SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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TERESA CASTELLANO, as Administratrix for the estate of DONALD SNOOK, and TERESA CATELLANO, individually,

Plaintiffs,

- v -

ANN/NASSAU REALTY LLC, BRF CONSTRUCTION CORP., GATEWAY DEMOLITION CORP., PARK EAST CONSTRUCTION CORP.,

Defendants.

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ANN/NASSAU REALTY LLC, BRF CONSTRUCTION CORP.

Plaintiff,

-against-

PARK EAST CONSTRUCTION CORP.

Defendant.

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ANN/NASSAU REALTY LLC, BRF CONSTRUCTION CORP.

Third-Party Plaintiff,

-against-

FELDMAN LUMBERUS LBM, LCC

Third-Party Defendant.

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DECISION AND ORDER

Index No.160655/2014

MOT SEQ 005

Third-Party Index No.595498/2015

Second Third-Party Index No. 595786/2015

NANCY M. BANNON, J.:

I.INTRODUCTION

In this personal injury action, the plaintiff, the representative of the estate of the injured party Donald Snook

(Snook), who died from alcohol-related liver disease allegedly exacerbated by his injuries, claims that he was injured while working in the employ of non-party Feldman Lumber (Feldman) at a construction site at 113 Nassau Street in Manhattan on March 13, 2013. The property was owned by defendant Ann/Nassau Realty LLC (the owner) who had hired defendant BRF Construction Corp. as general contractor (BRF). The Owner and the contractor now move pursuant to CPLR 3212 for (i) summary judgment dismissing the complaint; (ii) summary judgment on its third-party claims for contractual indemnification against defendant Park East Corp. (Park East); or in the alternative (iii) summary judgment for a conditional order of contractual indemnification as against Park East. The plaintiff cross-moves for summary judgment on the complaint. The motion is granted in part and the cross-motion is denied.

II.BACKGROUND

According to the testimony of plaintiff Teresa Castellano, the accident report of Snook's employer, Feldman, and the medical records of Snook, who is now deceased, Snook suffered personal injuries when a ton of sheetrock was purportedly put on a wheeled dolly by employees of Park Construction. According to the accident report signed by Snook, the dolly's wheels snapped and more than one ton of sheetrock on the dolly fell on Snook,

crushed Snook's right side, and pinned him against a makeshift railing injuring his shoulder, hand and leg.

The plaintiff commenced this action on October 28, 2014. BRF and the owner commenced a third-party action, *inter alia*, seeking indemnification on July 28, 2015. By supplemental summons and complaint dated August 3, 2015, the plaintiff asserted two causes of action in her capacity as the administratrix of Snook's estate sounding in general negligence. The third cause of action is also on behalf of Snook's estate for liability under Labor Law § 200. The fourth cause of action is for liability under Labor Law § 240(1) on behalf of Snook's estate. The fifth cause of action is for liability under Labor Law § 241(6) on behalf of Snook's estate. The sixth cause of action is for loss of consortium, asserted by plaintiff Castellano in her individual capacity.

III. DISCUSSION

A. Summary Judgment Standard

The proponent of a summary judgment motion is entitled to that relief upon a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof in admissible form to eliminate any material issues of fact. Alvarez v Prospect Hospital, 68 NY2d 320 (1986). Once the movant meets this burden, it becomes incumbent upon the party opposing

the motion to come forward with proof in admissible form to raise a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hospital, supra Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of their motion, BRF and the owner submit, *inter alia*, the pleadings, the verified Bills of Particulars, the deposition transcript of the plaintiff, the depositions of Philip Corso and Joseph Pecoraro of Feldman Lumber, the incident report signed by Donald Snook and their contract with Park East containing their indemnification agreement. In support of her cross-motion, the plaintiff submits, *inter alia*, the emergency room records and medical records of her husband, Mr. Snook, his worker's compensation registration form and the corporate depositions of Park East and the BRF.

B. The First, Second, and Third Causes for Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common law duty imposed upon an owner and general contractor to provide workers with a safe place. See Ross v Curtis-Palmer Hydro Elec Co., 81 NY2d 494 (1993); Cackett v Gladden Props., LLC, 2020 WL 2201033, __ AD3d __ (1st Dept. May 7, 2020). Property owners and general contractors may be liable for common law negligence and under Labor Law § 200 if the owner either created the dangerous

condition that caused the accident or actual or constructive notice of such dangerous condition. See Cappabianca v Skanska USA Bld'g, Inc., 99 AD3d 139 (1st Dept. 2012). When a claim arises out of alleged defects or dangers in the methods or materials of the work, the owner or general contractor will not be liable unless they had the authority to supervise or control the performance of the work. See Rizzuto v L.A. Wenger, Contracting Co., 91 NY2d 343 (1998). An owner's oversight and inspection of the work product is insufficient to impose liability. See Masciotta v Morse Diesel Int'l, Inc., 303 AD2d 209 (1st Dept. 2003). An owner or general contractor has authority to supervise and control work when they control the means and manner of how the work is performed *i.e.*, telling a contractor to use certain tools or techniques concerning how to perform the work. See Ortega v Puccia, 57 AD3d 5s4 (2nd Dept. 2008).

Here, the deposition testimony was that Snook's employer supplied the dollies but that the other defendants failed to secure the sheet rock while it was on the dollies to prevent a dangerous condition. This demonstrates that there are triable issues of fact as to whether BRF or the owner are liable for negligence or liability under Labor Law § 200. Thus, both parties' summary judgment motions on the first, second, and third causes of action must be denied.

C. The Fourth Cause of Action Under Labor Law § 240 (1)

As opposed to liability under Labor Law § 200 or common law negligence, "Labor Law 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure." Jock v Fien, 80 NY2d 965 (1992); see also Rocovich v Consolidated Edison Co., 78 NY2d 509, 512 (1991]). "Labor Law 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." Ross v Curtis Palmer Hydro Elec. Co., 81 NY2d 494, 501 (1993). To impose liability under Labor Law 240 (1), the plaintiff must prove a violation of the statute (*i.e.*, that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. See Blake v Neighborhood Hous. Sews. of N.Y. City, 1 NY3d 280, 287 (2003).

"[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically

significant elevation differential." Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 (2009). The purpose of the statute 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, instead of on workers, who are scarcely in a position to protect themselves from accident." Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 (1985).

"In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 662 (2014), *quoting* Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 (2001). "Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking." Fabrizi, supra at 662-63. "[F]or section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to 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" Narducci, supra at 268.

Here, the plaintiff adduced admissible evidence in the form of emergency room records and medical records demonstrating that he was injured when almost of ton of sheet rock fell on him because the dollies carrying the sheetrock were unsecured, collapsed, and caused the sheetrock to fall several feet onto Snook, causing him injuries. The defendants do not adduce any admissible evidence that the plaintiff was not injured or was the sole proximate cause of his injuries. Instead, they argue that the evidence that Snook was injured is inadmissible hearsay and that the evidence does not demonstrate that the sheetrock fell from an elevated height differential sufficient to establish liability under Labor Law § 240(1). Contrary to the defendants' argument, Snook's statements to his doctors and the contemporaneous incident report he gave to his superiors and signed are not inadmissible hearsay. See People v Ortega, 15 NY3d 610 (2010); Petrocelli v Tishman Contr. Corp., 19 AD3d 145 (1st Dept. 2005). The defendants' argument that they are entitled to summary judgment because the sheetrock was on a dolly at the same level as Snook is also meritless. It is well settled that a falling object being on the same level as the injured individual is not fatal to a Labor Law § 240. See Willinsky v 334 92nd Housing Dev/ Fund Corp., 18 NY3d 1 (2011); see also Kandatyan v 400 Fifth Realty, 155 AD3d 848 (2nd Dept. 2017). Rather, it presents a triable issue of fact as to

whether the injury was cause by the defendants' failure to provide adequate safety measures given the weight of the sheet rock on the dolly and the danger that it could fall on and injure a worker. Id. Thus, summary judgment is denied to both parties on the fourth cause of action.

D. The Fifth Cause of Action Under Labor Law § 241(6)

"Labor Law 241 (6) ... 'requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor'" St. Louis v Town of N. Elba, 16 NY3d 411, 413 (2011), *quoting* Ross, 81 NY2d at 501-502. Labor Law 241 § (6) is not self-executing because it depends upon an outside source, the Industrial Code. See Long v Forest-Fehlhaber, 55 NY2d 154 (1982). The Court of Appeals has held that, "for purposes of the nondelegable duty imposed by Labor Law 241 §(6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not" Ross, supra at 505. Therefore, to recover under Labor Law 241 § (6),

"the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and applicable provision of the New York State Industrial Code" Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 488 (1st Dept. 2018).

The plaintiff's Bill of Particulars alleges violations of 12 NYCRR 23-6.1(b), 23-6.1(c)(1), 23-1.7(e)(1) and (2). None of these provisions apply to the manner in which the Snook was injured because 12 NYCRR23-6.1(b) and (c)(1) are directed at injuries resulting from construction materials that are hoisted and 12 NYCRR 231.7 (e) and (2) are directed towards keeping passageways and work areas free from tripping hazards. As Snook was not injured by any hoisted construction devices or debris, the defendants' summary judgment granting dismissal of the fifth cause of action is granted.

E. Third Party Claims for Contractual Indemnification

Contractual indemnification is available to a party only where that party is itself free from fault in the happening of the underlying accident. See General Obligations Law § 5-322.1 (1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013). Since it has yet to be determined whether any of the movants was negligent or for that matter, liable, the parties have made no definitive showing here that could resolve

that issue on papers. As such, the branch of BRF's motion addressed to the BRF's third cross claim against Park East, which is for contractual indemnification, is denied as premature. See Miranda v Norstar Building Corp., 79 AD3d 42 (3rd Dept. 2010).

However, the defendant is entitled to a conditional order of summary judgment for contractual indemnification. Its contract with BRF provides as follows:

> [Park East] agrees to indemnify and save harmless Indemnitees from and against all liability, damage, loss, claims, demands, actions and expenses, which arise or are claimed to arise out of or are connected with any incident or occurrence which happens, or are alleged to have happened in or about the Place where such work is being performed, whether at the Site or other place, (1) while [Park East] is performing the work, either directly or indirectly through a sub subcontractor of the Subcontractor or materials or venders agreement, or (2) while any of the [Park East] or said sub subcontractor's property, work in progress, equipment, or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the work, including without limiting the generality of the foregoing, all liability, damages, loss, claims, demands and actions on account of personal injury, death or property loss to any [BRF], any of [BRF]'s employees, agents, subcontractors or invitees, any other Subcontractor, its employees, agents, subcontractors or invitees, or to any other persons, whether based upon or claimed to be based upon, statutory (including, without limiting the generality foregoing, worker's compensation), contractual, tort or other liability of any Indemnitee, and whether or not caused or claimed to have been caused by active or inactive negligence or other breach of duty by any Indemnitee, any Indemnitee's employees, agents, subcontractors, or invitees, or any other person as long as

> the Indemnitor or its sub subcontractor or its materialman or vendor was negligent in whole or in part.
>
> In the event that 100 percent Indemnity is prohibited by the law under the Paragraph above, then the extent of indemnity under said paragraph shall be limited to the portion of the damages (whether from personal injury, death or property damage) not attributable to the percentage of negligence of the Indemnitee.

Thus, to the extent that BRF is held liable in this action, it would be entitled to contractual indemnification against Park East.

IV.CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of the motion by defendants/third-party plaintiffs Ann/Nassau Realty LLC and BRF Construction Corp. for summary judgment dismissing the complaint is granted to the extent of dismissing the fifth cause of action and the motion is otherwise denied, and it is further,

ORDERED that the branch of the motion by defendants/third-party plaintiffs Ann/Nassau Realty LLC and BRF Construction Corp. for summary judgment on their third party claim against Park East Corporation, Inc. for contractual indemnification is granted to the extent that a conditional order of contractual indemnification is granted a in the event that BRF is incurs or

suffers damages as a result of this action and is otherwise denied, and it is further

ORDERED that the cross-motion of the plaintiff for summary judgment on the complaint is denied, and it is further,

ORDERED that the remaining parties shall contact chambers to schedule a settlement conference on or before July 31 2020.

This constitutes the Decision and Order of the court.

Dated: May 7, 2020 ENTER

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