Bellomo v Tishman Constr. Corp.
2020 NY Slip Op 31455(U)
May 15, 2020
Supreme Court, New York County
Docket Number: 150923/2016
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42
--x
GUY BELLOMO,

Plaintiff,

-against-
TISHMAN CONSTRUCTION CORPORATION,

Defendant.
.
--x
TISHMAN INTERIORS CORPORATION, sued incorrectly herein as TISHMAN CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

POTENZA ELECTRICAL CORPORATION and HARLEYSVILLE PREFERRED INSURANCE COMPANY,

Third-Party Defendants.
--x

DECISION and ORDER

Index No.: 150923/2016

MOT SEQ 005, 007, 008, 009

NANCY M. BANNON, J.:

Motion sequence numbers 005, 007, 008, and 009, are consolidated for disposition.

In motion sequence 005, plaintiff Guy Bellomo (plaintiff), moves, pursuant to CPLR 3212, for an order granting summary judgment as to his allegation that Labor Law § 240 (1) was violated by Tishman Interiors Corporation s/i/h/a Tishman Construction Corporation (Tishman).

In motion sequence 007, Tishman moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

In motion sequence number 008, Potenza Electrical Corporation (Potenza), moves, pursuant to 3212, dismissing plaintiff's complaint and dismissing Tishman's third-party

complaint. Tishman cross-moves, pursuant to CPLR 3212, for summary judgment holding Potenza contractually liable to indemnify, defend, and hold harmless Tishman.

In motion sequence number 009, Harleysville Preferred Insurance Company (Harleysville) moves, pursuant to CPLR 2221 (e), for leave to renew its motion for summary judgment which was denied by this court's order dated September 30, 2019. Upon renewal, Harleysville moves, pursuant to CPLR 3212, to dismiss the third-party complaint and declaring, pursuant to CPLR 3001, that Tishman is not entitled to additional insured coverage and that Harleysville has no obligation to defend or indemnify Tishman.

FACTUAL ALLEGATIONS

Plaintiff Guy Bellomo's EBT

On August 19, 2014, plaintiff was working for Potenza at a project located at Carnegie Hall in New York City. When plaintiff arrived at the site, he met with Brenda Rodriguez (Rodriguez), Potenza's forewoman, as well as a co-worker named "Carlos." Rodriguez proceeded to show the workers around the building. Carlos told plaintiff that they were going to be installing wire in a conduit on the first floor.

Plaintiff testified that at the time of his incident, he was pulling electrical wire through installed conduit. Plaintiff and Carlos retrieved a ladder from the equipment room. He believes that the ladder was aluminum, six feet high, and belonged to Potenza. Plaintiff inspected the ladder before the accident and it appeared to be sturdy and in a good condition.

Plaintiff testified that his accident took place on the first occasion in which he was ascending the ladder. Plaintiff recalls that he had set up the ladder on a flat surface. Plaintiff had reached the third step at the time of his accident. When plaintiff proceeded to pull a wire

while on the ladder, the ladder shifted and he fell down onto nearby steps. He testified that the manner in which he was pulling the wire did not contribute to his fall. Plaintiff maintains that he did not receive feedback from anyone that the ladder was not correctly set up. Plaintiff testified that there were no witnesses to his accident and that only Carlos was located in the area.

Prior to his accident, plaintiff recalls speaking to a site safety manager from Tishman. However, no one from Tishman directed him as to how to perform his work. Plaintiff testified that only Potenza directed his work and that no one else exercised control. Plaintiff did not think it was necessary to have anyone hold the ladder. He maintains that he was standing sideways on the ladder with both feet on the same rung and that the wire which he was pulling was located to his left.

Plaintiff testified that following his accident, Carlos helped him stand up. Plaintiff testified that as a result of the accident, he experienced pain in his back, neck, arms, and legs. He proceeded to the hospital.

Plaintiff's affidavit

Plaintiff submits an affidavit dated August 14, 2019. Plaintiff states that before he climbed the ladder, the side braces were locked in place and the ladder was fully extended. As he was pulling the wire with his left hand, both of his feet were on the third step of the ladder, while his right hand was placed on the ladder for additional stability. As he was pulling the wire, the ladder shifted and fell, causing plaintiff to fall. Plaintiff states that there was nothing improper in the manner in which he placed the ladder and it was the safest way possible. He

states that the ladder would have been safer if his foreperson assigned someone to hold the ladder while he was performing the work.

Lawrence Sokol's EBT

Lawrence Sokol (Sokol) testified that he works for Tishman as an architectural superintendent at the premises at which plaintiff was working. He was at the site every day. Sokol maintains that his direction and supervision of the trades was for scheduling and manpower. He managed the architectural finishes by directing trades for quality control. Sokol testified that Tishman did not perform any physical work at the site because it was the construction manager, but that it managed the project and scheduled the trades.

Sokol testified that he was not personally involved with the hiring of any of the trades. Certified Site Safety was the safety company hired by Tishman and a worker named James O'Connor (O'Connor) was on-site full time as the site safety manager. Sokol testified that Tishman workers were trained to report any unsafe conditions and correct them immediately, that Tishman had the authority to stop the work, and that Tishman held weekly safety meetings. Sokol testified that if he saw an unsafe ladder, he would have told the laborers to remove it.

Sokol testified that Tishman's daily construction reports state that Potenza was listed as a subcontractor and that it was in charge of pulling security wires. Sokol did not have any direct interactions with Potenza workers or have concerns from Potenza workers voiced to him. He did not witness plaintiff's accident, nor speak with plaintiff.

At his deposition, Sokol reviewed several documents. Sokol reviewed Tishman's "Supervisor's Accident Investigation Report" which he drafted. While drafting the report, Sokol

did not speak with plaintiff and does not recall if he spoke with anyone else. The report states that there were no witness to plaintiff's accident. The description of the accident states "[e]mployee was pulling cable from conduit while standing on an 'A frame' stepladder. Ladder gave way causing employee to fall to the floor and stepped below." Sokol's EBT, at 76. The cause of the alleged incident was listed as an improper setup or use of a ladder. Sokol did not recall where he received such information. He did not see the subject ladder or plaintiff utilizing it before the accident. Sokol testified that if he saw someone improperly using a ladder, he would stop the worker.

Sokol reviewed the accident/investigation report from the site safety manager which was signed by O'Connor. Sokol did not know if plaintiff spoke with O'Connor and did not know how O'Connor reached the conclusion that the improper setup of the ladder was the cause of the accident. Sokol also reviewed a "Certified Site Safety Report" which states that it was completed by Rodriguez. He testified that the document was also signed by O'Connor. The document states that there were no witnesses to plaintiff's accident. In the box entitled "corrective action" the report states "retrain employee or proper setup of ladder." Id. at 84. Sokol also reviewed a "C2 report" which was signed by Rodriguez.

Sokol did not have any reason to believe that the legs on the ladder were not locked because he did not witness the accident. Sokol maintains that he did not recall speaking with Rodriguez after the accident, although it may have been possible. At his deposition, Sokol also reviewed pictures of a ladder, but he did not know when they were taken. Sokol never saw the ladder other than in a picture and does not recall any complaints about ladders at the site. Sokol assumes that the ladder was structurally sound and that he did not know how plaintiff

fell. Sokol testified that workers were not to stand on the ladder and twist their upper body while pulling the wire at an angle. He testified that nothing in the report indicates an improper wire pull.

Michael Tarantino's EBT

Michael Tarantino (Tarantino), the owner of Potenza, testified that Potenza conducts work including HVAC control, security and fire alarm systems, and low voltage wiring. Tarantino recalls meeting plaintiff at the job and seeing him after his accident took place. He testified that plaintiff had a foreperson at the job from Potenza. He recalls that the work entailed installing wires and that plaintiff was working with Rodriguez. Tarantino testified that Rodriguez told him that someone had gotten hurt at the site.

Tarantino testified that he met with plaintiff who told him that he fell off of a ladder and struck his left arm on a stairway banister, however plaintiff did not say how he specifically fell off of the ladder. Tarantino maintains that Rodriguez told him that plaintiff had the ladder set up incorrectly and that he was pulling the wire sideways. Tarantino had not received any criticism about the ladder and had not inspected it. He believes that the accident was plaintiff's sole fault.

Tarantino testified that Tim Cusack, a Potenza employee, instructed Rodriguez to report to Carnegie Hall on the date of the accident as well as where to go. Tarantino maintains that according to Tishman's supervisor accident investigation report, the ladder gave way, causing plaintiff to fall. The report states that there were no witnesses.

Tarantino also reviewed the "Certified Site Safety" report which was completed by Rodriguez. This report states that while plaintiff was pulling wire from a conduit, the ladder

gave way causing plaintiff to fall. Tarantino testified that the report states that the cause of the accident was the improper set up of ladder. Rodriguez included in the repot that there were no witnesses. He testified that although Rodriguez did not witness the accident, she indicated that there was an improper set up of the subject ladder.

Tarantino also reviewed a “C-2 form” which is an employer's report of work-related injury or illness. Tarantino testified that the form states that plaintiff’s supervisor did not witness the accident. He testified that the description states that the ladder gave way causing employee to fall on the steps below. Tarantino testified that the foreman’s incident report does not say anything about an improper set up of the ladder. Tarantino clarified that Rodriguez did not tell him what caused the ladder to tip. Tarantino’s EBT, at 158.

DISCUSSION

Motion sequence 005

Plaintiff contends that his motion for summary judgment as to Labor Law § 240 (1) must be granted. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Labor Law § 240 (1) provides in part:

> "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, 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, hangers, 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."

The Appellate Division, First Department, has held that "[t]he failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc*., 66 AD3d 233, 235 (1st Dept 2009) (internal quotation marks and citations omitted). The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, 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." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001); *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

Plaintiff contends that when an unsecured ladder shifts, moves, or slips out from under a worker, and causes the worker to fall, a prima facie violation of Labor Law § 240 (1) is established. Plaintiff argues that the unsecured ladder which he was utilizing failed to provide proper protection for his task of pulling a wire. Plaintiff argues that Tishman, as the contractor responsible for on-site safety, is also responsible for Labor Law violations.

Plaintiff argues that the court should reject the testimony of Tarantino regarding a conversation he allegedly had with Rodriguez about the set-up of the ladder. Plaintiff contends that the credible evidence demonstrates that he fell from the ladder while he was pulling wire and that he did not improperly set up the ladder. Plaintiff maintains that Tarantino's testimony

is inconsistent with Potenza's report which was filled out contemporaneously with the accident. Plaintiff argues that there is nothing in Potenza's reports which references that the accident was observed by any witnesses.

In opposition, Potenza contends that based upon plaintiff's testimony, plaintiff has failed to establish that it was afforded an inadequate or defective safety device. Potenza argues that plaintiff has failed to establish that the ladder was the proximate cause of the accident or that plaintiff's stance on the ladder may have contributed to his fall. Potenza also contends that because plaintiff was the sole witness to his injury, summary judgment is not appropriate. Potenza argues that plaintiff's account of the accident is further questioned by Rodriguez who allegedly believed that plaintiff incorrectly set up the ladder.

Tishman also opposes plaintiff's motion and contends that plaintiff fails to demonstrate that there was a violation of Labor Law § 240 (1). Tishman argues that prior to his accident, plaintiff testified that he inspected the ladder and that it appeared to be in good condition. Tishman contends that plaintiff testified that he had no problems locking the ladder, that the ladder had proper footing, and that he does not know what caused the ladder to fall. Tishman also contends that plaintiff testified that he did not observe any defects with the ladder.

Tishman contends that Tarantino, the owner of Potenza, testified that Rodriguez, the acting foreperson for Potenza, had told him that plaintiff had the ladder set up incorrectly and that he was pulling the wire sideways. Tishman argues that this testimony is consistent with the reports filled out contemporaneously with the accident. Tishman also contends that plaintiff was the only witness to the accident.

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason.'" *Quattrocchi v F.J. Sciame Constr. Corp*., 44 AD3d 377, 381 (1st Dept 2007) (citation omitted), *affd* 11 NY3d 757 (2008). Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials." *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 (2d Dept 2000); *see also Picano v Rockefeller Ctr. N., Inc*., 68 AD3d 425, 425 (1st Dept 2009) (holding that Labor Law § 240 (1) was found to be violated when no one was holding the ladder from which plaintiff fell when it suddenly shuffled or wobbled, and that no safety devices were provided to prevent the ladder from slipping); *see also Hart v Turner Constr. Co*., 30 AD3d 213, 214 (1st Dept 2006) (holding that Labor Law § 240 (1) is violated when a ladder shifts, and causes a worker to fall).

Here, plaintiff has met his burden to demonstrate that defendants violated Labor Law § 240 (1). Plaintiff testified that the ladder shifted, causing him to fall to the ground. Furthermore, plaintiff has demonstrated that the ladder did not give him proper protection as required by the statute.

Defendants contend that plaintiff was the sole proximate cause of his accident. The Court of Appeals has held that "[w]here a plaintiff' actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) does not attach." *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 (2006) (internal quotations marks and citation omitted). In addition, "[w]here credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate." *Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 (1st Dept 2012).

Defendants argue that Rodriquez told Tarantino that plaintiff had the ladder set up incorrectly and that plaintiff was pulling the wire sideways. However, the testimony of Tarantino is inconclusive as he also testified that Rodriguez, who was not deposed, did not tell him what caused the ladder to tip and was not a witness to the accident. Furthermore, the "Certified Site Safety" report which was completed by Rodriguez states that there were no witnesses to plaintiff's accident. Also, the "C-2 form" which is an employer's report of work-related injury/illness, states that Rodriguez did not see the injury occur. Therefore, defendants attempt to argue that plaintiff incorrectly set up the ladder, is based upon speculation which is not supported by the testimony or the reports.

Finally, while defendants contend that plaintiff was the sole witness, the Appellate Division, First Department, has held "[t]hat plaintiff is the sole witness to the accident does not preclude summary judgment in his favor where nothing in the record contradicts his account or raises an issue of fact as to his credibility." *Concepcion v 333 Seventh LLC*, 162 AD3d 493, 494 (1st Dept 2018). Here, plaintiff's testimony is not contradicted, as there were no direct witnesses to his accident and Tarantino's testimony regarding Rodriguez's theory is inconclusive.

Therefore, as plaintiff met his burden and demonstrates that a violation of Labor Law § 240 (1) occurred, and as defendants failed to meet their burden to demonstrate that the statute was not violated, plaintiff's motion for summary judgment pursuant to Labor Law § 240 (1) must be granted.

Motion sequence 007

Tishman moves for summary judgment dismissing plaintiff's complaint. Tishman

first argues that Labor Law § 240 (1) is not applicable because the ladder was constructed, placed, and operated to give proper protection to plaintiff. However, as discussed by the court above in motion sequence 006, the part of plaintiff's motion seeking judgment as against defendants for a violation pursuant to Labor Law § 240 (1) has been granted.

Tishman contends that plaintiff's allegation of a violation of Labor Law § 241 (6) must also be dismissed. Plaintiff alleges violations of Industrial Code sections 23-1.7 (f); 23-1.21 (b) (1); 23-1.21 (b) (4); 23-1.21 (b) (4) (iv); and 23-1.21 (e) (3). However, in plaintiff's affirmation in opposition to this motion, counsel for plaintiff concedes that he is not challenging the part of defendants' motion seeking to dismiss plaintiffs' claims pursuant to Labor Law § 241 (6). Therefore, plaintiff's allegation that Tishman violated Labor Law § 241 (6) must be dismissed.

Tishman argues that plaintiff's allegation that they violated Labor Law § 200 must also be dismissed. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Cruz v Toscano*, 269 AD2d 122, 122 (1st Dept 2000) (internal quotation marks and citations omitted); *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 (1981) (holding "[a]n implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition").

Labor Law § 200 (1) states, in part:

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons . . . ."

Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. In order to find an owner or his agent liable pursuant to Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *See Rizzuto v L.A. Wenger Contr. Co*., 91 NY2d 343, 352 (1998). Moreover, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed." *Hughes v Tishman Constr. Corp*., 40 AD3d 305, 311 (1st Dept 2007).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, rather than the method of plaintiff's work. *See Murphy v Columbia Univ*., 4 AD3d 200, 202 (1st Dept 2004).

Tishman argues that there is no evidence that it exercised supervisory control over plaintiff or that it had input into how plaintiff was to perform his work. Tishman maintains that it did not create a dangerous condition at the site or have actual or constructive notice of any dangerous condition which caused plaintiff to fall. Tishman contends that plaintiff was not an employee of Tishman, nor was he under its control. Tishman argues that plaintiff's accident arose solely by the means and methods which he chose to employ.

In opposition, plaintiff contends that Tishman failed to meet its burden to demonstrate that Labor Law § 200 was violated. Plaintiff maintains that Tishman has not presented any evidence to support its claims that it did not exercise supervisory control for plaintiff's work.

Here, plaintiff fails to demonstrate that Tishman violated Labor Law § 200. Plaintiff testified that no one from Tishman directed him on how to perform his work and that only Potenza instructed him regarding his work. Plaintiff testified that the ladder belonged to Potenza. Furthermore, plaintiff fails to point to any testimony which suggests that Tishman was on notice, either actual or constructive, of any problems with the ladder. Sokol does not recall any complaints about ladders at the site and testified that Tishman's direction and supervision of the trades was limited to scheduling and manpower issues.

Therefore, as Tishman demonstrates that it did not exercise supervision over the injury producing work, or that it was on actual or constructive notice that the ladder which plaintiff was utilizing was defective, and as plaintiff fails to demonstrate otherwise, Tishman's motion for summary judgment pursuant to Labor Law § 200 must be granted.

Finally, the court notes that in motion sequence 007, plaintiff filed a cross motion to reargue its motion for summary judgment pursuant to Labor Law § 240 (1) as against Tishman, and to reargue a motion decided by a decision and order dated September 30, 2019. However, after reviewing the e-filing system, the referenced decision and order which plaintiff would like to reargue is for motion sequence 003. Motion sequence 003, is not plaintiff's motion, but is Harleysville's motion for summary judgment dismissing the third-party complaint and declaring that Tishman is not entitled to additional insurance coverage. In any event, as the court has

decided in motion sequence 005 that Tishman violated Labor Law § 240 (1), plaintiff's cross motion is denied as it is now moot.

Motion sequence 008

Potenza moves for summary judgment dismissing Tishman's third-party complaint. Potenza contends that Tishman is not a third-party beneficiary of the agreement between Potenza and Siemens Industry Inc. (Siemens), the general contractor, and that Potenza and Tishman are not in privity of contract.

Potenza contends that it entered into a contract (number 4504516171) with Siemens which is dated July 29, 2014. Potenza maintains that Article 1, subparagraph 1.2 of the contract states:

> "SUBCONTRACTOR shall perform the work as an independent contractor with exclusive control of the manner and means of performing the work as an independent contractor with exclusive control of the manner and means of performing the work in accordance with the requirement of this Subcontract. SUBCONTRACTOR has no authority to act or make any arrangement or representations on behalf of the CONTRACTOR or the Customer and no contractual relationship exists between subcontractor and the Customer. This Subcontract is not intended, and shall not be construed to create, between CONTRACTOR and SUBCONTRACTOR the relationship of principle and agent, joint ventures, co-partners, or any other such relationship, the existence of which is hereby expressly denied."

Bennett Affirmation, ex. I.

Potenza contends that because Tishman and Potenza did not enter into a contract, the third-party complaint should be dismissed. Potenza maintains that while the contract indicates that Tishman is defined as "Customer," Article 1 of the contract specifies that no contractual relationship exists between Potenza and Tishman. Potenza contends that there is no language within the agreement which discusses or clarifies this contradiction. Potenza argues that

although there exists an indemnity provision in the contract, the contract is not intended for the benefit of Tishman, and that any ambiguity should be held against the drafters.

In opposition to Potenza's motion, and in support of its own cross motion for summary judgment holding Potenza contractually liable for indemnification purposes, Tishman contends that Potenza has failed to establish a prima facie showing of entitlement to judgment as a matter of law. Tishman contends that on June 27, 2014, Carnegie Hall Corporation (Carnegie Hal), as owner, and Tishman, as the construction manager, entered into a contract with Siemens to perform installation work at the subject premises. Tishman argues that the contract between Tishman and Siemens required that Siemens indemnify and hold harmless Tishman and Carnegie Hall from and against all claims or cause of action, damages, losses, and expenses arising out of the performance of the work. Tishman contends that clause 8 of that contract required Siemens to obtain insurance coverage for Tishman and Carnegie Hall as additional insureds, and that the insurance rider required Siemens and the subcontractors, such as Potenza, to maintain insurance identifying Tishman and Carnegie Hall as indemnitees covered by insurance policies taken out by Siemens and Potenza.

Tishman argues that on August 5, 2014, Siemens and Potenza entered into subcontract to install the fire alarm and security system at the subject project. Tishman maintains that the contract between Siemens and Potenza identified Tishman as the "Customer" and required Potenza to obtain insurance identified by Tishman in the Tishman-Siemens contract.

Tishman maintains that paragraph 1.4 of the contract states:

> "[p]rior to commencement of the work, SUBCONTRACTOR shall provide, and maintain in full force and effect during the term of this Subcontract, the insurance coverage upon SUBCONTRACTOR's operations hereunder as specified in exhibit E, plus such other insurance coverage as CONTRACTOR may require.

SUBCONTRACTOR shall not be allowed on the Project or to commence the work until the original insurance certificates required by Exhibit E have been furnished to contractor."

Bennett Affirmation, ex. I.

Tishman contends that Article 5 of the contract provides that Tishman was to be included as an additional insured under all insurance policies and coverages under the Siemens-Potenza agreement. Tishman argues that Article 11 of the contract provides that Potenza shall indemnify Tishman as well as their respective agents or subcontracts and that plaintiff's accident triggers Potenza's obligation to defend, indemnify and hold harmless Tishman. Tishman also contends that Potenza's Certificate of Insurance lists Tishman as an additional insured on the policy regarding the above referenced project.

The Court of Appeals has held that "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." *Drzewinski v Atlantic Scaffold & Ladder Co*., 70 NY2d 774, 777 (1987), *quoting Margolin v New York Life Ins, Co*., 32 NY2d 149, 153 (1973); *see also Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 (1st Dept 2005). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 (1st Dept 1999).

Tishman contends that Potenza must provide it with contractual indemnification because it was a third-party beneficiary of the contract between Siemens and Potenza.

"When determining whether a third party is an additional insured under an insurance policy, a court must ascertain the intention of the parties to the policy, as determined from within the four corners of the policy itself." *Superior Ice Rink, Inc. v Nescon Contr. Corp.*, 52 AD3d 688, 691 (2d Dept 2008). A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011) (internal quotation marks and citation omitted). A party claiming to be a third-party beneficiary "has the burden of demonstrating an enforceable right." *Alicea v City of New York*, 145 AD2d 315, 317 (1st Dept 1988).

Here, as discussed by both Potenza and Tishman, Article 11 of the Siemens and Potenza contract includes a section entitled “Indemnity.” Article 11 states:

> “for separate consideration of ten dollars, the receipt and sufficiency of which is hereby acknowledged, the Subcontractor shall indemnify, defend and hold Contractor and Customer and each of their respective employees, agents or subcontractors harmless from any and all losses, damages, settlements, costs, charges, expenses or liabilities of every kind or character, including reasonable attorney’s fees and witness fees and other costs of defense and settlement, arising out of or relating to any and all claims, liabilities, losses, fines, penalties, liens, demands, obligations, actions, proceedings, or causes of action of every kind arising, including but not limited to death or injury to any person, destruction or damage to any property, or contamination or adverse effect upon natural resources or the environment, to the extent arising, in whole or part, out of any: (1) failure of Subcontractor, its employees, agents or subcontractors to comply with any law, ordinance, regulation, rule or order of any governmental or regulatory body including those dealings with health, safety or the environment; (2) improper, substandard, or inadequate performance or non- performance of the Subcontract, including any submission or deficient cost or pricing data or (3) any negligent or wrongful act or omission of the Subcontractor, its employees, agents, suppliers or subcontractors. In no event shall Contractor or Customer be

> liable to Subcontractor for indirect or consequential damages or loss of income or profit irrespective of the case, fault or reason for the same."

Bennett Affirmation, ex. I.

Based upon the language as agreed to in Article 11 of the Siemens and Potenza contract, Potenza was to indemnify Siemens as well as Tishman. Furthermore, Article 5, section 5.1, of the contract, which is entitled "ADDITIONAL INSURED STATUS" states:

> "[t]he Customer and CONTRACTOR, and their respective subsidiaries, or affiliates, officers, directors and employees shall be included as Additional Insureds under all insurance policies and coverages maintained by or required to be maintained by SUBCONTRACTOR pursuant to Subcontract Documents, excluding only Worker's Compensation and Employer's Liability and policies. Each policy shall provide that it is primary insurance as [it] regards additional insureds and contain a cross-liability or severability of interest clause."

Bennett Affirmation, ex. I.

When read together, Article 11 and Article 5, Section 5.1, demonstrate that the intent of the contract between Potenza and Siemens was for Tishman, the "Customer," to be named as an additional insured and to be provided indemnification. However, while the indemnification would be applicable as to Tishman, it has yet to be determined if the indemnification clause has been triggered. As discussed above, the indemnification agreement between Potenza and Siemens specifically requires that a finding be made that Potenza failed to comply with any law, ordinance, regulation, or rule; a finding that there was an improper, substandard, or inadequate performance or non- performance of the subcontract; or a negligent or wrongful act or omission of Potenza, its employees, agents, suppliers or subcontractors.

As it remains unclear whether Potenza was negligent in causing plaintiff's ladder to shift, the part of Tishman and Potenza's motion seeking summary judgment as to the claims for contractual indemnification must be denied as premature. *See Fernandez v Stockbridge Homes,*

LLC, 99 AD3d 550, 551-552 (1st Dept 2012) (holding that the lower court was proper to deny contractual indemnification where the movant did not establish that plaintiff's accident resulted from a "negligent act or omission" of the general contractor or subcontractors); *Hamill v Mutual of Am. Inv. Corp*., 79 AD3d 478, 479-480 (1st Dept 2010) (holding that contractual indemnification was premature when the movant did not submit any evidence of a "wrongful act or gross negligence" by plaintiff's employer's, which was required to trigger contractual indemnification); *Gomez v Sharon Baptist Bd. of Directors, Inc*., 55 AD3d 446, 447 (1st Dept 2008) (holding that contractual indemnification against plaintiff's employer was premature because there has been no finding that plaintiff's employer or its agents were negligent or proximately caused plaintiff's injuries).

Potenza also contends that based upon the fact that the plaintiff has not sustained a grave injury as defined under New York's Workers' Compensation Law, Tishman's claim for common law indemnification must be dismissed. Although in its third-party complaint, Tishman alleges that Potenza owes it common law indemnification, Tishman fails to address such claims in its cross motion. Furthermore, claims for common law indemnification against an employer are barred by section 11 of the Workers' Compensation Law Section if there is a lack of a grave injury. See Workers' Compensation Law § 11; *see also McGlinchey v Vassar Coll.*, 88 AD3d 626, 627 (1st Dept 2011).

Here, as Tishman fails to address the cause of action and because there is no evidence by Tishman which demonstrates that plaintiff's injury can be defined as a grave injury, the part of Potenza's motion seeking to dismiss Tishman's claim for common law indemnification must be granted.

Motion sequence 009

Harleysville moves, pursuant to CPLR Rule 2221 (e), to renew its motion for summary judgment, which the court denied without prejudice. Tishman fails to oppose the motion.

Pursuant to CPLR 2221 (e), a motion for leave to renew:

"1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion."

This court's September 30, 2019 order, the court denied its prior motion without prejudice, and indicated that it was for the reasons stated in Tishman's opposition papers. Harleysville contends that the court's decision was based upon the papers submitted in opposition, specifically the attorney affirmation of Tishman's counsel, William R. Bennett, III, Esq. Harleysville maintains that this affirmation noted that discovery in the main action was incomplete, and that discovery in the third-party action had not yet commenced, making Harleysville's motion premature.

Harleysville contends that none of the five court orders which were rendered since the prior motion was argued before this court on October 3, 2018, directed Harleysville to provide any further discovery in this litigation. Harleysville argues that it has responded to all discovery demands served upon it prior to moving for summary judgment, and that the opposing counsel has failed to set forth what further discovery was required that would preclude the award of summary judgment to Harleysville. The note of issue was filed on August 26, 2019 along with an affirmation from plaintiff's counsel which stated that all discovery was complete.

As discovery is now complete, and as the pending discovery process was the reason why this court denied the prior motion of Harleysville, the court grants plaintiff's motion for renewal.

Harleysville contends that its motion for summary judgment must be granted. Harleysville argues that Tishman was not a scheduled additional insured to the Harleysville policy and otherwise failed to qualify as an additional insured under the policy. Harleysville contends that while Potenza contracted with Siemens only, it did not have a standalone contract with Tishman, which was required for the contract to be applicable. Harleysville contends, that based upon the submitted evidence, Harleysville has no obligation to defend or indemnify Tishman, and the burden shifts to Tishman to demonstrate that summary judgment must not be granted.

Tishman fails to submit any opposition to the motion to renew or for the motion for summary judgment and fails to meet its burden to raise an issue of fact. *See Mazurek v Metropolitan Museum of Art*, 27 AD3d at 228 (holding that the burden shifts to a motion's opponent to demonstrate evidentiary facts in admissible form to raise a triable issue of fact).

Therefore, Harleysville's motion for summary judgment is granted.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Guy Bellomo's motion for partial summary judgment (MOT SEQ 005) for a violation of Labor Law § 240 (1) as against Tishman Interiors Corporation s/i/h/a Tishman Construction Corporation is granted; and it is further

ORDERED that Tishman Interiors Corporation s/i/h/a Tishman Construction Corporation's motion for an order granting summary judgment (MOT SEQ 007) dismissing plaintiff's complaint, is granted only as to the alleged violations of Labor Law §§ 200 and 241 (6) which are dismissed; and it is further

ORDERED that plaintiff Guy Bellomo's cross motion (MOT SEQ 007) for an order granting summary judgment for a violation of Labor Law § 240 (1) as against Tishman Interiors Corporation s/i/h/a Tishman Construction Corporation, and to reargue a decision and order dated September 30, 2019, is denied as moot; and it is further

ORDERED that Potenza Electrical Corporation's motion for summary judgment (MOT SEQ 008) dismissing Tishman Interiors Corporation s/i/h/a Tishman Construction Corporation's third-party complaint is denied, with the exception of the cause of action for common law indemnification which is dismissed; and it is further

ORDERED that the cross motion of Tishman Interiors Corporation s/i/h/a Tishman Construction Corporation's for summary judgment (MOT SEQ 008) is denied; and it is further

ORDERED that Harleysville Preferred Insurance Company's motion for leave to renew and for summary judgment (MOT SEQ 009) is granted, and the third-party complaint is dismissed as against Harleysville Preferred Insurance Company, with costs and disbursements to defendant upon the appropriate submissions; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: May 15, 202