Da Silva v Toll First Ave., LCC
2020 NY Slip Op 31797(U)
June 4, 2020
Supreme Court, New York County
Docket Number: 452797/2015
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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MARCOS DA SILVA and ELAINE SOARES,

Plaintiffs,

- v -

TOLL FIRST AVENUE, LCC, TOLL GC LLC, ROCKLEDGE SCAFFOLD CORP. and 4 MASTIC CONSTRUCTION COMPANY,

Defendants.

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TOLL FIRST AVENUE, LLC, and TOLL GC LLC,

Third Party Plaintiffs,

- v –

CASINO DEVELOPMENT GROUP, INC.,

Third Party Defendant,

----------X

INDEX NO. 452797/2015

MOTION DATE 02/01/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005)

were read on this motion to SUMMARY JUDGMENT .

ORDER

Upon the foregoing documents,

ORDERED that the part of defendant/third-party plaintiff's Toll First Avenue, LLC and Toll GC LLC (together the Toll Defendants) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claim, as well as those parts of the Labor Law § 241 (6) claim predicated upon violations of Industrial Code12 NYCRR 23-1.15 and the abandoned Industrial Code provisions, is granted and those claims are dismissed as against the Toll Defendants; and it is further

ORDERED that the part of the Toll Defendants' motion, pursuant to CPLR 3212, for summary judgment in its favor on its third-party claim against third-party defendant Casino Development Group, Inc. is granted; and the remainder of the Toll Defendants' motion is denied; and it is further

ORDERED that plaintiffs Marcos DaSilva and Elaine Soares cross motion, pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law § 240 (1) claim is granted; and it is further

ORDERED that counsel are directed appear for a conference in Part 59, either virtually (via internet-enabled video

conference or telephone conference) or, if possible, in person, in Room 331, 60 Centre Street, on August 4, 2020, 9:30 AM.

DECISION

In this action to recover damages for personal injuries, plaintiff construction worker asserts that on October 3, 2014, while installing a "PERI system" at a construction site located at 959 First Avenue, New York, New York (the Premises), an elevated unsecured wooden plank on which he was standing shifted, which caused him to fall.

In motion sequence number 005, defendants/third-party plaintiffs Toll First Avenue, LLC (Toll) and Toll GC LLC (GC) (together the Toll Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against them, as well as for summary judgment in their favor on their third-party claims for contractual indemnification against third-party defendant Casino Development Group, Inc. (Casino).

Plaintiffs Marcos DaSilva (plaintiff) and Elaine Soares cross-move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on their Labor Law § 240 (1) claims against the Toll Defendants.[1]

[1] This action has been discontinued as against defendant Rockledge Scaffold Corp. On a prior motion (motion sequence number 004), the court granted summary judgment dismissing the complaint and all cross claims as against 4 Matic Construction Corp (Doc No. 103).

BACKGROUND

On the day of the accident, the Premises was owned by Toll. Toll hired GC as the general contractor for a project at the Premises that involved the erection of a new-construction 32-story residential building (the Project). GC hired Casino to perform concrete superstructure work for the Project. Casino, in turn subcontracted certain superstructure installation work to non-party Gencon Services, Inc. (Gencon), plaintiff's employer.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Gencon as a carpenter. His work at the Project included pouring cement and installing concrete formwork.

While plaintiff worked for, and was paid by, Gencon, he was given a work shirt with "Casino" written on it (plaintiff's tr at 50). His supervisor on the Project was "Mauricio," a Gencon employee (id. at 58). Plaintiff was not supervised by workers from any other companies. Gencon also supplied plaintiff with safety equipment, including a safety harness and line. Plaintiff testified that he would use the safety line whenever he "had a place to hook it to" (id. at 66).

Gencon's work included installing concrete forms and pouring concrete at the Premises. On the day of the accident, Gencon had finished pouring the floor on the eighth floor and was beginning work on installing the superstructure for the ninth floor. At that time, plaintiff's work area was on the eighth floor, which was the highest floor then built. There was "nothing" on the floor, it "was just

floor" (id. at 73). He worked with three other people, "Junior," "Espeto" and "Angelo."

At the time of the accident, they were preparing a "table" - an approximately eight-foot long, four-foot wide hollow rectangular structure that would serve as the framework for the installation of concrete columns on the eighth floor (the Table). The Table was constructed of four metal posts, one in each corner, and a thin aluminum structure (called brackets by other witnesses) connecting the posts to keep them together.

Once built, the brackets around the Table was approximately "5 to 7 feet" high, though the posts continued higher (id. at 76). The inside of the table was hollow. According to plaintiff, the top of each post needed to have a "head" - a 5-inch by 10-inch U shaped metal pin - installed. So that plaintiff could reach the top of the posts to install the heads on the posts, Espeto and Angelo placed several 12- to 14-foot long, 10-inches wide wooden planks on the brackets, between the posts, to create plaintiff's work surface (*id.* at 87). The planks were not secured to the Table. On the day of the accident, plaintiff's coworkers had successfully completed 10 tables without incident.

Immediately before the accident, Espeto and Angelo set up three or four wooden planks across the Table's girders and plaintiff climbed up to perform his work. After successfully climbing onto the plank, plaintiff moved to install a head in the top of a post. He took a step and the plank fell out from under him, causing him to fall to the floor below. More specifically, plaintiff testified that he "stepped

on one side [of the plank] and the other side lifted, and it fell" causing him to fall with it (id. at 103).

While plaintiff wore his safety harness, "[t]here was no place to [secure] it" (id. at 101). In addition, according to plaintiff, Gencon did not have any ladders or scaffolds at the Premises on the day of the accident, and they "couldn't even put that kind of stuff up there" (id. at 91).

Finally, plaintiff testified that he never gave a written statement to anyone (id. at 190).

Deposition Testimony of Joseph Clark (Toll's Project Executive)

Clark testified that on the day of the accident, he was Toll's project executive for the Project at the Premises. He also held the title of project manager. His duties included the oversight and general implementation of the construction at the Project. He was present at the Project daily, performed walk-throughs most days, and had the authority to stop work if there was an unsafe practice or condition.

Clark confirmed that Toll was the owner and GC was the general contractor. The construction superintendent at the Project was Rick Farrell, an employee of the Toll Defendants. Farrell was responsible for scheduling, organizing the trades and confirming that the contractors complied with all "plans and specifications" (Clark tr at 20). He was also present most days and had the authority to stop work to address unsafe practices and conditions. Farrell would also prepare daily logs.

Clark confirmed that Casino was a subcontractor hired by GC to perform concrete foundation superstructure installation. The Toll Defendants did not direct or supervise any of Casino's work, nor did they provide Casino with any equipment or safety devices. He had no knowledge of a company named Gencon.

Around the time of the accident, the Project was undergoing "vertical construction" - meaning that the building's superstructure and floors were being constructed (id. at 35). Casino was responsible for that work.

Clark testified that the highest floor of the building would not have any tie off points, because, due to the nature of the work, "there is no means of being able to install a tie-off point" because "there is nothing above you to tie off to. You're literally creating the deck" of the next floor (id. at 77).

Clark testified that it was GC's custom to prepare an accident report for any accident that occurred at the Project. However, there was no accident report for plaintiff's accident. Further, Clark testified, he was not informed by anyone that an accident occurred, and did not become aware of the accident until he received a copy of the complaint in this action.

Deposition Testimony of William Charon (Casino's President)

William Charon testified that on the day of the accident, he was Casino's president. Casino is a concrete construction and installation company. He confirmed that Casino subcontracted Gencon and other companies to perform its work at the Project, and provided Gencon's workers with Casino labeled shirts. Casino itself only had

one employee at the Premises, John Verrastro, its safety manager. Verrastro was at the premises every day, and prepared daily project logs for Casino.

Charon testified that he did not recall when he first learned of the accident, and he noted that Verrastro's logbook for the day of the accident did not include any mention of the accident. Charon did not witness the accident. His understanding of the accident - learned from "conversations" with various people "over the last couple of years" (Charon tr at 32) - was that plaintiff was standing on top of an insufficiently secured wooden "girder" that shifted while he was trying to install another wooden girder on the top of the vertical poles (id. at 30). No one he spoke with witnessed the accident.

When Charon was asked whether wooden girders used as elevated surfaces were typically secured in some manner, he did not know. He never advised anyone to secure girders or planks being used in this manner, and he did not direct his safety supervisors to do so. He was aware that workers would use girders and planks in the manner that plaintiff did at the time of his accident (id. at 104).

Charon also testified that the height of the Table's brackets was four feet above the floor, which, according to Charon, is the typical bracket height for all PERI system Table installations. Though he testified that no fall protection is required if a worker is working at an elevation of four feet, Charon also testified that he had no knowledge of any specific code that sets forth such requirements. In addition, Charon testified that, because the eighth floor was the highest point in the building at the time of the accident, there were

no available overhead tie off points for plaintiff's safety harness and line.

Affidavit of Antonio Sampedro (Gencon's Laborer)

Antonio Sampedro averred that on the day of the accident he was a laborer employed by Gencon for the Project at the Premises. He was working on the seventh floor at the time of the accident and did not witness it. Sampedro stated that he heard workers shouting that plaintiff had fallen and ran to see what happened. He saw plaintiff on the ground in pain.

He stated that Gencon's supervisors were aware that all Gencon workers were working on top of unsecured planks while erecting the PERI system. Sampedro also stated that when he had performed similar tasks for other concrete installation companies, he was provided with a small mobile scaffold. Gencon did not provide or use mobile scaffolds.

DISCUSSION

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and

it is insufficient to merely set forth averments of factual or legal conclusions'" (Genger v Genger, 123 AD3d 445, 447 [1st Dept 2014], quoting Schiraldi v U.S. Min. Prods., 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim

The Toll Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 240 (1) claim as against them. Plaintiff cross-moves for summary judgment in his favor as to the same.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect

workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (Makarius v Port Auth. of N.Y. & N. J., 76 AD3d 805, 807 [1st Dept 2010]). Instead, 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]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004]).

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim against the Toll Defendants because the safety device he was provided - i.e. the unsecured wooden plank - failed to protect him from falling while he performed his elevated work. Specifically, the unsecured plank shifted and fell out from underneath him while he was working at a height, causing him to fall to the floor below.

In opposition, the Toll Defendants argue that the plank was not a safety device, but a passageway, and therefore plaintiff's accident

did not fall within the protections of section 240 (1) (Paul v Ryan Homes, Inc., 5 AD3d 58 [4th Dept 2004] [a plank being used as a "passageway from one place of work to another" was not a safety device as contemplated by the Labor Law] [internal quotation marks and citation omitted]). This argument is unpersuasive.

"A 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway" (Quigley v Port Auth. of N.Y. & N.J., 168 AD3d 65, 67 [1st Dept 2018]). The plank was not connecting two parts of a building but was being used to create an elevated work surface for plaintiff. In other words, the plank was not a passageway. Rather, the plank was used as the functional equivalent of a scaffold (see Gomez v City of New York, 63 AD3d 511, 512 [1st Dept 2009] [a fire escape that collapsed while plaintiff was working from it was the "functional equivalent of a scaffold and failed to provide adequate protection for [the plaintiff's] elevation-related work"]; Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 9 [1st Dept 2011] [plank used as the functional equivalent of a ladder was a safety device as contemplated by the Labor Law]). Accordingly, the plank was a safety device as contemplated by the Labor Law.

In addition, plaintiff testified that the plank was entirely unsecured, and the record establishes that he was not provided with another means to perform his elevation-related work. As it is uncontroverted that plaintiff's injuries "were sustained in his fall from an unstable wooden plank . . . he has satisfied the burden of showing that the defendants' failure to provide him with an adequate

safety device was [a] proximate cause of his injuries" (Auriemma, 82 AD3d at 10).

Next, the Toll Defendants argue that plaintiff was the sole proximate cause of his injuries because he created the condition that caused his fall by failing to secure the plank himself (Melendez v 778 Park Ave. Bldg. Corp. 153 AD3d 700, 701 [2d Dept 2017] [dismissing the section 240 (1) claim because the plaintiff's choice to stand on an unsecured plank "rather than standing upon the secured planking available to him" was the sole proximate cause of his accident]). The holding in Melendez hinges upon the existence of a sufficient safety device that the plaintiff blatantly disregarded. Here, the Toll Defendants fail to establish that they provided such a sufficient safety device or that plaintiff disregarded that safety device.

Moreover, a plaintiff cannot be the sole proximate cause of his accident where, as here, a defendant "failed to provide an adequate safety device in the first instance" (Hoffman v SJP TS, LLC, 111 AD3d 467, 467 [1st Dept 2013]; see also Nimirovski v Vornado Realty Trust Co., 29 AD3d 762 [2d Dept 2006]). Thus, any alleged negligence on plaintiff's part with respect to setting up the plank goes to comparative fault. Comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Melito v ABS Partners Real Estate, LLC, 129 AD3d 424, 425 [1st Dept 2015]). "[W]here the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury,

[n]egligence, if any, of the injured worker is of no consequence" (Hernandez v Bethel United Methodist Church of N.Y., 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted]).

Finally, while the Toll Defendants put forth a C-2 accident report and a C-3 Workers' Compensation claim form, both documents are unauthenticated. The C-2 report contains no witness statements, nor does it explain how the report's author learned of the information contained therein. While the C-3 claim form purports to be written and signed by plaintiff, it was not shown to plaintiff at his deposition or otherwise authenticated. In addition, the document is in English while plaintiff testified that he primarily speaks and reads Portuguese. In any event, the C-2 report is consistent with plaintiff's testimony regarding the accident. Further, plaintiff's testimony that his accident was caused when a plank fell is not inconsistent with his C-3 Workers' Compensation statement that his accident was caused when a "beam" fell (the Toll Defendants reply, exhibit B; Doc No. 157). Accordingly, these documents do not raise a question of fact as to the nature of plaintiff's accident.

Thus, the Toll Defendants are not entitled to summary judgment dismissing the Labor Law § 240 (1) claims as against them, and plaintiff is entitled to summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against the Toll Defendants.

The Labor Law § 241 (6) Claim

The Toll Defendants move for summary judgment dismissing the Labor Law § 241 (6) claim as against them.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) 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 [1998]; see also Ross, 81 NY2d at 501-502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (Ross, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (Annicaro v Corporate Suites, Inc., 98 AD3d 542, 544 [2d Dept 2012]).

Initially, plaintiff lists multiple violations of the Industrial Code in the bill of particulars. However, except for sections 23-1.15 (safety railings), 23-1.16 (b) and (d) (safety belts) and 23-5.1 (scaffolds), plaintiff does not oppose their dismissal. Therefore, the court deems those uncontested provisions abandoned (see Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 [1st Dept 2012]).

Thus, the Toll Defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated upon the abandoned provisions (id.).

Industrial Code 12 NYCRR 23-1.15

Section 23-1.15 governs safety railings and sets forth the specific size and height of such railings. While section 23-1.15 has been found to be sufficiently specific to sustain a Labor Law cause of action, it applies only where a worker was provided with safety railings in the first instance (Dzieran v 1800 Boston Rd., LLC, 25 AD3d 336, 337 [1st Dept 2006] [section 1.15 "do[es] not apply because plaintiff was not provided with any such safety devices"]). Here, no safety railings were provided. Therefore, this provision does not apply to plaintiff's accident.

Thus, the Toll Defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim based on an alleged violation of Industrial Code 12 NYCRR 23-1.15.

Industrial Code 12 NYCRR 23-1.16 (b) and (d)

Section 23-1.16 (b) and (d) provide, in pertinent part, the following:

> "Safety belts, harnesses, tail lines and lifelines.
>
> * * *
>
> "(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employees. At all times during use, such approved [harness] shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line

> attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.
>
> * * *
>
> (d) Tail Lines. The length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet."

Section 23-1.16 has been held to be sufficiently specific to support a claim under Labor Law § 241 (6) (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]). The Toll Defendants argue that this section cannot apply because plaintiff was not using a safety belt or tail line at the time of his accident (*id.*). That said, the record establishes that plaintiff was equipped with a safety belt and a tail line. However, plaintiff testified that there were no applicable tie-off points above him, as he was working at the highest point of the under-construction building and, therefore, he had no tie off point. However, it is unclear from the record whether a tie off point immediately below plaintiff may have been feasible.

The Toll Defendants provide the expert testimony of Bernard P. Lorenz, P.E., who opines that plaintiff's work did not require the use of a harness or safety line, in the first instance, because he was working below a height of six feet (Lorenz affidavit, the Toll Defendants' reply, exhibit D; Doc. No. 159). According to Lorenz, standard practices in the concrete construction industry and OSHA regulations do not require workers to tie off when working below six feet above a lower surface.

However, while Charon testified that the PERI brackets were only four feet above the floor, plaintiff testified that they were five to seven feet above ground. Therefore, a question of fact exists as to the height plaintiff was working from, and whether he, in fact, was required to have a tie-off point.

Thus, the Toll Defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim based on an alleged violation of Industrial Code 12 NYCRR 23-1.16 (b) and (d).

Industrial Code 23-5.1

Industrial Code 12 NYCRR 23-5.1 governs general provisions for all scaffolds. This section contains 11 subsections, many of which contain several sub-subsections. The parties are not clear as to which exact ones are addressed on the motion.

Instead, the Toll Defendants argue that plaintiff was not using a scaffold at the time of the accident, and therefore all of section 23-5.1 does not apply (Bennion v Goodyear Tire & Rubber Co., 229 AD2d 1003, 1003 [4th Dept 1996]). However, courts have contemplated the application of section 23-5.1 with respect to the functional equivalent of a scaffold (Lavore v Kir Munsey Park 020, LLC, 40 AD3d 711, 713 [2d Dept 2007] [noting that section 23-5.1 did not apply only because plaintiff's use of the functional equivalent of a scaffold had ceased prior to his accident and the planks that were being so used had already been removed prior to his fall]; Inguil v Rochdale Vil., Inc., 29 Misc 3d 1227[A], NY Slip Op 52036[U] [Sup Ct, NY County 2010] [finding that a functional equivalent of a scaffold that did not

comply with sections 23-5.1 (e), (h) and (j) constituted a violation of Labor Law § 241 (6)]).

Given the foregoing, the Toll Defendants have not established, as a matter of law, that Industrial Code section 23-5.1, and each of its subsections, do not apply to plaintiff's accident. Thus, the Toll Defendants are not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim based on an alleged violation of Industrial Code 23-5.1.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 004, 005 and 006)

The Toll Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

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" (Singh v Black Diamonds LLC, 24 AD3d 138, 139 [1st Dept 2005], citing Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its

work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (LaRosa v Internap Network Servs. Corp., 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (Naughton v City of New York, 94 AD3d 1, 11 [1st Dept 2012]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011], quoting Chowdhury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff alleges that he was injured when the plank, being used as the functional equivalent of a scaffold, dropped out from underneath him, causing him to fall to the floor below. Thus, plaintiff's accident was caused by the means and methods of the work - i.e., the failure to sufficiently secure the plank.

The Toll Defendants argue that, as the owner and the general contractor, they did not exercise actual supervision or control over the injury producing work, such that they could be held liable under the common-law or Labor Law § 200. A review of the record establishes that the Toll Defendants did not have the requisite authority or control over the work that led to plaintiff's accident. Rather, plaintiff testified that he was supervised by Gencon employees and further testified that no one else directed or controlled his work.

Plaintiff argues that the Toll Defendants had the authority to supervise and control the injury producing work, because they had their own representative at the Project and had the authority to stop work if they witnessed an unsafe working condition. Such authority, however, is insufficient to establish liability under Labor Law § 200 (see Bisram v Long Is. Jewish Hosp., 116 AD3d 475, 476 [1st Dept 2014] [where a defendant "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200"]; see also Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 AD3d 446, 449 [1st Dept 2013] ["[T]he mere fact that a general contractor had overall responsibility for the safety of the work done by the subcontractors is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control"] [internal quotation marks omitted]; Gonzalez v United Parcel Serv., 249 AD2d 210, 210 [1st Dept 1998] [section 200 properly dismissed where owner had no control "over the manner in which the work in question was done

. . . [or] supervised the use of the machine whose negligent alteration and operation is said to have caused plaintiff's injury"]; accord O'Sullivan v IDI Constr. Co., Inc., 28 AD3d 225, 226 [1st Dept 2005]; affd 7 NY3d 805 [2006]).

Thus, the Toll Defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

The Toll Defendants' Contractual Indemnification Claim Against Casino

The Toll Defendants move for summary judgment in their favor on their third-party contractual indemnification claim, as against Casino.

"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 Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]).

"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" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see also Murphy v WFP 245 Park Co., L.P., 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not

the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

Additional Facts Relevant to this Claim

On March 6, 2014, GC and Casino entered into a "Trade Subcontract" for concrete fabrication and installation at the Project at the Premises (the Agreement) (notice of motion, exhibit L). Exhibit E of the Agreement, entitled General Conditions, contains the following indemnification provision:

> "To the fullest extent permitted by law, [Casino] shall indemnify . . . [Toll], [GC] . . . and employees, agents, representatives, licensees and invitees of any of them, and anyone else acting for or on behalf of any of them, harmless from and against all liability, damages, losses, claims, demands and actions of any nature whatsoever . . . which arise out of, relate to or are connected with, or are claimed to arise out of, relate to or be connected with any of the following:
>
> > "1. This Subcontract
> >
> > "2. The performance or non-performance of the Work by [Casino], or any act or omission of [Casino], including without limitation, any breach of the Subcontract or any of the Contract Documents"

(id., sub-exhibit E, Art. 8[A]).

The scope of work section of the Agreement required Casino to furnish and install the concrete superstructure of the Premises, as well as "[a]ll required forms, form work, form ties, shores . . . etc. for the complete installation of all concrete work" (id., sub-exhibit A, § 20).

Here, at the time of his accident, plaintiff was installing concrete formwork for Gencon, Casino's subcontractor, as a part of

Casino's concrete installation work at the Project. Accordingly, plaintiff's accident arose out of the performance of work contemplated by the Agreement.

In opposition, Casino argues that a question of fact remains as to whether the Toll Defendants were negligent, because they had the general authority to oversee safety at the Project. As discussed above, while the Toll Defendants did have general supervisory authority over the Project at the Premises, such authority, by itself, is insufficient, as a matter of law, to establish that the Toll Defendants were negligent.

Thus, the Toll Defendants are entitled to summary judgment in their favor on their third-party contractual indemnification claim against Casino.

06/04/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
CHECK IF APPROPRIATE:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE