

Reyes v Sligo Constr. Corp.

2019 NY Slip Op 34861(U)

September 25, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 15-600833

Judge: David T. Reilly

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SHORT FORM ORDER

INDEX No. 15-600833
CAL. No. 18-01253OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 11-14-18 (007 & 009)
MOTION DATE 11-21-18 (008)
MOTION DATE 01-30-19 (010)
ADJ. DATE 02-13-19
Mot. Seq. # 007 - MotD # 009 - MG
008 - MotD # 010 - MD

-----X
MIGUEL REYES,

Plaintiff,

- against -

SLIGO CONSTRUCTION CORP. and
EQUITY TRUST COMPANY, CUSTODIAN
FBO PAUL JOSEPH DAVEY, IRA,

Defendants.

DELL & DEAN, PLLC
Attorney for Plaintiff
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Garden City, New York 11530

WILSON, ELSNER, MOSKOWITZ,
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150 East 42nd Street
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-----X
SLIGO CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

BIG MOOSE BUILDERS, INC.,

Third-Party Defendant.

GALLO VITUCCI KLAR, LLP
Attorney for Defendant Equity Trust
100 Crossways Park West, Suite 305
Woodbury, New York 11797

CONGDON, FLAHERTY, O'CALLAGHAN,
REID, DONLON, TRAVIS & FISHLINGER
Attorney for Third-Party Defendant Big Moose
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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motions/ Order to Show Cause and supporting papers dated October 15, 2018, October 18, 2018, and October 19, 2018 ; Notice of Cross Motion and supporting papers dated January 16, 2019 ; Answering Affidavits and supporting papers dated November 20, 2018, November 21, 2018, January 16, 2019, and January 23, 2019 ; Replying Affidavits and supporting papers dated November

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26, 2018, November 27, 2018, February 8, 2019; Other Memoranda of Law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (007) by defendant/third-party defendant Big Moose Builders, Inc., the motion (008) by defendant Equity Trust Company, the motion (009) by defendant/third-party plaintiff Sligo Construction Corp., and the cross motion (010) by plaintiff Miguel Reyes are consolidated for the purpose this determination; and it is further

ORDERED that the motion (007) by defendant/third-party defendant Big Moose Builders, Inc., for, *inter alia*, summary judgment dismissing the third-party complaint and cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion (008) by defendant Equity Trust Company for, *inter alia*, summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion (009) by defendant/third-party plaintiff Sligo Construction Corp. for, *inter alia*, summary judgment dismissing the complaint and cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the cross motion (010) by plaintiff Miguel Reyes for partial summary judgment in his favor on the issue of liability is denied.

Plaintiff Miguel Reyes commenced this action to recover damages for injuries he allegedly sustained on February 10, 2012, while working on a project to renovate a single-family home located at 40 Sugar Maple Road, Levittown, New York. As gleaned from the parties varying accounts of the incident, the accident allegedly occurred when wooden debris produced from the demolition of the premises, namely a two-by-four, struck plaintiff in the face and rendered him unconscious. The premises was owned by defendant Equity Trust Company (“Equity Trust”), as custodian for the benefit of the Paul Davey IRA. Equity Trust retained defendant/third-party plaintiff Sligo Construction Corp. (“Sligo”), as the project’s general contractor. Sligo hired plaintiff’s employer, third-party defendant Big Moose Builders, Inc. (“Big Moose”), to perform demolition and framing services for the project. By way of his bill of particulars, plaintiff alleges causes of action against defendants based on common law negligence, and violations of Labor Law §§ 200, 240 (1), and 241 (6). Defendants joined issue denying plaintiff’s claims, and Equity Trust asserted cross claims against Sligo. Thereafter, Sligo commenced a third-party action against Big Moose, which asserted cross claims against Equity Trust. The note of issue was filed on June 22, 2018.

Big Moose now moves for summary judgment dismissing the third-party complaint against it on the ground that the underlying claims asserted against Sligo are without merit, and that dismissal of those claims requires the dismissal of the third-party complaint. More specifically, Big Moose argues that plaintiff’s Labor Law § 240 (1) claim against Sligo must be dismissed under all of the varying versions of the accident, because in each of those versions of the accident the height between plaintiff and falling object was either *de minimis*, or plaintiff was struck by an object that — having been purposely dropped — did not require hoisting or securing for the purposes of the undertaking. Big Moose further asserts that plaintiff’s claims under Labor Law §§ 241 (6) and 200 should be dismissed against Sligo, as plaintiff failed to assert the violation of any specific applicable sections of the Industrial Code, and Sligo only possessed general

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supervisory authority over plaintiff's work. Although Equity Trust partially opposes Big Moose's motion, it now moves, on similar grounds, for dismissal of the complaint and cross claims against it. Equity Trust also seeks conditional summary judgment on its contribution, indemnification, and breach of contract cross claims against Sligo.

By way of a separate motion, Sligo moves for summary judgment dismissing the complaint and all cross claims against it on the basis plaintiff failed to assert viable claims under either Labor Law §§ 240 (1) and 241 (6), as his accident did not involve any significant elevational risk, and he failed to assert the violation of any specific applicable sections of the Industrial Code. Sligo further contends that it possessed no more than general supervisory authority over plaintiff's work, that none of its employees were present at the worksite on the day of the accident, and that it had no notice of any dangerous premises condition. Sligo partially opposes the motions by Big Moose and Equity Trust. While Sligo concedes that its common law indemnification claim against Big Moose is inactionable, it avers that Big Moose is contractually obligated to indemnify it because plaintiff's claims arose out of Big Moose's work. Sligo also requests that Equity Trust's common law indemnification claim against it be dismissed. Plaintiff opposes the motions by Sligo and Equity Trust for summary judgment dismissing the complaint, arguing that he stated actionable claims under Labor Law §§ 241 (6) and 200. In particular, plaintiff avers that triable issues exist as to how the accident occurred, and whether defendants violated 12 NYCRR 23-1.7 (a) (1), 12 NYCRR 23-3.3 (b) (3), and 12 NYCRR 23-3.3 (c) of the Industrial Code.

Plaintiff cross-moves for partial summary judgment in his favor on the issue of liability with respect to his Labor Law §§ 241 (6) and 200 claims. Specifically, plaintiff argues that defendants' failure to provide him a hard hat in violation 12 NYCRR 23-1.8 (c) (1) of the Industrial Code was the proximate cause of his injuries, and that Sligo, which possessed the authority to control his work, failed to prevent the unsafe demolition practices which resulted in his accident. Equity Trust and Sligo both oppose plaintiff's motion on the grounds that it was untimely, that plaintiff has abandoned almost all of the claims alleging violations of various sections of the Industrial Code, and that plaintiff failed to establish that 12 NYCRR 23-1.8 (c) (1), which requires the provision of safety hats under certain circumstances, is applicable to the facts of this case. Equity Trust and Sligo further assert that plaintiff has abandoned his Labor Law § 200 claim against Equity Trust, and that Sligo, which possessed no more than mere general supervisory authority over plaintiff's work, was not even present at the worksite on the day of the accident.

Initially, the Court notes that it will consider plaintiff's untimely motion where, as here, it was made on grounds nearly identical to those asserted in defendants' timely motions and contain issues already before the court (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]; *Whitehead v City of New York*, 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010]). However, as plaintiff failed to address the branches of defendants' motions seeking dismissal of his Labor Law § 200 claim against Equity Trust, and all but his Labor Law § 241 (6) claims predicated on alleged violations of Industrial Code provisions 12 NYCRR 23-1.7 (a) (1), 12 NYCRR 23-1.8 (c) (1), 12 NYCRR 23-3.3 (b) (3), and 12 NYCRR 23-3.3 (c), plaintiff is deemed to have abandoned those claims (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68

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AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]), and the unopposed branches of defendants' motions seeking their dismissal are granted.

As to the remainder of plaintiff's Labor Law § 241 (6) claim, the statute "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, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; see *Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (see *Rizzuto v L.A. Wenger Contr. Co.*, *supra*; *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (see *Forschner v Jucca Co.*, 60 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Here, defendants demonstrated that 12 NYCRR 23-1.7 (a) (1), which requires overhead protection for areas normally exposed to falling material or objects, is inapplicable where, as in this case, plaintiff testified that plywood and sub-flooring was still in place above his head in the kitchen where he was working at the time of the accident (see *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 NYS2d 593 [2d Dept 2013]; *Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 832 NYS2d 93 [2d Dept 2007]). Even assuming, arguendo, that the accident occurred on the outside of the premises, the Court still determines that the exterior of the premises could not be regarded as a place normally exposed to falling objects given the fact that demolition had only been underway on the first floor, the roof of premises was still intact, and the object which allegedly struck plaintiff was previously affixed to the building before it was intentionally dislodged and dropped (see *Djuric v City of New York*, 172 AD3d 456, 100 NYS3d 17 [2d Dept 2019]; *Fried v Always Green, LLC*, 77 AD3d 788, 910 NYS2d 452 [2d Dept 2010]). The Court concludes, for similar reasons, that 12 NYCRR 23-1.8 (c)(1), which requires that workers be provided with hard hats when working in an area "where there is a danger of being struck by falling objects or materials," is inapplicable under the circumstances of this case. Whether the accident is construed to have happened when a two-by-four struck plaintiff after it became dislodged from a nearby wall, or whether it ricocheted from the ground after the window fell, or whether plaintiff was struck by the window and the two-by-four after a co-worker used the piece of wood to push the window out, 12 NYCRR 23-1.8 (c) (1) is inapplicable, because the object was not located above plaintiff's head and it struck him in the forehead and face, rather than the top of his head where hard hats are meant to protect (see *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 43 NYS3d 483 [2d Dept 2016]; *Quishpi v 80 WEA Owner, LLC*, 145 AD3d 521, 43 NYS3d 319 [1st Dept 2016]; *Sikorski v Burroughs Drive Apts., Inc.*, 306 AD2d 844, 762 NYS2d 718 [4th Dept 2003]).

Defendants also demonstrated the inapplicability of 12 NYCRR 23-3.3 (b) (3) and 12 NYCRR 23-3.3 (c), which require continuing inspections to detect falling hazards related to weakened walls, structures, or other loosened material created by the progress of the work. In particular, defendants demonstrated that the accident arose from the intentional conduct of the demolition work by plaintiff and

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co-workers, rather than from structural instability caused by the progress of the demolition (*see Card v Cornell Univ.*, 117 AD3d 1225, 985 NYS2d 740 [3d Dept 2014]; *Garcia v Market Assoc.*, 123 AD3d 661, 998 NYS2d 193 [2d Dept 2014]; *Maldonado v AMMM Props. Co.*, 107 AD3d 954, 955, 968 NYS2d 163 [2d Dept 2013]; *Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 942 NYS2d 533 [1st Dept 2012]; *Smith v New York City Hous. Auth.*, 71 AD3d 985, 897 NYS2d 232 [2d Dept 2010]; *compare Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 103 NYS3d 523 [2d Dept 2019]). Plaintiff, who failed to show that he was exposed to an overhead falling hazard, or that the accident arose from structural instability caused by the progress of the demolition work rather than the immediate conduct of himself and his co-workers, failed to raise any significant triable issues in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Therefore, the branches of defendants' motions seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claims against Sligo and Equity Trust are granted.

As to plaintiff's Labor Law § 200 claim against Sligo, that section of the statute 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work in question (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816; *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 262 NYS2d 476 [1965]). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed (*Ortega v Puccia, supra* at 62). The mere general supervisory authority to oversee the progress of the work and inspect its quality is insufficient to impose liability (*see People v Ultimate Homes, Inc.*, 166 AD3d 667, 670, 87 NYS3d 189 [2d Dept 2018], quoting *Ortega v Puccia, supra* at 62; *see also Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 984 NYS2d 27 [1st Dept 2014]). By contrast, when a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 only if it created the dangerous condition or had actual or constructive notice of its existence (*see Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]).

Although named as the project's general contractor, Sligo demonstrated its prima facie entitlement to dismissal of plaintiff's Labor Law § 200 claim against it by submitting uncontroverted evidence that it neither exercised actual control over plaintiff's work nor possessed any more than mere general supervisory authority to do so, and that it lacked any notice of the alleged dangerous condition (*see Turgeon v Vassar Coll.*, 172 AD3d 1134, 100 NYS3d 374 [2d Dept 2019]; *Rodriguez v Trades Constr. Servs. Corp.*, 121 AD3d 962, 997 NYS2d 78 [2d Dept 2014]). Significantly, plaintiff, as well as his co-workers, testified the means and manner of his work were exclusively controlled by his employer, Big Moose. Sligo also submitted an affidavit by its owner, Paul Davey, who affirmed that Big Moose,

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like all the other subcontractors hired for the project, was responsible for controlling the work of its own personnel, and that none of Sligo's workers, including himself, were present at the worksite on the day of the alleged accident. Plaintiff, whose opposition consists of conclusory assertions regarding the supervisory authority of Big Moose's president, failed to raise a triable issue sufficient to overcome defendants' prima facie showing (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v New York*, *supra*). Therefore, the branch of defendants' motions seeking summary judgment dismissing plaintiff's Labor Law § 200 claims against Sligo is granted.

As to the branches of defendants' motions seeking dismissal of plaintiff's Labor Law § 240 claims against Equity Trust and Sligo, the protections afforded under the statute neither encompasses any and all perils connected in some tangential way with the effects of gravity (see *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97, 7 NYS3d 263 [2015]), nor guard against routine work place risks found at construction sites (see *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 895 NYS2d 279 [2009]). Rather, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for [because] of a difference between the elevation level where the worker is positioned and the higher level of the [object] being hoisted or secured" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407, 795 NYS2d 511 [2005]). "Liability may, therefore, be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d at 97, quoting *Runner v New York Stock Exch., Inc.*, *supra*). In determining whether an elevation differential is physically significant or de minimis, we must consider not only the elevational differential itself, but also "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*Runner v New York Stock Exch., Inc.*, *supra* at 605; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 935 NYS2d 551 [2011]). However, without a significant elevation differential, Labor Law § 240 (1) does not apply, even if the injury is caused by the application of gravity on an object (see *Oakes v Wal-Mart Real Estate Bus. Trust*, 99 AD3d 31, 36, 948 NYS2d 748 [3d Dept 2012]).

Moreover, in cases involving falling objects, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that at the time the object fell it was "being hoisted or secured" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268, 727 NYS2d 37 [2001]) or "required securing for the purposes of the undertaking" (*Novak v Del Savio*, 64 AD3d 636, 638, 883 NYS2d 558 [2d Dept 2009]). Thus, Labor Law § 240 (1) does not apply in falling objects cases where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected (see *Roberts v GE*, 97 NY2d 737, 742 NYS2d 188 [2002]; *Narducci v Manhasset Bay Assocs.*, *supra* at 268), or where the object in question was deliberately dropped (see *Solano v City of New York*, 77 AD3d 571, 909 NYS2d 357 [1st Dept 2010]; *Harinarain v Walker*, 73 AD3d 701, 702, 900 NYS2d 364 [2d Dept 2010]).

Notwithstanding the various versions of the accident proffered by plaintiff, the evidence adduced by defendants established, prima facie, that the accident does not fall within the purview of Labor Law § 240 (1), as the object which struck plaintiff was not being hoisted or secured at the time of the accident, and did not require securing or hoisting for the purposes of the undertaking (see *Roberts v GE*, 97 NY2d 737, 742 NYS2d 188 [2002]; *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268, 727 NYS2d 37

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[2001]; *Vatavuk v Genting N.Y., LLC*, 142 AD3d 989, 37 NYS3d 445 [2d Dept 2016]). Defendants further demonstrated that the elevational differential between plaintiff and the object which struck him, be it the two-by-four, the window, or both, was so de minimis that it cannot be said that the accident was caused by the existence of the type of significant elevational differential proscribed by the statute (see *Kuhn v Giovanniello*, 145 AD3d 1457, 43 NYS3d 628 [4th Dept 2016]; *Harinarain v Walker*, 73 AD3d 701, 702, 900 NYS2d 364 [2d Dept 2010]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 841 NYS2d 249 [1st Dept 2007]). Significantly, neither plaintiff nor his co-workers testified that the window or two-by-four in question was being hoisted or secured at the time of the accident, or required securing for the purpose of the undertaking. Indeed, Big Moose's president, Stephen Musso, testified that the window — which weighed between 100 and 150 pounds — was less than three feet above the floor of the premises, and that it was his understanding that the accident occurred when a piece of the two-by-four being used by another worker to pry the window out of its frame broke and struck plaintiff in the face. Plaintiff testified that he was bending down picking up debris from the floor of the premises when the two-by-four suddenly struck him in the face, rendering him unconscious. Plaintiff also gave an account of the accident where, after removing nails from the two-by-four, it dislodged from the wall because of vibrations caused by ongoing work, and struck him in the head. Furthermore, the inconsistent testimony of plaintiff's father and brother that the accident occurred when a window was thrown from the second floor and struck plaintiff as he was walking outside stretches the bounds of credulity, as neither of them witnessed the accident and their testimony contradicts plaintiff's own recollection of the accident. However, even accepting this version of the accident, where, as alleged by both men, the window was deliberately thrown to the ground, the accident would not give rise to an actionable Labor Law § 240 (1) claim (see *Solano v City of New York*, 77 AD3d 571, 909 NYS2d 357 [1st Dept 2010]; *Harinarain v Walker*, *supra*; see also *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 616 NYS2d 900 [1994]).

Plaintiff failed to raise a significant triable issue sufficient to defeat defendants' prima facie showing in this regard (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v New York*, *supra*). As discussed above, defendants demonstrated their entitlement to summary judgment under all of the various theories presented as to how accident occurred. Further, plaintiff failed to raise an issue as to whether the two-by-four or the window in question required hoisting or securing, or whether a significant elevation differential can be said to exist because of the weight of either object (see *Runner v New York Stock Exch., Inc.*, *supra*; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, *supra*; *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16,43 NYS3d 507 [2d Dept 2016]; *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335, 992 NYS2d 345 [2d Dept 2014]). The Court disregarded unauthenticated and unverified building records and photographs submitted by plaintiff which purportedly establish that the premises had a second floor at the time of the accident, as such evidence was not submitted in admissible form, and is speculative in light of testimony by the parties that no work had commenced on any existing or projected second floor of the premises (see *JP Morgan Chase Bank, N.A. v RADS Group, Inc.*, 88 AD3d 766, 930 NYS2d 899 [2d Dept 2011]; *Burns v City of Poughkeepsie*, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]; *Stahl v Stralberg*, 287 AD2d 613, 731 NYS2d 749 [2d Dept 2001]). Accordingly, the branches of defendants' motions seeking summary judgment dismissing the Labor Law § 240 (1) claims against Equity Trust and Sligo are granted.

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Having dismissed all of plaintiff's claims against Equity Trust and Sligo, including his claims under Labor Law §§ 241 (6) and 200, the Court denies, as moot, plaintiff's cross motion for partial summary judgment in his favor on the issue of liability.

Turning to the parties' cross and third-party claims for contribution, indemnification, and breach of contract, the Court grants the unopposed branch of Big Moose's motion for summary judgment dismissing the common law indemnification and contribution claims against it, as it undisputed that plaintiff did not suffer a grave injury as a result of the accident (*see Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 805 NYS2d 299 [2005])[Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a grave injury]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 [2d Dept 2018]). Big Moose, failed, however, to demonstrate its entitlement to dismissal of Sligo's contractual indemnification claim against it. The indemnification provision of the agreement between Sligo and Big Moose, provides, in pertinent part, as follows:

To the fullest extent allowed by law, General Contractor shall indemnify and hold (Client) harmless from any and all liability, costs, attorney's fees, and expenses from any claims or causes of action of whatever nature arising while on or near the project, or while performing contract related work, including those claims relating to its representatives, Subcontractors, suppliers or employee . . . relating to any action or failure to act by the Subcontractors, its representatives, its subcontractors, suppliers, or employees, whether or not it is alleged that the (Client), in any way contributed to the alleged wrongdoing or is liable due to a non-delegable duty.

Contractual indemnification claims against an employer for injuries sustained by its employees are not forbidden by the Worker's Compensation Law where such claims are based upon provisions entered into prior to the accident by which the employer expressly agrees to indemnification (*see Rodrigues v N&S Blg. Contrs. Inc.*, 5 NY3d 427, 805 NYS2d 299 [2005]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1998]). "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (*see George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]).

Although the primary action has been dismissed against Sligo, where, as in this case, the agreement between Big Moose and Sligo contains a broad indemnity agreement purporting to hold Sligo harmless from "any and all liability, costs, attorney's fees, and expenses from any claims [arising out of

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its work],” Sligo is still entitled to the costs, including counsel fees, it incurred in the defense of the primary action (see *McCleary v City of Glens Falls*, 32 AD3d 605, 819 NYS2d 607 [3d Dept 2006]; *Klock v Grosodonia*, 251 AD2d 1050, 674 NYS2d 187 [4th Dept 1998]; *Perchinsky v State*, 232 AD2d 34, 660 NYS2d 177 [3d Dept 1997]). Therefore, the branch of Big Moose’s motion seeking dismissal of the third-party contractual indemnification claim against it is denied. Conversely, as the evidence discussed above establishes that the accident arose out of Big Moose’s work and Sligo played no role in causing the accident, the Court grants the branch of Sligo’s motion seeking conditional summary judgment on its third-party contractual indemnification claim against Big Moose (see *Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014]; *Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; *Jamindar v Uniondale Union Free School Dist.*, *supra*).

Inasmuch as Equity Trust’s agreement with Sligo contained an identical provision requiring that Sligo hold Equity Trust “harmless from any and all liability, costs, attorney’s fees, and expenses from any claims” arising out of Sligo’s work or the work of its subcontractors, Equity is likewise entitled to conditional summary judgment on its contractual indemnification cross claim against Sligo (see *Bermejo v New York City Health & Hosps. Corp.*, *supra*; *McCleary v City of Glens Falls*, *supra*; *Klock v Grosodonia*, *supra*). Furthermore, as Sligo’s president admitted that Sligo failed to comply with the provision in its general contractor agreement requiring it to procure insurance naming Equity Trust as an additional insured for the purposes of the subject renovation project, the Court further grants the unopposed branch of its motion seeking summary judgment on its breach of contract claim against Sligo (*Kinney v Lisk Co.*, 76 NY2d 215, 218, 557 NYS2d 283 [1990]; *Calvitti v 40 Garden, LLC*, 155 AD3d 1399, 64 NYS3d 776 [3d Dept 2017]).

Dated: Sept 25, 2019



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION