SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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INDEX NO. 155989/2014

ASHTON GOUNDAN, LATCHMANI GOUNDAN,

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 006

PAV-LAK CONTRACTING INC., PAV-LAK INDUSTRIES, INC., 237 WEST 54 OWNER, L.L.C.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for summary judgment.

By notice of motion, defendant/third-party plaintiffs Pav-Lak Contracting Inc., Pav-Lak Industries, Inc., and 237 West 54 Owner, LLC (collectively, Pav-Lak) move pursuant to CPLR 3212 for an order dismissing all claims against Pav-Lak Industries, Inc. as it is not a proper party here, dismissing all claims against them on the merits, and granting them judgment on their third-party claims for contractual indemnification, including reasonable attorney fees, breach of contract, and insurance coverage.

Plaintiffs oppose and by notice of cross motion, move for an order granting them partial summary judgment on liability. Pav-Lak opposes the cross motion.

By notice of cross motion, Norguard Insurance Company, as the Workers' Compensation insurer of third-party defendant D&D Electrical Construction Company Inc., opposes Pav-Lak's motion and moves for an order permitting it to intervene in the action pursuant to CPLR 1012(a)(2) and 1013, and granting it dismissal of the first through fifth third-party claims for common law indemnification and contribution. Pav-Lak opposes the cross motion.

I. PERTINENT BACKGROUND

A. Pleadings

On October 30, 2013, plaintiff Ashton Goundan was employed by D&D and performing construction work at premises owned and managed by the Pav-Lak defendants. That day, while attempting to install a lighting fixture and standing on a scaffold, he was electrocuted, whereupon he fell from the scaffold onto a desk and then to the floor, sustaining personal injuries. He asserts claims for violations of Labor Law §§ 240(1), 241(6), and 200 and common law negligence. (NYSCEF 95).

In plaintiffs' bill of particulars, the following violations are alleged: 12 NYCRR (Industrial Code) 23-1.3, 23-1.5, 23-1.7(f), 23-1.13, 23-1.21, and Occupational Safety and Health Administration (OSHA) regulations 1926.416(a)(i) and (a)(3). (NYSCEF 97).

In Pav-Lak's third-party complaint, they assert claims against D&D for contribution, common law and contractual indemnification, and failure to procure insurance. (NYSCEF 96).

B. Ashton's deposition testimony (NYSCEF 98-100)

Ashton is a certified electrical technician, and was trained to never work with live electricity. While working for D&D on the project at issue, he only received instructions as to how to do his work from D&D foremen.

At the beginning of October, he was told by someone he believed to be a building owner that the owner wanted the lights on at all times. Everyone on the project worked with live power or electricity.

On the date of his accident, a D&D foreman instructed him to install an exit sign in the lobby. At first, he had a ladder to stand on, but it disappeared after he had left the lobby to retrieve a missing part. Nearby was a baker's scaffold, which Ashton decided to use.

The ladder was owned by D&D; the scaffold was labeled "Pav-Lak." There was nothing wrong with the scaffold, and it had railings on at least two of its sides.

Ashton never used a harness while working for D&D, never asked for one, and did not know if D&D had any, but he knew that a harness could be attached to the scaffold. He had never been "introduced to" any harnesses, nor was he instructed as to their use. If Ashton had had a harness, he would have been able to attach it to the scaffold or to hooks in the ceiling.

The power source for the exit sign was located in the transformer room, which Ashton knew, having wired it. He did not turn off the electricity before attempting to install the sign and knew that he was working with live power. As he reached into the sign, he had a "strange feeling," could not move his arms, and then found himself on the ground.

C. Deposition testimony of D&D's foreperson (NYSCEF 101)

D&D's foreperson on the project supervised Ashton's work. None of the owners directed D&D's work. On the day of the accident, the foreperson told Ashton to install the sign. The scaffold was owned by D&D and had railings on all sides. Ashton was not tied off on the scaffold and wore no safety harness.

At each monthly safety meeting Ashton was informed of the procedure for shutting off live power. Another D&D employee was in charge of safety standards.

The foreperson never instructed any employee to work with live power, nor did he hear anyone else do so. Ashton had been told to turn off the power before performing electrical work, and it was Ashton's responsibility to turn off the power.

D&D had harnesses and tie-off lines on the job site. The foreperson did not specifically direct Ashton to use a harness or tie-off line.

D. Deposition testimony of the president of the Pav-Lak entities (NYSCEF 102)

On the project at issue, Pav-Lak Contracting was the construction manager. Pav-Lak hired D&D and other subcontractors and monitored their progress, but did not direct their work. Pav-Lak did not purchase or provide any equipment for the project, nor did it provide D&D with any tools.

A separate company served as the on-site safety manager, conducting safety meetings and ensuring that all employees wore safety equipment when working.

Only D&D was authorized to turn the electrical power on and off.

E. Deposition testimony of D&D's senior project manager (NYSCEF 104)

D&D employees received all of their instructions from D&D supervisors. Among the duties of its senior project manager was to ensure that employees were doing their work safely and properly. Employees were never permitted to work with live power.

D&D had scaffolds and harnesses on site. After the accident, Ashton admitted fault for the accident to the senior manager as he had improperly worked with live power. There was no exception to the rule against working with live power.

F. Contract between Pav-Lak and D&D (NYSCEF 103)

The contract requires D&D to furnish all labor, materials, tools, equipment supplies, supervision, and management to complete the electrical work, and to comply with and be responsible for compliance with all safety rules and regulations.

D&D agrees, "to the fullest extent permitted by law," to indemnify Pav-Lak for injuries caused in whole or in part by any acts or omissions by D&D, and to procure certain insurance.

II. PAV-LAK'S MOTION FOR SUMMARY JUDGMENT ON THE COMPLAINT AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

A. Labor Law § 200 and common law negligence

Pursuant to Labor Law § 200, an owner and general contractor/project manager may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). Alternatively, an owner may be held liable for a dangerous condition on premises if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546 [1st Dept 2018]).

When an accident results from the manner in which an employee does his work, it implicates the employee's means and methods, not a dangerous condition. (*See generally, Cappabianca*, 99 AD3d at 144 [liability for dangerous condition on premises generally pertains to "a defect inherent in the property," not to manner in which work performed]; *Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404 [1st Dept 2018] [no evidence that Labor Law § 200 claim arose from alleged defect or dangerous condition on premises; "(w)here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises."]).

Thus, in *Pilato v 866 U.N. Plaza Assocs., LLC*, the Court held that a plaintiff's injury resulting from his touching a live wire was not a dangerous condition but rather implicated the means and methods of his work. "The fact that electricity was flowing into the light fixture was not a defective condition, nor was it dangerous until the plaintiff decided to change the ballast without turning off the current." (77 AD3d 644, 646 [2d Dept 2010]; *see also Rolewicz v State of New York*, 73 AD3d 1269 [3d Dept 2010] [live electrical cables not "dangerous condition"]).

Ashton's testimony as well as that of D&D supervisors establish that only D&D supervised and controlled his work, and there is no evidence that the Pav-Lak defendants controlled or supervised the means and methods of his work. (*Moura v City of New York*, 165 AD3d 434 [1st Dept 2018] [claims could not be imposed on defendant premised on means and methods of work as it exercised general supervisory authority over plaintiff's work, and did not provide actual supervision or direction over work]).

The authority to inspect work and to stop unsafe work practices does not constitute supervision and control sufficient to establish liability under this statute. (*Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, AD3d , 2019 NY Slip Op 01838 [1st Dept 2019] [general responsibility for site safety does not rise to level of supervisory control]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [regular inspection of work to ensure it was proceeding according to schedule and authority to stop unsafe work insufficient]).

B. Labor Law § 240(1)

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

Labor Law § 240(1) "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). It protects workers

against "'special hazards' that arise when the work site is either elevated or positioned below the level where 'materials or load [are] hoisted or secured," and the hazards are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross*, 81 NY2d at 501, quoting *Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 [1991]). The "special hazards . . . do not encompass *any and all perils* that may be connected in some tangential way with the effects of gravity." (*Ross,* 81 NY3d at 501 [emphasis in original]).

The statute imposes absolute liability on building owners and their agents for workplace injuries. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). Its purpose "is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), and even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Owners and general contractors are absolutely liable under the statute, regardless of their ability or authority to control, direct, or supervise the work at issue. (*Barreto v Metro. Transp. Auth.,* 25 NY3d 426 [2015]). If responsibility for the work at issue is delegated to another, it does not nullify the liability of the owner and contractor. Rather, it exposes the delegated party to liability. (*Id.* at 434; *see also White v 31-01 Steinway, LLC*, 165 AD3d 449 [1st Dept 2018] [subcontractor was liable as statutory agent of owner as it was delegated supervision and control over work at issue]).

Thus, even if Pav-Lak defendants delegated the supervision of Ashton's work to D&D, the Pav-Lak defendants may nonetheless be held liable for a violation of the statute.

Defendants contend that electrocution is not an elevation-related hazard covered by section 240(1), relying on *Tuohey v Gainsborough Studios*, in which the Court held that the hazard at issue there, electrocution, was unrelated to the elevation of the scaffolding on which the plaintiff had been standing when electrocuted (183 AD2d 636 [1st Dept 1992]), and cases similarly decided.

While electrocution may not, in and of itself, constitute an elevation-related hazard, when a worker works at a height, is electrocuted, and then falls and is injured as a result of the absence or inadequacy of a safety device, the injury may be covered by Labor Law § 240(1). (*See e.g., Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016] [plaintiff not entitled to summary judgment on Labor Law § 240(1) claim where he fell from ladder after receiving electrical shock; questions of fact remained as to whether ladder failed to provide proper protection and whether plaintiff should have been given additional safety devices]; *Jones v Nazareth Coll. of Rochester*, 147 AD3d 1364 [4th Dept 2017] [same]; *Vukovich v 1345 Fee, LLC*, 61 AD3d 533 [1st Dept 2009] [plaintiff's injury covered by Labor Law § 240(1) where he fell off unsecured ladder after receiving electrical shock; ladder was inadequate to prevent him from falling after being shocked]).

For example, in *Robinson v City of New York*, the Court found that there were triable issues as to whether the injury "was in any part attributable to the absence of railings or other protective devices upon the scaffolding he first fell back upon, and then off, after sustaining an electrical shock on the forklift," and thus it could not be determined as a matter of law that plaintiff's accident was not covered by Labor Law § 240(1). (22 AD3d 293 [1st Dept 2005]).

Defendants maintain that in contrast to *Nazario*, there is no evidence here that the scaffold failed to work properly or that plaintiff was not provided with protective devices, as D&D employees testified that harnesses and tie-off lines were available to employees at all times and the availability and use of these devices was discussed regularly at meetings. Rather, Ashton chose without good reason to not use a harness or tie-off line.

Liability under Labor Law § 240(1) may not be found absent violation of the statute and where the plaintiff's actions were the sole proximate cause of the accident. (*Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35 [2004]). A plaintiff is the sole proximate cause of his accident when he has adequate safety devices available, he knows they are available and he is expected to use them, he chooses for no good reason not to do so, and had he not made that choice the injury would not have occurred. (*Cahill*, 4 NY3d at 40).

To the extent that a power shut-off constitutes a safety device, defendants establish that Ashton knew that power was on, that he knew that he was not supposed to be working with live power, that he knew where and how to turn off the power, and that he chose for no good reason to work with live power. Plaintiffs raise no triable issue as to this argument.

Defendants establish that despite having access to a harness and tie-off lines, Ashton did not use them, without a good reason, and would not have fallen had he used them. (*See Guaman v City of New York*, 158 AD3d 492 [1st Dept 2018], *lv denied* 32 NY3d 903 [worker was sole proximate cause of accident as harness and rope system was in place on roof, he had been instructed to remain tied off at all times, and he could not have fallen had he been tied off]).

In opposition, Ashton alleges that he did not know that harnesses and tie-offs were available to him and had never been instructed to use them. There is thus a triable issue as to whether his actions were the sole proximate cause of his accident. (*See Valente v Lend Lease*

(US) Constr. LMB, Inc., 29 NY3d 1104 [2017] [triable issue as to sole proximate cause raised by conflicting accounts as to whether plaintiff had adequate safety devices available, and knew both that they were available and he was expected to use them]; *Drago v New York City Tr. Auth.*, 227 AD2d 372 [2d Dept 1996] [plaintiff's "knowing decision" to continue with installation of new cable only few feet away from live old cable created question of fact as to plaintiff's negligence]).

C. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct.

An owner is absolutely liable for the negligence of a contractor and subcontractor, and a contractor may be held liable for the negligence of a subcontractor, even if neither supervised or controlled the work site. A party to whom supervision was delegated may also be held liable. (*Barreto v Metro. Transp. Auth.,* 25 NY3d 426, 434-435 [2015]).

Pursuant to 12 NYCRR § 23-1.13(b)(3) and (4):[1]

> Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measure to be taken.

[1] While the Pav-Lak defendants assert that none of the violations referenced by plaintiffs in their pleadings are applicable here, as plaintiffs in their cross motion address only violations of Industrial Code sections 12 NYCRR 23-1.13(b)(3) and (4), they are deemed to have waived their reliance on any other violations as a predicate for their Labor Law § 241(6) claim.

Although defendants offer no evidence that proper warning signs were placed at the circuit or that employees had been advised of the location of the circuit, the evidence demonstrates that Ashton knew the location of the circuit and of the danger of working with live electrical power. Thus, defendants' failure to comply with 12 NYCRR § 23-1.13(b)(3) was not the proximate cause of Ashton's accident.

Pursuant to 12 NYCRR § 23-1.13(b)(4):

> No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.

While the circuit was not deenergized here, it was Ashton's responsibility to deenergize it before he began his work. Thus, plaintiffs do not establish, *prima facie,* a violation of this subsection on their cross motion. (*See Baumann v Metropolitan Life Ins. Co*., 17 AD3d 260 [1st Dept 2005] [where plaintiff was electrocuted after allegedly opening live outlet box and attempting to fix broken splice with bare hands, summary judgment on claim predicated on Industrial Code violation denied as there were questions of fact, among others, as to whether plaintiff's conduct was a "substantial factor and, if so, to what extent (plaintiff) was responsible for the accident that caused his death."]; *Lorefice v Reckson Operating Partnership, L.P*., 269 AD2d 572 [2d Dept 2000] [plaintiff's decision to work at live electrical panel with full knowledge of risk of electrical shock relevant to issue of plaintiff's comparative negligence, and even if there was *prima facie* violation of Industrial Code subsection, triable issues remained as to defendant's liability, including whether plaintiff was negligent in failing to use insulated mat available on premises]; *Snowden v New York City Tr. Auth*., 248 AD2d 235 [1st Dept 1998] [where worker received electrical shock from live wire, issues of fact existed as to defendants'

liability, including whether mats given plaintiff provided effective insulation, whether plaintiff was negligent in placement of mats, and proximate cause of his injuries]).

III. PAV-LAK'S MOTION FOR SUMMARY JUDGMENT ON THE THIRD-PARTY COMPLAINT AND CROSS MOTION TO INTERVENE AND FOR SUMMARY JUDGMENT

A. Intervention

As Pav-Lak defendants do not contest Norguard's motion for permission to intervene in this matter, it is granted.

B. Contractual indemnification claim against D&D

As Ashton's accident arose out of his performance of electrical work for D&D on the project, Pav-Lak defendants argue that D&D must indemnify it pursuant to their contract. D&D contends that the indemnification clause may not be enforced as it fails to conform to General Obligations Law § 5-322.1.

As the clause is limited to the fullest extent permitted by law, it is enforceable. (*Farrugia v 1440 Broadway Assocs*., 163 AD3d 452 [1st Dept 2018], *app withdrawn* 32 NY3d 1168 [2019] [as indemnity clause contained limitation "to the fullest extent permitted by law," it did not violate GOL 5-322.1]; *Frank v 1100 Ave. of Americas Assocs.,* 159 AD3d 537 [1st Dept 2018] [same]).

As the clause is enforceable and absent any dispute that Ashton's injury arose or resulted from the performance of his work for D&D, Pav-Lak defendants are entitled to judgment on their claim for contractual indemnity against D&D.

C. Common law indemnity and contribution

Norguard contends that absent evidence that Ashton sustained a "grave injury" as defined by Workers' Compensation Law § 11, D&D may not be held liable for common law indemnity

and contribution. It relies on the reports of Pav-Lak's medical experts and vocational rehabilitation expert, in which they opine that Ashton suffered, at most, a mild traumatic brain injury and is capable of working in several occupations. (NYSCEF 126-128).

In opposition, Pav-Lak defendants argue that there is a factual issue as to whether Ashton suffered a grave injury, based on a decision by the Social Security Administration (SSA) on Ashton's disability application wherein Ashton was found to be disabled from working, due in part to his brain injuries. (NYSCEF 133).

While Norguard argues that the SSA decision is irrelevant as the judge there did not find that Ashton was not employable but only that he was disabled under the Social Security law, the judge relied on the testimony of a vocational expert, who opined that based on Ashton's age, education, work experience, and residual functional capacity, "there are no jobs in the national economy that [Ashton] could perform." (*Id.*).

There is thus a triable issue as to whether Ashton suffered a grave injury, thereby precluding summary dismissal of the third-party claims for common law indemnity and contribution. (*See e.g., Rubeis v Aqua Club Inc*., 3 NY3d 408 [2004] ["grave injury" as related to brain injury is defined as unemployability in any capacity]; *Way v George Grantling Chemung Contracting Corp*., 289 AD2d 790 [3d Dept 2001] [showing that plaintiff suffered from postconcussive syndrome and had been awarded SSA disability benefits sufficient to raise material issue of fact as to grave injury]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of:

(1) dismissing (a) all claims against defendant Pav-Lak Industries, Inc.; (b) plaintiffs' Labor Law § 200 and common law negligence claims; and (b) plaintiffs' Labor Law § 241(6) claim based on any violations other than a violation of 12 NYCRR § 23-1.13(b)(4); and

(2) granting them judgment on their third-party claim for contractual indemnification against third-party defendant D&D Electrical Construction Company, Inc.,

And it is further

ORDERED, that plaintiffs' cross motion for partial summary judgment is denied in its entirety; it is further

ORDERED, that the portion of the cross motion to intervene by Norguard Insurance Company is granted, and Norguard is permitted to intervene in this matter; it is further

ORDERED, that the portion of Norguard's cross motion for summary dismissal of the third-party claims for common law indemnification and contribution is denied.

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3/28/2019
DATE

BARBARA JAFFE, J.S.C.

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