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SHORT FORM ORDER

COPY

INDEX No. 13-31413
CAL. No. 17-01285OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice Supreme Court

MOTION DATE 12-6-17 (001)
MOTION DATE 12-8-17 (002)
ADJ. DATE 1-26-18
Mot. Seq. # 001-MotD
Mot. Seq. # 002-MotD

---X

EDILSON PUNIN,

Plaintiff,

- against -

C.V.D. EQUIPMENT CORPORATION and WEST RAC CONTRACTING CORP.,

Defendants.

---X

WEST RAC CONTRACTING CORP.,

Third-Party Plaintiff,

- against -

COOL POWER, LLC,

Third-Party Defendant.

---X

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RST

C.V.D. EQUIPMENT CORPORATION,

Second Third-Party Plaintiff,

- against -

COOL POWER, LLC,

Second Third-Party Defendant.

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Upon the following papers numbered 1 to 59 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 22, 23 - 36 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 37 - 44, 45 - 52, 53 - 55 ; Replying Affidavits and supporting papers 56 - 57, 58 - 59 ; Other Memorandum of Law ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant/third-party plaintiff CVD Equipment Corporation for, inter alia, summary judgment dismissing the complaint and all cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff West Rac Contracting Corp. for, inter alia, summary judgment dismissing the complaint and all cross claims against it is granted to the extent indicated herein and is otherwise denied.

Plaintiff Edilson Punin commenced this action to recover damages for personal injuries he allegedly sustained on October 12, 2012, while working on a project to renovate a building located at 335 South Technology Drive, in Central Islip, New York. Plaintiff allegedly was injured when a light fixture attached to a support beam fell and struck him on the head while he was standing on scissor lift installing air-conditioning duct in the ceiling of the building. At the time of the accident, plaintiff was employed by third-party defendant Cool Power, LLC ("Cool Power"). Defendant/third-party plaintiff CVD Equipment Corporation ("CVD"), the owner of the premises, entered a trade agreement whereby it hired Cool Power as the prime HVAC contractor for the project, and defendant/third-party plaintiff West Rac Contracting Corp. ("West Rac") as its construction manager. By way of his complaint, plaintiff alleges causes of action against defendants based on common law negligence and violations of Labor Law §§ 200, 201, 240 (1), and 241(6). CVD and West Rac joined issue asserting affirmative defenses and cross claims against each other. Thereafter, West Rac commenced a third-party action against Cool Power. CVD then brought a second third-party action against Cool Power. The note of issue was filed on July 12, 2017.

CVD now moves for summary judgment dismissing the complaint against it on the grounds plaintiff voluntarily withdrew his Labor Law § 240 (1) claim by failing to assert the claim in his bill of particulars, and that such a claim would, in any event, be inactionable, since plaintiff's work did not require the hoisting or securing of the subject light fixture. As to the remaining claims, CVD argues that Labor Law § 201 of the statute is inactionable, that plaintiff failed to allege applicable violations of the Industrial Code in support of its Labor Law § 241 (6) claim, and that the Labor Law §200 and common law negligence claims against it must be dismissed, since it neither possessed the authority to control plaintiff's work, nor had actual or constructive notice of the alleged dangerous condition. Alternatively, CVD moves for conditional summary judgment on its contractual indemnification and breach of insurance procurement claims against West Rac and Cool Power. By way of a separate motion, West Rac moves, on similar grounds, for summary judgment dismissing the complaint against it. Additionally, West Rac argues that the claims against it must be

dismissed because it was a mere construction manager, possessing no authority or control over plaintiff's work or safety procedures at the time of his accident. West Rac also seeks conditional summary judgment on its third-party contractual indemnification claim against Cool Power.

Plaintiff oppose both motions only to the extent that they seek summary judgment dismissing the common law negligence and Labor Law § 200 claims. In particular, plaintiff argues that triable issues exist as to whether CVD and West Rac had actual or constructive notice of the dangerous condition, or alternatively, whether CVD may be held liable pursuant to the theory of res ipsa loquitur since the falling of the light fixture is not the type of accident that would have happened in the absence of some type of negligence, and CVD was in exclusive control of the instrumentality. Plaintiff's opposition papers include an affidavit in which he states, inter alia, that the only person he ever saw coming in contact with the building's light fixtures was a man who he "understood to be an employee of CVD," who appeared to be unscrewing some of the light bulbs from light fixtures located in the area of the building where he was working. The affidavit further states that plaintiff believed the man in question to be a CVD employee, because he observed him installing large pieces of machinery elsewhere in the building. Cool Power partially opposes both motions, arguing they should be denied to the extent they seek conditional summary judgment on the third-party contractual indemnification claims, as neither CVD nor West Rac have demonstrated their prima facie entitlement to such relief.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595[1980]).

Initially, the court notes that the branches of the motions by CVD and West Rac seeking dismissal of the Labor Law §§ 201, 240 (1) and 241(6) against them is granted, as plaintiff, by failing to oppose the requests for such relief, is deemed to have abandoned those claims (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]). Even assuming, arguendo, that plaintiff did not intend to abandon those claims, the court finds that Labor Law § 240 (1) is inapplicable under the circumstances of this case, as the light fixture in question was a permanent part of the building's structure and did not require securing for the purpose of advancing the HVAC installation project in which plaintiff was engaged at the time of the accident (*see* ***Fabrizi v 1095 Ave. of the Ams., LLC.***, 22 NY3d 658, 985 NYS2d 416 [2014]; ***Vatavuk v Genting N.Y., LLC***, 142 AD3d 989, 37 NYS3d 445 [2d Dept 2016]). Moreover, the single provision cited by plaintiff in support of his Labor Law § 241 (6) claim, section 23-1.7 of the Industrial Code, requiring the erection of overhead protections in places that are "normally exposed to falling material or objects," is likewise inapplicable, since there is no evidence that plaintiff was working in such an area at the time of his accident (*see* ***Marin v AP-Amsterdam 1661 Park LLC***, 60 AD3d 824, 875 NYS2d 242 [2d Dept 2009]; ***Mercado v TPT Brooklyn Assoc., LLC***, 38 AD3d 732, 832 NYS2d 93 [2d Dept 2007]). The claim predicated on Labor Law § 201 is likewise invalid, as that section of the statute, requiring the labor

commissioner to furnish employers with certain notices to be posted at work sites, does not afford workers a private cause of action for work related injuries (*see generally* Labor Law § 201; ***Retamal v Miriam Osborne Mem'l Home Assn***, 256 AD2d 506, 682 NYS2d 409 [2d Dept 1998]; ***Wirtz v Lobello***, 1 AD2d 416, 151 NYS2d 474 [4th Dept 1956]).

As to the remaining branches of the motions seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims, section 200 of the statute 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 (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). It applies to owners, contractors, or their agents (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of its existence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). By contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, there can be no recovery unless it is shown that the party to be charged had the authority to control the means and manner of the plaintiff's work (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]). Indeed, "[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (***Dos Santos v STV Engrs., Inc.***, 8 AD3d 223, 224, 778 NYS2d 48 [2d Dept 2004]).

Here, CVD and West Rac met their prima facie burden on the branches of their motions seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims by submitting evidence that they only possessed general supervisory authority over plaintiff's work, and that they did not have either actual or constructive notice of any alleged defects with the subject light fixture (*see* ***Wejs v Heinbockel***, 142 AD3d 990, 37 NYS3d 569 [2d Dept 2016]; ***Banscher v Actus Lend Lease, LLC***, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]). Significantly, Cool Power's construction manager testified that plaintiff's work was exclusively supervised by him, and that with the exception of general supervision related to the progress of the work, he had no knowledge of anyone from West Rac or CVD ever attempting to supervise or control the work performed by Cool Power employees. Plaintiff similarly testified that his work, including the means and methods of such work, was exclusively overseen by a Cool Power supervisor. With respect to any alleged notice of defects with the subject light fixture, plaintiff and CVD's site manager both testified that they were unaware of any problems with the light fixtures in the building, or of anyone making complaints regarding possible defects with the way such light fixtures were hung. CVD's site manager also testified that the light fixtures were in place well before the commencement of the renovation project, and that none of them were changed prior to the start of the project, or were scheduled to be changed after its completion.

Furthermore, West Rac established, as a matter of law, that it cannot be held liable under Labor Law § 200, as it served as the project's construction manager, and was not delegated the supervisory authority of a statutory agent such that it could avoid or correct the alleged unsafe condition (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 798 NYS2d 351 [2005]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; ***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]). Notably, West Rac submitted a copy of its agreement with CVD, wherein it was designated as CVD's construction manager responsible for budgeting, coordinating, and scheduling the work of the project's prime contractors (*see* ***Walls v Turner Constr. Co.***, *supra*; ***Barrios v City of New York***, 75 AD3d 517, 905 NYS2d 255 [2d Dept 2010]). West Rac also submitted a copy of a trade agreement executed by CVD which designates Cool Power as the HVAC prime contractor. Although the agreement refers to West Rac as the "genera contractor," it specifies West Rac would operate as the project's construction manager,

and that prime contractors such as Cool Power would be hired by CVD directly. The contract further provided that Cool Power was solely in control of determining the method and manner of its HVAC work, and ensuring the health and safety of its employees.

In opposition, plaintiff failed to raise any significant triable issues precluding dismissal of his common law negligence and Labor Law § 200 claims (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Where, as in this case, the defendants have established that they neither created nor had actual or constructive notice of the alleged defective condition, plaintiff's conclusory assertion that they had a duty to maintain the premises in a safe condition is insufficient to defeat the defendants' prima facie showing (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, *supra*). Likewise, the court finds plaintiff's opposing affidavit, in which he states he observed a CVD employee unscrewing bulbs from light fixtures in the area where he was working, to be insufficient to raise a triable issue, as it contradicts his earlier deposition testimony that he did not know of anyone moving or changing the light fixtures, and that he did not even know of CVD until after he had been injured. As such, the affidavit appears designed to raise a feigned issue of fact in an effort to avoid the consequences of dismissal (*see* ***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]; ***Novoni v La Parma Corp.***, 278 AD2d 393; 717 NYS2d 379 [2d Dept 2000]).

Moreover, plaintiff failed to demonstrate that the doctrine of res ipsa loquitur is applicable under the circumstances of this case, as the adduced evidence fails to rule out the possibility that the activities of plaintiff's own employer was the proximate cause of the accident (*see* ***Dermatossian v New York City Transit Authority***, 67 NY2d 219, 501 NYS2d 784 [1986]; ***Lococo v Mater Cristi Catholic High School***, 142 AD3d 590, 37 NYS3d 134 [2d Dept 2016]; ***Sowa v S.J.N.H. Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433,739 NYS2d 186 [2d Dept 2002]; ***Giordano v Toys "R" Us, Inc.***, 276 AD2d 669, 714 NYS2d 746 [2d Dept 2000]; *cf* ***Greenidge v HRH Constr. Corp.***, 279 AD2d 400, 720 NYS2d 46 [1st Dept 2001]). In particular, plaintiff's own supervisor testified that some of the work performed by Cool Power employees involved them strapping HVAC duct to the steel beams on which the lighting fixtures were hung, and that one of plaintiff's co-workers performed such work on the very steel beam on which the subject light fixture was hung prior to the accident. When describing such work, plaintiff testified that the hangers and clips that were used to hold the duct in place were forcefully hammered onto the steel beams. Since such evidence permits an inference that the work carried out by plaintiff's co-workers could have compromised the mechanism connecting the light fixture to the steel beam, causing the light fixture to eventually fall, the plaintiff failed to show control "of sufficient exclusivity to fairly rule out the chance that the [alleged defect] was caused by some agency other than the defendant[s'] negligence" (***Dermatossian v New York City Tr. Auth.***, *supra* at 228; *see* ***Giordano v Toys "R" Us, Inc.***, *supra*; ***Patrick v Bally's Total Fitness***, *supra*). Accordingly, the branches of the motions by CVD and West Rac for summary judgment dismissing the complaint against them is granted.

Having granted the branches of the motions by CVD and West Rac for summary judgment dismissing the complaint against them in the primary action, the branches of their respective motions seeking summary judgment on their third-party indemnification claims against Cool Power is denied, as moot (*see* ***Doodnath v Morgan Contr. Corp.***, 101 AD3d 477, 956 NYS2d 11 [1st Dept 2012]; ***Di Giulio v City of Buffalo***, 237 AD2d 938, 655 NYS2d 215 [1st Dept 1997]). Similarly, the branch of CVD's motion for summary judgment on its cross claims for contribution and common law indemnification against West Rac is denied as moot, there being no evidence that West Rac was actively negligent in causing plaintiff's accident (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]). As to the claims concerning the parties' alleged obligations to procure commercial liability insurance naming each other as additional insureds, CVD failed to demonstrate, prima facie, that West Rac or Cool Power failed to procure insurance naming CVD as an additional insured. Therefore, the branches of CVD's motion requesting summary judgment on its breach of contract claims based on the contractors' alleged failure to procure insurance naming it as an

additional insured is denied (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Conversely, West Rac failed to submit any evidence proving that it complied with the contractual requirement to purchase such insurance on behalf of CVD, or that Cool Power failed to procure such insurance on behalf of West Rac. Thus, the branches of West Rac's motion seeking affirmative relief on such claims is denied. It is noted that "[a]n agreement to procure insurance is not an agreement to indemnify or hold harmless, and the distinction between the two is well recognized" (***Kinney v Lisk Co.***, 76 NY2d 215, 218, 557 NYS2d 283 [1990]; *see* ***Calvitti v 40 Garden, LLC***, 155 AD3d 1399, 64 NYS3d 776 [3d Dept 2017]). A party seeking summary judgment on such a claim must submit proof that they were either not required to purchase such insurance (*see* ***Jones v Rochdale Vil., Inc.***, 96 AD3d 1014, 948 NYS2d 77 [2d Dept 2012]), or that they complied with the contractual requirement by obtaining such insurance naming the plaintiff as an additional insured (*see* ***Mathey v Metropolitan Transp. Auth.***, 95 AD3d 842, 943 NYS2d 578 [2d Dept 2012]).

Dated: 9-21-18

[redacted]
A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**