

<b>Stevens v Dick's Sporting Goods, Inc.</b>
2020 NY Slip Op 34851(U)
December 4, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 614299/2017
Judge: Sanford Neil Berland
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SHORT FORM ORDER

E-FILE

INDEX No. 614299/2017  
CAL. No. 2019022200T

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD N. BERLAND  
Acting Justice of the Supreme Court

MOTION DATE 3/24/20 (004)  
MOTION DATE 3/26/20 (005)  
ADJ. DATE 7/7/20  
Mot. Seq. # 004 MotD  
Mot. Seq. # 005 MG

-----X  
JEFFREY STEVENS and DOROTHY  
STEVENS,

Plaintiffs,

- against -

DICKS'S SPORTING GOODS, INC.,  
ADVANCED FIXTURES, INC., I3 LLC, and  
EASTMAN, COOKE & ASSOCIATES, LLC.,

Defendants.

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ADVANCED FIXTURES, INC., and I3 LLC,

Third-Party Plaintiffs,

- against -

TRILLIUM CONSTRUCTION SERVICES,

Third-Party Defendant.  
-----X

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Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers, including a memorandum of law, by defendant Dick's Sporting Goods, Inc., dated February 19, 2020; Notice of Motion and supporting papers, including a memorandum of law, by defendant Eastman, Cooke & Associates, LLC, dated March 2, 2020; Answering Affidavits and supporting papers by plaintiffs, dated April 28, 2020; and Replying Affidavits and supporting papers by Dick's Sporting Goods, Inc., dated May 22, 2020, it is

**ORDERED** that these pending motions (seq. 004 and 005) are hereby consolidated for purposes of this determination; and it is

**ORDERED** that motion (seq. 004) by defendant Dick's Sporting Goods, Inc. for summary judgment is granted to the extent of severing and dismissing plaintiff's Labor Law § 240(1) and § 200 causes of action, and is otherwise denied; and it is further

**ORDERED** that motion (seq. 005) by defendant Eastman, Cook & Associates, Inc. for summary judgment dismissing plaintiff's complaint and any cross-claims asserted against it is granted.

Plaintiffs, Jeffrey Stevens ("plaintiff"), and his wife derivatively, commenced this action seeking damages for personal injuries he sustained on August 1, 2014, while working on a renovation project at 499-64 Sunrise Highway in Patchogue, New York (the "property"). Defendant Dick's Sporting Goods, Inc. ("DSG") leased the property, which it was converting to a Dick's Sporting Goods retail store ("Dick's"). DSG retained Eastman, Cook & Associates, Inc. ("Eastman") as the general contractor for the renovation and directly retained defendant/third-party plaintiff Advanced Fixtures, Inc. ("Advanced") to manufacture and install retail displays. Advanced subcontracted the assembly and installation of the display fixtures to defendant/third-party plaintiff i3 LLC. In addition to its employees, i3 LLC obtained extra workers from third-party defendant Midwest Construction Services, Inc., d/b/a Trillium Construction Services ("Trillium")<sup>1</sup>, a temporary staffing agency. At the time of his accident, plaintiff was employed by Trillium as a carpenter and assigned to work on the display assembly and installation project.

In their amended complaint, plaintiffs allege causes of action against defendants for common-law negligence and violations of Labor Law §§ 240(1), 241(6) and 200. In its answer, DSG denies liability, interposes affirmative defenses and asserts cross-claims against Advanced and i3 LLC for contribution, contractual and common-law indemnification and for damages resulting from the failure to procure contractually required insurance. In its answer, Eastman denies liability and interposes several affirmative defenses. Discovery has been completed and the note of issue filed.

DSG now moves for summary judgment dismissing plaintiffs' amended complaint as asserted against it on the grounds that Labor Law § 240 (1) does not apply to the circumstances in which the accident occurred; that the provisions of the Industrial Code (12 NYCRR) upon which plaintiffs rely are either inapplicable to the circumstances surrounding the accident or are of a kind that may not serve to support a Labor Law § 241(6) cause of action; and that it cannot be held liable under Labor Law § 200 or for common-law negligence as it did not direct, control or supervise the injury-producing work.

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<sup>1</sup>In September 2019, by decision and order this court, Trillium's motion for an order granting it summary judgment dismissing the third-party complaint was granted.

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Alternatively, in the event it is denied summary judgment dismissing plaintiffs' claims against it, DSG moves for summary judgment in its favor on the cross-claim it has asserted against i3 LLC for contractual indemnification. Eastman moves for summary judgment dismissing the amended complaint as asserted against it on the grounds that it was neither a general contractor nor an agent of DSG with respect to the work plaintiff Jeffrey Stevens was performing and did not have the authority to supervise, control or direct such work.

Stevens testified that on the day of the accident, he and a partner were working assembling store displays on site from prefabricated components. The components were stored on pallets, which had been placed in groups at various locations within the building. Stevens testified that the accident occurred when he and his partner were in the process of moving a display component, an eight-foot-long by four-foot-wide side wall, from a pallet that was located in the approximate center of a group of pallets of display parts that had been placed next to one another "out on the floor" at the northwest end of the building. To reach the pallet that held the side wall, Stevens and the other worker had to walk across another pallet, which was covered with cardboard. Once they located the side wall, Stevens and his partner picked it up and proceeded back across the adjacent, cardboard-covered pallet so that they could bring the side wall out to where they were assembling the display. The side wall was heavy - weighing between 200 and 250 pounds, according to Stevens - and as they were proceeding across the cardboard-covered pallet, the cardboard gave way, and plaintiff's foot fell between the slats of the pallet, causing him to fall forward. After he fell, display components that were leaning against an I-beam post fell on him. Stevens testified that the pallets were approximately five to six inches in height.

Eastman's motion for summary judgment dismissing the amended complaint is granted. Raymond Ruggiano, the site superintendent for the renovation project, was deposed on behalf of Eastman. Jeffrey Tarris, the vice president of construction and development, was deposed on behalf of DSG. Ruggiano and Tarris testified that Eastman was hired as the general contractor to perform the framing, drywall and painting and to install the mechanical, electrical, plumbing and fire suppression systems. Tarris testified that Eastman did not have any responsibilities with respect to the installation or assembly of display cases and that Advanced was retained directly by DSG to perform that portion of the project. The written contract between DSG and Eastman corroborates Ruggiano's and Tarris's testimony. On these facts, which are not contradicted by anything plaintiffs have tendered, Eastman cannot be held liable for plaintiff's injuries and, therefore, is entitled to summary judgment dismissing the complaint as asserted against it (*see Russin v Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]; *Fumo v NAB Constr. Corp.*, 19 AD3d 446, 798 NYS2d 66 [2d Dept 2005]; *Serpe v Eyriss Prods., Inc.*, 243 AD2d 375, 663 NYS2d 542 [1st Dept 1997]).

Labor Law § 240 (1) was designed to provide "exceptional protection" for workers against "special hazards," which are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The right of recovery afforded by the statute does not extend to other types of harm (*id.*; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]).

Here, plaintiff neither fell from a height nor was he "struck by a falling object that was improperly hoisted or inadequately secured" within the contemplation of the Labor Law. Thus, his injuries are not

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attributable to the type of elevation-related hazard contemplated by Labor Law § 240 (1) (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 795 NYS2d 511 [2005]; *Smith v New York State Elec. & Gas Corp.*, 82 NY2d 781, 604 NYS2d 540 [1993]; *Biafora v City of New York*, 27 AD3d 506, 811 NYS2d 764 [2d Dept 2006]; *Jacome v State*, 266 AD2d 345, 698 NYS2d 320 [2d Dept 1999]). In opposition, plaintiff failed to raise a triable issue of fact. Therefore, plaintiffs' Labor Law § 240 (1) claim cannot be sustained, DSG is entitled to summary judgment dismissing same.

Labor Law § 241 (6) imposes a nondelegable duty upon an owner and general contractor or its agent to provide protective equipment, devices and other adequate and reasonable protection to persons employed in the construction or alteration of a building (*see Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Ross v Curtis-Palmer Hydro Elec. Co.*, *supra*). An owner, general contractor or agent will be held absolutely liable in damages regardless of whether it has actually exercised supervision or control over the work where a violation of Labor Law § 241(6) is a proximate cause of a plaintiff's injuries (*Ross v Curtis-Palmer Hydro Elec. Co.*, *supra*; *Zimmer v Chemung County Perf. Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102 [1985]). In addition to providing adequate protection for workers, Labor Law § 241 (6) requires compliance with the safety rules and regulations promulgated by the Commissioner of the Labor Department and found in the Industrial Code (*see Rizzuto v L.A. Wenger Constr. Co.*, *supra*; *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*). To sustain a cause of action under Labor Law § 241 (6), a plaintiff must allege a breach of an Industrial Code regulation which sets forth specific, concrete safety standards applicable to the circumstances of the accident (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 45 NYS3d 179 [2d Dept 2017]).

Here, plaintiffs allege violations of the Industrial Code, 12 NYCRR, § 23-1.5(a), (b) and (c), § 23-1.7 (b) (1) (i), (ii) and (iii), § 23-1.7 (e) (1), (e) (2) and (f), § 23-2.1 (a) (1) and (b), and § 23-3.3 (k) (1) (ii), and several sections of the Code of Federal Regulations ("CFR"). The CFR sections relied upon pertain to OSHA standards which cannot provide a basis for liability under Labor Law § 241 (6) (*see Wetter v Northville Indus. Corp.*, 185 AD3d 874, 127 NYS3d 521 [2d Dept 2020]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]).

12 NYCRR § 23-1.5 relates to general safety standards and, accordingly, will not provide a basis for a claim under Labor Law § 241 (6) (*Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, *supra*; *Vernieri v Empire Realty Co.*, *supra*). 12 NYCRR 23-1.7 (f), which provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground" is inapplicable under the facts presented. 12 NYCRR § 12-3.3 (k) (ii) applies to demolition materials and the demolition site and thus is not relevant to the facts herein.

However, DSG has failed to demonstrate a *prima facie* entitlement to summary judgment based on 12 NYCRR 23-1.7 (e) (2). This provision prohibits tripping hazards in passageways and working areas, and has been held to be sufficiently specific to support a cause of action under Labor Law § 241(6) (*see Lundy v Austein*, 170 AD3d 703, 95 NYS3d 289 [2d Dept 2019]; *Burns v Lecesce Constr. Servs. LLC*, 130 AD3d 1429, 12 NYS3d 722 [4 th Dept 2015]). Stevens's testimony is sufficient to raise an issue of fact as to whether his alleged injury resulted from the presence of a tripping hazard in the area he had to traverse, in violation of this section (*see Lundy v Austein*, *supra*; *Burns v Lecesce Constr. Servs. LLC*, *supra*; *see also*

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*Harkin v City of New York*, 69 AD3d 901, 893 NYS2d 273 [2d Dept 2010] [foot caught on wooden pallet, causing plaintiff to fall]; *Torres v Forest City Ratner Companies, Inc.*, 89 AD3d 928, 933 NYS2d 71 [2d Dept 2011] [regulation applicable when plaintiff fell after stepping on door laying on loose pipes]). Therefore, the branch of DSG's motion seeking to dismiss Labor Law § 241 (6) is denied.

DSG established *prima facie* entitlement to summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence causes of action. Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a reasonably safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1993]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 35 NYS3d 700 [2d Dept 2016]; *Rojas v Schwartz*, 74 AD3d 1046, 1046, 903 NYS2d 484 [2d Dept 2010]). A cause of action sounding in a violation of Labor Law § 200 or common-law negligence may arise from a dangerous or defective condition on the premises or from the manner in which the work was performed (see *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). To the extent plaintiffs' Labor Law § 200 and common-law negligence causes of action arise out of the means and methods used to perform the work, DSG may be held liable for common-law negligence or a violation of Labor Law § 200 only if it had "the authority to supervise or control the performance of the work" (*Pilato v 866 U.N. Plaza Assoc., LLC*, *supra* at 646; *Ortega v Puccia*, *supra* at 61), and the record is clear that it did not. Likewise, the record is clear that DSG played no part in the creation of the allegedly dangerous and defective condition, and there is no evidence to contradict the evidence that it had neither actual nor constructive knowledge of that condition.

Plaintiff's testimony that he only received direction and instruction from i3 LLC's foreman-supervisor and did not receive instruction or direction from anyone else is further evidence that DSG did not exercise supervision or control over the performance of the work Stevens was performing when the accident occurred. Accordingly, DSG is also entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it (see *Pchelka v Southcroft, LLC*, 178 AD3d 836, 115 NYS3d 382 [2d Dept 2019]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 56 NYS3d 187 [2d Dept 2017]).

Turning to the indemnification portion of DSG's motion, "[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'" (*Dzrewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777, 521 NYS2d 216 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153, 344 NYS2d 336 [1973]; see *Bermejo v New York City Health & Hosps. Corp.*, *supra* at 503 ["The right to contractual indemnification depends upon the specific language of the contract"]). Thus, "[a] party who has been held liable to an injured worker solely on the basis of the statutory liability imposed by section 240 (1), without any fault on its part, is entitled to recover under a contract of indemnity" (*Bermejo v New York City Health & Hosps. Corp.*, *supra* at 503; see *Brown v Two Exch. Plaza Partners*, *supra*).

DSG argues that it is entitled to be indemnified by i3 LLC based upon its National Vendor Agreement with Advanced and the Master Subcontractor Agreement ("Master Agreement") between Advanced and i3 LLC. However, neither agreement by its terms requires i3 LLC to indemnify DSG, and while the Master Agreement provides for i3 LLC indemnifying Advanced "and if required by the Prime

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Contract...[the] Client . . . ,” no “Prime Contract” has been proffered. Accordingly, the branch of DSG’s motion seeking contractual indemnification against i3 LLC is denied.

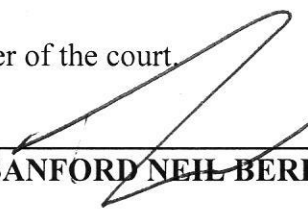
The court has considered the parties’ remaining arguments and, in view of the above determinations, deems that they do not require further discussion.

The foregoing constitutes the decision and order of the court.

Dated:

*12/4/2020*

Riverhead, New York



HON. SANFORD NEIL BERLAND, A.J.S.C.

         FINAL DISPOSITION

    XX     NON-FINAL DISPOSITION