SHORT FORM ORDER

ORIGINAL

INDEX No. 15-608788
CAL. No. 18-00481OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-18-18 (001)
MOTION DATE 8-27-18 (002)
ADJ. DATE 9-24-18
Mot. Seq. # 001 - MotD
002 - XMD

CESAR CHACHA,

Plaintiff,

- against -

FARRELL BUILDING COMPANY, INC., and FARRELL HOLDING CO., LTD.,

Defendants.

FARRELL BUILDING COMPANY, INC., and FARRELL HOLDING CO., LTD.,

Third-Party Plaintiffs,

- against -

DANIEL GUTIERREZ, INC,

Third-Party Defendants.

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Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants dated June 15, 2018; Notice of Cross Motion and supporting papers by plaintiff dated August 8, 2018; Answering Affidavits and supporting papers by defendants dated August 20, 2018 and by third-party defendant dated August 20, 2018; Replying Affidavits and supporting papers by defendants dated August 20, 2018 & August 27, 2018 and by plaintiff dated September 24, 2018; it is,

ORDERED that the motion by defendants for summary judgment dismissing plaintiff's complaint and on their third-party cause of action for contractual indemnification is decided as set forth herein; and it is further

ORDERED that the cross motion by plaintiff for summary judgment on his Labor Law § 240(1) cause of action is denied.

Plaintiff commenced this action seeking damages for personal injuries sustained on December 16, 2016, when a pneumatic nail gun discharged a nail into his knee while working on the construction site of a one-family house at 9 Wainscott Road in East Hampton, New York (the "property"). Defendant Farrell Holding Co., Inc. ("FHC) owned the property and defendant Farrell Building Company, Inc. ("Farrell Building") was the construction manager for the project. Third-party defendant Daniel Gutierrez, Inc. ("Gutierrez Inc.") was hired as the framing subcontractor, and at the time of the accident, plaintiff was employed by Guiterrez Inc. as a helper.

In his complaint, as amplified by his bill of particulars, plaintiff alleges that FHC and Farrell Building (hereinafter the "Farrell Defendants" when referred to collectively) were negligent in failing to furnish or erect safety devices to protect him from falling objects in violation of, among other rules and regulations pertaining to construction, Labor Law §§ 240, 241(6) and 200. He also alleges that the Farrell Defendants are liable for common-law negligence. The Farrell Defendants have interposed an answer denying liability and have impleaded Gutierrez, alleging causes of action for contractual and common law indemnification, contribution, and damages for breach of contract in failing to procure insurance and provide a defense.

Discovery has been completed and the note of issue filed. The Farrell Defendants now move for summary judgment dismissing plaintiff's complaint and for judgment in their favor on the third-party claim for contractual indemnification. Plaintiff cross-moves for summary judgment on his Labor Law § 240(1) cause of action against the Farrell Defendants.

Labor Law § 240 (1) and § 241 (6) impose a nondelegable duty upon owners and general contractors to provide protective equipment, devices and other adequate and reasonable protection to persons employed in the construction or alteration of a building (*see* ***Ross v Curtis-Palmer Hydro Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]; ***Cannon v Putnam***, 76 NY2d 644, 563 NYS2d 16 [1990]). A contractor, owner or agent will be held strictly liable where a violation of these sections of the Labor Law statute is the proximate cause of a plaintiff's injuries (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*; ***Zimmer v Chemung County Perf. Arts, Inc.***, 65 NY2d 513, 493 NYS2d 102 [1985]). The intent of the legislation is to protect workers by placing "'ultimate responsibility for safety practices at building construction jobs where such responsibility actually

belongs, on the owner and general contractor'" (***Klein v City of New York***, 89 NY2d 833, 835, 652 NYS2d 723 [1996], quoting ***Zimmer v Chemung County Perf. Arts, Inc.***, *supra* at 520). Thus, an owner or contractor may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*).

Labor Law § 200 is a codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work (***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Banscher v Actus Lend Lease, LLC***, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]). To be held liable under Labor Law § 200 and for common-law negligence for injuries arising from the means and methods used to perform the work, an owner or general contractor must have authority to exercise supervision and control over the work (***Paolchin v Mall Props., Inc.***, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; ***Banscher v Actus Lend Lease, LLC***, *supra*). Where a plaintiff's injuries stem from a dangerous condition on the premises, a defendant may be held liable if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (***Paolchin v Mall Props., Inc.***, *supra*; ***Banscher v Actus Lend Lease, LLC***, *supra*).

The Farrell Defendants argue they are entitled to summary judgment dismissing the complaint as asserted against them on the grounds that Labor Law § 240 (1) does not apply to the circumstances surrounding plaintiff's accident, the regulations relied upon to support the Labor Law § 241 (6) cause of action are not specific, inapplicable or not the proximate cause of the accident, and they cannot be held liable under Labor Law § 200 or for common-law negligence as they did not direct, control or supervise the injury-producing work. In opposition to the motion and in support of his cross motion for summary judgment on the Labor Law § 240 (1) cause of action, plaintiff argues that while he was engaged in a covered activity under the Labor Law, he was exposed to a gravity-related hazard which the Farrell Defendants failed to provide proper protection and supervision. Plaintiff also argues that defendants' motion should be denied as issues of fact exist.

In support of their motion, the Farrell Defendants submit, among other items, the transcripts of plaintiff's and Gutierrez's deposition testimony. Plaintiff testified that on the day of the accident, he had been working at the subject property for two to three weeks. As was the usual routine, the laborers were picked up from Patchogue and transported by van to the work site, arriving at approximately 7:00 a.m. Plaintiff testified that on the day of the accident he was tasked with applying straps to posts using a small nail gun, helping the skilled laborers with whatever they needed and cleaning the construction site. At approximately 4:00 p.m., the end of the workday, the laborers on a level above plaintiff were gathering the tools to be stored in the trailer. Carlos, one of the skilled laborers, asked plaintiff to grab one of the large pneumatic nail guns as he passed it down to him between the floor joists. Plaintiff testified that the nail gun was connected by a hose to an air compressor that was still on. As Carlos lowered the nail gun by holding onto the hose, plaintiff reached above his head and grabbed the gun with one hand and the hose with his other hand. After he grabbed the nail gun and hose, he began lowering the gun to the ground, and as he did so, the gun began to swing slightly, the tip hit his knee and discharged a nail into it. Plaintiff did not know what caused the gun to discharge, as the nail gun operates by pressing the tip against something and applying force to the trigger. Plaintiff denies that he pressed the trigger.

Daniel Gutierrez, the operator of Gutierrez Inc., testified that beginning in January 2014 plaintiff worked on several jobs sites whenever extra laborers were needed. According to Daniel Gutierrez, although plaintiff's responsibility was to clean the job sites he was eventually trained to do a few easy framing tasks and instructed on how to use a small nail gun. He testified that on the day of plaintiff's accident he arrived in the afternoon to perform work on the first floor while some of his other laborers were working on the roof. The work entailed the use of the large nail guns, also known as framing guns, which were attached to hoses hooked up to the air compressor. He further testified that when the workday was completed he turned off the air compressor and left the site as the laborers were putting away the tools and equipment. Five minutes later he received a call that plaintiff had been injured when a large nail gun discharged. He met plaintiff at the hospital and while helping him out of the van observed that a nail was imbedded in plaintiff's knee.

Daniel Gutierrez returned to the property the next day and tested the subject nail gun. He testified it performed normally and thereafter was continuously used at the property and other job sites until it burned out and was discarded. He also testified that the nail gun had never malfunctioned and denied that it had been altered. Gutierrez explained how the nail gun functions, testifying that the tip of the gun had to be pressed against something while simultaneously the trigger was pulled. He explained that a nail will not discharge if only the tip of the gun touches something, or if only the trigger is pulled.

The Farrell Defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action. The "extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (***Nieves v Five Boro Air Conditioning & Refrig. Corp.***, 93 NY2d 914, 915-916, 690 NYS2d 852 [1999], quoting ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501). Section 240 (1) "does not automatically apply simply because an object fell and injured a worker; a plaintiff must show that the object fell *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute" (***Fabrizi v 1095 Ave. of the Americas, LLC***, 22 NY3d 658, 663, 985 NYS2d 416 [2014]; *see* ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 268, 727 NYS2d 37 [2001]; ***Carlton v City of New York***, 161 AD3d 930, 932, 77 NYS3d 445 [2d Dept 2018]; ***Berman-Rey v Gomez***, 153 AD3d 653, 655, 59 NYS3d 789 [2d Dept 2017]). Thus, a plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purpose of the undertaking (*see* ***Fabrizi v 1095 Ave. of the Americas, LLC***, *supra*; ***Carlton v City of New York***, 161 AD3d 930, 932, 77 NYS3d 445 [2d Dept 2018]; *see* ***Ruiz v Ford***, 160 AD3d 1001, 75 NYS3d 242 [2d Dept 2018]; ***Berman-Rey v Gomez***, *supra*). Therefore, Labor Law § 240 (1) "does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected" (***Ruiz v Ford***, *supra* at 1003; *see* ***Narducci v Manhasset Bay Assoc.***, *supra*).

Here, plaintiff's testimony demonstrates that the lowering of the nail gun was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or expected, and the absence of such a device did not cause the nail gun to fall and injure plaintiff. Therefore, the injury-producing incident is outside the scope of section 240 (1). Accordingly, the Farrell Defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action. It follows, therefore, that plaintiff's motion for summary judgment in his favor on the same cause of action is denied.

In addition to owners and general contractors providing adequate protection for their workers, Labor Law § 241 (6) requires compliance with the safety rules and regulations promulgated by the Commissioner of the Labor Department and found in the Industrial Code (*see* ***Rizzuto v L.A. Wenger Constr. Co***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*). Thus, to sustain a cause of action under Labor Law § 241 (6), a plaintiff must allege a breach of an Industrial Code (12 NYCRR) regulation which sets forth specific safety standards applicable to the circumstances of the accident (*see* ***Ross v Curtis–Palmer Hydro–Elec. Co.***, *supra*; ***Keener v Cinalta Constr. Corp.***, 146 AD3d 867, 45 NYS3d 179 [2d Dept 2017]). A violation of such a regulation "by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable" (***Fusca v A & S Constr., LLC***, 84 AD3d 1155, 924 NYS2d 463 [2d Dept 2011]; *see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*).

Here, plaintiff's Labor Law § 241 (6) claim is premised upon violations of 12 NYCRR 23-1.5, 23-1.7(a)(1) and (2) and 23-1.10 (b). The latter regulation, 12 NYCRR 1.10(b), applies to electrical and pneumatic hand tools, and provides:

> (1) Power shut-off requirements. Electric and pneumatic hand tools shall be disconnected from power sources and the pressure in hose lines shall be released before any adjustments or repairs are made except for the replacement of bits in electric drills. Before disconnecting any air hose, the air shall be shut off. Every electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator.

This regulation sets forth a specific standard of conduct as it requires the air to be shut off before disconnecting electric and pneumatic hand tools from any air hose. The regulation is also applicable to the facts, as the "totality of § 23-1.10 implies that everything be shut down at once; i.e., when the power is off, the worker is safe because the tool has stopped operating" (***Hage v State***, 38 Misc 3d 1214[A], 966 NYS2d 346 [Ct Cl 2013]). Here, the testimony raises an issue of fact as to whether the air compressor was shut off and the pneumatic nail gun was disconnected from it. Therefore, as one of the Industrial Code regulations cited by plaintiff is both sufficiently specific and applicable, plaintiff's Labor Labor Law § 241 (6) cause of action remains viable. Because defendants have failed to meet their prima facie burden on this issue, it is not necessary to examine whether triable issues of fact were raised in opposition (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Plaintiff's testimony that he worked solely under the direction of Daniel Gutierrez or one of the other Gutierrez Inc. employees, and that the tools and equipment used to perform the work were supplied by his employer, establishes that the Farrell Defendants did not have the authority to supervise or control the injury-producing work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Lopez v Edge 112212, LLC***, 150 AD3d 1214, 56 NYS3d 187 [2d Dept 2017]; ***Ortega v Puccia***, 57 AD3df 54, 866 NYS2d 323 [2d Dept 2008]). Consequently, the Farrell Defendants cannot be held liable under Labor Law § 200 or for common-law negligence and, thus, have established their entitlement to summary judgment dismissing these claims.

Turning to the portion of the Farrell Defendants' motion seeking summary judgment on the third-party claim for contractual indemnification, since no finding has yet been made with respect to the parties' fault, if any, the motion is premature (*see* ***Erickson v Cross Ready Mix, Inc.***, 75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]). Moreover, Gutierrez Inc. argues that plaintiff's injury resulted from an unanticipated and spontaneous firing of the nail gun, and did not "result[] from acts, omissions, breach or default" as contemplated by the explicit language of the indemnification provision. Therefore, summary judgment must be denied. The argument in reply by the Farrell Defendants that Daniel Gutierrez identified the contract and testified that he attempted to procure insurance pursuant to its terms does not persuade the court at this juncture to grant the relief sought.

Dated: 5/23/19

THOMAS F. WHELAN, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION