Walsh v New York Univ.
2018 NY Slip Op 31582(U)
March 2, 2018
Supreme Court, New York County
Docket Number: Supreme Court, New York County
Judge: Carol R. Edmead

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

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THOMAS WALSH,

Plaintiff,

--against--

NEW YORK UNIVERSITY and TURNER CONSTRUCTION CORPORATION,

Defendants.

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NEW YORK UNIVERSITY and TURNER CONSTRUCTION CORPORATION,

Third-party Plaintiffs,

--against--

BURGESS STEEL, LLC, BURGESS STEEL ERECTORS OF NEW YORK, LLC, and BURGESS STEEL PRODUCTS CORP.,

Third-party Defendants.

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BURGESS STEEL, LLC, BURGESS STEEL ERECTORS OF NEW YORK, LLC, and BURGESS STEEL PRODUCTS CORP.,

Second Third-party Plaintiffs,

--against--

TRI STATE DISMANTLING CORP., NATIONAL ACCOUSTICS, INC., and D.P. CONSULTING CORP.,

Second Third-party Defendants.

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Index No. 116134/09
Motion Seq. Nos. 006 and 007

DECISION AND ORDER

Third-party index No. 590733/10

Third-party index No. 590521/13

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

In this Labor Law action, third-party defendants/second third-party plaintiffs Burgess Steel, LLC, Burgess Steel Erectors of New York, LLC, and Burgess Steel Products Corp.

(collectively, Burgess) move, pursuant to CPLR 3212, for summary judgment dismissing defendants/third-party plaintiffs New York University (NYU) and Turner Construction Corporation's (Turner) claims for contractual indemnity and breach of contract for failure to procure insurance (motion seq. No. 006). NYU and Turner move for summary judgment dismissing plaitntiff's complaint and granting NYU and Turner summary judgment on their claims for contractual indemnification against Burgess (motion seq. No. 007). The motions are consolidated for disposition.

BACKGROUND

This case arises out of renovation of NYU's Silver Hall, located at 100 Washington Square Park in Manhattan. NYU owns the property and Turner served as the construction manager on the project, which encompassed demolition and renovation work on four floors, including the roof. Turner's project superintendant, Devanand Deonarine (Deonarine) testified that the work on the roof involved "building a steel platform, so that NYU could install future mechanical equipment on that platform" (Deonarine tr at 27). This is the portion of the work with which plaintiff Thomas Walsh, an ironworker, and Burgess, his employer, were involved.

Prior to reaching the stage where the steel platform could be erected, some demolition work on the roof was required. Specifically, exhaust ducts and fans were removed (*id.* at 29). Turner hired second third-party plaintiff, Tri State Dismantling Corp. (Tri State), to do the demolition work on the roof. Prior to the project, the exhaust fans on the roof sat on iron angles that were raised two or three feet off of the roof (*id.* at 30-31). When Tri State removed the exhaust fans, they left a portion of the iron angles, which had supported them, protruding from the roof (id. at 32-35). As to why the angles were not fully removed, Deonarine tesitified that

"[y]ou don't want to cut [them] down low because then you would have water getting into the roof" (*id.*).

Prior to Burgess's erection of a metal platform, the carpentry subcontractors built a temporary plywood platform, referred to colloquially as a "dance floor," so that the work would not damage the roof (*id.* at 87). The remnants of the iron angles that had supported the exhaust fans protruded up from between the pieces of plywood of the "dance floor" (*id.* at 112-113). Deorarine testified that the project could have been scheduled differently, so that the protrusions were removed prior to Burgess's work, but doing so would have been more expensive:

> Q: Who decided, if you know, who decided that that would be the process?
> A: Basically the – whoever created the project schedule.
> Q: And who creates a project schedule?
> A: I did.
> Q: Okay. Is there any reason why you decided, and I'm not sure whether you decided or whether it ended up that leaving the protrusions in the condition they were in was the preferred way of doing it?
> A: It is the preferred way to do it because you end – you want to save your client, you know, money from basically having to rip that plywood out doing the protection, repairing the roof and putting the plywood [in] again.
> Q: Could it have been done differently?
> A: Yes. You could have actually – NYU could have actually removed all the plywood protection, repaired it, then put new protection down. That's what we could have done.

(*id.* at 117).

On October 14, 2009, plaintiff was working as a foreman for Burgess on the roof of Silver Hall. Directly before his accident, in which he tripped over one of the protruding angles, plaintiff gave instructions to his crew about the integration of beams, stored on the roof, to the metal platform Burgess was constructing. "I was telling them to take a couple of beams over to a certain area," plaintiff testified. "When I turned around, my pants, the lower part of the pants hooked the angle and flipped me to the ground" (plaintiff's September 3, 2014 tr at 59). Plaintiff alleges that the fall caused injuries, including a tear of the meniscus in his left knee, which

required surgery. Plaintiff also testified that the angles protruded six to eight inches from the plywood "dance floor" and that he had complained to the super from Turner about the safety risk they presented and the Turner super "said he was going to be taking care of them" (plaintiff's July 10, 2012 tr at 33-34, 37).

While no one from Turner acknowledged such a conversatin, Deonarine, Turner's project superintedant, testified that he saw the protruding angle remnants. Deonarine, who did walkthroughs of the jobsite "[a]t least three times a day," testified that the angles protruded approximately "six to eight inches" from the plywood "dancefloor" (Deonarine tr at 53, 88). Deonarine testified that he did not receive any complaints about the angles and, when asked why he did not have them removed, he responded: "Because in my mind they were close – they were away from the work area, and they were not a safety -- there were no major safety issues with it or safety concerns" (*id.* at 90).

Plaintiff commenced the action by serving his summons and complaint dated November 12, 2009. The complaint alleges that NYU and Turner are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6). Subsequently, NYU brought a third-party complaint dated August 10, 2010 against Burgess, alleging breach of contract for failure to procure insurance and seeking indemnification. Finally, Burgess brought a second third-party action against Tri State, National Accoustics, Inc. (National Accoustics), the carpentry subcontractor, and D.P. Consulting Corp. (DP Consulting) alleging failure to procure insurance, and seeking indemnification and contribution. While Tri State and National Accoustics joined the action, DP Consulting has never answered the second third-party complaint and is in default.

Turner and NYU argue, among other things, that the complaint should be dismissed, as the protruding angle involved in plaintiff's accident was not a dangerous condition on the jobsite. Burgess, on the other hand, argues that the Turner and NYU's claim for breach of contract should be dismissed because Burgess procured the insurance required by its contract with Turner. Additionally, Burgess argues that Turner and NYU's contractual indemnification claim is barred, or at least restricted, by the anitisubrogation doctrine.

DISCUSSION

The proponent of the motion for summary judgment must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]). This standard requires that the movant 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 (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, 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 (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]). Like the proponent of the motion, the party

opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

The party opposing summary judgment "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" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367 [1dt Dept 2007] ["(a) party's affidavit that contradicts (his or) her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v City of New York*, 86 AD3d 452, 928 NYS2d 1 [1st Dept 2011] *citing Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

Here, while Burgess's motion was made prior to NYU and Turner's motion, it makes more anyalytical and practical sense to discuss NYU and Turner application to dismiss plaintiff's complaint before turning to issues relating to indemnification.

Initially, the court must turn to plaintiff's timeliness argument. Plaintiff argues that NYU and Turner's motion should not be considered under *Brill v City of New York*, 2 NY3d 648 [2004]), as the note of issue was filed on June 27, 2017, and the motion was served on August 28, 2017. The court's "part rule" is that summary judgment must be 60 days from the filing of the note of issue. *Brill* held that courts, absent a showing of good faith, do not have discretion to

extend the time parties have to file dispositive motions beyond the 120-day deadline specified by CPLR 3212 (a) (2 NY3d at 652). Thus, *Brill* is not implicated in this circumstance. In any, event NYU and Turner are correct that they did not violate the court's 60-day rule, as the 60th day from the filing of the note of issue was August 26, 2017, and they e-filed the motion on the next business day, Monday, August 28, 2017. The court takes judicial notice that these dates are correct, and finds that, under General Construction Law § 25-a, Turner and NYU's motion was filed within the 60 day deadline. Thus, as the motion was filed both within the court's 60-day deadline, and well within the CPLR's 120-day deadline, the motion is timely and the court will consider it.

I. NYU and Turner's Application to Dismiss Plaintiff's Complaint

A. Labor Law § 240 (1)

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]). Where a violation has proximately caused a plaintiff's injuries, owners

and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Here, plaintiff's allegations plainly do not implicate Labor Law § 240 (1), as tripping and falling to the ground does not involve a risk arising from a phyisically significant elevation differential. Moreover, plaintiff has abandoned his Labor Law § 240 (1) claim by failing to address it in his opposition to Turner and NYU's motion (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Accordingly, the branch of Turner and NYU's motion seeking dismissal of Labor Law § 240 (1) must be granted.

B. Labor Law § 200 and Common-law Negligence

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 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

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]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled

the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, Turner and NYU contend that they had no supervisory control over plaintiff's work, as they did not provide him with instruction as to how to perform his work. However, plaintiff is alleging that the iron angle was a dangerous condition on the premises. Turner and NYU argue that they had no notice of the condition because they received no complaints about it. This argument is unpersuasive for two reasons. First, Turner's own witness, Deonarine, testified that he saw the cut angles protruding six to eight inches from the plywood "dance floor." Second, plaintiff testified that he complained about the condition to a Turner employee and was assured that it would be remedied. While no one from Turneer has acknowledged that such a conversation took place, there is clearly a question as to whether it took place. Accordingly, there is plainly a question of fact for the jury as to constructive and actual notice.

The only question left is whether the protruding cut angle was actually a dangerous condition. If there is a question of fact regarding this issue, then the branch of Turner and NYU's

motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be denied. Turner and NYU argue, citing to *Brezinski v Olympia & York Water St. Co.* (218 AD2d 633 [1st Dept 1995]), that the condition was not dangerous because it was open and obvious. In *Brezinski*, the plaintiff was injured when he fell from a catwalk with no handrails located above a building's roof (*id.* at 634). *Brezinski* did not have to with liability, but with apportionment of damages between defendants and the extent to whether the owner could get contractual indemnification because it was only vicariously liable, and not actively at fault (*id.* at 633-635). In that context, the First Department held that "[a] landowner is under no duty to warn a worker or his employer of dangers and conditions that are open and obvious, either pursuant to Labor Law § 200 or common-law negligence principles that it codifies" (*id.* at 635).

Brezinski is not decisive here, as cut angles protruding six to eight inches from a makeshift plywood platform are clearly distinguishable from the open and obvious danger presented by the catwalk in that case. While visible, a cut angles protruding half a foot from a plywood platform, presents the type of danger that lies in wait. Thus, plaintiff's Labor Law § 200 and common-law negligence cannot be dismissed on the basis of the dangerous condition being open and obvious.

Plainitff, in opposition, argues, citing to *Aragona v State of New York* (74 AD3d 1260 [2d Dept 2010]) that there is a question of fact as to whether the cut angle constituted a dangerous condition. In *Aragona*, the plaintiff, a dock builder, was injured "when he tripped on a padeye, which was welded to the deck of a work barge, as he was carrying materials" (*id.* at 1260). The Appellate Division held that the Court of Claims erred by dismissing plaintiff's Labor Law § 200 and common-law negligence claims where there was a question of fact as to whether the padeye was a dangerous condition on the jobsite (*id.* at 1260-1261). The court agrees with plaintiff that a

padeye, a metal plate with a projecting loop or ring, is much more closely analogous to the cut angle here than the catwalk in *Brezinski*. Thus, there is a question of fact as to whether cut angle is a dangerous question and the branch of Turner and NYU's motion that seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claims must be denied.

On reply, Turner and NYU raise a new argument as to the section 200 claim. That is, they argue, citing, among others, to *Gasper v Ford Motor Co.* (13 NY2d 104 [1963]), that the cut angle was an inherent part of the work being performed. In support, Turner and NYU submit plaintiff's deposition testimony in which he indicated that having cut angles on the jobsite is a common occurrence:

> Q: In your history of working in the construction industry as an iron worker, have you ever seen angle irons on a roof like this before?
> A: 90 percent of the jobs have it.
> Q: It's a frequent occurrence?
> A: Yes.
> Q: Do you know why these angle irons are not remove entirely before you t typically begin work?
> A: I'm assuming they're not removed becauase they don't want to get the roofer there and rip up the roof and take the angles out and patch the roof up. It's probably a costly thing.

(plaintiff's September 3, 2014 tr at 69).

Gasper held that section 200 liability "does not extend to hazards which are part of or inherent in the very work which the contractor is to perform" (13 NY2d 104 [1963]). Here, Turner's Deonarine testified that the work could have been ordered such that the cut angles would be removed before Burgess did its platform installation work, and that, for cost reasons, NYU and Turner opted to leave the cut angles in place. Plaintiff's testimony that this choice is commonly made on roof renovation jobs may show that this practice was customary, but there is a distinction between a practice that is customary and one that is inherently necessary. As Deonarine testimony shows that there is no inherent requirement on roof demolitions and

renovations that owners and contractors leave cut angles on the jobsite while work is ongoing, *Gasper* does not require that plaintiff's section 200 claim be dismissed. Thus, while the inherency argument may have procedural faults, as it was raised in the section 200 context for the first time on reply, it also, and more importantly, fails on substantial grounds.

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Initially, the court points out that, by failing to address them in its opposition, plaintiff has abandoned allegations relating to any Industrial Code regulation except for those relating to

12 NYCRR 23-1.7 (e). Moreover, while plaintiff argues under both subsections of this regulation, only subsection 1 does not apply because the accident took place in a work area rather than passageway. Accordingly, plaintiff allegations relating to 12 NYCRR 23-1.7 (e) (1) are dismissed. 12 NYCRR 23-1.7 (e) (2), entitled "Protections from general hazards, Tripping and other hazards, Working areas," provides that:

> "The parts of floors, platforms and similar areas where persons work or pass shall be kept free form 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."

Courts have held that this regulation is sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g. Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012]). Turner and NYU seek to have this regulation dismissed as an alleged predicate to liability, as plaintiff allegations refer to 12 NYCRR 1.7 without specificying as to which subsection is implicated. In support, Turner and NYU cite to *Reilly v Newireen Assoc.* (303 AD2d 214 [1st Dept 2003]). In *Reilly*, the First Department upheld the trial court's denial of plaintiff's application for leave to amend the complaint where plaintiff's complaint and bill of particulars failed to reference any Industrial Code regulations, and a court ordered deadline for amending the pleadings had passed (*id.* at 217-218) . While plaintiff could have pled more precisely,[1] there is nothing in *Reilly* that suggests that this lack of precision necessitates dismissal of 12 NYCRR 1.7 (e) (2) as a possible predicate for liability.

More substantively, Turner and NYU argue that the cut angle was not dirt, debris and from scattered tools and materials, or a sharp projections, as specified by the statute. In support, Turner and NYU cite to *Aragona* and *Dalanna v City of New York* (308 AD2d 400 [1st Dept

[1] *See* above, section IB, where the court was obliged to entertain and dismiss plaintiff's boilerplate and plainly meritless Labor Law §240 (1) claim.

2003]). Aragona held that defendant made a *prima facie* showing of entitlement to summary judgment by proferring evidence that "the padeye was not a sharp projection" (74 AD3d at 1261). *Dalanna* similarly held that a bolt, "which was embedded in the ground was not dirt, debris, scattered tools and materials, or a sharp projection" as specified by the regulation (308 AD2d 401 [internal quotation marks omitted]).

In opposition, plaintiff argues, citing, among others, to *Lenard v 1251 Ams. Assoc.* (241 AD2d 391 [1st Dept 1997]), that the cut angle was a tripping hazard, whether it is categorized as a debris, a sharp projection, or material. In *Lenard*, where the plaintiff tripped over a door stop affixed to a concrete floor, the First Department reversed the trial court's finding that 12 NYCRR 1.7 (e) (2) was inapplicable. In doing so, the Court reasoned that the term "sharp projections" should be interpreted broadly under the regulation:

> while defendants suggest that we should limit the definition of sharp projection to projections which are capable of cutting or puncturing, such a definition would be inordinately narrow in this context. It is an elementary rule of statutory construction that when a definite provision is made with reference to one particular subdivision of a section of the law dealing with the identical subject matter as the other subdivisions thereof, and a similar reference is omitted from the other subdivisions thereof as well as from all of the rest of the section, the particular reference is intended to apply solely to the subdivision in which it is contained and to exclude its application from all of the rest. Here, since the paragraph immediately preceding the one at issue specifically limited the [s]harp projections to which it applied to those which could cut or puncture any person and since the sharp projections to which the paragraph involved herein applies were not so limited, we must interpret the term as found in the latter paragraph more broadly. Thus, it is apparent that the appropriate definition in the latter paragraph would include any projection that is sharp in the sense that it is clearly defined or distinct. The door stop that allegedly caused plaintiff to fall clearly comes within this definition, as it was not a gradual change in the level of the floor but was, instead, a distinct object jutting out from the rest of the floor's surface.

(*id.* at 393-394 [internal quotation marks and citation omitted]).

A cut angle, under this interpretation, is clearly a sharp projection. While it is analogous

to the padeye in *Aragona*, the angle is clearly distinguishable in that it is cut, rather than rounded, unbroken metal. Thus, as the cut angle involved in plaintiff's accident was a sharp projection under the regulation, 12 NYCRR 1.7 (e) (2) cannot be dismissed as inapplicable.

II. Turner and NYU's Contractual Indemnification and Breach of Contract Claims Against Burgess

A. Contractual Indemnification

The contract between Turner and Burgess contains a broad indemnification provision. Burgess argues that the antisubrogation rule prohibits its application. The Court of Appeals has held that "[a]n insurer ... has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 295 [1993]). This antisubrogation rule bars claims for indemnification among insureds, at least up to the limit of the subject insurance policy (*see Maksymowicz v New York City Bd. of Educ.*, 232 AD2d 223, 223 [dismissing the third-party complaint of owners/third-party plaintiffs, as their claims were barred by the antisubrogation rule, as "the owners [were] additional insureds on the policy of general liability insurance purchased by the employer pursuant to its obligation to indemnify the owners"] [internal quotation marks and citation omitted]).

Here, Turner and NYU are covered, up to a $1,000,000 limit, by an Old Republic Insurance Company (Old Republic) policy, taken out by Burgess, on which Turner and NYU are additional insureds. Turner and NYU concede that the antisubrogation rule bars indemnication up to the limit of the Old Republic policy. In reply, Burgess argues that Turner and NYU's claim should be dismissed up to the limits of the Old Republic insurance policy. Thus, Burgess implicitly concedes that the Turner and NYU's claim for contractual indemnification should not

be dismissed in its entirety because Burgess may owe contractual indemnification for any amount over the limit of the insurance policy. As a consequence, the branch of Burgess's motion that seeks dismissal of Turner and NYU's claim for contractual indemnification should be granted only to the extent that claims for contractual indemnification within the limits of the common insurance policy are barred.

As to Turner and NYU's application for summary judgment on its contractual indemnification claims against Burgess, that application is premature for two reasons. First, in uncertain whether the limit of the common insurance will be exhausted. Second, as the court is denying the branch of Turner and NYU's motion that seeks to dismiss the Labor Law § 200 and common-law negligence claims against them, there is still a potential that a jury could find that plaintiff's injuries were caused, 100%, by Turner and NYU active fault. In such a circumstance, Turner and NYU would not be entitled to any contractual indemnification, regardless of whether the common insurance is exhausted (*see Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dept 2013] [as "defendants failed to establish that they were free of negligence, their motion for contractual indemnification was properly denied"]). Accordingly, the branch of Turner's motion that seeks dismissal of their claims for contractual indemnification against Burgess must be denied.

B. Breach of Contract for Failure to Procure Insurance

Here, Old Republic policy satisfies Burgess's obligation to procure primary insurance. The dispute, instead, is as to whether Burgess satisfied its obligation to procure excesss insurance under the contract. In support of the branch of its motion that seeks dismissal of Turner and NYU claim for breach of contract for failure to procure insurance, Burgess submits a certified copy of an excess insurance policy taken out with Scottsdale Insurance Company (Scottsdale) with a

limit of $5,000,000.

While Turner and NYU are not specifically named as additional insureds on the excess policy, Burgess contends that the terms of the primary insurance are incorporated into the excess insurance policy -- and that, accordingly, it *procured* excess insurance for Turner and NYU, as required by the Turner/Burgess contract. The Scottdale excess provides that "[t]his poicy is excess insurance and, except as otherwise stated in this Policy, follows the terms, conditions, exclusions, definitions and endorsements of the "Underlying described in ITEM 5. of the Declarations[2] (Scottsdale excess policy, at "Insuring Agreements").

In opposition, Turner and NYU argue that this branch of Burgess's motion should be denied because Scottsdale has not agreed to provide them with additional insured covereage on a primary, non-contributory basis, including contractual liability, without reserevation. Turner and NYU, however, point out nothing that Burgess has done, in taking out the excess policy, that failed to live up to its contractual obligation to *procure* insurance. As Burgess made a *prima facie* showing of entitlement to judgment by providing a certified copy of the excess insurance, and Turner and NYU have failed to raise an issue of fact as to whether Burgess complied with its obligations under its contract with Turner. Accordingly, the branch of Burgess's motion that seeks dismissal of Turner and NYU's claim for breach of contract for failure to procure insurance must be granted.[3]

[2] ITEM 5. specifically references the Old Republic primary policy.
[3] If Scottsdale has failed, in error, to recognize its obligations to Turner and NYU, then Turner and NYU's remedy is to bring a declaratory judmgent action against Scottsdale.

CONCLUSION

Accordingly, it is

ORDERED that defendants/third-party plaintiffs New York University (NYU) and Turner Construction Corporation's (Turner) motion for summary judgment (motion seq. No. 007) is granted only to the extent that plaintiiff's Labor Law § 240 (1) claims, as well as any allegations relating to Industrial Code violations other than 12 NYCRR 23-1.7 (e) (2), are dismissed; and it is further

ORDERED that third-party defendants/second third-party plaintiffs Burgess Steel, LLC, Burgess Steel Erectors of New York, LLC, and Burgess Steel Products Corp. (collectively, Burgess) motion for summary judgment (motion seq. No. 006) is resolved as follows:

- Turner and NYU's claim for contractual indemnification is barred up to the limit of the common insurance policy issued by Old Republic Insurance Company.

- The branch of the motion seeking dismissal of Turner and NYU's claims Burgess for failure to procure are granted.

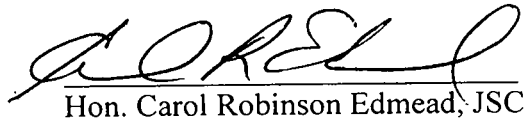
It is further

ORDERED that the Clerk is directed to enter judgment accordingly; the remaining claims shall proceed forward to trial.

This constitutes the decision and order of the court.

Dated: March 2, 2018

ENTER:



Hon. Carol Robinson Edmead, JSC

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