SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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MARCELO MELO, SULEY MELO,

Plaintiff,

- v -

SKANSKA KOCH, INC.,

Defendant.

INDEX NO. 157053/2013

MOTION DATE 11/17/2017

MOTION SEQ. NO. 003

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff Marcelo Melo's motion for partial summary judgment on liability under Labor Law § 240 (1) is granted and defendant/third party plaintiff Skanska Koch, Inc., is found to be liable to plaintiff pursuant to Labor Law § 240 (1); and it is further

ORDERED that the issue of the amount of a judgment to be entered thereon shall be determined at a trial; and it is further

ORDERED that the cross motion by defendant/third party plaintiff Skanska Koch, Inc., for summary judgment dismissing the complaint and for an order of contractual indemnification is

granted to the extent that the claims under 12 NYCRR § § 23-1.8, 23-1.15, 23-1.21, 23-1.30, 23-2.1, and 23-2.8 are dismissed, and the cross motion is otherwise denied.

DECISION

In this action, plaintiff Marcelo Melo seeks to recover damages for injuries allegedly sustained when he fell off a ladder at the Brooklyn Bridge. Plaintiff's wife asserts a derivative claim for loss of consortium.

At the time of the accident, plaintiff was performing his work duties as an employee of third-party defendant Ahern Painting Contractors (Ahern), a subcontractor of defendant Skanska Koch (Skanska). Skanska was the general construction manager and contractor on the project to repair and repaint the bridge.

Plaintiff brings claims based on Labor Law § § 200, 240 (1), and 241 (6), and common-law negligence against Skanska. Plaintiff moves for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim. Skanska cross-moves for summary judgment dismissing the complaint and on its claim for contractual indemnification from Ahern.

Facts

According to the parties' depositions, the facts are as follows.

On the day of the accident, plaintiff was assigned to paint a portion of the Brooklyn Bridge that was on an elevated level and accessed by a ladder affixed to the bridge. Plaintiff testified that it was between eight and eight thirty in the morning, that the weather was foggy, and that the ladder was wet. Kevin Lighty, the Ahern health and safety officer, testified that it was raining that morning.

Carrying a bucket of paint that had a paint brush in it in his right hand, plaintiff proceeded up the ladder, holding on to the ladder with his left hand. Five or six feet up the ladder, as plaintiff was moving his right foot to put it on another rung, the foot slipped, he lost his balance, and he fell. His back struck a guardrail. Plaintiff says that his foot slipped because of the moisture on the ladder. He tried to hold on to the ladder with his left hand, but that slipped also, although he was wearing gloves.

Plaintiff testified that the ladder had been wet at other times, but he had never had a problem with it during his two years on the job. Before the accident, he had often used the ladder.

Lighty testified that if a worker needed to bring tools and materials from one level to another, he could have another worker hand it up to him or the materials could be fastened with a rope and lifted to the elevated level. Plaintiff said that he

had used those methods and that his usual practice was to carry the paint bucket and brush up the ladder with him. On the day of the accident there was no rope in the vicinity and plaintiff did not ask for one. Lighty did not remember if there were any ropes or lines available to plaintiff when the accident occurred. He was not sure if, at the time of the accident, another worker could have handed the materials up to plaintiff. He was not sure if the bucket could have been passed up. That would depend on the weight of the bucket and the height of the workers.

Thomas Koch, Skanska's safety manager, testified that workers at six feet or more above ground had to be protected by a guardrail or a safety harness. A worker wearing a harness had to secure it by tying off to a proper anchorage or anchor point. A proper anchorage was one that could withstand a weight of 5,000 pounds. A worker would not tie off to a ladder unless it was engineered to be used as an anchorage. The supervisor would have to inform the worker if the ladder was a compliant anchor point. Koch did not know if there was an anchor point for plaintiff to tie off to at the place where the accident occurred. There were some proper anchor points on the Brooklyn Bridge, but he did not remember where they were. Plaintiff testified that there were times when he tied off his harness to the safety cable of the bridge, but that it was not possible to

tie off to the cable while climbing a ladder. Ahern provided plaintiff with safety equipment, including ropes, gloves, hard hat, boots, vest, and a harness. He had a harness on the job site but does not remember if he was wearing it when he had the accident.

After the accident, Lighty came to the accident site while plaintiff was still there. Lighty investigated and did not come across any area where plaintiff could have tied off as he was climbing the ladder. Skanska's rule was that workers had to maintain three points of contact while going up a ladder. If Koch saw someone climbing with something in his hands, he would make that person get off the ladder. Lighty stated that a worker climbing with an object in his hand could not maintain the three points of contact.

DISCUSSION

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (Madeline D'Anthony Enters., Inc. v Sokolowsky, 101 AD3d 606, 607 [1st Dept 2012]). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidence demonstrating the existence of material questions of fact needing to be determined at trial (Farias v Simon, 122 AD3d 466, 467 [1st Dept 2014]).

Plaintiff argues that he is entitled to summary judgment under Labor Law § 240 (1), known as the "scaffold law," which imposes absolute liability on owners and contractors who fail to provide adequate safety devices to workers laboring at elevated work sites, where that failure proximately causes the worker's injuries (Jock v Fien, 80 NY2d 965, 967-968 [1992]; Nieves v Five Boro A.C. & Refrig. Corp., 93 NY2d 914, 916 [1999]). The fact that an accident occurred, in and of itself, does not establish that a defendant is liable under the statute (DeRosa v Bovis Lend Lease LMB, Inc., 96 AD3d 652, 659 [1st Dept 2012]). A plaintiff prevails on a Labor Law § 240 (1) claim by demonstrating that the defendant violated the statute by not protecting plaintiff against the risks arising from working at an elevated level, and that the plaintiff sustained injury as a direct consequence of the violation (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]; Ernish v City of New York, 2 AD3d 256, 257 [1st Dept 2003]).

Here, plaintiff establishes a prima facie case for summary judgment under Labor Law § 240 (1), through his testimony that he fell while ascending a wet and slippery ladder, that defendant did not provide him with any safety device to prevent the fall, and that he was injured by the fall (Mennis v Commet 380, Inc., 54 AD3d 641, 642 [1st Dept 2008] [summary judgment for plaintiff who fell on affixed ladder which was wet];

Robinson v NAB Constr. Corp., 210 AD2d 86, 87 [1st Dept 1994] [summary judgment for plaintiff who fell off scaffold-ladder that had no safety devices]).

In opposition to the motion, Skanska argues that summary judgment is inappropriate since plaintiff was the sole proximate cause of his own accident. To defeat a section 240 (1) claim on the basis that the plaintiff was negligent, defendant must show that plaintiff was the sole cause of his own accident. That a plaintiff contributed to his accident and bears partial responsibility for it is not a defense to liability (Torres v Monroe Coll., 12 AD3d 261, 262 [1st Dept 2004]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]).

Skanska points out that plaintiff ascended the ladder carrying a paint bucket, in violation of the three points of contact rule. Assuming plaintiff's action evidences negligence, it does not evidence his sole negligence; it does not show that he was the only negligent party and that he alone was responsible for his own accident. As defendant's failure to provide a safety device contributed to the accident, it cannot be said that plaintiff was the sole proximate cause of it.

Skanska contends that plaintiff was a recalcitrant worker, that is, one who refuses to use the safety devices available to him (Garcia v 1122 E. 180th St. Corp., 250 AD2d 550, 551 [1st Dept 1998]). The recalcitrant worker defense requires a showing

that the injured worker deliberately refused to use available and visible safety devices in place at the work site (Ramos v Port Auth. of New York & New Jersey, 306 AD2d 147, 148 [1st Dept 2003]; Garcia, 250 AD2d at 551-552). Plaintiff testified that no rope was available to him. Lighty were not sure that plaintiff could have had the materials lifted to him by another worker or a rope. There was testimony that a worker on the ladder had no place to tie off, even if he had a rope. Defendants have no evidence that plaintiff refused to use safety devices or that any were made available to him.

Skanska argues that the ladder itself was a safety device and that plaintiff offers no evidence to show that the ladder proved defective. The ladder did not fail, collapse, or prove unsafe. However, plaintiff is not obligated to show that the ladder that he fell from was defective (see Klein v City of New York, 222 AD2d 351, 352 [1st Dept 1995], affd 89 NY2d 833 [1996]). Plaintiff shows that safety devices were not provided, and he is entitled to partial summary judgment on liability on his Labor Law § 240 (1) claim.

Turning to Skanska's motion to dismiss the complaint, that is denied regarding the Labor Law § 240 (1) claim. As to the Labor Law § 241 (6) claim, Skanska argues that none of the allegedly violated regulations are applicable here. Labor Law § 241 (6) imposes a nondelegable duty upon owners and general

contractors to provide reasonable protection to construction workers (Misicki v Caradonna, 12 NY3d 511, 515 [2009]). To establish a claim under section 241 (6), the plaintiff must prove that the defendant violated a regulation of the Industrial Code (12 NYCRR) which sets forth a specific standard of conduct, as opposed to a regulation which "simply declare[s] general safety standards or reiterate[s] common-law principles" (id.; Coyago v Mapa Props., Inc., 73 AD3d 664, 664 [1st Dept 2010]).

Of the Industrial Code regulations listed in plaintiff's bill of particulars, Skanska objects to the application of 12 NYCRR § § 23-1.8, 23-1.15, 23-1.16, 23-1.21, 23-1.30, 23-2.1, and 23-2.8. Plaintiff's reply addresses the section 23-1.16 claim and none of the others. Thus, the court deems that plaintiff has abandoned his claims pertaining to the sections that Skanska discusses, and that plaintiff does not (see Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003]).

Regulation 23-1.16, discussed by both sides, provides that every harness must be properly attached to a securely anchored tail line or lifeline, so that if the user should fall such fall shall not exceed five feet (12 NYCRR 23-1.6 [b]). Skanska states that plaintiff was provided with the proper lines but chose not to use them. However, there was testimony that no line or rope was made available to plaintiff and there was no place to anchor a lifeline or tail line if plaintiff had been

wearing a harness. Skanska fails to show that it did not violate this regulation.

12 NYCRR § § 23-1.5 and 23-1.7 are the regulations listed by plaintiff which Skanska does not oppose. The court sua sponte dismisses the claim based on section 23-1.5, which is not specific enough to serve as a predicate for liability under Labor Law § 241 (6) (see Cordeiro v TS Midtown Holdings, LLC, 87 AD3d 904, 906 [1st Dept 2011]; Carty v Port Auth. of N.Y. & N.J., 32 AD3d 732, 733 [1st Dept 2006]; Maldonado v Townsend Ave. Enters., Ltd Partnership, 294 AD2d 207, 208 [1st Dept 2002]). The regulation merely sets forth a general standard of care and does not provide for or proscribe a specific kind of conduct. Section 23-1.7 is not appropriate for sua sponte determination. That section, along with section 23-1.16, remain as possible bases for liability under section 241 (6).

Concerning the Labor Law § 200 and common-law negligence claims, Skanska argues for dismissal on the basis that it had no control over the means, methods, and materials of the work.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work (Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993]). Claims under Labor Law § 200 are divided into two categories depending on the circumstances of the accident: those involving injury caused by

the method, manner, or materials used by the injured worker, and those involving injury caused by a dangerous or defective condition at the work site (Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143-144 [1st Dept 2012]). When the accident arises from a subcontractor's means or methods, it must be shown that the owner or contractor exercised supervisory control over the injury-producing work (Comes, 82 NY2d at 877; Cappabianca, 99 AD3d at 144).

Plaintiff does not take issue with Skanska's argument that it did not supervise or control plaintiff's work. He emphasizes that his accident was caused by a defect at the work site, in which case supervisory control is irrelevant (see Seda v Epstein, 72 AD3d 455, 455 [1st Dept 2010]). In any event, there is no evidence that Skanska ordered plaintiff how to do his work or oversaw him in any way. The fact that Koch had the authority to stop an unsafe practice if he observed it indicates not control, but Skanska's "general supervision and coordination of the work site and is insufficient to trigger liability" under Labor Law § 200 (Singh v Black Diamonds LLC, 24 AD3d 138, 140 [1st Dept 2005]; see also Maddox v Tishman Constr. Corp., 138 AD3d 646, 646 [1st Dept 2016]).

Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it

and failed to remedy it (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011]). Skanska does not discuss this aspect of liability. There is an issue of fact regarding whether the water on the ladder was a dangerous condition and whether Skanska had notice of it. The motion to dismiss the Labor Law § 200 claim thus is denied.

Next, Skanska seeks contractual indemnification and reimbursement of attorneys' fees and costs from Ahern. As a contractor cannot be indemnified for its own negligence (General Obligations Law § 5-322.1), Skanska argues that it was not negligent. However, it has been determined that Skanska is liable under the scaffold law and whether Skanska is liable under Labor Law §§ 241(6) or 200 present questions of fact. Thus, an order of contractual indemnification is not appropriate at this juncture.

10/10/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE