Madkins v 22 Little W. 12th St., LLC
2019 NY Slip Op 32734(U)
September 17, 2019
Supreme Court, New York County
Docket Number: 153651/2014
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

PHILLIP MADKINS,

Plaintiff,

- v -

22 LITTLE WEST 12TH STREET, LLC, *et al.*,

Defendants.

----------X

INDEX NO. 153651/2014

MOTION DATE

MOTION SEQ. NO. 004, 005, 006, 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 106-130, 188, 199, 202

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 152-160, 189-191, 195, 198, 201, 206

were read on this motion to/for partial summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 131-151, 187, 204

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 161-185, 192-194, 196-197, 200, 203

were read on this motion to/for summary judgment.

By notice of motion, third-party defendant Handco Welding Corp. moves pursuant to CPLR 3212 for an order granting it summary dismissal of all claims, cross claims, and third-party claims against it (seq. number four). Defendants 22 Little West 12th Street, LLC, LW 12th Street Holding, LLC, Katselnik & Katselnik Group, Inc., Katselnik & Katselnik Group, Inc. d/b/a K&K Group, Inc., and Katselnik & Katselnik Inc. (collectively, defendants) oppose.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for partial summary judgment on liability as to his Labor Law §§ 240(1) and 241-a claims against defendants (seq.

number five). Defendants, second third-party defendant Northeast Service Interiors LLC, and Handco oppose.

By notice of motion, Northeast moves pursuant to CPLR 3212 for an order summarily dismissing the second third-party complaint and all cross claims against it (seq. number six). Defendants oppose.

By notice of motion, defendants move pursuant to CPLR 3212 for an order granting them summary judgment on their third-party claims for indemnification and/or breach of contract as against Handco and Northeast and for failure to procure insurance (seq. number seven). Handco and Northeast oppose.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

Plaintiff, a welder, alleges that on November 19, 2012, he was injured while working for Handco at a construction site at 22 Little West 12th Street in Manhattan. Katselnik & Katselnik Group, Inc. and Katselnik & Katselnik, Inc. (collectively, K&K) were the general contractors on the site. They retained Handco to perform certain work, and Northeast as the demolition contractor. (NYSCEF 107).

A. Plaintiff's testimony (NYSCEF 121)

Hanco's duties at the site included inserting steel beams into the walls of the elevator shaft and placing decking on the roof. At the request of K&K's foreman, Handco employees created some of the pocket cuts in the walls by chopping bricks out of the walls for the beams, but K&K did not otherwise direct or supervise plaintiff.

On the date of his accident, plaintiff was working in an elevator shaft cutting decking on the first floor, while other Handco employees worked above him on the roof or bulkhead of

the elevator shaft. Upon his arrival in the morning, he found bricks on the floor but did not know how they got there, although on prior occasions, he had seen laborers removing bricks from the floor of the shaft. There was no dust or debris there and plaintiff had never complained about debris in the shaft.

After plaintiff had cut the decking, he hooked it up to a chain fall, which was then hoisted to the bulkhead. As he worked, he heard jackhammering and chipping hammers, but did not know the nature or location of that work, nor did he see any workers above him.

Plaintiff saw holes in several floors in the shaft above him, including where the chain fall was located. The chain fall could not be planked off because the decking went through it. Other areas should have been covered by planks or plywood but were not.

Demolition workers too were picking up bricks and putting them in a wheelbarrow approximately 30 to 40 feet away from plaintiff. The bricks had fallen to the first floor after demolition workers had chopped them out of a stairwell on the top floor that was being demolished. The workers had been doing that work the week of plaintiff's accident. The shaft was more than 20 feet from the stairwell.

Based on plaintiff's past work experience, he believed that a chute should have been attached to the stairwell and then used to move the bricks into a dumpster, but he never complained about the lack of a chute.

As he worked, plaintiff was struck on his shoulder and back by a falling brick. Plaintiff did not see where it had come from or what had caused it to fall, although he thought that it had been chopped out of a wall of the shaft which was done to accommodate the installation of beams into the walls. No one witnessed the accident. On the day of plaintiff's accident, no Handco employee was working with bricks.

B. K&K

1. Deposition of president (NYSCEF 120)

K&K's president testified that for the first three or four months of the project, he was on site at least weekly for client meetings and was not aware of any debris being disposed of through the shaft. Four K&K laborers worked on the project, accepting deliveries, broom cleaning, sweeping, and cleaning the premises at each day's end. Its project manager's duties included managing the project, dealing with the owner and subcontractors, determining the scope of work for the day, and ensuring that the work was correctly and timely performed. The project manager conducted daily safety meetings with workers, including subcontractors' employees, and he walked through the site to ensure that there were no safety issues or problems and to stop unsafe work if necessary.

According to the president, Northeast's work included removing slab openings, staircases, and walls, which included chopping up concrete and bricks, and removing demolition debris. An interior chute enclosed in plywood was built for the removal of debris from an upper floor to a ground floor, approximately 30 feet away from the shaft. It was used by Northeast to transport debris to lower floors. Debris was also transported by hand and carried it down in buckets.

2. Deposition of vice president (NYSCEF 118)

K&K's vice president testified that the agreement between K&K and the owner required K&K to provide and maintain necessary temporary barricades, fencing, or other overhead protection to protect against hazards, including falling materials.

The vice president never observed any debris being thrown down the shaft, although there were barricades situated around it and temporary planks on every floor that protected

workers and debris from falling down the shaft. The project manager was tasked with ensuring that the planks were in place each morning and to stop work if they were not. The workers were prohibited from transporting materials through the shaft.

Northeast's employees used an internal plywood chute to transport the debris coming from the stairwell. The chute was near the stairwell, which was located in the opposite direction of the elevator shaft. The vice president was not aware that Northeast employees threw debris down the shaft.

3. Contract between K&K and the owner (NYSCEF 128)

The contract provided, among K&K's other responsibilities, that it was responsible for site safety and daily clean up, including the removal and disposal of all debris and rubbish generated by its operations. K&K was also solely responsible for providing all necessary protective barriers within the building to ensure the safety of all workers at the site.

K&K was additionally required to ensure that all of its contracts and purchase orders with subcontractors subject them to the same provisions as its contract with the owner, and that they require the subcontractors to assume, with respect to K&K, the same legal obligations and responsibilities that K&K assumed with respect to the owner, including indemnification and insurance requirements.

C. Handco

1. Deposition of president (NYSCEF 119, 124)

Handco's president testified that he was at the site almost daily and that K&K's project manager was continually at the project, along with laborers who swept the floors. Handco's employees worked on all five floors of the building, its foreperson directed the employees at the project, and K&K had no authority to direct them. For Handco to install beams into the walls of

the elevator shafts, K&K laborers chopped pockets into the walls using jackhammers, and then closed off the openings once the beams were in place. He was unaware that K&K's project manager held safety meetings. Plaintiff never complained to him about any safety issues, nor did any other Handco employee.

The president was at the site on the day of plaintiff's accident, working on the building's roof installing beams. He described the floor of the roof level within the elevator shaft and all of the other floors as covered by planks and plywood, and he denied that Handco employees were hoisting decking through the shaft that day as all or most of the floors in the shaft were covered from above by planks and sheets of plywood. The decking that plaintiff cut was in pieces that were small enough to hand-carry up the stairs.

Handco employees reached the roof via a staircase next to the shaft. The work they performed on the roof on the day of plaintiff's accident was 60 to 70 feet away from the shaft. Hanco's president saw K&K employees on the roof, and none from Northeast.

When notified that plaintiff had been hurt, the president proceeded to the first floor, where plaintiff told him that he had been hit by a brick. Not seeing any bricks, the president asked plaintiff where it was and plaintiff told him that it had broken on his back. The president saw dust but no brick fragments in the area, nor other debris.

According to Handco's president, not only should plaintiff have not been working inside of the shaft for safety reasons, but a work area under a concrete slab had been set up for him outside of the shaft, as working inside the shaft exposed him to a risk of being hit by falling objects.

That day, no work on the shaft was being done by Handco or any other trades nor was there any ongoing demolition work. Prior work performed by the demolition contractor had

created debris, including bricks and concrete, which was removed from the first floor and put into a container. Although a chute had been in place in the stairwell at some point, the president did not remember it being there on the day of plaintiff's accident. The stairwell was on the opposite side of the building from the shaft where plaintiff was working. He never observed anyone tossing debris from floor to floor.

2. Workers compensation report (NYSCEF 158)

Handco filed a workers compensation claim report for plaintiff's accident reflecting that plaintiff had reported that a brick had fallen on him.

3. Subcontract (NYSCEF 129)

The subcontract between K&K and Handco provides, as pertinent here, that Handco will indemnify and hold harmless the owner and K&K from all liability and claims arising out of or connected with or claimed to arise out of or be connected with the performance of Handco's work, or any negligent act or omission of Handco or any parties under its control. Handco was responsible for its employees' safety.

Handco was also required to obtain insurance identical to that obtained by K&K for the project, and did so effective from June 14, 2012 to June 14, 2013. (NYSCEF 130).

D. Northeast (NYSCEF 125)

Northeast's foreman testified that he worked on the project and reported each day to an associate or owner of Northeast. No other trades or contractors directed his or other employees of Northeast. His job was to demolish stairs and bulkhead, and to discard garbage and debris from the building. Garbage and debris were removed solely by using a chute in the interior stairwell, from which the debris was deposited into a box surrounded by protective plywood. The debris was then removed by hand and was never thrown down to the first floor.

On the day of plaintiff's accident, Northeast employees were demolishing the stairs 30 feet away from the shaft. Northeast employees performed no work on the roof.

Northeast had previously demolished a bulkhead on the roof using electric chipping guns, sledgehammers, and crow bars, which produced brick, wood, and metal debris removed by workers who carried it down the stairs in buckets. The demolition took two days and was completed after the stairs were demolished and new stairs built. The bulkhead was located 20 feet from the elevator shaft.

E. Pertinent daily reports (NYSCEF 127)

A K&K daily report for November 17, 2012, two days before plaintiff's accident, reflects that Northeast was continuing demolition of the bulkhead, removing steel and a partial brick wall, and starting to remove debris to the ground floor. K&K laborers were filling and chopping beam pockets and cleaning up throughout. Handco was continuing work on the bulkhead roof using steel and framing.

The report for the next day, a Sunday, reflects no work performed by Northeast or K&K; Handco continued its previous day's work.

On November 19, the date of plaintiff's accident, Northeast continued its demolition of the bulkhead and removed debris to the ground floor, K&K cleaned up and filled beam pockets and grouted steel, and Handco continued work on the roof and ground floor.

II. HANDCO'S MOTION

A. Contentions

1. Handco (NYSCEF 107, 108)

Handco denies any contractual requirement to indemnify K&K, claiming that K&K failed to fulfill its duty to provide a safe workplace, which included placing barricades to block entry to

the shaft. Had K&K duly placed the barricades, it maintains, plaintiff would not have been in the shaft and the accident would not have occurred. It, moreover, denies that it was negligent as it performed no work involving bricks at the time of the accident. Rather, its employees were performed unrelated work on the roof 60 to 70 feet away from the shaft.

Nor is any party entitled to common law indemnification from it, Handco argues, because it was plaintiff's employer and there is no allegation that plaintiff sustained a grave injury. Finally, Handco contends that it obtained the required insurance coverage.

2. K&K opposition (NYSCEF 188)

K&K asserts that plaintiff's testimony establishes that other Handco employees were working on the roof and using the hoist to lift the decking that plaintiff had cut, thereby creating an opening in the planks in the shaft and thereby permitting the brick to fall and hit plaintiff. Thus, even if K&K was responsible for installing the planks, Handco employees either removed or moved them to hoist the decking. Thus K&K's actions or inactions were not the proximate cause of plaintiff's accident. At the very least, questions of fact exist as to whether Handco was negligent, and it is thus not entitled to summary dismissal.

Moreover, there is evidence that Handco, not K&K, created the pockets in the elevator shaft. Thus, if the brick had fallen from a pocket, it was Handco's work that caused plaintiff's accident. And, if there is evidence that the use of the hoist in the elevator shaft was unsafe, then Handco's employees' conduct in directing its use is the sole proximate cause of the accident.

K&K also argues that absent evidence of its negligence, Handco must indemnify it, and that it failed to procure the required insurance as its policy does not name K&K and the owner as additional insureds.

3. Reply (NYSCEF 199)

Handco maintains that K&K was creating pockets in the wall of the shaft, which may have dislodged a brick, and it thus fails to demonstrate its freedom from negligence. It observes that K&K did not oppose dismissal of its claims for common law indemnity and contribution against Handco, and it denies having breached its duty to obtain insurance coverage.

B. Analysis

The testimony of plaintiff and Handco's president establishes that both Handco and K&K created pockets in the walls of the shaft by chopping bricks out of them, and the daily reports reflect that two days before and on the date of plaintiff's accident K&K employees were filling beam pockets. Thus, to the extent that the brick that hit plaintiff originated from a pocket, Handco does not establish that it is free from negligence.

Having produced a copy of its insurance policy, Handco establishes that it did not breach its contract with K&K to obtain insurance, and there is no opposition to the dismissal of K&K's third-party claims against Handco for common law indemnification and contribution.

III. PLAINTIFF'S MOTION (NYSCEF 152)

A. Contentions

1. Plaintiff (NYSCEF 153)

Plaintiff moves pursuant to Labor Law §§ 240(1) and 241-a for partial summary judgment on liability on his claims as against defendants. He argues that as it is undisputed that an object which was supposed to be secured fell on him from above, defendants are liable, and that he need not identify any particular safety device which should have been but was not provided.

To the extent that planking is a safety device, plaintiff denies that it covered the entire

opening of the shaft, and contends that it was otherwise insufficient as the brick nevertheless fell and hit him.

Should defendants dispute whether a brick fell on him by relying on the testimony of Handco's president that he saw no brick afterward, plaintiff relies on the workers compensation report and hospital records showing that he sustained fractures in his back. At oral argument, the hospital records were found to be neither relevant nor admissible on this motion.

2. Defendants' opposition (NYSCEF 189)

Defendants observe that plaintiff's accident was unwitnessed and that the president had seen no bricks around plaintiff after the accident. Moreover, while plaintiff alleges in his complaint that he is permanently disabled due to the accident, surveillance footage taken by defendants contradicts it. They thus argue that credibility issues preclude summary judgment in plaintiff's favor. There is also a factual issue, they maintain, as to whether plaintiff was the sole proximate cause of the accident by working in the elevator shaft despite having been prohibited from doing so and by moving planks to create an opening for the decking to be hoisted.

3. Northeast's opposition (NYSCEF 195)

Northeast also contends there is a triable issue as to whether plaintiff was hit with a falling brick and even if he was, it argues, he fails to establish that the "falling object" is covered by Labor Law § 240(1) absent proof that the brick was being hoisted or secured or required securing for the purposes of plaintiff's undertaking, rather than that it was part of the permanent wall and thereby constituted a general workplace hazard.

4. Handco's opposition (NYSCEF 198)

Handco reiterates the other defendants' arguments and asserts that as there was planking present, plaintiff also fails to establish a violation of Labor Law § 241-a.

5. Plaintiff's reply (NYSCEF 201)

Plaintiff denies that there is a triable issue as to whether he was hit by a brick, relying on his statements to others, medical records showing his injuries, and work records showing that demolition work was ongoing at the time of his accident. He also denies having claimed to be completely disabled and thus maintains that the surveillance video footage does not disprove his claims or the extent of his injuries. And even if there was planking, there were openings in it through which the brick may have fallen, as evidenced by photographs.

Plaintiff also denies that he was the sole proximate cause of his injuries as his president admitted that he had been assigned to cut decking in the elevator shaft. And, absent opposition to his motion on his Labor Law § 241-a claim, it should be granted.

B. Analysis

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

1. Circumstances of accident

Although plaintiff testified that he was hit by a brick, according to Handco's president, he

had seen no bricks around him after the accident and when he asked plaintiff about the brick, plaintiff replied that it had broken on him. The foreman, however, had seen no brick fragments. No other admissible evidence is offered by plaintiff to establish what object, if any, hit him, and thus a triable issue is raised as to whether plaintiff was hit by a brick.

Haynes v Boricua Vill. Hous. Dev. Fund Co., Inc., 170 AD3d 509 (1st Dept 2019,) is distinguishable as there, the Court held that the testimony of a witness controverting the plaintiff's version of the accident did not raise a triable issue as the witness had arrived at the accident scene 20 to 30 minutes after the accident. Here, by contrast, plaintiff's president was at the shaft within minutes of the accident. (*See e.g., Pelonero v Sturn Roofing, LLC*, AD3d , 2019 NY Slip Op 06327 [4th Dept 2019] [given conflicting versions of how accident occurred which raised issue of fact, plaintiff's motion should have been denied]; *Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018] [conflicting versions of accident raised by testimony that witnesses' inspection of scaffold after accident revealed no defects]; *Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014] [triable issue of fact existed as to how plaintiff's accident occurred, precluding summary judgment for plaintiff, as there was conflicting testimony of witnesses and even though no witness saw accident happen]; *Noble v 260-261 Madison Ave., LLC*, 100 AD3d 543 [1st Dept 2012] [while plaintiff may be granted partial summary judgment based on testimony as to how accident happened and even if accident unwitnessed, motion may be denied where defendants present evidence raising issue as to whether accident occurred in manner claimed]).

While plaintiff argues that his motion may not be denied solely on the ground of his credibility being questioned, the credibility question arises from the disputed facts as to how he was injured. (S*ee Medrano v Port Auth. of New York and New Jersey*, 154 AD3d 521 [1st Dept

2017] [affidavit of coworker contradicted plaintiff's version of accident and called into question plaintiff's credibility, precluding summary judgment for plaintiff]; *Velez v City of New York*, 134 AD3d 447 [1st Dept 2015] [conflicting versions of accident raised credibility issues that could not be resolved on summary judgment motion]). In any event, to the extent that the surveillance videos contradict plaintiff's claims of injury, having testified that he has bad days and good days, he raises a trial issue.

2. 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]).

Labor Law § 240(1) requires a showing that either safety equipment was provided but it was defective or that no equipment was provided but should have been. (*See Ortiz v Varsity*

Holdings, LLC, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish that there is safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] ["liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"]).

In "falling object" cases, the plaintiff must demonstrate that the object which fell was either being hoisted or secured or required securing, or, in essence, that the object fell because of the absence or inadequacy of a safety device. (*Fabrizi v 1095 Ave. of the Am.*, 22 NY3d 658 [2014]).

Here, plaintiff offers no evidence that the brick was being secured or hoisted or that it required securing for the purpose of his work in cutting decking in the shaft. Rather, having identified the brick as having originated from a pocket that had been cut into the shaft's wall, it was thus part of the permanent structure and could not constitute a falling object, and absent any allegation that the brick was not secured or required securing while he worked in the shaft, plaintiff does not establish a violation of Labor Law § 240(1). (*See Djuric v City of New York*, 172 AD3d 456 [1st Dept 2019] [Labor Law § 240(1) inapplicable where object that fell and struck plaintiff was permanent part of structure and not one that required securing]; *Flossos v Waterside Redevelopment Co., L.P.*, 108 AD3d 647 [2d Dept 2013] [ceiling which fell on plaintiff was not falling object]).

If the brick had been deliberately thrown down the shaft, it would not constitute a falling object covered by section 240(1). (*See e.g., Torres v Love Lane Mews, LLC*, 156 AD3d 410 [1st Dept 2017] [where plaintiff struck by falling bricks, motions for summary judgment properly denied as there were triable issues as to whether bricks fell accidently or were deliberately

dropped by demolition workers; if deliberately dropped, bricks would not constitute falling objects pursuant to Labor Law § 240(1)]; *Solano v City of New York*, 77 AD3d 571 [1st Dept 2010] [plank deliberately dropped from window does not constitute falling object]). By contrast, in *Hill v Acies Group, LLC*, the statute was held violated where the plaintiff had been struck by a brick that had fallen from several stories above out of a coworker's hands and there were no overhead protective devices present. (122 AD3d 428 [1st Dept 2014]).

Moreover, and in any event, as plaintiff did not see how the brick fell on him, he does not establish, *prima facie*, that it fell as a result of the absence or inadequacy of a safety device. (*See Pazmino v 41-50 78th St. Corp*., 139 AD3d 1029 [2d Dept 2016] [plaintiff struck in head by piece of wood, but did not see wood fall or from where it had fallen, thus he failed to demonstrate that it fell because of absence or inadequacy of safety device]; *Podobedov v E. Coast Constr. Group, Inc*., 133 AD3d 733 [2d Dept 2015] [plaintiff did not meet burden on Labor Law § 240(1) claim as he did not see falling object, how it fell or from where it fell, and thus his belief that he was hit by cement that had fallen from floor above him insufficient to establish violation of statute]).

In the cases relied on by plaintiff, how an object fell and from where it fell was not entirely unknown or disputed, and thus they are inapposite. (*Escobar v Safi*, 150 AD3d 1081 [2d Dept 2017] [plaintiff hit by sheet of plywood which fell while either being hoisted to roof or while on roof after being hoisted due to failure to secure it]; *Stawski v Pasternack, Popish & Reif, P.C*., 54 AD3d 619 [1st Dept 2008] [plaintiff struck by cinder block that had been cut from column and returned to open cavity without being secured or cemented]; *Rosa v R.H. Macy Co., Inc*., 272 AD2d 87 [1st Dept 2000] [plaintiff struck in head by piece of metal dropped accidently by co-worker]).

In light of this result, there is no need to consider whether plaintiff or Handco was the

sole proximate cause of his accident.

3. Labor Law § 241-a

Labor Law § 241-a requires that workers working in or at elevator shaftways in the course of construction or demolition be protected by sound planking at least two inches thick and laid across openings at levels no more than two stories above nor more than one story below workers.

As plaintiff concedes that there was planking above him and offers no evidence as to its thickness and position, he fails to establish, *prima facie*, a violation of this provision. Moreover, his testimony that openings in the planking were created for Handco to hoist the decking undermines this claim. (*See Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404 [1st Dept 2007] [Labor Law § 241-a claim should have been dismissed where plaintiff injured by falling objects which were being hoisted to upper floors as it was "undisputed that the elevator shaft was uncovered because the open shaft was reasonably necessary to hoist [steel stringers] from ground level to the building's upper floors by an electric chain hoist which was erected in the shaft"]).

IV. NORTHEAST'S MOTION

A. Contentions

1. Northeast (NYSCEF 132)

Northeast denies that there is any evidence that the brick that hit plaintiff was attributable to its action or inaction as it is undisputed that its work involving bricks was performed in a stairwell at least 20 feet from the shaft where plaintiff worked. Additionally, Northeast's employee denied that its work was performed on the roof the day of the accident, and plaintiff had identified the brick as originating from the cutting of pockets in the walls, which work Northeast did not perform. Absent any proof of negligence on its part, Northeast asserts that the

third-party claims for contractual and common law indemnity must be dismissed. Moreover, Northeast procured the required insurance coverage and thus there is no viable claim for breach of contract.

2. Defendants' opposition (NYSCEF 187)

Defendants contend that triable issues of fact remain as to whether the brick that hit plaintiff originated with Northeast's ongoing demolition activities at the site.

B. Analysis

No evidence is offered to establish, or that raises an issue, as to whether Northeast's work may have caused a brick to hit plaintiff. All of the witnesses testified that Northeast demolished a stairwell at least 20 feet from the elevator shaft. Regardless of whether Northeast was using a chute or not, the bricks being moved from the top floors to the ground floor were enclosed within the stairwell and Northeast denied working on the roof before plaintiff's accident. Handco's president saw no Northeast employees on the roof that day, and even if the daily report reflects that Northeast employees were working on the roof, the location of that work was 20 feet from the elevator shaft.

Plaintiff, moreover, testified that the brick that hit him originated from the cutting of the pocket wall, in which Northeast did not participate. It thus establishes, *prima facie*, its freedom from negligence. Northeast also submits proof that it complied with K&K's insurance requirements.

V. DEFENDANTS' MOTION (NYSCEF 161)

Defendants assert that they are entitled to judgment on their third-party claims against Handco and Northeast for indemnification and breach of contract, as plaintiff's accident arose from Handco's and Northeast's negligence. They also deny being liable for the accident.

As there is a triable issue as to whether the brick originated from work done by K&K and/or Handco (*supra*, II.B.), defendants do not establish either their own freedom from negligence or that Handco was negligent. Nor do they demonstrate that Handco failed to procure the required insurance. (*Id.*).

Northeast establishes that defendants' third-party claims against it have no merit (*supra*, IV.B.), and defendants do not demonstrate otherwise.

VI. CONCLUSION

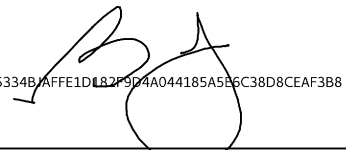
Accordingly, it is hereby

ORDERED, that Handco Welding Corp.'s motion for summary judgment (seq. four) is granted to the extent of dismissing the third-party claims against it for common law indemnification, contribution, and breach of contract, and is denied as to the claim for contractual indemnification; it is further

ORDERED, that plaintiff's motion for partial summary judgment (seq. five) is denied in its entirety; it is further

ORDERED, that the motion of third-party defendant Northeast Service Interiors LLC for summary judgment (seq. six) is granted, and the third-party complaint against it is severed and dismissed in its entirety, as are any cross claims asserted against it; and it is further

ORDERED, that defendants/third-party plaintiffs' motion for summary judgment on its third-party complaints (seq. seven) is denied in its entirety.



9/17/2019
DATE

BARBARA JAFFE, J.S.C.

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