Popovski v 340 Court St., LLC
2019 NY Slip Op 32465(U)
August 21, 2019
Supreme Court, New York County
Docket Number: 162293/2014
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

---X

DANNY POPOVSKI and BRENDA POPOVSKI,

Plaintiffs,

- v -

340 COURT STREET, LLC, ALCHEMY PROPERTIES, INC. and NOHO CONSTRUCTION LLC,

Defendants.

---X

340 COURT STREET, LLC, ALCHEMY PROPERTIES, INC. and NOHO CONSTRUCTION LLC,

Third-Party Plaintiffs,

- v -

UNITED PANEL TECHNOLOGIES CORP.,

Third-Party Defendant.

---X

340 COURT STREET, LLC, ALCHEMY PROPERTIES, INC. and NOHO CONSTRUCTION LLC,

Second Third-Party Plaintiffs,

- v -

NATIONS ROOF EAST LLC,

Second Third-Party Defendant.

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INDEX NO. 162293/2014

MOTION DATE 04/02/2019

MOTION SEQ. NO. 001–003

DECISION + ORDER ON MOTION

NYSCEF Doc Nos. 46–68, 115–118, 124–126, 139–143, 168–169, 180 and 183 were read on motion seq. 001.
NYSCEF Doc Nos. 69–83, 127–133, 144–156, 162–167, 181 and 184 were read on motion seq. 002.
NYSCEF Doc Nos. 84–113, 134–138, 157–161, 170–177 and 182 were read on motion seq. 003.

The branch of motion seq. 001 by third-party defendant United Panel Technologies Corp. ("United") pursuant to CPLR 3212 granting United summary judgment dismissing the first cause of action of the third-party complaint of defendants/third-party plaintiffs 340 Court Street, LLC ("340 Court"), Alchemy Properties, Inc. ("Alchemy") and NOHO Construction LLC ("Noho" and, together with 340 Court and Alchemy, the "Owner defendants") for common-law indemnification and contribution is granted, and the first cause of action of the third-party complaint is dismissed with prejudice.

The branch of United's motion in seq. 001 pursuant to CPLR 3212 in support of dismissing the third cause of action of the complaint of plaintiffs Danny Popovski (hereinafter "plaintiff") and Brenda Popovski as to the claims made pursuant to Labor Law §§ 240 (1) and 241 (6), as predicated, as to the latter, on a violation of 12 NYCRR 23-1.7 (b) (1) is resolved to the extent that plaintiff has withdrawn the claims.

The branch of United's motion in seq. 001 pursuant to CPLR 3025 to amend its pleadings to assert cross claims for common-law indemnification against second third-party defendant Nations Roof East LLC ("Nations") by means of service of the proposed third third-party complaint is denied. Consequently, the branch of United's motion in seq. 001 pursuant to CPLR 3212 seeking summary judgment on its claim in its proposed third third-party complaint for common-law indemnification and contribution from Nations is denied as moot and, in any event, would have been premature as issue would not yet have been joined in any third third-party action.

The branch of United's motion in seq. 001 pursuant to CPLR 3212 granting United summary judgment dismissing the third cause of action of the third-party complaint alleging breach of contract for failure to procure insurance is granted, and the third cause of action of the third-party complaint is dismissed with prejudice.

Motion seq. 002 by plaintiff pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability on his Labor Law § 241 (6) cause of action is denied.

The branch of motion seq. 003 by the Owner defendants pursuant to CPLR 3212 granting the Owner defendants summary judgment dismissing the complaint as against them is granted in part to the extent that the first and second causes of action sounding in common-law negligence are dismissed with prejudice, the claims in the third cause of action alleged pursuant to Labor Law §§ 200, 240 (1), and 241 (6), as predicated, as to the latter, on violations of 12 NYCRR 23-1.7 (b) (1) and 23-1.7 (b) (e) (1), are dismissed with prejudice, and this branch of the motion in seq. 003 is otherwise denied.

The branch of the Owner defendants' motion in seq. 003 pursuant to CPLR 3212 granting the Owner defendants summary judgment on their third-party and second third-party claims against United and Nations for common-law indemnification, contractual indemnification, and breach of contract for failure to procure insurance is granted in part to the extent that the Owner defendants are entitled to contractual indemnification from both United and Nations and are entitled to conditional common-law indemnification from Nations, and this branch of the motion in seq. 003 is otherwise denied.

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on April 22, 2013, when he tripped and fell while on the roof of a building located at 340 Court Street, Brooklyn, New York (the "Premises").

On the day of the accident, 340 Court was the owner/sponsor of the Premises where the accident occurred. 340 Court hired Alchemy to assist it in selling units at the Premises. 340 Court also hired Noho to act as the project manager for a project at the Premises that entailed construction of a new commercial building (the "Project"). 340 Court hired Nations to furnish and install the roof of the Premises. 340 Court also hired United to install exterior panels and windows, among other things, at the Premises. United employed plaintiff as a carpenter.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, his work for United included installing coping on bulkheads, which were located on the roof of the Premises. Plaintiff's foreman on the project was also a United employee. Plaintiff's foreman was the only person who provided plaintiff with instructions and oversaw his work. Plaintiff testified that United provided plaintiff with personal safety equipment.

Plaintiff further testified that, on the day of the accident, plaintiff was alone on the roof, installing coping on a bulkhead. Plaintiff described the roof as a flat, wide surface that was partially finished. The finished portion of the roof was covered with two-foot square, two-inch thick concrete tiles (hereinafter "Pavers") while the unfinished portion was either bare concrete or covered by a black felt or paper material (hereinafter "Fleece").

According to plaintiff, on the day of the accident, the roof was "a total mess" (plaintiff's tr at 89). Parts of the roof were covered by debris, water and "material all over the place" (*id.* at 91). To get to his work area, plaintiff took an elevator to the roof, then had to walk south-to-north through a "very narrow path . . . like walking a tightrope" through debris consisting of "studs" and "Styrofoam" (*id.* at 261). Plaintiff was able to traverse the area to his work site without incident. The work site was a bulkhead toward the northeast side of the roof (hereinafter, the "Bulkhead"). Pavers had been installed south of the Bulkhead, but "there were no pavers up against the bulkhead. They were four or five feet away from [it]" (*id.* at 271), while some of the installed Pavers had Fleece "just laid on top" of them (*id.* at 125–126).

Plaintiff testified that, from when he began work in the morning to when he returned to work after a lunch break, plaintiff was the only person in the work area. Toward the end of the day, while walking east to west through the work area to collect his tools, plaintiff "tripped" and fell due to a missing Paver approximately five feet south of the Bulkhead (*id.* at 145). Plaintiff testified that "the tip of [his] boot hit the Paver that was there, [but] the rest of [his] foot stepped on the paver that was missing" (*id.* at 146). Plaintiff testified that he "couldn't tell that [the Paver] was missing" because Fleece covered the hole and some of the surrounding Pavers, as well (*id.*). After plaintiff fell, he got up, collected his tools, and went home.

When asked to describe the area where he was walking when he tripped, plaintiff explained that, to his left, the Pavers were installed and, to the right, and up to the Bulkhead where he was working, no Pavers had been installed. Plaintiff indicated that he was walking on the leading edge of the Paver installation at the time of the accident. Plaintiff further testified that, at the time of the accident, there was no one in the process of installing Pavers.

Deposition Testimony of Michael Johannes (Nations' President)

Michael Johannes ("Johannes") testified that, at the time of the accident, Johannes was the president of Nations. Johannes stated that did not regularly visit the Premises. Johannes indicated that he was familiar with the scope of the Project and believed that the Paver installation was approximately 75% complete on the day of the accident.

Johannes explained that the roof was constructed in several layers. First, the roof concrete was poured and allowed to cure. Then, a sealing membrane was installed directly over the concrete. Next, a drainage mat was laid on top of the membrane. After that, insulation was placed atop the membrane. Then the Fleece—described as a black fabric "filter"—was laid atop the insulation (Johannes tr at 52). The Fleece came in long rolls and covered the entire rooftop. Plastic pedestals were installed on top of the Fleece to act as spacers and levelers for the Pavers. The Pavers were then installed directly on top of the pedestals. The Pavers were "[t]wo foot by two foot by two inches thick" and approximately 75 pounds each (*id.* at 54). Together, they make up the "walking surface" of the roof and nothing was to be installed above them (*id.* at 54, 55).

According to Johannes, occasionally, pieces of Fleece might be used to protect Pavers while they were stacked prior to their installation (*id.* at 66), but there would be no reason to leave Fleece on top of an installed Paver. Johannes further testified that he did not recall any instance where Nations placed Fleece on top of Pavers at the Project.

Johannes indicated that there was no need to protect or cover installed Pavers, except in cases of "extraordinary traffic" where Nations would lay down Masonite (*id.* at 71).

Johannes further indicated that Nations would place plywood on the Fleece to keep it from blowing away prior to installing the Pavers. Johannes indicated that Nations did not place any signs or barriers warning that Paver installation was underway.

Deposition Testimony of Hugo Cervantes (Nations' Foreman)

Hugo Cervantes ("Cervantes") testified that, on the day of the accident, he was employed by Nations as a foreman at the Project. As foreman, one of his duties was to close off areas where Pavers were missing. He would do so by placing caution tape around the missing paver. If caution tape was not feasible, Nations' workers would try to stop people from going into the area or give them a verbal warning. Cervantes further testified that he never saw Fleece covering pavers at the Project.

Deposition Testimony of Joel Breitkopf (Alchemy's Agent)

Joel Breitkopf ("Breitkopf") testified that, on the day of the accident, he was an agent of Alchemy and a member of Noho while acting as a representative of 340 Court. Breitkopf visited the Premises "once a week, to check on progress" (Breitkopf tr at 13).

Breitkopf testified that the Project did not have a general contractor, although it did have a construction manager—non-party 340 Court Construction, LLC. The construction manager

and the various subcontractors were responsible for site safety at the Project. They would make reports to him, but he did not have any control over how either the construction manager or the subcontractors performed their work.

According to Breitkopf, Noho had no employees of its own and hired contractors to oversee safety at the Project. Alchemy and 340 Court also had no employees at the Project. Non-party Alchemy Administrative, LLC provided the project manager and assistant project managers for the Project.

Deposition Testimony of Robert Schmidt (United's President)

Robert Schmidt ("Schmidt") testified that, on the day of the accident, he was the president and sole shareholder of United. United is a construction company specializing in façades. Schmidt testified that United did not install the Pavers.

United employed foremen at the Project who were responsible for making sure that the work area was safe and to oversee United's workers. Schmidt was unaware of any complaints about the working conditions on the roof of the Premises. Schmidt first learned of plaintiff's accident the following day, when plaintiff spoke with him and filled out an incident report.

The Incident Report

Plaintiff filled out an incident report on the day after the accident. In it, he stated that he was injured while "installing coping on the roof bulkhead" (the Owner defendants' affirmation in opposition to plaintiff's motion, exhibit C). Specifically, he stated that he "just finished installing [the] last piece of coping and gathered material and tools to move to [the] next project. [He] stepped on to uneven flooring covered by black felt and fell" (*id.*).

Plaintiff's Affidavit

In an affidavit, plaintiff describes the area where he fell as having "debris [that] created passageways that [he] had to navigate to complete [his] work" (plaintiff's aff, ¶ 7). Plaintiff's affidavit does not describe the nature or size of the debris.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "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 from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of

material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

On April 2, 2019, the Court held oral argument in this matter (*see* NYSCEF Doc No. 183 [oral arg tr].) At the oral argument, the Court ruled on certain issues raised in the instant motions. As to motion seq. 001, the Court dismissed the first cause of action in the third-party complaint for common-law indemnification and contribution as against United, as employer (oral arg tr at 4, lines 11–21). The Court further dismissed the third cause of action in the third-party complaint alleging breach of contract for failure to procure insurance (*id.* at 6, lines 16–20). Further, Plaintiff effectively withdrew his claims pursuant to Labor Law §§ 240 (1) and 241 (6), as predicated, as to the latter, on a violation of 12 NYCRR 23-1.7 (b) (1) (*id.* at 21, lines 2–4; at 26, lines 15–21). As such, the Court will address the remaining relief sought in the motions.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 001, 002 and 003)

Plaintiffs move in seq. 002 for summary judgment in their favor on the Labor Law § 241 (6) claim against the Owner defendants. The Owner defendants move in seq. 003 for summary judgment dismissing the claim against them. United also moves in seq. 001 for summary judgment dismissing the claim as against the Owner defendants.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors "'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" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the 12 NYCRR (the "Industrial Code"), rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such

violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).[1]

Plaintiffs allege in their bill of particulars that the Owner defendants violated 12 NYCRR 23-1.7 (b) (1) and 12 NYCRR 23-1.7 (b) (e).[2] As noted above, plaintiff concedes that Rule 23-1.7 (b) (1) is inapplicable to the facts of this case. Therefore, the court will only address Rule 23-1.7 (b) (e) (1) and (2).

Rule 23-1.7 (b) (e) (1)

12 NYCRR 23-1.7 (b) (e) (1) provides, in pertinent part:

> "(e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from . . . debris and from any other obstructions or conditions which could cause tripping."

Initially, Rule 23-1.7 (b) (e) (1) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]).

Plaintiff argues that Rule 23-1.7 (b) (e) (1) applies to the facts of this case because the area where plaintiff tripped was a passageway and the missing Paver created a condition that caused him to trip. In opposition, the Owner defendants and United argue that Rule 23-1.7 (b) (e) (1) does not apply because the area where plaintiff tripped did not constitute a passageway.

"While the term 'passageway' is not defined in the Industrial Code, 'courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Prevost v One City Block, LLC*, 155 AD3d 531, 535 [1st Dept 2017], quoting *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]). Piles of debris may create passageways in otherwise open areas (*see e.g., Lois v Flintlock Constr. Servs., LLC*, 2014 NY Slip Op. 33421 [U] *2 [Sup Ct, Bronx County 2014], *aff'd* 137 AD3d 446, 447 [1st Dept 2016] [plaintiff established the existence of a passageway where he testified that he was required to walk between two 8-foot by 15-foot piles of debris made of broken concrete, wood and nails covered by tarps, situated 2-to-3 feet apart]; *Aragona v State of New York*, 147 AD3d 808, 808 [2d Dept 2017] [plaintiff established the existence of a passageway through testimony and other evidence showing that he was required to walk through a two-to-three foot wide corridor "created by lumber and construction materials"]).

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[1] It is noted that 340 Court, as the owner, may be liable for plaintiff's injuries under Labor Law § 241 (6). In addition, Alchemy and Noho do not contest that they are proper Labor Law defendants.

[2] Plaintiffs also list several OSHA violations in support of his section 241 (6) claim. However, OSHA governs employer/employee relationships, and the Owner defendants are not plaintiff's employer (*Delaney v City of New York*, 78 AD3d 540, 540 [1st Dept 2010]). Therefore, "[s]ince [defendant] was not an employer of [plaintiff] . . . the OSHA regulations do not provide a specific statutory duty, the violation of which would result in [defendant's] liability" (*Khan v Bangla Motor and Body Shop, Inc.* 27 AD3d 526, 529 [2d Dept 2006], *lv dismissed*, 7 NY3d 864 [2006]).

Here, plaintiffs did not sustain their burden of establishing prima facie that the accident occurred in a passageway as contemplated in Rule 23-1.7 (b) (e) (1). According to plaintiff, the roof where the accident occurred was generally a large, flat, open space. Although plaintiff testified that, when he exited the elevator onto the roof, the immediate area around him was covered in materials, such as studs and Styrofoam, that created a "very narrow path" that he walked through to get to his work area, plaintiff did not trip within this "very narrow path" (plaintiff's tr at 108). Rather, plaintiff testified that he traversed the path safely and then proceeded to his work area, where the accident allegedly occurred.

The Appellate Division, First Department recently held that a passageway is specifically defined as "an interior or internal way of passage inside a building" (*Quigley v Port Auth. Of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]; *see also Lester v JD Carlisle Dev. Corp., MD.*, 156 AD3d 577, 578 [1st Dept 2017] ["Industrial Code § 23-1.7 (e) (1), which applies to 'passageways,' is not applicable to the roof, an open area"]). Plaintiff never described his work area in detail at his deposition, and there are no photographs depicting the area. Moreover, plaintiff did not describe the existence of any debris in his work area that was arranged or piled in such a way as to have created a passageway, such as the large and clearly defined debris piles discussed in *Lois* and the piles of lumber and construction materials discussed in *Aragona*. Even if there had there been some evidence that plaintiff traversed a debris-formed corridor on the building's roof, it would be of no moment, as the roof is not an interior or internal way of passage inside a building pursuant to the holdings in *Quigley* and *Lester*.

As such, the Court finds that 12 NYCRR 23-1.7 (b) (e) (1) is inapplicable to the facts of this case and will not serve as a predicate for liability of the Owner defendants under plaintiffs' Labor Law § 241 (6) claim.

Rule 23-1.7 (b) (e) (2)

12 NYCRR 23-1.7 (b) (e) (2) provides, in pertinent part:

> "(2) Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Rule 23-1.7 (e) (2) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*Boss v Integral Constr. Corp.*, 249 AD2d at 215).

Notably, plaintiffs do not move for summary judgment in their favor on this alleged violation. Rather, the Owner defendants and United argue that Rule 23-1.7 (e) (2) does not apply to plaintiff's accident because the Paver and the Fleece were integral to the ongoing roof installation at the Project (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 [1st Dept 2010] ["paper covering" that was "purposefully laid over newly installed floors to protect them"

constituted "an integral part of the floor work . . . and could not be construed to be misplaced material over which one might trip"]).

Any dirt, debris, tools or materials that are an "integral part" of the work being performed would not be a violation of Rule 23-1.7 (b) (e) (2) (*see Solis v 32 Sixth Ave. Co. LLC,* 38 AD3d 389, 390 [1st Dept 2007] [debris covering scaffold "resulted directly from the masonry work plaintiff and his coworker were performing, and thus constituted an integral part of that work"]). The relevant inquiry is whether the debris or material was a part of work that was ongoing at the time of plaintiff's accident (*Rossi v 140 W. JV Mgr, LLC*, 171 AD3d 668, 668 [1st Dept 2019] [debris "consisting of cables . . . was not inherent in, or an integral part of, the work being performed by either plaintiff electrician or [defendant contractor] at the time of the accident"]; *see also DeMercurio v 605 West 42nd Owner LLC*, 172 AD3d 467 [1st Dept 2019]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] [readily observable demolition debris that accumulated as a result of demolition "was not inherent in the work being performed by plaintiff, an electrician, at the time of the accident"]; *accord Lois v Flintlock Constr. Servs., LLC,* 137 AD3d at 448).

Here, the Court finds that there is a genuine issue of material fact as to whether the Fleece that plaintiff alleges caused him to fall was integral to work being performed in the accident area by Nations at the time of the accident, or, rather, just errant debris or scattered materials covering a hole left by a missing Paver. Initially, it is undisputed that plaintiff's work did not involve the Fleece, while Nations' work did involve the Fleece. There is no testimony in the motions submitted establishing why the Fleece was on top of the Pavers and above the hole into which plaintiff allegedly stepped or whether it was "purposefully laid over" the Pavers as a part of Nations' work at the time of plaintiff's accident (*Rajkumar v Budd Contr. Corp.*, 77 AD3d at 596). At the oral argument, counsel for the Owner defendants stated that he could not "explain why [the Fleece] was in . . . [the] position that it was" (oral arg tr at 26, lines 3–6).

As to any argument that plaintiff never testified that the Fleece was a cause of his accident, the Court finds this argument unpersuasive. Plaintiff testified that the Fleece was a cause of his fall, as it obscured a missing Paver, and when Plaintiff stepped into the resulting hidden hole, he tripped (plaintiff's tr at 146 ["I couldn't tell it was missing because it was just black, the paper or felt"]). Further, the incident report notes that plaintiff "stepped on to uneven flooring covered by black felt and fell" (the Owner defendants' affirmation in opposition to plaintiff's motion, exhibit C).

Based upon the foregoing, the Court finds that the Owner defendants are not entitled to summary judgment dismissing the Labor Law § 241 (6) claim, as predicated upon a violation of 12 NYCRR 23-1.7 (b) (e) (2). Consequently, the Owner defendants are not entitled to dismissal of the fourth cause of action, the derivative claim of co-plaintiff Brenda Popovski, as the Owner defendants' sole argument in support of dismissal was that if all other claims were dismissed as against them, the derivative claim must also be dismissed. The Labor Law § 241 (6) claim survives, and thus so shall Brenda Popovski's derivative claims survive the motion.

The Common-Law Negligence and Labor Law § 200 Claims

The Owner defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them. 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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

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

> "All 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."

There are two distinct, fact-dependent standards applicable to section 200 cases: (1) when the accident is the result of the means and methods used by a contractor to do its work; and (2) when the accident is the result of a dangerous condition that is an inherent part of the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

Where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, it is alleged that the accident was caused in part by a Paver that had not yet been installed, and in part by a hole hidden by the Fleece that lay atop it. As such, the Court finds that the accident is alleged to have been caused by the means and methods of the work, i.e., the incomplete, ongoing installation of the Fleece and the Pavers. To the extent plaintiff alleged that he tripped in part on a fully installed Paver beside the hidden hole, the accident was also caused

by a hazardous condition inherent in the Premises. Nevertheless, the Court finds that, under either theory of the happening of this accident, the Owner defendants have established their entitlement to summary judgment dismissing the common-law and Labor Law § 200 claims.

As to a means and methods analysis, a review of the testimony and evidence in the record reveals that Owner defendants did not supervise or control the installation of the Fleece or Pavers, nor did they supervise or control plaintiff's work. Plaintiff himself testified that he received supervision and direction only from United's foreman.

Plaintiffs argue that the Owner defendants had control over the Project because Breitkopf, as agent of 340 Court, received reports from subcontractor supervisors and had the authority to stop work if it was unsafe. This argument fails, as it is well-settled that such general supervisory control is insufficient to impute liability under section 200, as even where a defendant "may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]). United's argument that Noho had a general duty to ensure that subcontractors performed their work safely, and properly stored their materials, is similarly unavailing.

As to an inherently hazardous condition analysis, the Owner defendants have shown prima facie by means of the testimony of Johannes, Cervantes, Breitkopf, and Schmidt that they did not create a dangerous condition or have actual or constructive notice of the missing Paver.[3] There is no evidence in the record establishing how long the condition existed prior to plaintiff's accident, nor is there any evidence of any complaints made to the Owner defendants about a missing Paver. In this type of case, where, as here, the moving party asserts a complete absence of evidence in the case regarding notice, supported by admissible evidence, the burden shifts to the non-moving party to raise a genuine issue of material fact in response. That has not been done. As such, the Owner defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

Owner defendants' Third-Party Claims for Contractual Indemnification against United and Nations (Motion Sequence Number 003)

The Owner defendants move for summary judgment in their favor on their third-party and second third-party claims for contractual indemnification against United and Nations, respectively.

[3] The Fleece is not a hazardous condition as contemplated by the Labor Law, as it was not a permanently installed part of the building. Therefore, the Fleece was not a "defect inherent in the property, but instead resulted from the manner in which [Nations] performed its work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [internal quotation marks omitted], *quoting Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]).

Additional Facts Relevant to This Issue

The agreement between 340 Court and United (the "340 Court/United Agreement") contains "Rider No. 1," which includes an indemnification provision (the "United Indemnification Provision") which states, in pertinent part, as follows:

> "[United] agrees to protect, defend, indemnify and hold harmless the entities and individuals listed in Exhibit B-1 and their employees, affiliates and agents . . . free and harmless from and against any and all losses, claims . . . without limitation and, in connection with or arising directly or indirectly out of work performed by [United] in connection with the Project"

(Owner defendants' notice of motion, exhibit Y, the 340 Court/United Agreement, Rider No. 1 at 6).[4] Exhibit B-1, annexed to the 340 Court/United Agreement, lists 340 Court, Alchemy and Noho as indemnitees.

The agreement between 340 Court and Nations (the "340 Court/Nations Agreement") is drafted and structured identically in material part to the 340 Court/United Agreement, including its own "Rider No. 1" with an indemnification provision that applies to Nations (the "Nations Indemnification Provision") (the Owner defendants' notice of motion, exhibit Z, the 340 Court/Nations Agreement).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also, Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Generally, an employer's liability for an on-the-job injury is limited to workers' compensation benefits, except where the employee suffers a grave injury (*Rubeis v Aqua Club, Inc*., 3 NY3d 408, 412-413 [2004]). Nevertheless, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.,* 36 AD3d 769, 771 [2d Dept 2007]; *see*

[4] There is a separate indemnification provision, found in Exhibit B to the 340 Court/United Agreement. However, Rider No. 1 states that "[t]o the extent that there is a conflict between this Rider No. 1 and any other Contract Document . . . to which this is a rider, the provisions of this Rider No. 1 shall govern" (Owner defendants' notice of motion, exhibit Y, the 340 Court/United Agreement, Rider No. 1 at 1). Accordingly, the United Indemnification Provision governs over the indemnification provision found in Exhibit B of the 340 Court/United Agreement.

also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc., 113 AD3d 500, 502 [1st Dept 2014]). Here, although there is no grave injury, there is a written contract between 340 Court and United, plaintiff's employer, that contains an indemnification provision. As such, the court must determine whether the United Indemnification Provision applies to the present action.

Initially, United argues that the United Indemnification Provision cannot apply here because it runs afoul of General Obligations Law (GOL) § 5-322.1, in that it requires United to indemnify Owner defendants for Owner defendants' own negligence. GOL § 5-322.1 provides, as relevant, that an agreement "purporting to indemnify or hold harmless the [indemnitor] against liability for damage . . . caused by or resulting from the negligence of the [indemnitor] . . . is against public policy and is void and unenforceable."

Courts have held that an indemnification provision will be unenforceable under GOL § 5-322.1 where it to does not contain "saving language" – for example, "[t]o the fullest extent permitted by law" (*Williams v City of New York* 74 AD3d 479, 480 [1st Dept 2010]). That said, where an indemnitee is not negligent, an indemnification provision that is missing such language is still enforceable (*see Crouse v Hellman Constr. Co., Inc.* 38 AD3d 477, 478 [1st Dept 2007] ["Since [the indemnitee] was not negligent, [the indemnitor's] agreement to indemnify is enforceable under [GOL] §5-322.1, even though the agreement does not limit the obligation to what the law allows"]; *see also Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508, 508 [2d Dept 2005] [section 5-322.1 will not prevent enforcement of an indemnification provision "where the party to be indemnified is found to be free of any negligence").

As noted previously, there is no evidence that any of the Owner defendants were, themselves, negligent in causing plaintiff's accident, and the common-law negligence and Labor Law § 200 claims against them have been dismissed. Accordingly, under the facts of this case, even though the United Indemnification Provision is missing "saving language," it does not run afoul of GOL § 5-322.1, because the Owner defendants have been found to be free from all negligence except that which is nondelegable and vicarious in nature. As the Nations Indemnification Provision is functionally identical to the United Indemnification Provision, it too does not run afoul of GOL § 5-322.1. As such, neither is void or unenforceable.

Based upon a review of the agreements submitted, the Court finds that the Indemnification Provisions are sufficiently broad in that they encompass any injury that occurred "in connection with or arising directly or indirectly out of work performed" by United or Nations on the Project (the Owner defendants' notice of motion, exhibit Y, the 340 Court/United Agreement, Rider No. 1, at 6; and exhibit Z, the 340 Court/Nations Agreement, Rider No. 1, at 6). Here, plaintiff was injured while performing work for United on the Project. As such, the Court finds that plaintiff's accident occurred in connection with and arose indirectly out of United's work.

Similarly, Nations was the contractor responsible for the installation of the Pavers and Fleece over which plaintiff tripped. As such, the Court finds that plaintiff's accident occurred in connection with and/or arose directly or indirectly out of Nation's work.

Accordingly, pursuant to the United Indemnification Provision and the Nations Indemnification Provision, the Owner defendants are entitled to summary judgment on their third-party claim for contractual indemnification against United and their second third-party claim for contractual indemnification against Nations.

The Owner defendants' Third-Party Claims for Common-Law Indemnification Against United and Nations (Motion Sequence 001 and 003)

The Owner defendants move for summary judgment in their favor on their third-party and second third-party claims for common-law indemnification as against United and Nations, respectively. United moves for summary judgment dismissing said claim against it.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d at 65).

As previously indicated, at the oral argument, the Court dismissed the common-law contribution and indemnification cause of action as against United.

As to Nations, the Court has not ruled on whether Nations was negligent as a matter of law. The Owner defendants' argument that Nations must have been negligent because they were responsible for installing the Paver and Fleece is conclusory and ultimately unavailing. Such a determination as to any contributory negligence will properly await the finder of fact. As such, the Court finds that granting summary judgment on this issue would be premature.

As such, the Owner defendants are not entitled to summary judgment on their third-party and second-third party claims for common-law indemnification as against United and Nations. Nevertheless, the Owner defendants are entitled to conditional common-law indemnification from Nations, as the Court has decided that the Owner defendants has shown as a matter of law that "any liability on their part would be statutory and vicarious," and if there is some negligence on the part of Nations, as potential indemnitor, common-law indemnification of the Owner defendants from Nations will be appropriate. (*Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011].)

The Owner defendants' Third-Party Claims for Breach of Contract for the Failure to Procure Insurance Against United and Nations (Motion Sequence Numbers 001 and 003)

The Owner defendants move for summary judgment in their favor on their third-party and second third-party claims for breach of contract for the failure to procure insurance as against United and Nations, respectively. United moved for summary judgment dismissing said claim against it, and as previously indicated the Court granted United's motion and the claim is dismissed as against United.

Notably, Owner defendants do not argue that United or Nations did not procure insurance. Rather, they argue that United and Nations' insurers have failed to accept tender of plaintiff's claim. As the court noted during the oral argument, it is inapposite with respect to a breach of contract on the part of the insured that an insurer may have failed to accept tender of plaintiff's claim (tr at 6). The legal issue before the Court is whether Nations purchased the required additional insured coverage for the benefit of the Owner defendants in the first instance.

A party is not liable to another for breach of contract for the failure to procure insurance where that party fulfills its contractual obligation to procure proper insurance for the benefit of the other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996] [third-party defendant was not liable to appellants for breach of contract for failure to procure insurance "inasmuch as [it] had fulfilled its contractual obligation to procure proper liability insurance on behalf of appellants"]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

Here, no party has provided a copy of Nations' insurance policy for the court's review. Rather, the Owner defendants have tacitly acknowledged that Nations was insured by Endurance American Specialty Insurance Company (Endurance), under "policy # GLP1000368400," as evidenced by their tender of plaintiff's claim to Endurance and Endurance's response and reservation of rights (the Owner defendants' notice of motion, exhibit T). Nevertheless, because the policy itself has not been submitted, the Court cannot review it to determine whether it, in fact, covers the Project as required by the 340 Court/Nations Agreement. As such, the Owner defendants have failed to show prima facie entitlement to summary judgment on this issue.

United's Request for Leave to Amend Pleadings (Motion Sequence 001)

United moves to amend its pleadings to initiate a new third third-party action against Nations for common-law indemnification. United also moves for summary judgment on its proposed new claim.

CPLR 3025 (b) provides the following, as relevant:

> "Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just . . . . Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

"Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" *(McCaskey, Davies and Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983] [internal quotation marks and citations omitted]; *see also Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.,* 151 AD3d 527, 527 [1st Dept 2017]).

Here, United seeks leave, not to amend an extant pleading, but to initiate an entirely new third-party action against Nations pursuant to the proposed "Third Third-Party Summons" and "Third Third-Party Complaint" (United's notice of motion, exhibit U). No third third-party action currently exists. United provides no case law supporting the position that CPLR 3025 (b) may be used to seek leave to initiate an entirely new third-party action.

Importantly, CPLR 3025 (b) deals with "amended and supplemental pleadings." According to the practice commentaries for this Rule, "[a]n amendment is something that makes any change at all in a pleading" while "[a] 'supplement' seeks to add to the pleading a claim or matter that only came into being . . . after the original pleading was served" (Patrick M. Conners, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 3025, § C3025:9; last accessed via Westlaw, August 21, 2019). Accordingly, as United seeks neither to amend a pleading, or to supplement one, its request for leave to amend is denied.

Even if the branch of motion seq. 001 made pursuant to CPLR 3025 were not procedurally defective, this Court would not permit further impleader at this stage of the litigation, where the note of issue was filed nearly a year ago, where numerous discovery conferences were held where the prospect of a cross-claim or new third third-party action by United against Nations was never raised and where to permit such additional claims now would unduly delay the determination of the main action and prejudice the substantial rights of Nations (*see* CPLR 1010).

Given the foregoing, that part of United's motion seeking summary judgment on its proposed third third-party claim for common-law indemnification against Nations is moot.[5]

CONCLUSION

Accordingly, it is

ORDERED that the branch of motion seq. 001 by third-party defendant United Panel Technologies Corp. ("United") pursuant to CPLR 3212 granting United summary judgment dismissing the first cause of action of the third-party complaint of defendants/third-party plaintiffs 340 Court Street, LLC ("340 Court"), Alchemy Properties, Inc. ("Alchemy") and NOHO Construction LLC ("Noho" and, together with 340 Court and Alchemy, the "Owner defendants") for common-law indemnification and contribution is granted, and the first cause of action of the third-party complaint is dismissed with prejudice; and it is further

ORDERED that the branch of United's motion in seq. 001 pursuant to CPLR 3212 in support of dismissing the third cause of action of the complaint of plaintiffs Danny Popovski (hereinafter "plaintiff") and Brenda Popovski as to the claims made pursuant to Labor Law §§ 240 (1) and 241 (6), as predicated, as to the latter, on a violation of 12 NYCRR 23-1.7 (b) (1) is resolved to the extent that plaintiff has withdrawn the claims; and it is further

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[5] Even if the purported amendment was allowed, it would improper to simultaneously grant a motion to amend a pleading and grant a motion for summary judgment on said amended pleading, as the non-moving party must be afforded an opportunity to answer the pleading and seek discovery (*see R&G Brenner Income Tax Consultants v Gilmartin,* 166 AD3d 685, 688 [2d Dept 2018]; *Organek v Harris,* 90 AD3d 1512, 1513 [4th Dept 2011]).

ORDERED that the branch of United's motion in seq. 001 pursuant to CPLR 3025 to amend its pleadings to assert cross claims for common-law indemnification against second third-party defendant Nations Roof East LLC ("Nations") by means of service of the proposed third third-party complaint is denied; and it is further

ORDERED that the branch of United's motion in seq. 001 pursuant to CPLR 3212 seeking summary judgment on its claim in its proposed third third-party complaint for common-law indemnification and contribution from Nations is denied as moot; and it is further

ORDERED that the branch of United's motion in seq. 001 pursuant to CPLR 3212 granting United summary judgment dismissing the third cause of action of the third-party complaint alleging breach of contract for failure to procure insurance is granted, and the third cause of action of the third-party complaint is dismissed with prejudice; and it is further

ORDERED that motion seq. 002 by plaintiff pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability on his Labor Law § 241 (6) cause of action is denied; and it is further

ORDERED that the branch of motion seq. 003 by the Owner defendants pursuant to CPLR 3212 granting the Owner defendants summary judgment dismissing the complaint as against them is granted in part to the extent that the first and second causes of action sounding in common-law negligence are dismissed with prejudice, the claims in the third cause of action alleged pursuant to Labor Law §§ 200, 240 (1), and 241 (6), as predicated, as to the latter, on violations of 12 NYCRR 23-1.7 (b) (1) and 23-1.7 (b) (e) (1), are dismissed with prejudice, and this branch of the motion in seq. 003 is otherwise denied; and it is further

ORDERED that the branch of the Owner defendants' motion in seq. 003 pursuant to CPLR 3212 granting the Owner defendants summary judgment on their third-party and second third-party claims against United and Nations for common-law indemnification, contractual indemnification, and breach of contract for failure to procure insurance is granted in part to the extent that the Owner defendants are entitled to contractual indemnification from both United and Nations and are entitled to conditional common-law indemnification from Nations, and this branch of the motion in seq. 003 is otherwise denied; and it is further

ORDERED that all parties shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on one another.

The foregoing constitutes the decision and order of the Court.

8/21/2019
DATE

ROBERT DAVID KALISH, J.S.C.

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