

<b>McRae v EPS Iron Works, Inc.</b>
2019 NY Slip Op 30749(U)
March 19, 2019
Supreme Court, New York County
Docket Number: 156554-2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

-----X  
OTIS MCRAE,

Plaintiff,

-against-

EPS IRON WORKS, INC., CHELSEA PIERS L.P.,  
CHELSEA PIERS MANAGEMENT INC., and JOHN  
DOE CORPORATION,

Defendants.  
-----X

EPS IRON WORKS, INC.,

Third-Party Plaintiff,

-against-

STERLING IRON WORKS, LLC,

Third-Party Defendant.  
-----X

**HON. KATHRYN E. FREED, J.S.C. :**

The following documents, filed with NYSCEF, were considered in determining the motions herein:

Mot. Seq. No. 002: Docs. 43-54; 130; 143-152; 158-160; 163; 175-176

Mot. Seq. No. 003: Docs. 56-76; 129; 153; 168-169; 177

Mot. Seq. No. 004: Docs. 77-96; 117-128; 154-156; 170-173; 178

Mot. Seq. No. 005: Docs. 97-114; 132-142; 157; 161-162; 164-167; 174; 179

**DECISION AND ORDER**

Index No: 156554-2015

Mot. Seq. Nos. 002 - 005

Motion sequence numbers 002, 003, 004, and 005, are consolidated for disposition. In motion sequence 002, plaintiff Otis McRae (plaintiff), moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to his claim of a violation of Labor Law § 240 (1).

In motion sequence 003, third-party defendant Sterling Iron Works, LLC (Sterling), moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing third-party plaintiff EPS Iron Work, Inc.'s (EPS) claims for common law indemnification and contribution. Sterling also cross-moves, pursuant to CPLR 3212, to dismiss plaintiff's complaint and all cross claims asserted against it.

In motion sequence 004, Chelsea Piers L.P. and Chelsea Piers Management Inc. (collectively "Chelsea Piers") move, pursuant to CPLR 3212, for an order dismissing the alleged violations of Labor Law §§ 200 and 240 (1) and granting summary judgment on its cross claims for contractual indemnification as against EPS and Sterling.

In motion sequence 005, EPS moves, pursuant to CPLR 3212, for an order dismissing plaintiff's complaint, including the alleged violations of Labor Law §§ 200, 240 (1), and 241 (6), and all cross claims asserted against it. EPS also moves for an order granting it summary judgment on its claims for indemnification, contribution, and additional insured coverage against Sterling.

### **FACTUAL BACKGROUND**

Plaintiff testified that he suffered personal injuries on July 16, 2014, after a steel beam fell from a dolly and onto his foot. Plaintiff maintains that, on the date of his accident, he was working for Kevin Hansen (Hansen), who acted as his boss. He was not sure of the name of the

company for which he worked, but testified that he had heard of Sterling. Plaintiff also testified that, in 2014, he did not work for any entity other than Sterling. Plaintiff had worked with Hansen on about 50 jobs and was always paid in cash.

On the day before plaintiff's alleged accident, Hansen instructed him to go to Chelsea Piers the following day for a job. Plaintiff was not provided with any information as to what he was going to do on the date of his accident, did not know who owned Chelsea Piers and did not know who had hired Sterling. He also maintained that he did not interact with anyone from EPS. No one other than Hansen provided him with instructions. When plaintiff arrived at Chelsea Piers, Hansen told him to hand off materials from the top of a flatbed truck. The truck contained 15 iron beams which covered its entire length. The beams varied in length and were five feet, eight feet, and 20 feet long. It took one or two people to lift the beams. A worker arrived to assist him, along with a worker from Sterling who was driving a fork lift which belonged to Chelsea Piers. A worker from Chelsea Piers was blocking traffic in the area under the direction of another worker.

After working on top of the truck, plaintiff was instructed by Hansen to get off of the truck to move beams from the truck to the inside of Chelsea Piers. Pursuant to Hansen's instructions, the worker utilizing the forklift lifted the beams from the truck and placed them on a dolly which Hansen obtained from Chelsea Piers. Plaintiff testified that, after one beam was placed on the dolly, the dolly snapped in the middle due to its weight. This required Hansen to replace the dolly. Hansen, who decided to use the dolly, brought it out to the location.

The workers were next instructed to transport a large beam which was between 20 to 40 feet long. Plaintiff claims that, after the beam was placed on the ground, it was lifted onto a

different dolly. Plaintiff maintains that the beam was about one to two feet off of the ground and that about twelve feet of the beam was sticking off of the dolly. Someone told Hansen that the beams were being loaded in an unsafe manner and suggested that they use two forklifts. Plaintiff did not think the dolly was sufficient for the weight of the beam. Hansen told the workers to be careful because the beam could roll over.

Once the beam was loaded onto the dolly, the workers proceeded to push the dolly. Plaintiff recalled that a worker pushed the beam, while another worker was located in front of the beam to guide it. Hansen was located behind plaintiff, directing him.

After the dolly could not be pushed any further because of an incline in the sidewalk, Hansen directed plaintiff to go to the open side of the dolly. Plaintiff and another worker were then located in front of the dolly on its open side, while Hansen and another worker were located behind the dolly. Before plaintiff could start pushing, the beam rolled off of the dolly and onto plaintiff's left foot. At the time of plaintiff's accident, Hansen was holding onto the dolly. Plaintiff did not see the dolly move. After the men lifted the beam off of plaintiff's foot, he sat on the ground and an ambulance was called.

Anthony Pagan (Pagan) testified that, on the day of plaintiff's accident, he was employed by Sterling. He recalled that Hansen instructed the workers how to perform their jobs. Pagan believed that the dolly belonged to Chelsea Piers' maintenance or mechanics crew. According to Pagan, Chelsea Piers would not allow the flatbed truck to drive inside of the building. He maintained that the crew of four helped remove and unload the beams from the truck and participated in pushing the materials onto the dolly. The beams were eight or ten feet long, weighed over 800 pounds, and extended several feet past the edge of the dolly.

Pagan testified that the workers made at least one trip with the materials before plaintiff's accident. Hansen was located in front of the beam, while the other workers were located behind it. Hansen spoke about safety and told the workers to not get in front of the beam. The accident occurred when the men were moving the beam down a driveway. Pagan recalled pulling plaintiff back because he moved in front of the beam at the open end of the dolly. He maintained that the beam slid off of the dolly and onto plaintiff's foot. He did not recall how high off the ground the platform was. Pagan testified that he did not recall anyone from Chelsea Piers instructing him how to push the dolly and did not observe any work at the site being conducted by EPS.

Stefen Faiella (Faiella) witnessed plaintiff's accident. Hansen hired Faiella to work at the job and Faiella believed that he was employed by Sterling, Hansen's company, on the job. Faiella recalled that plaintiff's accident took place in front of Chelsea Piers and that the truck driver with the beams would not drive inside.

Faiella pushed a steel beam onto a dolly before the accident in an area where the ground was not even. He maintained that the accident occurred as he and the crew were attempting to turn the dolly into the entrance area. Faiella was on the opposite side of the dolly from plaintiff and Pagan. Plaintiff was located on the open side of the dolly, which had no guard to protect the material from falling. He testified that they used two dollies at the same time, with one dolly placed towards the front of the beam and the other towards the back of the beam. Faiella believed that he was simultaneously holding onto the dolly and the beam.

Faiella recalled that the ground was tilted. He did not see the beam fall directly from the dolly, but saw the beam on top of plaintiff's foot. He believed the beam was about 20 feet long, a foot wide, and weighed two tons. He did not know who the dollies belonged to. Faiella did not

know the identity of the truck driver or the name of the company which transported the steel to the site.

Faiella was unaware whether any representative from EPS or Chelsea Piers participated in any aspect of the work. He did not believe that EPS had any workers at the site. He never took any direction from EPS, and did not recall seeing anyone assisting from Sterling or Chelsea Piers. Although there were Chelsea Piers employees in the area, he did not know whether they were assisting with the work.

Hansen, Sterling's founder, was Sterling's foreman, but that company is now dissolved. He recalled that plaintiff was a part time worker and that he sporadically hired him for jobs. Hansen placed a bid for the work at Chelsea Piers after Phil Strocchia of EPS requested an estimate for a job. The job at Chelsea Piers was unloading steel beams from a truck and bringing them inside of the building for installation.

Hansen hired plaintiff and two other laborers to work for Sterling on the job. The workers first had to unload iron from a truck provided by EPS. Pagan used a forklift which belonged to Chelsea Piers and which was provided by a Chelsea Piers worker. Hansen interacted with a Chelsea Piers foreman named "Franco" as well as a Chelsea Piers manager.

The truck driver was supposed to back up into the building at Chelsea Piers. However, the truck driver refused and explained that his truck was too big. Hansen testified that a forklift was used instead to unload the steel onto wood blocks, and the beams were then to be moved onto a dolly so that they could be wheeled inside. He believed that there were 14 beams in total. The beam which was involved in plaintiff's accident was 26 feet long, eight inches wide, and around 1600 to 1800 pounds. Hansen testified that the subject beam was located about eight

inches off of the ground before it fell onto plaintiff's foot. Hansen did not see any other forklifts or tools which he might be able to use. He did not consult with anyone before commencing the process of moving the beams. He did not recall anyone assisting with traffic, although there was a worker in a security booth nearby who was not involved in loading or moving the beams.

Hansen maintained that, at the time of plaintiff's accident, the driveway where the men were working did not have a gradient or a slant. Hansen believed that he made the turn into the driveway, with his back to the beam, to ensure that no cars were approaching. Hansen maintained that the workers had their hands on the iron or the dolly to pivot the steel.

When the accident occurred, Hansen was about 10 to 15 feet ahead of the beam and was not touching the same. He did not tell plaintiff to change his position with respect to the beam. He first became aware of the accident when he heard someone shout. When he turned around, he saw the beam flopped on its side and plaintiff hopping on one foot. After the accident, Hansen spoke with Pagan, who told him that they hit a dip in the sidewalk and that he tried to push plaintiff out of the way.

According to Hansen, Chelsea Piers never: 1) entered into a written or oral contact with Sterling; 2) told him how to conduct his work; or 3) supervised the unloading of the truck. He recalled, however, that there may have been a discussion about using a Chelsea Piers forklift. Hansen was not sure who the dolly belonged to, but assumed that it was supplied by Chelsea Piers. He did not recall whether a worker from Chelsea Piers was directing traffic at the time of the accident and remembered that a manager from Chelsea Piers responded to the accident scene. He believed that the manager for Chelsea Piers delegated to Sterling the authority for his company to unload the flatbed and deliver the beams.

On the morning of the accident, Hansen spoke to "Phil" of EPS about the scope of the work. He maintained that neither "Phil" nor anyone from EPS performed physical work at the site or provided instructions as to how to unload materials from the truck. Hansen believed that "Phil" made the arrangements for the use of the forklift and told Hansen that the truck with the beams was going to pull in front of the job site. He did not know who drove, or employed the driver of, the truck. Hansen told his workers, and possibly the Chelsea Piers manager, how they were going to unload the materials after the driver refused to drive the truck into the building. He did not believe that the dolly was defective.

Philip Strocchia (Strocchia), vice-president and a founder of EPS, a steel contractor, testified that EPS was hired by Chelsea Piers to work at the project. At his deposition, Strocchia reviewed a certificate of insurance and testified that the certificate was presented to businesses with which EPS worked. Strocchia also reviewed an indemnity agreement providing that EPS was to be held harmless for work performed for Sterling. He testified that the agreement covered all of the different jobs EPS had with Sterling, but it did not specifically mention Chelsea Piers. He maintained that the combination of a purchase order and a proposal constituted the agreement between Chelsea Piers and EPS. He recalled calling his insurance broker and adding Chelsea Piers as an additional insured on EPS's policy.

Strocchia represented that EPS did not have any involvement with the day to day activities of the job. He said that the structural engineer was hired by Chelsea Piers, which provided an architectural or structural drawing. After drawings were prepared, EPS submitted them to Chelsea Piers, which verbally approved them. Strocchia hired Sterling, a subcontractor, and that the steel was to be delivered by a trucking company hired by EPS. Although EPS did

not have a formal written agreement with Sterling covering all jobs, it had a certificate of insurance.

Strocchia maintained that, other than the trucking company and Sterling, EPS did not hire any other companies to perform any aspects of the work encompassed in the purchase order. Sterling was to provide all equipment and manpower to perform the work. EPS was required to provide all manpower and equipment necessary to deliver, unload, and transport the steel. None of EPS's employees was present during any of Sterling's work.

Michael Braitto (Braitto), general manager of property management and senior vice president of Chelsea Piers, also testified. Braitto could not locate an accident report for plaintiff's accident and did not recall any employees from Chelsea Piers discussing the accident. Braitto recalled a contract in July of 2014 for the installation of several steel posts and beams at Chelsea Piers for which EPS was a contractor. He maintained that, at the time of plaintiff's accident, Chelsea Piers owned one forklift and that the other two were owned by dock building firms. Braitto testified that Chelsea Piers also owned five or six different types of dollies. He did not know whether any of the dollies were provided to EPS in July of 2014 and did not recall EPS making any requests for equipment from Chelsea Piers.

According to Braitto, his permission was needed for workers to use the forklift and the dollies. He recalled "Phil" complaining to him that the truck driver did not know how to back into Chelsea Piers and did not drive to the front of the site as directed. Braitto did not know who owned the truck or where it came from.

### LEGAL CONCLUSIONS

"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 issues of fact . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Plaintiff contends that he should be granted partial summary judgment as to his claim of a violation of Labor Law § 240 (1). Plaintiff argues that defendants violated Labor Law § 240 (1) when they failed to provide a proper safety device and that the violation was the proximate cause of his accident. Plaintiff argues that the subject beam weighed over 1800 pounds and was transported on an unsecured dolly. Plaintiff maintains that he was performing a protected activity as he was conducting a task which has a gravity related risk, that the force from the weight of the beam was significant, and that the undertaking required a sufficient safety device.

In opposition, EPS first contends that it is not a proper defendant pursuant to the Labor Law because it was not an owner, or an agent of the owner, of the premises where the accident occurred, but rather was a subcontractor hired by Chelsea Piers. EPS maintains that it was not in privity of contract with the owner and, thus, could not have been an agent of the owner.

"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 . . . Thus, 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. Once an entity becomes an

agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity.” *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 (2d Dept 2013) (internal quotation marks and citations omitted); *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 (1981) (holding that a contractor hired for a specific project is subject to liability under the Labor Law as a statutory agent of the general contractor if it has been delegated the work in which plaintiff was engaged).

Here, Strocchia testified that EPS was required to provide all manpower and equipment necessary to deliver, unload, and transport the steel. Strocchia also testified that Sterling was hired by EPS to assist with the work. Since plaintiff’s accident occurred during the process of unloading and delivering steel, and because this was an activity which EPS would have the authority to control, Labor Law § 200 is applicable as to EPS.

EPS also contends that plaintiff’s claim of a violation of Labor Law § 240 (1) must be dismissed. EPS contends that it is undisputed that the dolly remained on the ground at all times and that plaintiff’s accident did not arise out of a physically significant elevation differential. EPS argues that plaintiff did not fall from an elevated height and was not struck by an object falling from an elevated height.

Chelsea Piers contends that Labor Law § 240 (1) is inapplicable as to plaintiff’s accident because there was a minimal elevation differential. It maintains that, pursuant to Hansen’s testimony, the beam only fell eight inches. Chelsea Piers argues that plaintiff did not assert that protective devices could have been utilized to secure the falling object. Alternatively, Chelsea Piers contends that plaintiff’s motion for partial summary judgment should be denied because a triable issue of fact exists as to whether the dolly involved in the accident was an adequate safety

device.

Labor Law 240 (1) provides in part:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.”

“Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001) citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

Although defendants argue that the elevation of the beam falling from the dolly was not significant, in *Marrero v 2075 Holding Co. LLC*, the Appellate Division, First Department held that a fall of a heavy steel beam from a cart could be considered to be a violation of Labor Law § 240 (1) given the weight and force the beam was able to generate during its descent.

Specifically, the Appellate Division, First Department, held:

"[a]s a result, an A-frame cart containing Sheetrock and two 500-pound steel beams tipped over toward the plaintiff. The steel beams fell, landing on his left calf and ankle. While the record did not specify the height, the uncontroverted evidence shows that the steel beams fell a short distance from the top of the A-frame cart to plaintiff's leg. Given the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis."

*Marrero*, 106 AD3d at 409 (citations omitted); *see also Slawsky v Turner Constr. Co.*, 87 NYS3d 886, 886 (1st Dept 2018) (holding "[t]he motion court correctly found that plaintiff adduced sufficient evidence that he was exposed to an elevation-related hazard supporting a claim pursuant to Labor Law § 240 [1] . . . [t]hat the glass partition may have only traveled a short distance does not warrant dismissal in light of the partition's weight of between 300 and 400 pounds").

Here, pursuant to the above case law, the force which the beam's weight of 1600 to 1800 pounds could generate during even a short fall may be sufficient for Labor Law § 240 (1) to be applicable. However, questions of fact exist as to whether the device was adequate and was properly utilized.

First, while plaintiff and Hansen testified that the beam was being pushed on one dolly, Faiella testified that two dollies were being utilized at the same time with one dolly located towards the front of the beam, and another dolly located towards the back of the beam. This conflict in testimony not only raises the question as to how many devices were being utilized to transport the beam but, if accurate, also raises questions as to how and why the beam fell off both dollies.

There also exists a question as to how high the beam was located from the ground before it fell onto plaintiff. While Chelsea Piers argues that pursuant to the testimony of Hansen, the beam fell eight inches, plaintiff testified that the beam was up to two feet above the ground. A question of fact also exists as to whether plaintiff was instructed to walk in front of the open section of the dolly. Plaintiff testified that Hansen directed him to walk to the open side of the dolly. However, Hansen testified that he did not tell plaintiff to change his position. It is also

unclear whether there was a slant in the ground on which the dolly was being pushed. While Hansen testified that the driveway was not slanted, Faiella testified that the ground was tilted.

Also disputed is whether the device utilized to transport the steel was adequate pursuant to Labor Law § 240 (1). "The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted).

"The duty to furnish adequate safety devices is nondelegable, and those who fail to furnish such devices are absolutely liable for injuries that proximately result from an employee's elevation-related accident. A defendant who provides an adequate safety device may assert the defense that an injured worker-who neglected to use or misused the available device-was the sole proximate cause of his or her injuries." *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 (1st Dept 2014) (citations omitted).

Here, questions of fact exist regarding whether the dolly was an appropriate safety device to transport the beam and whether the beam could have been secured in a way which would have prevented it from sliding off of the dolly. Therefore, because questions of fact exist as to why the accident occurred and whether the dolly was an adequate safety device to carry the subject beam, plaintiff's motion for partial summary judgment pursuant to Labor Law § 240 (1) must be denied.

Defendants also contend that plaintiff's claims made pursuant to Labor Law § 241 (6) must be dismissed. Labor Law § 241 (6) provides, in pertinent part:

"[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

\* \* \*

(6) 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 . . . ."

Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *See Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 (1st Dept 2007). In plaintiff's verified bill of particulars, plaintiff alleges violations of sections 23-2.3 (c), 23-3.3 (c)(e)(h), 23-1.5 (c)(1)(2)(3), and 23-2.1 (b) of the Industrial Code.

EPS and Chelsea Piers contend that Industrial Code section 23-2.3 (c), entitled "Tag Lines" is not applicable because the accident did not occur while the Sterling crew was hoisting a steel panel or a structural steel member; that section 23-3.3 (c)(e)(h), entitled "Demolition by hand" is not applicable since this accident did not involve demolition; that section 23-1.5 (c)(1)(2)(3), entitled "Condition of equipment and safeguards" is not applicable as there is no evidence that the dolly was damaged or not sound or operable before its use; and that section 23-2.1 (b), entitled "Disposal of debris" is not applicable because the accident did not involve the disposal of debris.

In his opposition, plaintiff fails to address such specific sections of the Industrial Code or explain each sections applicability. *See Perez v Folio House, Inc.*, 123 AD3d 519, 520 (1st Dept

2014) ("[a]s to the remaining Industrial Code regulations on which plaintiff predicates his section 241 (6) claim, his failure to address them indicates that he has abandoned them as bases for liability"); *Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 (1st Dept 2013) (holding "[p]laintiff abandoned the Labor Law § 241 (6) claims that are predicated on violations of other Industrial Code provisions and OSHA regulations cited in his bill of particulars, since he failed to address them in his motion papers or on appeal").

Therefore, because plaintiff fails to address the applicability of the alleged violated sections of the Industrial Code, the branches of the motions by Sterling, EPS, and Chelsea Piers motions seeking summary judgment as to Labor Law § 241(6) must be granted, and the claims alleging violations of sections 23-2.3 (c), 23-3.3 (c)(e)(h), 23-1.5 (c)(1)(2)(3), and 23-2.1 (b) of the Industrial Code must be dismissed.

Defendants also move to dismiss plaintiff's claims for common law negligence as well as a violation of Labor Law § 200. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Cruz v Toscano*, 269 AD2d 122, 122 (1st Dept 2000) (internal quotation marks and citation omitted).

Labor Law § 200 (1) states, in pertinent part, as follows:

"[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . ."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

Sterling fails to meet its burden of demonstrating that plaintiff's claims for common law negligence and Labor Law § 200 must be dismissed against it. Plaintiff testified that Hansen, a foreman for Sterling, supervised the manner of his work, including the way in which he was transporting the beam on the dolly and instructed him to walk in front of the open side of the dolly. Because the testimony indicates that Hansen was directing plaintiff's work at the time of the accident, that branch of Sterling's motion seeking dismissal of plaintiff's claims for negligence and a violation of Labor Law § 200 must be denied.

Chelsea Piers contends that summary judgment dismissing plaintiff's Labor Law § 200 claim as against it must be granted because plaintiff's accident was caused by the decision of Sterling to transport the steel using a dolly. It argues that it did not exercise any supervisory control over plaintiff's work and was not aware of the manner in which the steel was being

transported. Further, it contends that there is no allegation that the dolly was dangerous or defective.

Plaintiff contends that questions of fact exist regarding whether Chelsea Piers was negligent because it coordinated with Sterling the movement of the structural steel from the truck to the worksite. Plaintiff argues that the decision to use a dolly was one which was made by Sterling in consultation with agents of Chelsea Piers. He argues that Chelsea Piers knew or should have known that the dolly which it provided would be used to carry heavy loads which it was not intended to carry. Plaintiff argues that the record contains questions of fact as to how much involvement Chelsea had in the decision to use the dolly.

With regard to the unloading process, Hansen testified:

- Q. What person or entity delegated the authority for your company to unload that flatbed and deliver the steel to the room?
- MR. JAIRATH: What do you mean by delegate?
- Q. Who gave you the direction to do that?
- A. I guess the manager for Chelsea Piers.
- Q. What do you mean by guess?
- A. They delegated.

Hansen EBT, at 86.

Hansen also testified that he believed that Chelsea Piers brought the dollies over for Sterling's use and that he recalled a conversation with the manager of Chelsea Piers regarding how the materials were going to be unloaded after the driver refused to back his truck into the building. This testimony raises questions of fact regarding the control, if any, which Chelsea Piers may have exercised over the unloading process. Therefore, that branch of Chelsea Piers's motion seeking dismissal of plaintiff's claims for common law negligence and a violation of Labor Law § 200 must be denied.

EPS also contends that it was not negligent and that the allegations that it violated Labor Law § 200 must be dismissed. EPS argues that the testimony demonstrates that it had no ability to supervise or control the activity which brought about plaintiff's injury. EPS also contends that it neither gave permission to utilize the subject dolly, nor had the ability to do so, since the dolly belonged to Chelsea Piers.

Here, a question of fact exists as to whether EPS may have had the authority to control the activity which brought about plaintiff's injury. Strocchia testified that EPS was required to provide all manpower and equipment necessary to deliver, unload, and transport the steel. Hansen testified that he spoke with Strocchia regarding the scope of work on the morning of the accident; that Strocchia provided him with an overall plan for the project; and that Strocchia had the ability to provide him with specific instructions and directions. Hansen also testified that Strocchia was to make the arrangements for equipment such as forklifts.

Since EPS was in charge of transporting the steel, unloading it, and obtaining the equipment to unload it, a question of fact exists regarding whether it had the authority to supervise or control the performance of plaintiff's work. Therefore, that branch of EPS's motion seeing to dismiss plaintiff's claims for common law negligence and a violation of Labor Law § 200 must be denied.

There also exist questions of fact arising from the testimony regarding Strocchia's awareness of the accident. Strocchia testified that he did not know about the accident until he was contacted by an insurance company and that no one, including Hansen, ever called him to explain how the accident occurred. However, this testimony is contradicted by Hansen, who testified that Strocchia arrived minutes after the accident and questioned Hansen as to why

plaintiff was sitting on the sidewalk.

Sterling also moves to dismiss the cross claims for common-law indemnification and contribution by EPS and Chelsea. The Court of Appeals has held that “[a]bsent an express indemnification agreement, or a ‘grave injury’ as enumerated in Workers' Compensation Law § 11, an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits. Where a ‘grave injury’ results, a primary defendant may commence a third-party action against the injured plaintiff's employer for common-law indemnification and/or contribution.” *Fleming v Graham*, 10 NY3d 296, 299 (2008).

Sterling argues that plaintiff did not sustain a grave injury pursuant to Section 11 of the Workers Compensation Law. Section 11 of the Workers Compensation Law provides in part:

"An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Sterling contends that, because plaintiff lost fewer than two whole toes, plaintiff's injury did not constitute the “loss of multiple toes” requirement as dictated by the statute to sustain a grave injury. Sterling argues that *Castro v United Container Mach. Corp.*, 96 NY2d 398 (2001), is controlling. There, the Court of Appeals addressed the issue of whether “loss of multiple fingers” as specified in the statute could mean “partial loss” of multiple fingers. The Court held that strict interpretation of the statutory language mandated that the injury must consist of the

whole finger, and not just a tip of the finger.

In opposition, plaintiff argues that the court should require a fuller record regarding the medical intricacies of whether or not the third toe in question has sustained amputations which functionally render it half a toe or no toe.

Chelsea contends that issues of fact exist as to whether plaintiff sustained a grave injury. They argue that, while Sterling relies upon the report of Dr. John F. Waller (Dr. Waller) to demonstrate that no grave injury was sustained, Dr. Waller opined that the second toe of plaintiff's left foot was completely amputated and that the third toe was partially amputated. Chelsea maintains that, since the distal and middle phalanges were amputated, the two joints connecting the three phalanges were amputated, leaving a stump consisting of the proximal phalanx. Chelsea argues that the loss of the two joints connecting the three portions of the third toe should be considered to be the equivalent to the loss of a toe.

In a case in the Supreme Court, Bronx County, in which a plaintiff lost one toe, and had another toe partially amputated, the court held:

“[w]ith respect to whether plaintiff has suffered a grave injury as defined by Workers' Compensation Law 11, plaintiff himself testified that he lost only his fourth toe, and plaintiff agreed at his deposition that his "fifth toe continues to be attached to [his] foot." . . . The medical evidence relates that plaintiff lost one toe, the fourth toe with no mention of any loss of the fifth toe. Dr. Ali Guy's notation of a partial amputation of the fifth toe is not dispositive, since partial amputations are not a loss under Worker's Compensation Law 11. (*Castro v United Container Mach. Group*, 96 NY2d 398, 761 N.E.2d 1014, 736 N.Y.S.2d 287 [2001]). Since plaintiff lost one toe, and not "multiple toes," WCL 11 mandates that his employer(s) not be held liable for plaintiff's on the job injuries.”

*Nunez v Park Plus, Inc.*, 2015 NY Misc LEXIS 2588 (citations omitted).

Here, the affirmed reports of Dr. Andre M. Casden (Dr. Casden) and Dr. Waller have

been submitted for this court's review. Both reports state that the doctors are licensed to practice in the state of New York and include affirmations, pursuant to CPLR 2106, that the reports are true and within a reasonable degree of medical certainty under penalty of perjury. The report of Dr. Casden states that plaintiff is "status post amputation of the left second toe and one-half of the third toe on the left foot." The report of Dr. Waller states that "[a]n amputation of his second toe was noted and a partial amputation of the third toe was noted."

As confirmed by both physicians affirmed reports, plaintiff lost one toe, and had a partial amputation of another. Therefore, plaintiff did not lose "multiple toes" as specified in section 11 of the Workers Compensation Law or suffer a grave injury pursuant to the statute. Thus, Chelsea and EPS's cross claims for common-law indemnification and contribution must be dismissed.

Sterling also cross-moves for summary judgment dismissing the defendants' contractual claims against it. Sterling maintains that there is no indemnification agreement pursuant to which Sterling is required to indemnify any entity in connection with the project. Although Sterling admits that an indemnification agreement dated January of 2014 exists, it maintains that that agreement relates to another project and does not govern the project at issue since there is no blanket indemnification agreement between Sterling and EPS. Sterling also contends that there is no agreement requiring Sterling to purchase insurance naming any party in connection with the project.

The parties submit an agreement between EPS and Sterling which is entitled "Indemnity Agreement and Agreement." The agreement states:

"To the fullest extent permitted by law, subcontractor shall indemnify, hold harmless, and defend Contractor, Owner and agents and employees of any of them from and against all claims, damages, losses, and expenses including but not limited to attorneys fees arising out of or resulting from the work of subcontractor provided any such claim, damages, loss, or expenses . . . is caused in whole or in part by any act or omission of the subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable pursuant to the performance of the work. Notwithstanding the foregoing, subcontractor's obligation to indemnify Contractor, Owner, and agents and employees of any of them for any judgment, mediation or arbitration award or settlement shall extend only to the percentage of negligence of subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable in connection to such claim, damage, loss and expense . . . ."

NYSCEF Doc. No. 125.

EPS contends that it is entitled to summary judgment for contractual indemnification and for breach of contract from Sterling. EPS argues that it is entitled to contractual indemnification from Sterling because plaintiff's claim falls within the scope of the indemnity provision contained in the contract between EPS and Sterling. EPS maintains that it was to be named on Sterling's insurance policies and that Sterling has failed to demonstrate that it procured the requisite insurance.

Chelsea Piers contends that the plain language of the indemnification provision requires Sterling, as subcontractor, to defend, indemnify, and hold harmless EPS, as contractor, and Chelsea Piers, as owner, for any claims arising from the work of Sterling.

Hansen testified that the date on the agreement, which states "January 2014", is incorrect because he was not working with EPS at the time at which the contract was signed. Although Hansen identified his signature, Hansen testified that Sterling did not submit a bid for the project until at least March, and that he was not awarded the job until April or May. Thus, Hansen's testimony raises a question of fact as to whether the agreement was for the subject project at

Chelsea Piers and whether it is applicable as between EPS and Sterling. Therefore, Sterling's cross motion to dismiss the claims for contractual indemnification and breach of contract must be denied.

Chelsea Piers argues that it should be entitled to summary judgment on its cross claims for contractual indemnification against EPS and Sterling and for breach of contract for failing to procure insurance for Chelsea. It maintains that the document entitled "Purchase Order" dated June 13, 2014, discusses contractual indemnification obligations.

The "Purchase Order" states, in part:

"Vendor, Contractors and/or Supplier shall indemnify Chelsea Piers Management against all claims arising from the work covered by this Purchase Order . . . Lessee's contractor's, vendors, etc., general liability insurance shall apply on a primary and non-contributing basis with respect to all protection provided to Chelsea Piers thereunder. In addition, the general liability insurance shall provide that no act or omission of lessee, contractor or vendor will in any way effect or reduce the insurance coverage available to Chelsea Piers thereunder."

NYSCEF Doc. No. 124.

Chelsea Piers contends that, although the purchase order was not signed by EPS, it is enforceable because EPS did not proceed with the work set forth in its bid documents until it received the purchase order. Chelsea Piers argues that Strocchia testified that after his company submitted a bid for the work and received the purchase order from Chelsea, he then decided to proceed with the project. It further contends that, based upon the clear intention of the parties, EPS is obligated to indemnify Chelsea Piers for any judgment entered against the latter in this lawsuit.

EPS contends that the subject indemnification clause violates the General Obligations Law because it requires EPS to defend and indemnify Chelsea Piers against all claims arising

from the covered work. Section 5-322.1 of the General Obligations Law provides, in part:

“[a] covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers’ compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.”

Since the clause in the Purchase Order states that EPS was to indemnify Chelsea Piers “against all claims arising from the work covered by this Purchase Order,” this clause would violate the General Obligations Law. Therefore, the branch of the motion by Chelsea Piers seeking summary judgment on its claims for contractual indemnification as against Sterling and EPS must be denied.

Finally, Chelsea Piers argues that EPS is in breach of its contract because it did not obtain insurance which was agreed to in the "Purchase Order." However, the testimony of Strocchia raises issues of fact as to whether insurance was obtained. At his deposition, Strocchia reviewed a certificate of insurance which states that the certificate holder is Chelsea Piers and testified that he recalls calling his insurance broker and adding Chelsea Piers as an additional insured on EPS's policy.

Therefore, because there remains a dispute as to whether EPS obtained insurance naming Chelsea Piers as an additional insured, that branch of Chelsea Piers’s motion seeking summary

judgment as to the cause of action for breach of contract must be denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Otis McRae's motion (sequence 002) for partial summary judgement as to his claim of a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that third-party defendant Sterling Iron Works LLC's motion (sequence 003) and cross motion are granted only to the extent that the cross claims against Sterling Iron Works LLC for common-law indemnification and contribution are dismissed, as well as plaintiff's claim alleging a violation of Labor Law § 241 (6), which is also dismissed; and it is further

ORDERED that Chelsea Piers L.P. and Chelsea Piers Management Inc.'s motion (sequence 004) for summary judgment dismissing the complaint and on their cross claims for contractual indemnification as against EPS Iron Works, Inc. and Sterling Iron Works LLC are denied; and it further

ORDERED that EPS Iron Works, Inc.'s motion (sequence 005) to dismiss plaintiff's complaint pursuant to Labor Law §§ 200, 240 (1), 241 (6), and to dismiss the cross claims against it, is granted only as to plaintiff's claim alleging a violation of Labor Law § 241 (6) which is dismissed as against EPS Iron Works, Inc.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: March 19, 2019

ENTER:



HON. KATHRYN E. FREED, J.S.C.