SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 516746/2016
Motion Date: 11-19-18
Mot. Cal. Nos.: 2-4

----------x

CHRISTOPHER BALLESTE,

Plaintiff,

-against-

FOREST CITY RATNER COMPANIES, LLC, FOREST CITY ENTERPRISES, L.P., QDOBA RESTAURANT CORPORATION and THE BENMOORE CONSTRUCTION GROUP, INC.

Defendants.

----------x

BENMOORE CONSTRUCTION GROUP, INC.

DECISION/ORDER

Third-Party-Plaintiff,

-against-

DELTA ELECTRIC INC.,

Third-Party-Defendant.

----------x

The following papers numbered 1 to 9 were read on the motion and cross-motions:

Papers:	**Numbered:**
Notices of Motion and Cross-Motions Affidavits/Affirmations/Exhibits/	1-3
Answering Affidavits/Affirmations/Exhibits	
Reply Affidavits/Affirmations/Exhibits	4-8
Other	9

Upon the foregoing papers, the motions are decided as follows:

In this action to recover damages for personal injuries arising out of a work site accident,

MS#02;03;04
XMD

the plaintiff, CHRISTOPHER BALLESTE, moves pursuant to CPLR § 3212 for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) as against the defendants. Third-Party-Defendant, DELTA ELECTRIC, INC. ("Delta") cross-moves pursuant to CPLR § 3212 for an order awarding it summary judgment dismissing plaintiff's complaint and all third-party and cross claims asserted against it. Defendant/third-party-plaintiff, BENMOORE CONSTRUCTION GROUP, INC. ("Benmoore") cross-moves pursuant to CPLR § 3212 for an order awarding it summary judgment on its third-party claim against Delta for contractual indemnification. The three motions are consolidated for disposition.

Background:

The accident giving rise to this action occurred on June 20, 2016, while the plaintiff was performing construction work at the Ridge Hill Mall located at 67 Market Street, Yonkers, New York. The plaintiff was employed as a mechanic's helper by Delta, an electrical sub-contractor, and maintains that he was caused to suffer injuries as a result of falling from a 12' to 14' A-frame ladder. The building under construction was owned collectively by defendants, FOREST CITY RATNER COMPANIES, LLC and FOREST CITY ENTERPRISES, L.P. and defendant Benmoore was the general contractor. The construction project involved an interior fit-out for a new restaurant that was going to be operated by defendant, QDOBA RESTAURANT CORPORATION ("Qdoba").

At his deposition, the plaintiff testified that at the time of the accident, he was standing on the third rung from the top of the ladder which was set up on the floor in an area which was going to be a bathroom. Before climbing up the ladder, he opened the ladder and made sure all four feet touched the floor. As far as he knew, there was nothing wrong with the ladder. The

bathroom area was approximately 7' to 8' by 9' to 10' and was framed out with metal studs.

Plaintiff climbed up the latter to enable him to feed heavy BX air-conditioning cables to his foreman, Larry Buscher, who was on the roof. The cables were hanging from the ceiling in front of him and to his left and he was intending to feed the cables to Mr. Buscher through a rectangular opening in the ceiling that measured approximately 1' by 2'. He maintained that at the time of the accident, both of his feet were on the third step from the top of the ladder which he estimated to be about 9 feet above the ground. He testified that as he was reaching for the cables with his left hand and holding onto the top of the ladder with his right hand, the ladder suddenly tipped over and fell.

Jeffrey Pittel, the owner of Benmore, testified at his deposition that he was an eyewitness to the accident and actually saw the plaintiff fall. He maintained that when plaintiff fell, he was standing on the top cap/rung of the ladder, not on the third rung from the top as plaintiff claims, and that plaintiff simply lost his balance and fell to ground as he was reaching for something.

Plaintiff's Labor Law § 240(1) Claim:

"Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v. Turner Constr., Inc.,* 17 NY3d 369, 374). "To prevail on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Lopez-Dones v. 601 W. Assoc., LLC,* 98 AD3d 476, 479; *see Berg v. Albany Ladder Co., Inc.,* 10 NY3d 902, 904). In a ladder case, "[t]he mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" (*Delahaye v. Saint Anns School,* 40

AD3d 679, 682; *see Esteves-Rivas v. W2001Z/15CPW Realty, LLC,* 104 AD3d 802, 803-804). To impose liability under Labor Law § 240(1) in a ladder case, there must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries (*see Hugo v. Sarantakos*, 108 AD3d 744, 745, *Artoglou v. Gene Scappy Realty Corp.,* 57 AD3d at 461).

Where a plaintiff falls off a ladder because he lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240(1) does not attach (*see Gaspar v. Pace Univ.,* 101 AD3d 1073, 1074; *Chin-Sue v. City of New York,* 83 AD3d 643, 644). Liability under such circumstances would make a defendant an insurer of the workplace, a result which the Legislature never intended in enacting Labor Law § 240(1) (*see Blake v. Neighborhood Hous. Servs. of NY City,* 1 NY3d 280, 286; *Molyneaux v. City of New York,* 28 AD3d 438).

Further, there is no liability under Labor Law § 240(1) where a plaintiff's own carelessness or the manner in which he uses a ladder was the sole proximate cause of his fall (*see Robinson v. Goldman Sachs Headquarters, LLC*, 95 AD3d 1096; *Destefano v. City of New York,* 39 AD3d 581, 582).

It is well settled that the proponent of a motion for summary judgment has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient proof eliminating any material issues of fact (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v. City of New York*, 49 NY2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). If the proponent meets this burden, the

burden shifts to any party opposing the motion to come forward with proof in admissible form raising a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman,* 49 NY2d at 562; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1068). If the proponent fails to meet its initial burden, the Court must deny the motion regardless of the sufficiency of the opposition papers (*see Winegrad,* 64 NY2d at 853; *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 AD3d 547).

Here, plaintiff's submissions, which included Mr. Pittel's deposition transcript, did not demonstrate plaintiff's entitlement to judgment as a matter of law. Plaintiff presented no evidence demonstrating that the ladder was defective in any way or that it was improperly set up. While plaintiff maintains that he fell because the ladder was inadequately secured, there is sufficient evidence from which a jury could infer that plaintiff simply lost his balance or that plaintiff's own carelessness in standing on the top rung/cap was the sole proximate cause of his fall. For these reasons, plaintiff's motion pursuant to CPLR § 3212 for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) is **DENIED**. DELTA's cross-motion for an order awarding it summary judgment dismissing plaintiff's claim pursuant to Labor Law § 240(1) is also **DENIED** as there are triable issues of fact as to whether the ladder was adequately secured.

Delta's Motion for Summary Judgment Dismissing Plaintiff's Labor Law § 241(6) Claim:

Labor Law § 241(6) imposes on owners and contractors a non-delegable duty to "provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Perez v. 286*

Scholes St. Corp., 134 AD3d 1085, 1086, quoting *Lopez v. New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983). In order to establish liability under Labor Law § 241(6), " 'a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case ' " (*Rodriguez v. 250 Park Ave., LLC,* 161 AD3d 906, quoting *Aragona v. State of New York,* 147 AD3d 808, 809).

In this case, plaintiff alleges that defendant Benmoore violated the following provisions of the Industrial Code: 12 NYCRR §§23.17(f)[1], 23-1.21(b)(4)(iii)[2], 23-121(b)(4)(iv)[3], 23-1.21(b)(4)(v)[4] and 23-12 NYCRR § 1.21(e)(3)[5]. 12 NYCRR § 23.17(f) does not apply since

---

[1]12 NYCRR § 23.17(f) provides: " Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

[2]12 NYCRR §23-1.21(b)(4)(iii) provides: "A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.

[3]12 NYCRR § 23-1.21(b)(4)(iv) provides: "When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

[4]12 NYCRR § 23-1.21(b)(4)(v) provides: "The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder."

[5]12 NYCRR § 23-1.21(e)(3) provides "Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means."

plaintiff was provided with a ladder. 12 NYCRR § 23-1.21(b)(4)(iii) does not apply because there is no claim that the ladder was leaning against a structure. 12 NYCRR § 23-1.21-b(1) does not apply since there is no claim that the ladder broke, dislodged or loosened. 12 NYCRR § 23-1.21(b)(4)(v) does not apply since there is no claim that the upper end of the ladder was leaning against a slippery surface and 12 NYCRR § 23-1.21(b)(4)(iv) does not apply because plaintiff was not using a leaning ladder. Triable issues of fact exist, however, as to whether a violation of 12 NYCRR § 23-1.21(e)(3) was a proximate cause of the accident. If Jeffrey Pittel's testimony that plaintiff was standing on the top cap/rung of the ladder is credited, a jury can infer that plaintiff was performing work more than 10 feet or more above the ladder's footing in which case the ladder should have been steadied by a person stationed at the foot of the ladder or that the ladder should have been secured against sway by mechanical means. For the above reasons, Delta's motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is **DENIED.**

Delta's Motion for Summary Judgment Dismissing Plaintiff's Negligence and Labor Law § 200 Claims:

Labor Law § 200 is a codification of the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *Gonzalez v. Perkan Concrete Corp.*, 110 AD3d 955). While Delta's Notice of Cross-Motion states that Delta is seeking dismissal of plaintiff's negligence and Labor Law § 200 claims, Delta' moving papers demonstrate otherwise. In his affirmation in support in the cross-motion, Delta's attorney vehemently argues that Benmoore's negligence was the sole cause of the accident (¶¶ 86-92). According, Delta's cross-motion insofar as it seeks dismissal of

plaintiff's negligence claims and claims pursuant to Labor Law § 200 is **DENIED.**

Delta's Motion for Summary Judgment Dismissing Benmoore's Claims for Contractual Indemnity and Contribution:

The contract between Delta and Benmoore contains the following indemnification provision:

> To the fullest extent permitted by law, you firm [Delta] shall indemnify and hold harmless us [Benmoore] and the client against any claims, damages, losses and expenses (including legal fees) arising out of or resulting from the performance of the subcontracted work to the extent caused in whole on in party by [Delta] or anyone directly or indirectly employed with you firm.

The General Obligations Law prohibits the enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent (*see* General Obligations Law § 5-322.1; *see also Itri Brick & Concrete Corp. v. Aetna Casualty and Surety Co.,* 89 NY2d 786, *Castrogiovanni v. Corp. Prop. Inv'rs*, 276 AD2d 660, 661). Delta correctly argues that if it is determined that Benmoore's negligence was the proximate cause of plaintiff's injuries, Benmoore's claim for contractual indemnify against Delta must fail. Delta did not, however, demonstrate as a matter of law that Benmoore was negligent and that any such negligence was a proximate cause of plaintiff's injuries. Accordingly, Delta's cross-motion insofar as it seeks dismissal of Benmoore's claim for contractual indemnity must be **DENIED.** Similarly, since Delta's moving papers did not demonstrate Delta's freedom for negligence as a matter of law, Delta's cross-motion insofar as it seeks dismissal of defendants' claims for contribution is also **DENIED.** While it is unclear if Delta is seeking dismissal of Benmoore's claim for indemnification based on Delta's failure to procure insurance (Delta's attorney appears to be seeking this relief in Point IV of his affirmation in support), since Delta's submissions are devoid

of any admissible proof demonstrating its entitlement to summary judgment dismissing this claim, this aspect of Delta's motion must also be **DENIED.**

Benmoore's Cross-Motion for Summary Judgment Against Delta for Contractual Indemnity.

Benmoore contends that since there is no evidence demonstrating that it **actually** supervised or controlled plaintiff's work, there is no basis to find that it is liable in common-law negligence or pursuant to Labor Law § 200(1). In the Second Department, however, to impose liability against an owner or contractor in common law negligence or pursuant to Labor Law § 200(1), proof of that party's actual supervision and control is not required. In a means and methods case, such as this, a party may be held liable for common-law negligence or a violation of Labor Law § 200 if it had the authority to supervise or control the performance of the work, regardless of whether it actually controlled the work (*see Gonzalez v. Perkan Concrete Corp.,* 110 AD3d 955, 959-960; *Forssell v. Lerner,* 101 AD3d 807, 808; *Ortega v. Puccia,* 57 AD3d 54, 61). "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; *Hoa Lam v. Sky Realty, Inc.*, 142 AD3d 1137, 1138). Benmoore's submissions did not demonstrate as a matter of law that it lacked authority to supervise and control plaintiff's work. Even if the Court were to find otherwise, the contract between Qdoba and Benmoore, which provided that Benmoore was required to supervise and direct all the work and that it was to be "solely responsible for and have control over the construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work", raises a triable issue of fact as whether Benmoore had authority to

supervise and control plaintiff's work. Benmoore's motion for summary judgment on its claim against Delta for contractual indemnfication is therefore **DENIED.**

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment against the defendants on the issue of liability pursuant to Labor Law § 240(1) and Delta's cross-motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim are **DENIED**; it is further

ORDERED that Delta's cross-motion for summary judgment dismissing the remainder of plaintiff's complaint and the third-party complaint is **DENIED,** and it is further

ORDERED that Benmoore's motion for summary judgment against Delta on its claim for contractual indemnification is **DENIED**.

This constitutes the decision and order of the Court.

Dated: June 27, 2019

PETER P. SWEENEY, J.S.C.