., Ex. K, 99:5-13). Dounis, the Senior Safety Engineer for Tishman, states that "[plaintiff] would direct the work, the project plans, means and methods . . ." of the VSC project (*id.*, 71:2-15). Notably, Plaintiff does not submit testimony suggesting that CRC had supervisory authority over the work performed at the VSC.

The case law cited to by Plaintiff is distinguishable. In *Williams v. Dover Home Improvement, Inc.*, (276 A.D.2d 626 [2d Dept 2000]), the defendant-homeowners hired defendant-contractor to perform home improvements. The defendant-contractor thereafter hired the subcontractor, the plaintiff's employer, to perform the roofing work. The court determined that since defendant-contractor had the authority to choose the subcontractors who did the work, and directly entered into contracts with them, it had the authority to exercise control over the work, and was thus a contractor under Labor Law § 240(1). Here, however, the subcontract between CRC and Rapiscan states in no unclear terms that Rapiscan retained control over the worksite.

Accordingly, since CRC was neither a contractor, nor delegated the authority to supervise or control the work at the VSC, Plaintiff's motion for summary judgment of its Labor Law § 240 (1) claim is denied and the branch of CRC's motion for summary dismissal of Plaintiff's Labor Law §§ 240(1) and 241(6) [1] claims are granted as against CRC.

Labor Law § 240(1)

While the Court is dismissing Plaintiff's section 240(1) claims as against CRC, as it is not a proper Labor Law defendant, the Court now analyzes Plaintiff's substantive section 240(1) arguments as to Port Authority and Tishman.

Labor Law § 240(1), 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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]), and that this failure was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

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[1] The Court notes that CRC moves to dismiss Plaintiff's Labor Law § 241(6) claim under Industrial Code sections 23-1.5; 23-1.7; 23-1.8; 23-1.12; 23-1.30; and 23-2.3 Plaintiff's opposition does not address these violations, and they are thus deemed abandoned (*see Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]).

Unless the worker's actions were the sole proximate cause of his injuries, the owner and contractor remain statutorily liable under section 240(1) (*see Hernandez v. Bethel United Methodist Church of N. Y.*, 49 A.D.3d, 252, 252-53 [1st Dept 2008]). "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Nacewicz v. Roman Catholic Church of the Holy Cross*, 105 A.D.3d 402, 402–03 [1st Dept 2013]). "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

Here, Plaintiff meets his *prima facie* burden entitling him to relief under Labor Law § 240(1) by demonstrating that the use of a single sling was not sufficient to protect him from the bundle of falling I-beams and that the failure to provide an additional safety device proximately caused his injury. Specifically, Plaintiff demonstrates that the single sling failed to prevent the bundle from falling, and that the absence of an adequate hoisting device to secure the bundle during its transportation caused his injury. Plaintiff testified that at the time of his accident, workers were transporting a bundle of I-beams from the staging area to another area within the VSC (E-file Doc. No. 49, Dozier Aff., Ex. E, 80:5-12). Plaintiff further stated that each I-beam was approximately thirty-seven feet in length and weighed one thousand pounds each (*id.*, 61:16-17) and that the forklift operators used a single nylon sling to transport the bundle (*id.*, 62:14-15), and that there were three I-beams per bundle (*id.*, 64:6-9). Plaintiff testified that while

transporting the bundle, it made contact with a two-foot high wall, which pushed the load out of balance causing the bundle to become loose and "violently shift[] position from one side to another, and I would kind of describe it as to more of a left and right as it's going up and down at the same time" (*id.*,103:17-21). Plaintiff further testified that as a result of the bundle hitting the wall, the sling broke and an I-beam struck his left foot (*id.*, 102:20-24). Plaintiff indicated that the bundle was approximately two to three feet from the ground before it contacted his body (*id.*, 95:11-15).

Further, Dounis, the Senior Safety Engineer for Tishman, testified that the use of "a single sling to a forklift rail is not allowed," and is "against manufacturer procedures [for] use of the machine" (E-file Doc. No. 49, Dozier Aff., Ex., M, 31:22-33:2). Collins, Tishman's Senior Vice President and Site Safety Director, testified that the two safety slings are used to steady and control the load so that it does not become imbalanced (E-file Doc. No. 49, Dozier Aff., Ex. I, 32:15-33:2; 33:17-35:19). Accordingly, Plaintiff has shown that the absence of an additional hoisting device to secure the bundle during its transportation at least contributed to his injury.

In opposition, neither Port Authority nor Tishman provide any evidence that the single sling used to hoist the bundle was adequate. Moreover, Port Authority and Tishman fail to raise an issue of fact as to whether Plaintiff was the sole proximate cause of his accident. There is no evidence that a safety device was readily available or that Plaintiff was expected to use it. While Oswald, an employee of Eurotech who has not been deposed, affirmed that "[a]t the time of the accident, there were additional nylon slings available for us to use to carry the load" (E-file Doc. No. 89, Lucas Aff., Ex., D, ¶12), suggesting that additional slings adequate to transport the bundle was available, there is no evidence indicating that Plaintiff knew that another sling was readily available or that the Plaintiff was expected, or instructed, to use a second sling to secure

the load. Indeed, Port Authority and Tishman do not argue that plaintiff was ever directed to use an additional sling (see *Nacewicz* at 402–03).

Moreover, while there are differing accounts as to whether Plaintiff directed the forklift operators to use a single sling, where, as here, the single sling was inadequate to protect Plaintiff from a gravity related injury, and Plaintiff was not directed to use more than one sling, Plaintiff cannot be the sole proximate cause of his accident even if he directed the forklift operator to use a single sling (*see Hernandez v. Bethel United Methodist Church of N.Y.*, 49 A.D.3d 251, 253 [2008] ["[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' "] [internal citations and quotation marks omitted]; *see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012]).

Additionally, the Port Authority Defendants' argument that Plaintiff's accident did not involve an elevation related risk fails, as Labor Law § 240(1) encompasses gravity-related accidents, such as being struck by a falling object that was improperly hoisted or inadequately secured (*see Ross v. Curtis–Palmer Hydro.-Elec. Co.*, 81 N.Y.2d 494, 500–501; *Brown v. VJB Const. Corp.*, 50 A.D.3d 373, 376, [1st Dept 2008] ["[T]he extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240 (1)."]). Moreover, the elevation differential of approximately three feet may not be considered *de minimis* where, as here, "the weight of the object being hoisted is capable of generating an extreme amount of force, even though it only traveled a short distance" (*Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 474, [1st Dept 2012]).

Labor Law § 200

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" (*Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 [1993]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143-144 [1st Dept 2012]). Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). As discussed above, CRC did not have supervisory authority over the work performed at the VSC, and thus, Plaintiff's claim under Labor Law § 200 is dismissed. Since CRC is not liable for Plaintiff's injury, the Port Authority Defendants' cross-claims for indemnification and contribution are also dismissed.

Contractual and Common Law Indemnification

"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 N.Y.2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 N.Y.2d 149, 153 [1973]; *see also Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 [2004]).

Here, CRC is entitled to contractual indemnification from Eurotech. The relevant portion of the indemnification provisions in the contracts between CRC and Shelter and Eurotech indicates that:

> To the fullest extent permitted by law, Subcontractor agrees to indemnify, defend and hold harmless the Owner, Contractor and all additional Indemnitees . . . from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses, and disbursements related to . . . personal injuries . . . *arising out of or in connection with or as a result of or consequence of the performance of the Work of the Subcontractor in this agreement* (emphasis added).
>
> (E-file Doc. No 76, Dozier Aff., Ex. E, Art. 4A; Ex. F, Art. 4A).

Here, a Eurotech employee was performing work pursuant to the agreement at the time Plaintiff was injured. Specifically, Brian Dwyer, an employee of Eurotech, was operating the forklift when the sling broke (E-file Doc. No. 49, Dozier Aff., Ex. M, 16:7-9). However, CRC has not submitted evidence that Shelter was performing work pursuant to the contract at the time Plaintiff was injured. Moreover, there is no evidence indicating that CRC was negligent. As discussed above, CRC did not have any employees at the VSC and there is no claim that the forklift itself, which was provided by CRC, caused Plaintiff's injury.

"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 A.D.3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept 1999]). Here, CRC has not shown its entitlement to common law indemnification, as it has failed to show that Shelter or Eurotech were negligent as a matter of law.

Accordingly, CRC s entitled to summary judgment of its cross-claims against Eurotech for contractual indemnity, but it is not entitled to summary judgment on any of its other cross-claims for indemnification.

Breach of Obligation to Obtain Insurance

A party which breaches its obligation to procure insurance naming such party as an additional insured "is liable for the resulting damages, including the amount of damages awarded to or paid to the injured party in the main action, within the limits of the policy that was to have been procured, as well as the costs incurred in defense of the main action" (*Encarnacion v. Manhattan Powell L.P.*, 258 A.D.2d 339, 340 [1st Dept 1999], citing *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 219 [1990]).

CRC is not entitled to summary judgment of its cross-claim for breach of contract against Shelter and Eurotech. The provision requiring Shelter and Eurotech procure insurance states that the "[s]ubcontractor shall provide Commercial General Liability insurance on an occurrence basis with a combined limit for bodily injury, personal injury and property damage of at least $1 million per occurrence with a $2 million site/project specific aggregate" (E-file Doc. No 49, Dozier Aff., Ex. R, Art. 5A; Ex. S, Art. 5A).

Eurotech contends, and CRC concedes, that Eurotech accepted CRC's tender subject to a reservation of rights. While CRC argues that the procurement provision was not complied with, it fails to produce evidence that Shelter or Eurotech breached its obligation to procure insurance.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Plaintiff, Brian Allman, is granted to the extent that he is entitled to summary judgment on his Labor Law § 240(1) as against defendants the Port Authority of New York and New Jersey, Tishman Construction Corporation, and Tishman Construction and Corporation of New York. It is further

ORDERED that the motion of defendant CRC Associates Inc. is granted to the extent that the Complaint of Plaintiff, Brian Allman, and the cross-claims of the Port Authority of New York and New Jersey, Tishman Construction Corporation, Tishman Construction and Corporation of New York, Shelter Electronic Maintenance Corp., and Eurotech Construction

Corp. are dismissed and CRC's cross-claims for contractual and common law indemnification are granted as against Eurotech Construction Corp., including for attorney's fees It is further

ORDERED that the Clerk enter judgment accordingly. It is further

ORDERED that the case is severed and shall proceed against remaining defendants. It is further

ORDERED that counsel for Plaintiff, Brian Allman, shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

Dated: June 12, 2018

Hon. Carol Robinson Edmead, J.S.C.

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