Impoco v Marjam Supply Co.Inc.
2019 NY Slip Op 30576(U)
January 4, 2019
Supreme Court, Kings County
Docket Number: 507322/14
Judge: Larry D. Martin

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of January, 2019.

PRESENT:

HON. LARRY D. MARTIN

Justice.

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GAETANO IMPOCO AND JENNIFER IMPOCO,

Plaintiffs,

- against -

Index No. 507322/14

MARJAM SUPPLY CO. INC., EARL JOHNSON, THE WHITING-TURNER CONTRACTING COMPANY, TOM RECTENWALD CONSTRUCTION, INC. AND MALL 1-BAY PLAZA, LLC,

Defendants.

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THE WHITING-TURNER CONTRACTING COMPANY, TOM RECTENWALD CONSTRUCTION, INC. AND MALL 1-BAY PLAZA, LLC,

Third-Party Plaintiffs,

- against -

CONSTRUCTION RESOURCES CORP. OF NEW YORK,

Third-Party Defendant.

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KINGS COUNTY CLERK FILED 2019 MAR -7 AM 10: 29

KINGS COUNTY CLERK FILED 2019 FEB 27 AM 11: 18

The following papers numbered 1 to 16 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-6
Opposing Affidavits (Affirmations)	7, 8, 9, 10, 11
Reply Affidavits (Affirmations)	12, 13, 14, 15, 16
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiffs Gaetano Impoco and Jennifer Impoco move for an order, pursuant to CPLR 3212, granting partial summary judgment in their favor as to the issue of liability on the Labor Law § 241 (6) claim against defendants/third-party plaintiffs Tom Rectenwald Construction, Inc., and Mall 1-Bay Plaza, LLC, and setting this matter down for an assessment of damages.

Defendants/third-party plaintiffs The Whiting-Turner Contracting Company, Tom Rectenwald Construction, Inc., and Mall 1-Bay Plaza, LLC move, pursuant to CPLR 3212, for an order (1) dismissing plaintiffs' complaint and all cross claims as against them, (2) granting summary judgment on their cross claim for common-law indemnification over and against defendants Marjam Supply Co., Inc. and Earl Johnson and (3) dismissing third-party defendant Construction Resources Corp. of New York's claims for indemnification and contribution.

Third-party defendant Construction Resources Corp. of New York moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing defendants' third-party complaint and all cross-claims asserted against it.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff Gaetano Impoco (plaintiff or injured plaintiff) on May 6, 2014 when he was hit by a delivery truck driven by defendant Earl Johnson (Johnson), while working at Bay Plaza mall, located at 290 Baychester Avenue, Bronx, New York. At the time of the incident, defendant/third-party plaintiff Mall1-Bay Plaza, LLC (Mall-1) was the owner of the premises, which was undergoing construction. Mall-1 hired defendant/third-party plaintiff Whiting-Turner Contracting Company (Whiting-Turner) to act as the construction manager for the mall construction project. Mall-1 hired most of the trade

contractors directly to work on the overall exterior mall construction. Mall-1, through its agent, Prestige Properties, which is not a party herein, also hired third-party defendant Construction Resources Corp. of New York (CRC) for the latter to provide general labor, and clean-up and/or debris removal services at the premises. At the time of the accident, a majority of the exterior mall structure had been completed, and the interior build-out stores within the mall were undergoing construction. Sterling Jewelers, Inc., not a party herein, was a tenant of space in the mall. Sterling Jewelers had entered into a contract with defendant/third-party plaintiff Tom Rectenwald Construction, Inc., (Rectenwald) for the latter to serve as the general contractor in charge of building a Kay Jewelers store within its leased mall space. Rectenwald, in turn, hired various subcontractors, including non-party CEI Contracting, Inc. (CEI), a drywall contractor, to work on the Kay Jewelers project. Plaintiff was employed by CEI.

During his deposition, the plaintiff testified that he worked for CEI as a carpenter foreman in charge of scheduling deliveries, laying out jobs and performing carpentry work. Plaintiff testified that he was the one who determined the schedule of deliveries for CEI's materials, and was in charge of job site safety in connection with the loading of such materials. His general duties with respect to deliveries were to schedule them, sign paperwork upon receipt of the deliveries, and assist in unloading the truck. Plaintiff explained that the supply house would usually call him to notify him that a truck was on site at which point he would then go out and meet the truck, and tell the driver where to park. Plaintiff would then help unload the truck, sign the delivery ticket and count the materials to make sure it was correct. Plaintiff testified that he usually always directed the truck drivers on where to stop, depending on the security personnel at the mall. He described the designated delivery/loading dock area as being a paved road located in the rear of the mall

adjacent to the building's doors. According to plaintiff, there was only the one road (one lane), with no markings on it, leading to the area where they received deliveries. The trucks came in one way and exited another way after making its delivery.

On the day of the accident, the plaintiff was working with two other CEI employees, Billy Brown and Carmine Stanko, who were carpenters doing drywall and framing work for the Kay Jewelers project. Plaintiff recalled ordering certain supplies from defendant Marjam Supply Company, Inc. (Marjam). He described the Marjam truck as being a big flatbed truck with three axles. When he first observed the truck, it was at the mall's security gate. The security guard on duty called the plaintiff to inform him that a Marjam delivery was on site. The security guard then opened up the gate to allow the Marjam truck to enter. Plaintiff testified that he then directed the driver, defendant Earl Johnson (Johnson) on where to stop the truck, which was parallel and approximately12 feet from the building. After the truck stopped, Johnson got out and handed the plaintiff paperwork for him to sign. Johnson then unstrapped the load, which consisted of metal studs. Plaintiff, along with his two coworkers, set up an A-frame cart on the side of the truck towards the rear access and started unloading the truck onto the cart. Plaintiff was holding the A-frame cart so it would not roll backwards since the road was on an incline. After they finished unloading the truck , Brown and Stanko started pushing the loaded cart towards the building around the back of the truck. Plaintiff joined them in helping to push the cart up the step to the building from behind. Plaintiff explained that he and his co-workers had to back up in order to make a ramp to get the materials inside the building. While he was in the process of pushing the cart, the rear passenger tire of the truck rolled over plaintiff's foot and ankle, thereby causing him to fall to the ground. Plaintiff testified that no one from Whiting-Turner or Rectenwald directed him on how he was to do his work at the site.

Johnson, Marjam's truck driver, testified that the mall was under construction when he arrived on the date of the accident, and that a construction fence was around the perimeter of the premises. When Johnson arrived at the premises, he stopped his truck at the gate where a security guard was stationed. Johnson notified the security guard that he had a delivery for CEI, at which point the guard then opened the gate to allow the truck to pass through. Johnson claimed that he drove his truck about 200 or 300 feet and was then directed to park his truck by an individual he believed was a teamster, who was wearing a vest and hard hat, and waving an orange flag. Johnson testified that there was no room for any trucks or vehicles to pass on the right or left side of the truck while it was parked. According to Johnson, it was a one-way road, and no trucks could go anywhere until he moved his truck. About 10 to 15 minutes after he parked, two people came out and unloaded the materials onto a cart. After the materials were unloaded, Johnson claimed he got back into his truck and looked in both mirrors to check to see if anybody was on the side of the truck. At that point, Johnson claimed that the teamster/flagman reappeared and motioned for him to move his truck forward. Johnson then moved the truck about two or three feet ahead, at which point he realized that his truck had rolled over the plaintiff's leg.

The resultant injuries were the basis of this action commenced by plaintiff, and his wife derivatively, against Mall-1, Whiting-Turner, Rectenwald, Marjam and Johnson alleging violations of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence. After joinder of issue, Whiting-Turner, Rectenwald and Mall-1 subsequently commenced a third-party action against CRC asserting claims for common-law indemnity, contractual indemnity, and breach of contract for failure to procure insurance. The parties engaged in discovery and the plaintiffs filed a Note of Issue on or about June 12, 2017. The motions ensued.

Discussion

Defendants Whiting-Turner, Rectenwald and Mall-1 (collectively, defendants) seek summary judgment dismissing the plaintiffs' entire complaint (comprised of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence claims) insofar as asserted against them. Plaintiffs, in turn, seek partial summary judgment in their favor on the issue of liability on the Labor Law § 241 (6) cause of action as against defendants Rectenwald and Mall-1.

It is well settled that "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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Whether Rectenwald and Whiting-Turner Were Contractors or Statutory Agents Within the Meaning of the Labor Law

Defendants initially argue that the plaintiffs' Labor Law claims should be dismissed as against Whiting-Turner and Rectenwald because neither defendant was a general contractor or a statutory agent within the meaning of the Labor Law. Specifically, as to Rectenwald, defendants argue that it was only the general contractor in charge of the mall's interior build-out space for the Kay Jewelers store, and that it had no responsibilities for the

location of the plaintiff's accident, which occured outside the mall. Thus, defendants contend that Rectenwald's responsibilities as general contractor were limited solely to the 900 square foot Kay Jewelers space.

In addition, defendants point out that the accident occured in a general/common area of the premises, which was shared by many of the mall's tenants. As such, defendants argue that Rectenwald had no control or authority to control anything that occured at or near the delivery/loading area located outside of the mall. Chris Rightenhour, Rectenwald's Site Safety Superintendent, testified that Rectenwald had nothing to do with the mall's exterior shell work, and that its duties were only limited to the build-out work for the Kay Jewelers store (Rightenhour tr at 37). Although Rectenwald hired plaintiff's employer, CEI, to do the framing for the Kay Jewelers project, Rightenhour claimed that Rectenwald's job was limited to keeping track of the subcontractors, coordinating their work schedule, and making sure they had materials and manpower in a timely fashion (*id.* at 65). Defendants contend it was the individual subcontractor's responsibility for coordinating delivery of their necessary materials, and transporting them into the Kay Jewelers space. Thus, defendants argue that Rectenwald had no supervision or control with respect to how plaintiff, or his employer (CEI), performed its work, or how it received its delivery of materials at the site.

Here, the court finds that defendants have failed to make a prima facie showing that Rectenwald was neither a "general contractor" nor a "statutory agent" within the meaning of Labor Law. Rectenwald's status as a contractor under the Labor Law is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right (*see Myles v Claxton*, 115 AD3d 654, 655 [2014]; *Russin v Picciano & Son*, 54 NY2d 311, 317–318 [1981]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]; *Medina v R.M. Resources*, 107 AD3d 859, 860 [2013]; *Samaroo v Patmos Fifth*

Real Estate, Inc., 102 AD3d 944, 946 [2013] ["a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right"]). Since Rectenwald had the authority to choose/hire the subcontractors who did the work, including plaintiff's employer (CEI), and directly entered into contracts with them, it had the authority to exercise control over the work, even if it did not actually do so (*see Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2018]; *Williams v Dover Home Improvement, Inc.*, 276 AD2d 626, 626 [2000]). Under these circumstances, defendants have failed to establish that Rectenwald was not a general contractor and/or a statutory agent within the meaning of the Labor Law.

With respect to Whiting-Turner, defendants argue that it was retained to act as a construction manager for the overall construction of the mall, not the individual leased store space projects such as Kay Jewelers. Defendants contend that Whiting-Turner was merely an adviser to Mall-1 and was not responsible for hiring any of the subcontractors on the site, nor was it delegated any responsibilities as to the means or method of their work. Instead, defendants contend that Whiting-Turner was an adviser on safety programs and plans on the overall mall construction project, and monitored the progress of the work at the site. In light of this limited role, defendants argue that Whiting-Turner cannot be deemed a general contractor or a statutory agent within the meaning of the Labor Law.

In support of this contention, Anthony Messina, Whiting-Turner's lead project manager on the mall project, testified that Whiting-Turner was an adviser to Mall-1, and was hired to ensure compliance with the overall mall construction project scheduling and drawings (Messina tr at 10-13). He explained that Whiting-Turner did not hold any subcontracts with any entities, it had no supervisory role with regard to any of the individual contractors, and that it merely monitored, reviewed and made recommendations to the owner

(Mall-1) on contractor generated safety programs (*id.* at 13-14, 43). Messina specifically testified that Whiting-Turner did not monitor, supervise or generate reports for any tenant build-out contractors or contractors not associated with the mall's outer shell construction at the site (*id.* at 46-47). Messina further testified that the individual contractors took care of their own materials supply, and used their own means and methods in terms of receiving deliveries (*id.* at 12-13, 70).

In opposition, Marjam and Johnson (collectively, Marjam), and the plaintiffs argue that Whiting-Turner was in fact an agent of the owner, Mall-1. In this regard, the parties point to section 3.2.13 of the Mall-1/Whiting-Turner contract, which states that Whiting-Turner shall "expedite and coordinate the ordering and delivery of materials, including those that must be ordered well in advance of construction." Additionally, Marjam points out that Exhibit H to the contract states that Whiting-Turner was also responsible for monitoring and coordinating tenant construction activities at the site. There is also deposition testimony in the record that Whiting-Turner had the authority to stop the work in the event it observed an unsafe condition. Based upon the foregoing, Marjam and plaintiffs argue that Whiting-Turner clearly had a duty, as an agent of the owner, to make sure the delivery process was proceeding in a safe manner.

Although a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 200, 240 (1), and 241 (6), "it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises" (*Rodriguez v JMB Architecture*, LLC, 82 AD3d 949, 950 [2011]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work

being done where a plaintiff is injured" (*Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2017]). A role of general supervision "is insufficient to impose liability under the Labor Law" (*Rodriguez v JMB Architecture,* LLC, 82 AD3d at 951).

Here, the court finds that the defendants have made a prima facie showing that Whiting-Turner lacked the requisite authority to control or supervise the plaintiff's work (*see Lamar v Hill Intl., Inc.*, 153 AD3d at 686; *Vazquez v Humboldt Seigle Lofts, LLC*, 145 AD3d 709, 710 [2016]; *Rodriguez v JMB Architecture, LLC*, 82 AD3d at 951). Although the construction management services contract between Mall-1 and Whiting-Turner provided that the latter was responsible for coordinating the ordering and delivery of materials, and monitoring/coordinating tenant construction activities at the site, the contract did not confer upon Whiting-Turner the authority to control the methods used by the contractors, including the plaintiff's employer, to complete their work. Whiting-Turner was authorized only to review and monitor safety programs developed by prime contractors, to make recommendations and provide direction to the owner regarding corrective action to be taken if an unsafe condition was detected, and to stop work only in the event of an emergency.

Moreover, the court notes that the parties' deposition testimony demonstrates that Whiting-Turner did not exercise any control or a supervisory role over the plaintiff's day-to-day work, and did not assume any responsibility for the manner in which the plaintiff, or any other contractors, received their deliveries at the site. Instead, Whiting-Turner primarily made recommendations to Mall-1 regarding the delivery process for the contractors. Plaintiffs have failed to raise an issue of fact establishing otherwise. Inasmuch as the defendants have made a prima facie showing that Whiting-Turner had no control or supervisory authority over the plaintiff's work or over the delivery/loading dock area, plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 claims are hereby dismissed as against Whiting-Turner (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293

[2003]; *Russin v Louis N. Picciano & Son*, 54 NY2d at 318; *Vazquez*, 145 AD3d at 709–710).

Plaintiffs' Labor Law § 240 (1) Claim

Defendants move for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim. In so moving, defendants argue that plaintiff's accident did not involve the type of extraordinary gravity-related risks covered under the statute. In support of this argument, defendants point to the fact that plaintiff neither fell from a height, nor was he struck by a falling object. Instead, plaintiff was injured when the ground level Marjam delivery truck, from which he had previously unloaded materials, drove over his leg/foot, which defendants argue falls outside the purview of Labor Law § 240 (1). This court agrees and notes that the plaintiffs have failed to offer any opposition to this branch of defendants' motion. Inasmuch as the work in which the plaintiff was engaged at the time of the accident did not involve an elevation-related risk within the meaning of Labor Law § 240 (1) (*see Landa v City of New York*, 17 AD3d 180, 181 [2005]), that branch of defendants' motion which seeks dismissal of this cause of action is granted.

Plaintiffs' Labor Law § 241 (6) Claim

Plaintiffs seek partial summary judgment as to liability on their Labor Law § 241 (6) claim against defendants Rectenwald and Mall-1. Defendants oppose plaintiffs' motion, and seek summary judgment dismissing said claim as against them.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts

of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford·Tower Condominium, Inc.*, 35 AD3d 378, 379 [2006]).

Here, in their Supplemental Verified Bill of Particulars, the plaintiffs allege that defendants violated Industrial Code 12 NYCRR § 23-1.29 and § 23-1.33(b)(4)(b). In support of their motion for summary judgment, however, the plaintiffs only rely upon the alleged violation of section 23-1.29(a). In opposition to plaintiffs' motion, and in support of their own motion, defendants argue that, since the accident occurred in the loading zone/dock, which was more than 100 feet away from the Kay Jewelers space, which was under construction, it did not occur in an area where construction, excavation or demolition was taking place and, therefore, Labor Law § 241 (6) is not applicable. Defendants further argue that plaintiffs' Labor Law § 241 (6) cause of action must be dismissed because section 23–1.29(a), the only provision upon which the plaintiffs rely, is not applicable to the facts of this case and, in any event, was not violated.

As an initial matter, the court rejects defendants' argument that Labor Law § 241 (6) is inapplicable to the facts of this case because plaintiff's injuries did not occur in connection with construction, demolition, or excavation work as required by the Labor Law. This narrow view of the circumstances of plaintiff's accident does not comport with the governing caselaw. As stated by the Court of Appeals, Labor Law § 241 (6) covers industrial accidents that occur in the context of construction (*Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002]). Indeed, *Shields v General Elec. Co.*, 3 AD3d 715 (2004) is instructive. There, the Court noted that "work that is an 'integral part of the construction contract' and is 'necessitated by and incidental to the construction . . . and involve[s] materials being readied for use in connection therewith' is construction work" (*id.* at 717, quoting *Brogan v International Bus. Machs. Corp.*, 157 AD2d 76, 79 [1990] ["(T)he lack of proximity between the place of accident and the precise location of construction is not dispositive against Labor Law liability for injuries to workers handling construction materials and equipment"]; *see also Karwowski*

v 1407 Broadway Real Estate, LLC, 160 AD3d 82, 87 [2018]; *Danielewski v Kenyon Realty Co., LLC*, 2 AD3d 666, 667 [2003]). Thus, contrary to defendants' contention, the process of receiving a delivery of necessary materials for his work and the location where such delivery took place at the time of plaintiff's injury constituted an integral part of the construction project and, therefore, falls within the ambit of section 241 (6) (*see Lucas v KD Dev. Constr. Corp.*, 300 AD2d 634 [2002]; *see also Shields*, 3 AD3d at 717; *Brogan*, 157 AD2d at 79).

The court now turns to the alleged Industrial Code violations. Although the plaintiffs appear to have abandoned their reliance upon section 23-1.33(b)(4), the court notes that this provision, entitled "Pedestrian protection," applies to persons passing by construction operations and not to workers, such as plaintiff, on a construction site. Thus, section 23-1.33 cannot support plaintiffs' Labor Law § 241 (6) claim.

As to 12 NYCRR 23–1.29(a), this provision provides as follows:

> "(a) Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons."

In support of their motion, plaintiffs argue that section 23-1.29 (a) is applicable to the facts herein and that defendants (Mall-1 and Rectenwald) violated this provision by failing to provide a flag person to direct and/or control public vehicular traffic in the delivery/loading area in the rear of the building. Plaintiffs maintain that there was no traffic control, or any designated flag person to direct delivery truck traffic, specifically Marjam's truck, on the day of the accident. In this regard, the plaintiff himself testified that he did not see any flagman directing truck traffic on the date of his accident, and that he was actually the one who directed Johnson (Marjam's driver) where to position his truck in order to unload the

materials. Although Johnson gave conflicting testimony that a flagman (someone other than the plaintiff) was present on the day in question, and was the one who had directed him to move his truck forward immediately before the plaintiff was injured, the plaintiffs note that this alleged flag person has not yet been identified. Moreover, plaintiffs argue that, even if there was some type of traffic control provided on the date in question, such measures were either improper or insufficient since they failed to prevent the plaintiff's accident from occurring. Plaintiffs additionally argue that the Marjam delivery truck constitutes "public" vehicular traffic, and that the defendants violated section 23-1.29(a) by failing to protect the injured plaintiff from the hazard posed by said vehicle.

In opposition, defendants argue that section 23-1.29(a) is inapplicable herein in that the accident occured on a roadway that was not in close proximity to any public vehicular traffic. Defendants note that section 23-1.29(a) was intended to direct public vehicular traffic away from areas where traffic could be hazardous to the persons performing work and, therefore, the regulation focuses on hazards caused by the close proximity to such traffic. Defendants point out that, at the time of the alleged incident, the mall was not accessible to the public and, thus, public vehicles were not permitted to access the site. Plaintiff himself testified that, at the time of the accident, the mall site was enclosed by fences on all sides, which limited access to the site. Additionally, security personnel were stationed at the entrance gate, which was closed upon arrival. In order to access the mall, the delivery vehicles were required to present their paperwork to the security guard, who would then open up the gate and notify the contractor that a delivery had arrived on the premises. Michael Stone, Vice President of Prestige Properties (Mall-1's agent), also testified that the service road leading to the delivery area did not provide any direct access to a public or main road (Stone tr at 16).

Marjam's driver, Johnson, testified that the roadway leading to the delivery/loading area, where the plaintiff was injured, was a one-way street, and that there was no room for

other vehicles to pass by him until he moved his truck. Additionally, Chris Rightenhour, Rectenwald's Site Safety Superintendent, testified that, at the time of the accident, the road that led from the security gate to the loading area in the rear of the building was about 29 feet wide, and that it was not a road that people (public traffic) drove on. Rather, he explained that it was only used for deliveries, and that only two trucks were permitted access through the security gate at a time (Rightenhour tr at 58-59). Thus, defendants point out that, during the time that Marjam's truck was parked in the loading area, not only was there no public vehicular traffic, there wasn't even room for delivery truck traffic on the roadway in question.

As defendants point out, section 23-1.29(a) only applies to workers who are performing work "on or in close proximity" to a street, roadway or highway "where public vehicular traffic may be hazardous to the persons performing such work." Here, there has been no showing that the plaintiff's accident occurred in such an area where public vehicular traffic posed a hazard to the plaintiff. Instead, there is ample testimony in the record that the one-way road leading to the designated loading/delivery area was closed off, and not near any public road or traffic. In fact, access could only be gained by having the security guard open the gate upon arrival. Thus, the court finds that the plaintiff was not exposed to any public vehicular traffic as contemplated by section 23-1.29(a). Nor is the court persuaded by plaintiffs' contention that the Marjam delivery truck constituted "public" vehicular traffic under the factual circumstances presented here. The Marjam truck needed to be at the loading zone for the very purpose of delivering materials for plaintiff's employer (CEI) to unload. Moreover, there is no testimony that any other vehicle or delivery truck, besides the Marjam truck, posed a traffic hazard to the plaintiff at the time of the accident. Based upon the foregoing, the court finds that section 23-1.29(a) is not applicable to the facts set forth herein.

Furthermore, the cases upon which the plaintiffs rely are distinguishable in that they all involved accidents which actually did occur in an area that was "on or in close proximity

to a street" where public vehicular traffic posed a hazard (*see McGuinness v Hertz Corp.*, 15 AD3d 160, 161 [2005]). In *McGuinness v Hertz Corporation,* the plaintiff, a construction worker, was struck by an automobile proceeding eastbound along East 65th Street and Manhattan, where a construction project was in progress. At the time of the accident, the plaintiff was directing the delivery of materials to the site at a loading dock, which protruded seven to eight feet into the street, when a Hertz rental car, proceeding in the lane next to where he was working, ran over his leg. The *McGuinness* Court held that section 23-1.29(a) applied under those circumstances (*id.* at 161; *see Kerrigan v New York State Elec. & Gas Corp.*, No. 5:11-CV-1320 GLS/ATB, 2015 WL 58386 [N.D.N.Y. Jan. 5, 2015] [where work was being performed on two-way road, Kerrigan plaintiff was injured when he and fellow workers were traveling east and had stopped but traffic was still proceeding in the west lane in close proximity to the plaintiff]). Additionally, in *Henry v 170 E. End Ave., LLC* (2012 N.Y. Slip Op. 31673 [Sup.Ct. N.Y. Cnty. June 21, 2012]), the court found section 23-1.29 (a) applicable where the plaintiff was struck by a vehicle involved in the construction project, and the record indicated that the vehicle accelerated in order to avoid an approaching public vehicle, which was not involved in the construction project.

Here, in contrast to the above-cited cases, there is absolutely no showing that the plaintiff's accident occured in a location where any traffic, public or otherwise, posed a hazard to the plaintiff. Since the plaintiffs have failed to raise an issue of fact regarding same, that branch of defendants' motion seeking to dismiss plaintiffs' Labor Law § 241 (6) cause of action is granted. Correspondingly, plaintiffs' motion seeking partial summary judgment as to liability on said claim is denied.

Plaintiffs' Labor Law § 200/Common-law Negligence Claims

Defendants also seek summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims. Labor Law § 200 codifies the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Yong Ju*

Kim v Herbert Constr. Co., 275 AD2d 709 [2000]). "Where . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if he or she had 'the authority to supervise or control the performance of the work' " (*Forssell v Lerner*, 101 AD3d 807, 808 [2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 62). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010] [internal quotation marks omitted]; *see Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2013]; *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 832 [2012]; *Harrison v State of New York*, 88 AD3d 951, 954 [2011]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2008]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]).

Rectenwald

Here, it is clear that the plaintiff's alleged injury did not result from a physical defect at the construction site, but instead resulted from the manner in which he performed his work – receiving a delivery of construction materials (*see Gargan v Palatella Saros Builders Grp., Inc.*, 162 AD3d 988, 989[2018]). As to Rectenwald, the court finds that plaintiffs' Labor Law § 200 and common-law negligence claims should be dismissed as against it, since the undisputed evidence establishes that Rectenwald did not direct or control plaintiff's work or the loading dock area where he was injured. Moreover, the record evidence clearly establishes that the injured plaintiff himself exercised direct supervisory control over the method and manner of the materials delivery process in question. In this regard, the plaintiff testified that he himself contacted Marjam and placed the order for the materials to be

delivered. He additionally testified that he was the one who met Johnson upon his arrival at the loading area, and directed him on where to park his truck prior to unloading it. Plaintiff further testified that no one from Rectenwald told him how his work was to be done (Plaintiff tr at 37-39). Contrary to plaintiffs' assertion, Rectenwald's general supervision over the Kay Jewelers construction project and its coordination of the worksite regarding the jewelry store is insufficient to trigger liability pursuant to Labor Law § 200 and common-law negligence (*see Vasiliades v Lehrer McGovern & Bovis,* 3 AD3d 400, 401–402 [2004]; *Reilly v Newireen Associates*, 303 AD2d 214, 218–221 [2003] lv denied 100 NY2d 508 [2003]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2000]). The plaintiffs have failed to raise a triable issue of fact in opposition. Accordingly, plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed as against Rectenwald.

Whiting-Turner

Plaintiffs' Labor Law § 200 and common-law negligence claims are also dismissed as against Whiting-Turner inasmuch as there is no evidence that said defendant had any supervisory role with regard to the plaintiff's work, or the delivery/loading area in which the plaintiff was injured. Anthony Messina, Whiting-Turner's lead project manager who worked on the mall project, testified that the individual contractors took care of their own materials supply, and that Whiting-Turner had no supervisory role with regard to any of individual contractors (Messina tr at 12-13). Messina also testified that the owner (Mall-1) hired a firm, R.D.S. as a dock master who handled and organized the delivery and flow of materials (*id.* at 31), and that he occasionally saw a flag person on the premises in the area in the back of the building (*id.* at 34). While there is deposition testimony that Whiting-Turner, as the construction manager, made recommendations on contractor generated safety programs, including the delivery/loading dock area (*id.* at 14), such action simply indicates Whiting-Turner's general supervision duties on the site, and is insufficient to establish liability pursuant to Labor Law § 200 and common-law negligence (*see Singh v Black Diamonds*

LLC, 24 AD3d 138, 140 [2005]). Accordingly, plaintiffs' section 200 and common-law negligence claims as against Whiting-Turner are dismissed (*see Linkowski v City of New York*, 33 AD3d 971, 975 [2006]; *Singh*, 24 AD3d at 139–140; *Vasiliades*, 3 AD3d at 401–402).

Since all of the causes of action in the plaintiffs' complaint asserted against Rectenwald and Whiting-Turner have been dismissed, all cross claims asserted against said defendants, and the third-party claims by said defendants for common-law indemnification and contribution are also dismissed (*see Yong Ju Kim v Herbert Const. Co.*, 275 AD2d 709, 713 [2000]; *Dilena v Irving Reisman Irrevocable Trust*, 263 AD2d 375 [1999]).

Mall-1

However, that branch of defendants' motion seeking to dismiss plaintiffs' Labor Law § 200 and common-law negligence claims as against Mall-1 is denied. While defendants assert that Mall-1 did not have any supervisory role over the plaintiff or his employer, CEI, or the area where plaintiff was injured, there is evidence in the record that Mall-1 (and/or its agent, Prestige Properties)[1] hired a company specifically responsible for overseeing and coordinating the delivery of materials for the individual tenant build-out projects, including the Kay Jewelers project. Anthony Messina, Whiting-Turner's representative, testified that Whiting-Turner's role was to act as an adviser to Mall-1 regarding safety issues. According to Messina, Mall-1 asked Whiting-Turner to make a recommendation as to who it should hire specifically to assist their tenant coordination group with facilitating their deliveries and bringing materials to the site (Messina tr at 34). Based upon Whiting-Turner's recommendation, Mall-1 hired the firm, R.D.S. (not a party herein) as a dock master, who was responsible for handling and organizing the delivery and flow of materials at the site (*id.*

[1] Matthew Lucchese, an employee of Prestige Properties, the property manager for the mall property. Lucchese testified that his duties were to make sure the premises were safe, take care of the utilities, oversee housekeeping and secure the facilities (Lucchese tr at 10).

at 31-32). Messina further testified that, on his daily trips to the site, he observed a flag person directing delivery traffic (*id.* at 34). Additionally, there is evidence in the record that Mall-1 retained control over the entrance onto the premises, in that it hired the security company (Ready Security) which was stationed at the gate and permitted the truck drivers to enter the premises. Michael Stone, the Vice President of Prestige Properties, also testified that it was the Mall-1's responsibility to maintain the loading/delivery areas, as well as certain tenants to the extent their activities and the materials being delivered would have impacted it.

Viewing the evidence in a light most favorable to plaintiffs, the court finds that a triable issue of fact exists as to whether Mall-1 had control over the delivery/loading area, and whether it was responsible for providing a flagman who, either was not present on the day in question, or was there and negligently directed Johnson to move his truck, thereby causing the plaintiff's accident. Since questions of fact have been raised as to whether Mall-1 exercised the requisite degree of control over the delivery/loading area to warrant the imposition of liability pursuant to Labor Law § 200 and common-law negligence, that branch of defendants' motion seeking to dismiss said claims as against Mall-1is denied.

Mall-1's Common-Law Indemnity

Cross-Claim Against Marjam and Johnson

Defendants (Mall-1, Rectenwald and Whiting-Turner) seek summary judgment on their common-law indemnity cross-claims against Marjam and Johnson (collectively, Marjam). It is well settled that common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries (*Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909 [2011]; *Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483 [2010]). Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence.

Since plaintiffs' complaint has been dismissed as against Rectenwald and Whiting-Turner, the indemnity cross-claims asserted by said defendants are moot. However, as to Mall-1's common law indemnity cross-claim against Marjam, issues of fact as to Mall-1's control over the delivery/loading dock area preclude granting summary judgment in Mall-1's favor. Indeed, Mall-1 has not established that it was free from fault in the happening of the plaintiff's accident since there is evidence in the record that Mall-1 was responsible for the common delivery/loading dock area in the back of the building, and that the delivery traffic safety personnel may have been employed by a company (R.D.S) hired by Mall-1.

Additionally, Mall-1 has failed to demonstrate that Marjam's negligence caused the accident. In this regard, Marjam refers to Johnson's deposition testimony that, when he entered the site, there was a flagman directing traffic in the delivery area, and that just before the accident occurred, the flagman directed him to move the truck forward. Johnson additionally testified that prior to moving the truck, he looked in both mirrors and checked to see if anybody was near the truck and then the flagman motioned for him to move forward. Based upon the foregoing testimony, issues of fact exist as to whose negligence, if any, caused the plaintiff's accident. Courts have held that "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties" (*Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2009]). Accordingly, that branch of defendants' motion for summary judgment in favor of Mall-1 on its cross claims against Marjam for common-law indemnity is denied.

Marjam and Johnson's Common-Law Indemnity

Cross-Claim Against Defendants

Defendants also seek to dismiss Marjam and Johnson's (collectively, Marjam) cross-claims against them for common-law indemnity and/or contribution. Since all of plaintiffs' claims have been dismissed entirely as against Rectenwald and Whiting-

Turner, all cross-claims against said defendants for contribution and common-law are moot and, therefore, are also dismissed. However, in light of the issue of fact as to whether Mall-1 exercised the requisite degree of control over the delivery/loading area where the plaintiff was injured, that branch of defendants' motion seeking to dismiss Marjam's common-law indemnity and contribution cross-claims as against Mall-1 is denied.

CRC's Motion

CRC moves for summary judgment dismissing defendants' (Mall-1, Rectenwald, and Whiting-Turner) third-party claims for common-law and contractual indemnity, breach of contract for failure to procure insurance, as well as all cross claims asserted against it.

Common-Law Indemnity

As to defendants' indemnity third-party claims, CRC argues that there is no evidence in the record that any of its workers had any involvement with the happening of the plaintiff's accident, or with directing the Marjam delivery truck prior to the plaintiff's injury. In support of this contention, CRC refers to the deposition testimony of Marjam's truck driver, Johnson, who claimed to have been directed to pull away from the loading area by an unidentified flagman just before his truck struck the plaintiff. CRC maintains that the alleged flagman was not employed by it, and notes that Johnson admitted that he did not know for whom the flagman worked (Johnson tr at 70).

In addition, CRC refers to the testimony of John Modica, who testified on its behalf. Modica described CRC as a "paymaster" company that carried payroll for different companies that were not signed with the union affiliated with the project (Modica tr at 9). Pursuant to the terms of CRC 's contract with Mall-1, dated February 6, 2014, CRC was hired to perform debris removal and clean-up services at the project site. Modica testified that CRC had about twenty laborers, two teamsters and three to six

engineers working at the site (*id.* at 14). He further testified that the CRC laborers worked inside the building keeping the job site clean, while the teamsters' job was to check credentials to make sure everyone was a union driver when they entered the site (*id.* at 16, 19, 24). He additionally testified that the CRC engineers were responsible for operating the cranes and other machines on the job site. According to Modica, none of the CRC workers directed any delivery trucks at the site, or otherwise performed flagman duties (*id.* at 27-28). He further testified that CRC was not responsible for any traffic safety at the job site (*id.* at 34).

CRC also submits the affidavit of Joseph Terrusa, a teamster who was employed by CRC on the date of the plaintiff's accident. Terrusa avers that he was one of the two teamsters employed by CRC who were working at the mall site. He avers that, on the day of the accident, he was responsible for checking the union credentials of the delivery truck drivers before they were allowed to enter the construction site, and that the other teamster was stationed on a water truck located in front of the premises (Terrusa Aff, at ¶ 3-4). Terrusa further avers that he did not direct the operation of the Marjam delivery truck involved in the plaintiff's accident, and was not involved in directing the operation of any vehicles on the premises (*id.* at ¶ 6).

CRC additionally points to the deposition testimony of Anthony Messina of Whiting-Turner, wherein he testified that he was not aware of CRC providing any flagman services at the site (Messina tr at 48). Stone, on behalf of Prestige Properties, Mall-1's agent, also testified that CRC did not supply any flagman for the site or anyone to direct traffic (Stone tr at 30, 71).

In opposition, defendants argue that an issue of fact exists as to CRC's role with respect to the happening of the accident. In support of this contention, defendants rely upon Johnson's deposition testimony that he believed that the flagman who directed him was a teamster worker. A review of Johnson's full testimony regarding this issue,

however, reveals that Johnson admitted that he did not know who the alleged flagman was or for whom he worked. More importantly, Johnson testified that he assumed the alleged flagman was a teamster because the mall was a union worksite, but that he did not actually know for sure whether the individual was a teamster, or for what company he worked (Johnson tr at 70, 86-87). There is no evidence to support the allegation that any CRC laborers, teamsters or employees were in anyway involved in the truck delivery area or the directing of the Marjam truck involved in the plaintiff's accident, and the contention that CRC's teamster may have performed flagman services on the date of the accident is mere speculation insufficient to raise an issue of fact (*see Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 [2006], lv. denied 8 NY3d 803 [2007]).

Based upon a review of the record, the court finds that CRC has established its entitlement to judgment as a matter of law by demonstrating that none of its laborers/employees directed the Marjam truck, were responsible for directing delivery traffic, or were in any way involved in or created the dangerous condition in the delivery/loading area that caused the plaintiff's accident (*see Prevost v One City Block LLC*, 155 AD3d 531, 534 [2017]; *Palone v City of New York*, 5 AD3d 750, 751 [2004]; *Skates v City of New York*, 304 AD2d 820 [2003]; *Maloney v Consolidated Edison Co. of N.Y.*, 290 AD2d 540 [2002]). Accordingly, defendants' common-law indemnity third-party claim is dismissed as against CRC.

Contractual Indemnity

The branch of CRC's motion seeking to dismiss defendants' contractual indemnification third-party claim is granted. "'The right to contractual indemnification depends upon the specific language of the contract'" (*Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 722 [2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding

circumstances (*Alayev v Juster Associates, LLC*, 122 AD3d 886, 887 [2014]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

Here, defendants' third-party claim against CRC for contractual indemnity is based upon the contract between Mall-1 and CRC, dated February 6, 2014. Pursuant to the terms of the indemnification provision (section 8[b]) in the contract, CRC's indemnification obligations are limited to indemnifying the Mall-1 for claims "resulting from Subcontractor's [CRC] performance of the work," "except arising from the acts of omission of Contractor [Mall-1]." As noted above, there is no evidence that any of CRC's workers were involved in the happening of the plaintiff's accident or that the accident arose out of CRC's work at the site, which was primarily cleaning and removal of debris. Since there is no evidence that the subject indemnity provision has been triggered, defendants' contractual indemnity claim is also dismissed as against CRC.

Breach of Contract for Failure To Procure Insurance

Lastly, to the extent that defendants' have asserted a breach of contract for failure to procure insurance third-party claim against CRC, said claim is hereby dismissed as CRC has made a prima facie showing that it fulfilled its contractual obligation under its contract with Mall-1to acquire the requisite insurance (*see DiVona v Wakefeld,* 35 AD3d 527 [2006]). Based upon foregoing, defendants' third-party complaint is dismissed as against CRC.

Conclusion

In sum, plaintiffs' motion for partial summary judgment as to liability on the Labor Law § 241 (6) claim is denied.

The motion for summary judgment by defendants Mall-1, Whiting-Turner and Rectenwald is granted to the extent that plaintiffs' complaint is severed and dismissed as against Rectenwald and Whiting-Turner, and all common-law indemnity and contribution cross-claims asserted against these defendants are also dismissed. That branch of

defendants' motion seeking to dismiss plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims as against Mall-1 is also granted. That branch of defendants' motion seeking to dismiss plaintiffs' Labor Law 200 and common-law negligence claims against Mall-1 is denied. That branch of defendants' motion seeking common-law indemnification over and against defendants Marjam and Johnson is also denied.

CRC's motion seeking summary judgment dismissing defendants' third-party complaint and all cross claims asserted against it is granted.

The foregoing constitutes the decision, order and judgment of the court.

ENTER

J. S. C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
FILED
2019 FEB 27 AM 11:18

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