SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOSE LUNA,

Plaintiff,

-against-

PSEG LONG ISLAND, LLC, LONG ISLAND POWER AUTHORITY, THREE GALS INDUSTRIAL, LLC, and LONG ISLAND ELECTRIC UTILITY SERVCO, LLC,

Defendants.

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PSEG LONG ISLAND, LLC

Third-Party Plaintiff,

-against-

3 GALS INDUSTRIAL, LLC and MID SUN GROUP INC.

Third-Party Defendants,

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THREE GAL'S INDUSTRIAL, LLC,

Second Third-Party Plaintiff,

-against-

MIDSUN GROUP INC.,

Second Third-Party Defendant

IAS Part 15
Index No. 604290/2016
Motion Seq. Nos. 007-011

MOD

PSEG LONG ISLAND, LLC, LONG ISLAND POWER AUTHORITY, THREE GALS INDUSTRIAL, LLC, and LONG ISLAND ELECTRIC UTILITY SERVCO, LLC,
Third Third-Party Plaintiff,

-against-

3 GALS INDUSTRIAL, LLC and MID SUN GROUP INC.,
Third Third-Party Defendants.
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LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

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Third-Party Defendant Mid-Sun's Notice of Motion, Affirmation & Exhibits.....1
Defendants/Third-Party Plaintiffs' (PSEG) Aff. in Opposition & Exhibits.....2
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Plaintiff's Notice of Motion, Affirmation & Exhibits.....2
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Plaintiff's Affirmation in Opposition.....6
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Defendants/Third-Party Plaintiffs' (PSEG) Order to Show Cause, Affirmation & Exhibits.....11

This action stems from personal injuries sustained by plaintiff, Jose Luna, on March 22, 2016, while performing painting work on behalf of his employer, Mid Sun Group Inc., at the Glen Head, Long Island substation owned by defendant Long Island Power Authority (LIPA) and managed by defendant PSEG Long Island, LLC. Luna alleges that he was never informed that the substation switchgear roof upon which he was working contained bushings that were energized, and Luna was electrocuted as he applied silicone around the base of a bushing. All of the parties now seek various relief. Luna seeks summary judgment on the issue of liability against PSEG and LIPA. PSEG, LIPA and defendant Long Island Electric Utility Servco (collectively, the "utility defendants") seek summary judgment dismissing all claims and cross-claims against them.[1] Defendant 3 Gals Industrial, LLC ("3 Gals") requests that the court "so order" a stipulation of discontinuance as against it filed by Luna and grant summary judgment dismissing all cross-claims and third-party claims against it. Mid Sun seeks partial summary judgment dismissing the contractual indemnification and breach of contract claims brought against it by the utility defendants.[2]

SUMMARY JUDGMENT STANDARD

It is the movant who has the burden to establish an entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). A court must view the evidence submitted in the light most favorable to the

[1] According to publicly-filed Federal Energy Regulatory Commission documents and as can be gleaned from certain of the motion papers, Servco is a wholly-owned subsidiary of PSEG that provides services to LIPA. Servco entered into a contract with 3 Gals, the nature of which is disputed and discussed, *infra*. Apart from that, this court is left in the dark as to the nature of Servco's involvement with respect to the Glen Head substation and plaintiff's work there. The utility defendants denied knowledge or information sufficient to form a belief as to whether Servco contracted with PSEG to operate and manage the substation. Plaintiff does not seek summary judgment against Servco.

[2] The utility defendants have also moved, unopposed, for an order restricting access to e-filed documents numbered 193, 211-220, 245-251, 263, 265, 267, and 270 solely to court personnel, parties to the action and their counsel. This motion is granted because the documents are of a sensitive nature since they pertain to the ownership and operation of the substation, part of Long Island's electrical system. The utility defendants shall submit a separate order restricting access to these documents for the court to execute.

nonmoving party. *Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 201 (2d Dept. 2019). A moving defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's proof. *In re New York City Asbestos Litigation (Carriero)*, 174 A.D.3d 461 (1st Dept. 2019); *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008).

Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman,* 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

A. THE SUMMARY JUDGMENT MOTIONS OF LUNA AND THE UTILITY DEFENDANTS

Plaintiff seeks summary judgment on his Labor Law § 200 and common law negligence claims against LIPA and PSEG.

Many, if not most, of the facts surrounding the circumstances of Luna's accident are not disputed. Luna, who does not speak English, arrived at the Glen Head substation with two Mid Sun co-workers, one of whom—Jose Montoya—was the foreman of the crew. They were there to prime, seal and paint a switchgear building. At the substation they met James Masella, a PSEG employee, who acted as a foreperson of a six-person PSEG crew. The Mid Sun crew waited while PSEG de-electrified one-half of the switchgear building so that the Mid Sun crew could work on that half (the other half remained electrified so that it could continue to supply needed power to residents). Masella gave the go-ahead to Montoya to start work and told him which half of the roof was de-electrified. Certain markings were also placed on the side—but not the roof—of the building to divide the electrified and non-electrified portions of the roof.

One of the central issues of fact is whether Masella told Montoya that the bushings were on the electrified or de-electrified side. Montoya testified that Masella told him the bushings were on the safe side and Montoya admits that he repeated this to Luna. Masella

denies that he told Montoya this and testified that the bushings were on the electrified side of the markings. This issue of fact compels denial of Luna's motion. Although Luna may have a very strong case to present to a jury even if Masella's version is credited, his expert's opinion of claimed OSHA violations do not warrant the granting of summary judgment because OSHA regulations do not impose a specific statutory duty on parties other than a plaintiff's employer. *Gallagher v. 109-02 Development, LLC*, 137 A.D.3d 1073, 1075 (2d Dept. 2016). (The court does not opine as to whether such violations may nonetheless be introduced at trial as some evidence of the defendants' negligence).

The utility defendants seek the dismissal of Luna's claims, arguing that Luna cannot demonstrate a violation of the Labor Laws or their negligence. For the reasons set forth above, there is an issue of fact as to whether the utility defendants were negligent.

The claim under Labor Law § 200 is also valid since Luna alleges and has provided evidence that the utility defendants—as the parties owning and managing the substation—allowed a known dangerous condition (the electrified bushings) to exist on the roof of the switchgear building at the time Luna was working on it at their request. The common law and Labor Law § 200 impose a duty upon an owner or general contractor to provide construction site workers with a safe place to work. *Comes v. N.Y. State Electric And Gas Corp.*, 82 N.Y.2d 876 (1993). More specifically, this duty applies to owners, contractors, or their agents, who had control over or supervised the work, or who created the dangerous condition and had actual or constructive notice of it. *Kim v. Herbert Construction. Co.*, 275 A.D.2d 709 (2nd Dept 2000). This is not a means or methods case. *Cf. Comes v. N.Y.S. Electric and Gas Corp.*, 82 N.Y.2d 876 (1993).

To prove a claim under Labor Law § 241(6), it must be demonstrated that a plaintiff was engaged in construction, excavation or demolition and that a violation of an applicable Industrial Code Regulation caused the plaintiff injury. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501 (1993); *Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 102 (2002); *Carey v. Five Bros. Inc.*, 106 A.D.3d 938 (2d Dept. 2013). The statute imposes a non-delegable duty on property owners and therefore a plaintiff need not show that an owner

exercised supervision or control over the work site to establish a right of recovery. *St. Louis v. Town of North Elba*, 16 N.Y.3d 411, 413 (2011).

Luna relies upon an alleged violations of Industrial Code Sections 23-1.13(b)(3) and (4) to support his § 241(6) claim. Reliance upon these sections would be sufficient to satisfy his claim assuming they applied to the utility defendants. Luna concedes that they do not apply to LIPA, so this claim is dismissed as against LIPA. The issue is whether Industrial Code Section 23-1.13(a) renders Sections (b)(3) and (4) inapplicable to PSEG and Servco.

Industrial Code Section 23-1.13(a) states that none of the provisions of Section 23-1.13 apply to operations conducted by "employers, owners, contractors and their agents subject to the jurisdiction of the Public Service Commission." Public Service Law § 5 provides that the jurisdiction of the Public Service Commission shall extend to the "distribution of . . . electricity ...to electric plants . . . and to the persons or corporations . . . operating the same." PSEG operated the substation, so Luna may not rely on Industrial Code Sections 23-1.13(b)(3) and (4) to support its § 241(6) claim against it and this claim is dismissed as against PSEG. To the extent Servco had operational control of the substation—the only reason it could be liable to Luna in this action—it was also subject to the jurisdiction of the Public Service Commission and the § 241(6) claim is likewise dismissed as against it.[3]

B. MID SUN'S MOTION

Mid Sun seeks summary judgment dismissing the utility defendants' third-party claims against it alleging a right to contractual indemnification (Seventh Cause of Action) and breach of the parties' May 30, 2014 contract (Mid Sun Contract) (Eighth Cause of Action). The utility defendants also claim that Mid Sun was obligated to procure insurance in its favor pursuant to a written agreement between Mid Sun and 3 Gals (Third Third-Party Complaint, ¶ Forty-Eighth). Mid Sun correctly points out that the Mid Sun Contract's term expired on December 31, 2015 and that Luna's injury did not occur until approximately 3 months later. There is no evidence that the injury resulted from anything that occurred prior to December 31, 2015.

[3] The court notes that the utility defendants did not argue that Luna was not engaged in the type of work to which Labor Law § 241(6) is applicable and the court does not reach this issue.

The utility defendants counter that the Mid Sun Contract expressly provides that the obligation of Mid Sun to obtain insurance on its behalf extends for a period of 3 years from the date Mid Sun "accepts the Work." "Work" is defined as any "labor . . . provided by [Mid Sun] under this Contract." The utility defendants also point out that the Mid Sun Contract provides that Mid Sun's obligation to indemnify for negligent acts in performance of the "Work" survives the expiration of the contract.

The issue before the court, therefore, is whether Luna's injury at the substation was in connection with or stemmed from labor provided under the terms of the Mid Sun Contract. Perhaps the agreement was implicitly extended. If not, Mid Sun is correct—its obligations to procure insurance and indemnify under the Mid Sun Contract are inapplicable because those obligations expressly related to labor performed under that agreement.

The answer to the posed question is supplied by the utility defendants themselves in connection with their opposition to the motion of 3 Gals for summary judgment. In their opposition papers the utility defendants argue that Mid Sun was acting as a subcontractor for 3 Gals and was performing work at the substation pursuant to a June 9, 2014 written agreement between Servco and 3 Gals. Under the doctrine of judicial estoppel, a party is precluded from inequitably adopting a position inconsistent with an earlier assumed position—or contemporaneously assumed position—in the same action. *Hartsdale Fire District v. Eastland Constuction, Inc.*, 65 A.D.3d 1145 (2d Dept. 2009). The utility defendants do not argue that Luna was working at the substation under an extension of the Mid Sun contract.

Since the work at issue was not being performed under the terms of the Mid Sun Contract its insurance and indemnification provisions are inapplicable and the utility defendants' Seventh and Eighth Causes of Action against Mid Sun are dismissed.[4]

C. 3 Gals' Motion

3 Gals argues that it should be dismissed from this action because, in reality, the worked performed by Mid Sun at the substation was not pursuant to the Servco – 3 Gals

[4] Contrary to the utility defendants' argument, there is no basis to find that Mid Sun was obligated to insure or indemnify the utility defendants under the 3 Gals – Servco contract. That obligation, if any, belonged to 3 Gals.

contract. As a result, it seeks dismissal of the cross-claims and third-party claims for contractual and common law and contractual indemnification and contribution brought against it by the utility defendants and Mid Sun.[5] Mid Sun has not opposed 3 Gals' motion. The utility defendants do.

The June 9, 2014 contract between Servco and 3 Gals was entitled a "Contract For Purchase of Equipment And Materials." A review of the agreement makes clear that it is an agreement to sell equipment and materials. The utility defendants quotations of language from the General Terms and Conditions part of the agreement—which are annexed as Exhibit A thereto—in an attempt to transform the agreement to encompasses services such as that performed by Luna is unconvincing.

It is not disputed that, pursuant to a September 11, 2015 3 Gals - Mid Sun written agreement, 3 Gals billed and collected from PSEG funds on behalf of Mid Sun for work similar to that which Luna was performing. Apparently this was done at PSEG's request to help it satisfy certain requirements concerning doing business with minority enterprises. It also is not disputed that there was no purchase order, invoice or collection for the work in question. Even if there is a fact issue as to whether 3 Gals was to invoice PSEG on Mid Sun's behalf for the work Luna was performing, it does not follow that it was doing so under the terms of its equipment contract or that 3 Gals thereby incurred common law obligations to indemnify the utility defendants. As a result, all of the claims against 3 Gals are dismissed.

Any sought relief not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: December 28, 2019
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

[5] Luna has discontinued his claims against 3 Gals.