Royland v McGovern & Co., LLC
2020 NY Slip Op 33734(U)
November 4, 2020
Supreme Court, New York County
Docket Number: 152015/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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JAN ROYLAND and BARBARA ROYLAND,

Plaintiffs

- against -

McGOVERN & COMPANY, LLC, MARSHALL'S MOVING SERVICE, INC., and PERAGALLO PIPE ORGAN COMPANY,

Defendants

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Index No. 152015/2013

DECISION AND ORDER

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McGOVERN & COMPANY, LLC,

Third Party Plaintiff

- against -

MILFORD FLOORING CORP.,

Third Party Defendant

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injuries and lost services sustained March 17, 2010, when plaintiff Jan Royland, employed by third party defendant Milford Flooring Corp., used a ramp placed over stairs to transport his floor

sander into St. Francis Xavier Church at 46 West 16th Street, New York County, which was undergoing renovation. Defendant Marshall's Moving Service, Inc., had installed the ramp, which became loose at the top of the stairs as Royland was ascending the ramp, causing him to slide down to the sidewalk. Defendant McGovern & Company, LLC, was the general contractor for the renovation. The nonparty owner of the premises contracted separately with defendant Peragallo Pipe Organ Company to refurbish the church's pipe organ. Peragallo Pipe Organ hired Marshall's Moving Service, which constructed the ramp, to transport the pipe organ parts back into the church.

Marshall's Moving Service moves for summary judgment dismissing the complaint and all cross-claims against Marshall's Moving Service. C.P.L.R. § 3212(b). Peragallo Pipe Organ cross-moves for summary judgment dismissing the complaint and all cross-claims against Peragallo Pipe Organ. Id. Plaintiffs cross-move for summary judgment that Marshall's Moving Service owed a duty of care to Royland, directed and controlled the work that caused his injury, and violated applicable federal Occupational Health and Safety Administration (OSHA) regulations; that res ipsa loquitur applies; and that Marshall's Moving Service is liable for violation of New York Labor Law § 241(6).

C.P.L.R. § 3212(b) and (e). Plaintiffs separately cross-move for summary judgment that Peragallo Pipe Organ owed a duty of care to Royland and directed and controlled Marshall's Moving Service's activities, that res ipsa loquitur applies, and that Peragallo Pipe Organ is liable for violations of Labor Law §§ 240(1) and 241(6). C.P.L.R. § 3212(b) and (e).

McGovern & Company separately moves for summary judgment dismissing the complaint and cross-claims against McGovern & Company and for summary judgment on McGovern & Company's indemnification claims against co-defendants and third party defendant. Id. Plaintiffs cross-move for summary judgment on McGovern & Company's liability for violations of Labor Law §§ 200, 240(1), and 241(6) and for negligence, also claiming that res ipsa loquitur applies. C.P.L.R. § 3212(b) and (e).

The parties stipulated that any contracts between the parties in the record of the pending motions and cross-motions for summary judgment were authenticated and admissible for purposes of these motions.

II. PERMISSIBILITY OF THE MOTIONS AND CROSS-MOTIONS

A. Peragallo Pipe Organ's Cross-Motion

As set forth above, Peragallo Pipe Organ cross-moves against Marshall's Moving Service's motion for summary judgment and seeks

summary judgment dismissing the complaint and all cross-claims against Peragallo Pipe Organ. Marshall's Moving Service's motion seeks relief that includes dismissal of Peragallo Pipe Organ's cross-claim for contribution against Marshall's Moving Service.

C.P.L.R. § 2215's provision that a "party may serve upon the moving party a notice of cross-motion demanding relief" refers to relief against the moving party and thus does not allow a cross-motion as a vehicle for relief against a non-moving party. See Puello v. Georges Units, LLC, 146 A.D.3d 561, 561 (1st Dep't 2017); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014). Although C.P.L.R. § 2215(b) provides that the "relief need not be responsive to that demanded by the moving party" and thus may relate to distinct claims or defenses, a cross-motion still must demand relief against the moving party.

Peragallo Pipe Organ's cross-motion to Marshall's Moving Service's motion is permissible only to the extent that the cross-motion seeks summary judgment dismissing Marshall's Moving Service's cross-claims against Peragallo Pipe Organ for contribution, implied and contractual indemnification, and breach of a contract to procure insurance, as Marshall's Moving Service

is the moving party.

B. Timeliness of Plaintiffs' Cross-Motions

Since plaintiffs filed a note of issue August 28, 2019, the deadline for summary judgment motions was December 26, 2019. C.P.L.R. § 3212(a). Both Marshall's Moving Service and McGovern & Company timely served their summary judgment motions October 25, 2019, and October 28, 2019, respectively. C.P.L.R. § 2211; Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706, 706 (1st Dep't 2013); Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't 2009); Aqeel v. Tony Casale, Inc., 44 A.D.3d 572, 572 (1st Dep't 2007); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007). Plaintiffs' cross-motions served January 31, 2020, were untimely. C.P.L.R. § 3212(a). The court may consider plaintiffs' cross-motions, however, to the extent that they respond to and address claims "nearly identical" to Marshall's Moving Service's and McGovern & Company's timely motions for summary judgment. Jarama v. 902 Liberty Ave. Hous. Dev. Fund Corp., 161 A.D.3d 691, 692 (1st Dep't 2018); Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 A.D.3d 446, 449 (1st Dep't 2013).

The motions by Marshall's Moving Service and McGovern & Company seek summary judgment dismissing the complaint against

these defendants. Plaintiffs' untimely cross-motion, which seeks summary judgment on defendants' liability based on Labor Law § 240(1) and 241(6) and on issues regarding defendants' liability based on Labor Law § 200 and negligence, satisfies this requirement.

III. PLAINTIFFS' LABOR LAW AND NEGLIGENCE CLAIMS

A. Labor Law § 200 and Negligence

Labor Law § 200 codifies the duty of a general contractor and any agent of the construction site owner or a general contractor to maintain construction site safety. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). If a dangerous condition arising from construction of the ramp caused Royland's injury, McGovern & Company, as the general contractor, would be liable for negligently permitting that condition and violating Labor Law § 200, if McGovern & Company supervised or exercised control over the activity that caused his injury. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015); Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012). See Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st

Dep't 2014); Francis v. Plaza Constr. Corp., 121 A.D.3d 427, 428 (1st Dep't 2014). If a dangerous condition on the work site caused Royland's injury, liability depends on McGovern & Company's creation or actual or constructive notice of the condition. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d at 144.

Royland's injury arose from the methods or means of the work at the construction site, rather than any condition of the premises. Gilligan v. CJS Bldrs., 178 A.D.3d 566, 566 (1st Dep't 2019); Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d 568, 569 (1st Dep't 2015); Castellon v. Reinsberg, 82 A.D.3d 635, 636 (1st Dep't 2011). Plaintiffs identify hazards or defects related only to the placement of the ramp that caused Royland's injury and not any hazard or defect inherent in the site. Villanueva v. 114 Fifth Ave. Assoc. LLC, 162 A.D.3d 404, 406 (1st Dep't 2018); Singh v. 1221 Ave. Holdings, LLC, 127 A.D.3d 607, 608 (1st Dep't 2015); Castellon v. Reinsberg, 82 A.D.3d at 636. Marshall's Moving Service installed and removed the ramp daily, including on the day Royland was injured, demonstrating that the ramp was not a condition inherent in the site.

While McGovern & Company insists that it did not direct Royland's work, control of the work that caused the injury is the

critical issue. The deposition testimony by Bruce Tarr, the owner of Marshall's Moving Service, that only it assembled and installed the ramp on the day Royland was injured, demonstrates that McGovern & Company did not control the assembly or installation of the ramp. Tarr testified that the only other contractor that ever assisted with the assembly and installation of the ramp was Peragallo Pipe Organ, but it did not do so on the day Royland was injured. Although Timothy Caines, McGovern & Company's project superintendent, maintained supervisory and overall safety responsibilities, they do not establish the requisite control over Marshall's Moving Service's installation of the ramp. Haynes v. Boricua Vil. Hous. Dev. Fund Co., Inc., 170 A.D.3d 511, 511 (1st Dep't 2019); McLean v. Tishman Constr. Corp., 144 A.D.3d 534, 535 (1st Dep't 2016); Howard v. Turner Constr. Co., 134 A.D.3d 523, 525 (1st Dep't 2015). Therefore McGovern & Company is entitled to summary judgment dismissing plaintiffs' Labor Law § 200 and negligence claims against McGovern & Company.

Peragallo Pipe Organ, although neither the owner nor a general contractor, still may be liable as the owner's statutory agent under the Labor Law if Peragallo Pipe Organ maintained the authority to control the activity that caused Royland's injury.

Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d 426, 434 (2015); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005); Santos v. Condo 124 LLC, 161 A.D.3d 650, 653 (1st Dep't 2018); Coretto v. Extell W. 57th St., LLC, 137 A.D.3d 677, 678 (1st Dep't 2016). Peragallo Pipe Organ, which the owner hired to refurbish the organ and in turn hired Marshall's Moving Service, which constructed the ramp, to transport the organ into the church, maintained the authority to control the activity that caused Royland's injury and thus was the owner's statutory agent under the Labor Law. Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d at 434; Walls v. Turner Constr. Co., 4 N.Y.3d at 863-64; Santos v. Condo 124 LLC, 161 A.D.3d at 653; Coretto v. Extell W. 57th St., LLC, 137 A.D.3d at 678.

Marshall's Moving Service, even though it was not hired directly by either the owner or the general contractor, but was hired by the owner's agent Peragallo Pipe Organ, also may be liable as a statutory agent under the Labor Law as long as Marshall's Moving Service was delegated the authority to control the activity that caused Royland's injury. Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 292-93 (2003). Tarr's testimony establishes that Peragallo Pipe Organ delegated control over the assembly and installation of the ramp to Marshall's

Moving Service. Since it exercised its authority to control the work that caused Royland's injury, Marshall's Moving Service owed a duty of care to Royland. Ramade v. C.B. Contr. Corp., 127 A.D.3d 596, 597 (1st Dep't 2015). See Ferguson v. Durst Pyramid, LLC, 178 A.D.3d 634, 635 (1st Dep't 2019).

Tarr's testimony and the deposition testimony by Frank Peragallo, Peragallo Pipe Organ's vice president, that he did not participate in constructing the ramp or direct its placement, at least on the day Royland was injured, demonstrate Peragallo Pipe Organ's lack of control over that work. Nevertheless, the contract between the owner and Peragallo Pipe Organ dated April 13, 2009, provided that it "shall be responsible for and shall supervise and direct all the work," which included relocation of the pipe organ. Aff. of Kevin McGinnis Ex. G, at 13, 15. Thus Peragallo Pipe Organ also owed a duty of care to Royland. Peragallo Pipe Organ's lack of involvement in the construction or placement of the ramp bears only on whether Peragallo Pipe Organ breached that duty, a determination plaintiffs do not seek at this juncture.

Royland's deposition testimony that he fell when the top section of the ramp came loose raises factual issues whether he was injured because the ramp was negligently installed.

Therefore Marshall's Moving Service is not entitled to summary judgment dismissing plaintiffs' Labor Law § 200 and negligence claims against Marshall's Moving Service.

Plaintiffs do not seek at this juncture a determination that the ramp was negligently installed or summary judgment on their Labor Law § 200 or negligence claim against Marshall's Moving Service. In any event, plaintiffs fail to demonstrate that faulty construction or placement of the ramp, as opposed to its use by various contractors hauling their materials or equipment to which Royland testified, caused the top section of the ramp to break loose.

B. OSHA Regulations

Plaintiffs also contend that Marshall's Moving Service's violation of federal OSHA regulation 29 C.F.R. § 1910.22 demonstrates its breach of a duty to Royland and thus its negligence. Although OSHA governs an employer's conduct toward its own employees, Marshall's Moving Service is also liable under OSHA for its own conduct that affected Milford Flooring Corp's employees "engaged in a common undertaking" on the renovation site. Barzaghi v. Maislin Transp., 115 A.D.2d 679, 684 (2d Dep't 1985); Flores v. Infrastructure Repair Serv., LLC, 52 Misc. 3d 664, 670 (Sup. Ct. N.Y. Co. 2015); Brennan v. Occupational Safety

and Health Review Com'n, 513 F.2d 1032, 1038 (2d Cir. 1975). See Universal Const. Co., Inc. v. Occupational Safety and Health Review Com'n, 182 F.3d 726, 728 (10th Cir. 1999); United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 982-83 (7th Cir. 1999). 29 U.S.C. § 654(a)(2) requires every employer to comply with the regulations promulgated under OSHA for the benefit of all employees on the work site, "even employees of another employer," Universal Const. Co., Inc. v. Occupational Safety and Health Review Com'n, 182 F.3d at 728; "regardless of whom in a given workplace is threatened by non-compliance," United States v. Pitt-Des Moines, Inc., 168 F.3d at 982; and without limitation to instances where a violation of a regulation exposes the employer's own employees to a hazard. Flores v. Infrastructure Repair Serv., LLC, 52 Misc. 3d at 670-71; Brennan v. Occupational Safety and Health Review Com'n, 513 F.2d at 1037-38.

Thus Marshall's Moving Service, which nowhere claims it was not an employer under OSHA, violated OSHA regulations if, through prohibited acts or omissions, it created a hazard accessible to Marshall's Moving Service's own employees or the employees "of other employers engaged in a common undertaking." Flores v. Infrastructure Repair Serv., LLC, 52 Misc. 3d at 671; Brennan v. Occupational Safety and Health Review Com'n, 513 F.2d at 1038.

Plaintiffs fail to show, however, that Milford Flooring Corp.'s employees were in any way engaged in a common undertaking on the renovation project with Marshall's Moving Service's employees who were assembling and installing the ramp and transporting pipe organ parts into the church. Therefore, because Marshall's Moving Service was not Royland's employer, plaintiffs may not rely on Marshall's Moving Service's violation of 29 C.F.R. § 1910.22 to establish its breach of a duty to Royland. Martinez v. 3801 Equity Co., 155 A.D.3d 445, 446 (1st Dep't 2017); Hinton v. City of New York, 73 A.D.3d 407, 408 (1st Dep't 2010); Khan v. Bangla Motor & Body Shop, Inc., 27 A.D.3d 526, 529 (1st Dep't 2006).

C. *Res Ipsa Loquitor*

Plaintiffs also seek a determination that res ipsa loquitur applies to establish defendants' negligence. Res ipsa loquitur, a doctrine based on circumstantial evidence of defendants' unspecified negligence, entitles plaintiffs to summary judgment only where their circumstantial evidence is so convincing and defendants' opposition so weak as to render an inference of defendants' negligence inescapable. Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006); Stubbs v. 350 East Fordham Road, LLC, 117 A.D.3d 642, 644 (1st Dep't 2014).

For res ipsa loquitur to apply, plaintiffs must establish that the failure of the ramp (1) was not caused by Royland's contributory act, (2) was caused by an instrumentality in defendants' exclusive control, and (3) was a condition that ordinarily does not occur absent negligence. James v. Wormuth, 21 N.Y.3d 540, 546 (2013); Morejon v. Rais Constr. Co., 7 N.Y.3d at 209; Wilkins v. West Harlem Group Assistance, Inc., 167 A.D.3d 414, 415 (1st Dep't 2018); Smith v. Consolidated Edison Co. of N.Y., Inc., 104 A.D.3d 428, 429 (1st Dep't 2013). Res ipsa loquitur does not apply here because the ramp was not under defendants' exclusive control. Royland testified that workers employed by various contractors, including his own employer, used the ramp. Moreover, plaintiffs need not resort to res ipsa loquitur because, according to plaintiffs, the cause of Royland's injury is known: the faulty construction or placement of the ramp. James v. Wormuth, 21 N.Y.3d at 546; Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494 (1997).

D. Labor Law § 240(1)

A failure to provide adequate safety devices to protect against construction work's elevation related hazards, as required by Labor Law § 240(1), imposes absolute liability on a general contractor and any statutory agent, if that failure

proximately caused Royland's injury. Saint v. Syracuse Supply Co., 25 N.Y.3d 117, 124 (2015); Fabrizi v. 1095 Ave. of the Ams., L.L.C., 22 N.Y.3d 658, 662 (2014); Soto v. J. Crew Inc., 21 N.Y.3d 562, 566 (2013); Wilinski v. 334 E. 92nd Hous Dev. Fund Corp., 18 N.Y.3d 1, 7 (2011). Liability depends on an elevation related hazard and the absence of an adequate safety device or use of a safety device that failed to provide protection. Berg v. Albany Ladder Co., Inc., 10 N.Y.3d 902, 904 (2008); Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267-68 (2001); Ervin v. Consolidated Edison of N.Y., 93 A.D.3d 485, 485 (1st Dep't 2012); Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 9-10 (1st Dep't 2011).

Marshall's Moving Service installed the ramp to facilitate moving heavy pipe organ parts into the church, which was a significant elevation above the sidewalk level. When Royland pulled his floor sander weighing 75-80 pounds up the ramp from sidewalk level to the church, he was exposed to an elevation related risk. Aramburu v. Midtown W. B, LLC, 126 A.D.3d 498, 499 (1st Dep't 2015); Ervin v. Consolidated Edison of N.Y., 93 A.D.3d at 485. Although no witness establishes the height from the sidewalk to the top of the steps, the authenticated photographs depict a height that is more than enough to pose an elevation

related hazard. Auriemma v. Biltmore Threatre, LLC, 82 A.D.3d 1, 9 (1st Dep't 2011); Remes v. 513 W. 26th Realty, LLC, 73 A.D.3d 665, 666 (1st Dep't 2010). See Sawczyszyn v. New York Univ., 158 A.D.3d 510, 511 (1st Dep't 2018); Morris v. City of New York, 87 A.D.3d 918, 919 (1st Dep't 2011); Torkel v. NYU Hosps. Ctr., 63 A.D.3d 587, 590 (1st Dep't 2009); DeStefano v. Amtad N.Y., 269 A.D.2d 229, 229 (1st Dep't 2000). Whether or not the ramp was a safety device under Labor Law § 240(1), it failed to protect Royland from the elevation related hazard. Conklin v. Triborough Bridge & Tunnel Auth., 49 A.D.3d 320, 320 (1st Dep't 2008); McCann v. Central Synagogue, 280 A.D.2d 298, 299-300 (1st Dep't 2001) Amico v. Park Ave. Plaza Co., 168 A.D.2d 391, 391-92 (1st Dep't 1990).

Contrary to Marshall's Moving Service's contention, Labor Law § 240(1) covers Royland's work installing and finishing floors. See Clavijo v. Atlas Terms., LLC, 104 A.D.3d 475, 476 (1st Dep't 2013). Contrary to McGovern & Company's contention, the ramp was not a passageway excluded from Labor Law § 240(1)'s coverage. Because the ramp covered only part of the exterior stairs, the ramp was not a "a defined walkway or pathway used to traverse between discrete areas as opposed to an open area." Prevost v. One City Block LLC, 155 A.D.3d 531, 535 (1st Dep't

2017) (quoting Steiger v. LPCiminelli, Inc., 104 A.D.3d 1246, 1250 (4th Dep't 2013)).

Defendants further contend that McGovern & Company forbade the use of the ramp by anyone other than employees of Marshall's Moving Service and Peragallo Pipe Organ. To fall within Labor Law § 240(1)'s protection, however, the ramp need not have been intended for Royland's use. Gherardi v. City of New York, 49 A.D.3d 280, 280 (1st Dep't 2008). In any event, Royland testified that the ramp was the only means to transport his floor sander into the church and that workers uninvolved with moving the organ used the ramp. Therefore plaintiffs are entitled to summary judgment on the liability of McGovern & Company, the general contractor, and Peragallo Pipe Organ and Marshall's Moving Service, both statutory agents, under Labor Law § 240(1). Aramburu v. Midtown W. B, LLC, 126 A.D.3d at 499; Ervin v. Consolidated Edison of N.Y., 93 A.D.3d 485; McCann v. Central Synagogue, 280 A.D.2d at 299.

E. Labor Law § 241(6)

The duty to comply with the regulations under Labor Law § 241(6) is non-delegable, subjecting a general contractor and any statutory agent to liability for a violation even if the general contractor and agent exercised no supervision or control over

Royland's work and received no notice of work site conditions. Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 361 n.8 (2006); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 878; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502-503 (1993). While a failure to take the safety measures required by this statute, proximately causing injury, does not impose absolute liability absent negligence, the statute imposes liability on a general contractor and an agent for injuries caused by another party's negligence regardless of the general contractor's or agent's own negligence. Rizzuto v. Wegner Contr. Co., 91 N.Y.2d at 349-50; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d at 502 n.4.

Plaintiffs rely on 12 N.Y.C.R.R. § 23-1.22(b)(2), (3), and (4) to support their Labor Law § 241(6) claim. In light of the testimony that the ramps were used by workers and for hauling equipment, 12 N.Y.C.R.R. § 23-1.22(2) and (4) do not apply because they relate to ramps "constructed for use of persons only." 12 N.Y.C.R.R. § 23-1.22(2) and (4); Torkel v. NYU Hosps. Ctr., 63 A.D.3d at 591. See Purcell v. Metlife Inc., 108 A.D.3d 431, 433 (1st Dep't 2013).

12 N.Y.C.R.R. § 23-1.22(b)(3) requires "ramps constructed for the use of wheelbarrows, power buggies, hand carts and hand

trucks" to be "at least 48 inches wide and made of planking at least two inches thick full size or metal of equivalent strength" and that the planking used be "laid close, butt jointed and securely nailed." Frank Peragallo testified that the ramp was used for hand trucks hauling organ parts. This testimony, combined with the testimony by Royland that he fell when the top section of the ramp broke loose, raises factual issues whether he was injured because the ramp was not of the requisite strength or not laid, jointed, and secured in compliance with 12 N.Y.C.R.R. § 23-1.22(b)(3). Weiss v. El Ad Props. NY LLC, 62 A.D.3d 472, 473 (1st Dep't 2009); Arrasti v. HRH Constr. LLC, 60 A.D.3d 582, 583 (1st Dep't 2009). See Nassar v. Macy's Inc., 182 A.D.3d 414, 414 (1st Dep't 2020). Therefore defendants are entitled to summary judgment dismissing plaintiffs' Labor Law § 241(6) claim to the extent that the claim is based on any regulation other than 12 N.Y.C.R.R. § 23-1.22(b)(3), but are not entitled to summary judgment dismissing plaintiffs' Labor Law § 241(6) claim to the extent that the claim is based on 12 N.Y.C.R.R. § 23-1.22(b)(3). Sawczyszyn v New York Univ., 158 A.D.3d at 512.

Plaintiffs, on the other hand, have established that a violation of 12 N.Y.C.R.R. § 23-1.22(b)(3) caused the ramp to break loose, leading to Royland's injury. Plaintiff's expert

architect inspected the ramps that, according to Tarr's affidavit, Marshall's Moving Service installed at the church March 17, 2010. They were less than 48 inches wide, were made of planking less than one inch thick, and lacked any fixtures to secure the ramp to the stairs. Royland's testimony that the ramp slid out as he reached the top of the stairs does not indicate that the non-complaint width caused his injury, but does demonstrate that the non-compliant thin planking was not of the requisite strength and not secured to the stairs, causing the planking to break loose and leading to his injury. Therefore plaintiffs are entitled to summary judgment on defendants' liability under Labor Law § 241(6) based on 12 N.Y.C.R.R. § 23-1.22(b)(3). Sawczyszyn v New York Univ., 158 A.D.3d at 512.

IV. DEFENDANTS' CROSS-CLAIMS AND THIRD PARTY CLAIMS

Marshall's Moving Service and McGovern & Company seek dismissal of all cross-claims against these defendants. McGovern & Company also moves for summary judgment in its favor on its cross-claims against Marshall's Moving Service and Peragallo Pipe Organ and its third party claim against Milford Flooring Corp. for indemnification. Marshall's Moving Service and McGovern & Company each cross-claim against their respective co-defendants for contribution, implied and contractual indemnification, and

breach of a contract to procure insurance. Peragallo Pipe Organ Company cross-claims against Marshall's Moving Service and McGovern & Company for contribution. Milford Flooring Corp. counterclaims against McGovern & Company for contribution and cross-claims against Peragallo Pipe Organ and Marshall's Moving Service for implied indemnification.

A. Permissibility of Milford Flooring Corp.'s Cross-Claims

"A cross-claim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable." C.P.L.R. § 3019(b). "Where a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant." C.P.L.R. § 3019(d). Therefore, Milford Flooring Corp.'s service of a summons and answer with the claims against defendants renders Milford Flooring Corp. a defendant for the purposes of its cross-claims.

B. Implied Indemnification and Contribution Claims

Since the court dismisses the Labor Law § 200 and negligence claims against McGovern & Company, it may seek implied indemnification. Serowik v. Leardon Boiler Works Inc., 129

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A.D.3d 471, 472 (1st Dep't 2015); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2012). Since McGovern & Company was not negligent, Marshall's Moving Service is not entitled to summary judgment dismissing McGovern & Company's implied indemnification and contribution claims. Berihuete v. 565 W. 139th St., L.P., 171 A.D.3d 667, 667 (1st Dep't 2019); Liberman v. Cayre Synergy 73rd LLC, 140 A.D.3d 623, 624 (1st Dep't 2016). Marshall's Moving Service and Peragallo Pipe Organ, as the parties that carried out, supervised, or were responsible to supervise the work that caused Royland's injury, are liable to McGovern & Company for implied indemnification if Marshall's Moving Service and Peragallo Pipe Organ were negligent. Joynes v. Acadia-P/A 161st St., LLC, 117 A.D.3d 651, 651 (1st Dep't 2014); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 480; Naughton v. City of New York, 94 A.D.3d at 10. As set forth above, plaintiffs move for summary judgment only on whether these defendants owed Royland a duty of care and do not seek summary judgment that defendants were negligent. McGovern & Company contends only that its co-defendants assembled and installed the ramp, but does not identify how they were negligent. Therefore McGovern & Company is not entitled to

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summary judgment on implied indemnification against either Marshall's Moving Service or Peragallo Pipe Organ. Ortiz-Cruz v. Evers, 150 A.D.3d 622, 623 (1st Dep't 2017). Since McGovern & Company was not negligent, it is entitled to summary judgment dismissing its co-defendants' cross-claims and Milford Flooring Corp.'s counterclaims for contribution against McGovern & Company. Astrakan v. City of New York, 184 A.D.3d 444, 445 (1st Dep't 2020); Ramos v. Pet Mkt. W. 57th St., Inc., 114 A.D.3d 423, 424 (1st Dep't 2014).

C. Contractual Indemnification and Breach of a Contract to Procure Insurance

The subcontract between McGovern & Company and Milford Flooring provides for indemnification of McGovern & Company regardless of its negligence. Despite New York General Obligations Law § 5-322.1's prohibition against indemnification for a party's own negligence, as this subcontract provides, the absence of McGovern & Company's negligence renders the provision enforceable even without terms limiting indemnification "to the fullest extent permitted by law." Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210 (2008). See Mathews v. Bank of Am., 107 A.D.3d 495, 496 (1st Dep't 2013); Hernandez v. Ten Ten Co., 102 A.D.3d 431, 434 (1st Dep't 2013); Naughton v. City of New York,

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94 A.D.3d at 12.

In ¶ 5(b) of the subcontract, Milford Flooring Corp. agreed to indemnify McGovern & Company for liability "caused by[,] arising from, or in any way incidental to the performance of the work hereunder." Aff. of Patrick McConnell Ex. O, at 8, 10. Since Royland's injury occurred while transporting a floor sander into the premises to perform his work of renovating the floors, McGovern & Company is entitled to summary judgment on the contractual indemnification claim against Milford Flooring Corp. Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 413-14 (1st Dep't 2019); Adagio v. New York State Urban Dev. Corp., 168 A.D.3d 602, 603 (1st Dep't 2019); Wilk v. Columbia Univ., 150 A.D.3d 502, 503 (1st Dep't 2017); Best v. Tishman Constr. Corp. of N.Y., 120 A.D.3d 1081, 1082 (1st Dep't 2014).

McGovern & Company fails to rebut Marshall's Moving Service's evidence, however, that there was no written contract between Marshall's Moving Service and any co-defendant. Therefore Marshall's Moving Service is entitled to summary judgment dismissing McGovern & Company's claims for contractual indemnification, Astrakan v. City of New York, 184 A.D.3d at 445-46; Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549-50 (1st Dep't 2018), and breach of a contract to procure insurance.

LaMorte v. City of New York, 107 A.D.3d 439, 440-41 (1st Dep't 2013); Regno v. City of New York, 88 A.D.3d 610, 610 (1st Dep't 2011); Children's Corner Learning Ctr. v. Miranda Contr. Corp., 64 A.D.3d 318, 322 (1st Dep't 2009). See Nicholson v. Sabey Data Ctr. Props., LLC, 160 A.D.3d 587, 587 (1st Dep't 2018); Galue v. Independence 270 Madison LLC, 119 A.D.3d 403, 403 (1st Dep't 2014). Nor does McGovern & Company present any contract by Peragallo Pipe Organ requiring it to indemnify or procure insurance for McGovern & Company.

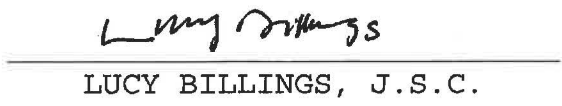
D. Marshall's Moving Service's Cross-Claims Against Peragallo Pipe Organ

Peragallo Pipe Organ's only support for dismissal of Marshall's Moving Service's cross-claims is the claim that Peragallo Pipe Organ was not negligent. Since factual issues regarding its negligence remain, as discussed above, Peragallo Pipe Organ fails to meet its burden to obtain summary judgment dismissing those cross-claims. Linhart v. Rojas, 154 A.D.3d 440, 440 (1st Dep't 2017); Chapman v. City of New York, 139 A.D.3d 507, 507-508 (1st Dep't 2016); Lee v. New York City Tr. Auth., 138 A.D.3d 579, 579 (1st Dep't 2016); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609, 609 (1st Dep't 2011).

V. CONCLUSION

In sum, for the reasons explained above, the court grants the motion for summary judgment by defendant Marshall's Moving Service, Inc., to the extent of dismissing plaintiffs' Labor Law § 241(6) claim based on violation of 12 N.Y.C.R.R. § 23-1.22(b)(2) and (4) and the cross-claims by defendant McGovern & Company, LLC, for contractual indemnification and breach of a contract to procure insurance. C.P.L.R. § 3212(b) and (e). The court grants the motion for summary judgment by McGovern & Company to the extent of dismissing plaintiffs' Labor Law § 200 and negligence claims and Labor Law § 241(6) claim based on violation of 12 N.Y.C.R.R. § 23-1.22(b)(2) and (4) and co-defendants' cross-claims and third party defendant's counterclaim for contribution against McGovern & Company. C.P.L.R. § 3212(b) and (e). The court grants plaintiffs' cross-motions to the extent of granting summary judgment on their Labor Law § 240(1) claim against McGovern & Company and defendant Peragallo Pipe Organ Company and on their Labor Law § 241(6) claim against all defendants. C.P.L.R. § 3212(b) and (e). The court otherwise denies the parties' motions and cross-motions.

DATED: November 4, 2020



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