Jakob v 767 Fifth Partners, LLC
2021 NY Slip Op 30308(U)
February 3, 2021
Supreme Court, New York County
Docket Number: 155057/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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INDEX NO. 155057/2016

WILLIAM JAKOB,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002 003

- v -

767 FIFTH PARTNERS, LLC, BOSTON PROPERTIES, INC., BOSTON PROPERTIES MANAGEMENT, INC., PETRETTI & ASSOCIATES, LLC, BROOKLINE MECHANICAL INC.,

DECISION + ORDER ON MOTION

Defendants.

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BROOKLINE MECHANICAL INC.

Third-Party
Index No. 595877/2017

Plaintiff,

-against-

CELTIC SHEET METAL

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 150, 151, 160, 161, 164

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152, 153, 154, 155, 156, 157, 158, 159, 162, 163, 165, 166, 167, 168, 171

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

This is an action to recover damages for personal injuries allegedly sustained by a metalworker on February 16, 2016, when, while working at a construction site located at 767 Fifth Avenue, New York, New York (the Premises), he was struck by falling ductwork, causing him to fall from the ladder he was on.

In motion sequence number 002, defendant/third-party plaintiff Brookline Mechanical Inc. (Brookline) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it, and for summary judgment on its third-party indemnification claims against third-party defendant Celtic Sheet Metal (Celtic).

In motion sequence number 003, plaintiff moves, pursuant to CPLR 3025 (b), for leave to amend the complaint to correct the date of the accident and, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against defendants 767 Fifth Partners, LLC (767 Fifth) and Petretti & Associates, LLC (Petretti).

In connection with motion sequence number 003, defendants 767 Fifth, Petretti, Boston Properties, Inc. and Boston Properties Management, Inc. (collectively, defendants) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.

BACKGROUND

On the day of the accident, 767 Fifth was an owner of the Premises. 767 Fifth, through its management company, hired Petretti to provide construction management services for a project at the Premises that entailed the gut renovation of six floors (the Project). Petretti hired Brookline to perform mechanical installation work at the Premises. Brookline, in turn, subcontracted its sheet metal and HVAC duct installation work to Celtic. Plaintiff was employed by Celtic.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Celtic. His duties included installing HVAC ductwork at the Project. This would often require him to lift sections of ductwork weighing fifty to two hundred pounds in order to fit them in place before attaching

them to the structure. He and his partner, John Hernandez, were the only two Celtic employees working on the 30th floor of the Premises at the time of the accident.

Plaintiff initially testified that he was not certain about the date of the accident – it was either February 15 or 16, 2016. However, he later recalled that February 15, 2016 was Presidents day. He then testified that the accident occurred "the day after the holiday, which was the 16th. We don't work on Presidents' Day. It is a holiday" (plaintiff's tr at 46).

Plaintiff testified that before the accident he was installing a "VAV system" – a 20-foot-long, 300-pound section of HVAC ductwork (*id.* at 49) with Hernandez. To perform his work, plaintiff was provided a lift (the Lift) and a ladder by Celtic. The Lift and the ladder were Celtic property. Plaintiff testified that, while the Lift was not in good condition – rusted and slightly bent – he had never had serious problems with it prior to the accident. According to plaintiff, he and Hernandez placed a section of ductwork onto the Lift and moved it into position nine or ten feet above the floor. Hernandez then left the area to continue working on a different section of the HVAC while plaintiff began to secure the new ductwork to the existing framework. Plaintiff testified that this was typical.

To secure the ductwork, plaintiff had to "attach the hangers . . . to the main trunk line" (*id.* at 51). To perform this work, plaintiff climbed a ladder to reach the ductwork. Then, plaintiff explained:

> "I went to put the system into place. The lift collapsed, spilling the ductwork on top of me . . . my arm was outreached trying to push it in. Came down on top of me and my head. I was knocked off the ladder and onto the floor"

(*id.* at 49-50). Plaintiff clarified that immediately before the accident, he was standing on the third rung from the top of the ladder, with both arms over his head, using a wrench to tighten bolts on the ductwork. Then the Lift "suddenly dropped, striking me, pushing the ladder over"

(*id.* at 73). The Lift's arm, which holds the ductwork, struck plaintiff in the shoulder, then the duct dropped and struck plaintiff in the head. Plaintiff fell backwards from the ladder and hit the ground.

Plaintiff stayed on the ground for a few minutes before getting up and finding Hernandez. Hernandez then helped plaintiff place the duct on a different lift. Plaintiff then successfully completed the installation. He continued working through the day and he worked the following day as well, though the pain in his shoulder and arm continued to worsen. Plaintiff reported the accident to his foreman on the day after the accident and filed a written report the following Monday, February 22, 2016. Ultimately, plaintiff continued working through the end of March 2016.

At his deposition, plaintiff was shown several photographs. He identified the photographs as depicting the Lift. Plaintiff was also shown two accident reports. He noted that one accident report misdated the accident. He also noted that he had signed another accident report that contained many blanks and he did not know who had filled them in after he signed it.

Deposition Testimony of James Powderly (Petritti's Vice President)

James Powderly testified that on the day of the accident he was a vice president of Petritti. His duties included project management, which entailed the supervision of assistant project managers and superintendents at the Project. Petritti was the construction manager for the Project at the Premises. It hired several subcontractors to perform work on the Project, including Brookline. Brookline was hired to install the HVAC system (Powderly tr at 24). Brookline subcontracted the sheet metal work to Celtic.

Powderly was present several times a week to supervise and schedule work. Petretti had three superintendents present at the Premises on a daily basis and ran safety meetings once a

week. If Powderly or other Petretti employees saw unsafe conditions, they had the authority to stop work.

Powderly was not present at the Premises at the time of the accident and did not know anything about what happened. If an accident occurred and was reported to a Petritti supervisor, that supervisor would prepare an accident report, but would not investigate the incident.

Powderly was shown a photograph that plaintiff had previously identified as the Lift. Powderly indicated that the Lift appeared to be damaged because "one of the arms is coming apart" (*id.* at 48).

Deposition Testimony of Vincent Bongiorni (Brookline's Project Manager)

Vincent Bongiorni testified that at the time of the accident, he was Brookline's project manager for the Project. His duties included coordinating Brookline's subcontractors and interfacing with the general contractor and/or construction manager. Brookline hired Celtic as a subcontractor for the Project. It did not provide Celtic with any tools and did not supervise or direct Celtic's employees. Bongiorni also testified that he was unsure if he had the authority to stop work.

Bongiorni did not know of the accident prior to learning that plaintiff had filled out an accident report for Petretti. He did not investigate the accident or prepare an accident report.

Deposition Testimony of Kevin Faul (Celtic's Project Manager)

Kevin Faul testified that at the time of the accident, he was Celtic's project manager for the Project. His duties included "the day-to-day running" of the Project, including coordinating with subcontractors and making sure the Project was running on time. Celtic was hired by Brookline to furnish and install duct work at the Project. Faul was typically present at the Premises two times a week.

Faul testified that Celtic had two to three teams of workers on the project at any given time. Each team was two workers. Celtic also had a foreman on site. Celtic provided its workers with ladders and duct lifts. The ladders and lifts were maintained by Celtic.

Each Celtic team was provided with one duct lift. Faul explained that a specific duct lift was assigned to a specific team (Faul tr at 24). Installation of ductwork is a two person job. When asked if workers ever work alone, Faul stated "[n]o, they can't" (*id.* at 31).

Faul learned of the accident approximately a week after it happened from Celtic's foreman. Faul asked the foreman to check the Lift out. The foreman reported to Faul that the Lift operated normally, but Faul still directed the foreman to "put it on the truck in the back of the shop" to have it inspected. The Lift was subsequently inspected at Celtic's shop. Faul was not aware that any issues were found with the Lift and testified that it "went back into stock and was shipped out to another job" (*id.* at 34).

Faul also testified that plaintiff returned to work and, to Faul's knowledge, continued to work with no issue for over a month.

Deposition Testimony of Johnny Hernandez (Celtic's Junior Foreman)

Johnny Hernandez testified that on the day of the accident he was employed by Celtic as a junior foreman. Hernandez testified that he did not specifically recall working on the Project at the Premises. He also did not recall ever working with plaintiff, stating "no, I do not remember a William Jakob" (Hernandez tr at 13). Hernandez further testified that he did not recall having a partner at any Celtic project who suffered an accident and injury, aside from minor injuries (*id.* at 20). Hernandez also testified that he did not remember ever having a problem with a duct lift on a project, but if he had experienced any issues with a duct lift it was the type of thing he would recall (*id.* at 21).

The Accident Reports

The C-3 Report

Plaintiff signed a Workers' Compensation Employee Claim Form (the C-3 Report) on April 4, 2016. The C-3 Report indicates that the accident occurred on February 15, 2016. In it, plaintiff stated that "[w]hile working, a duct lift dropped causing a duct to fall on [him], injuring [his] RT shoulder (rotator cuff tear)" (plaintiff's notice of motion, exhibit 7; NYSCEF Doc. No. 137).

The Petretti Accident Reports

Plaintiff submits two accident reports on Petretti letterhead. The first report (located in plaintiff's notice of motion, exhibit 7; NYSCEF Doc. No. 137) is three pages long, though only two pages are provided to the court. On the first page, it indicates that the date of the accident was February 21, 2016 – a Sunday – and describes the incident as "[d]uct lift stage fell w/o warning (defect) jamming right arm downward" (*id.*). The second page indicates that the cause of the accident was "improper or defective equipment" and otherwise contains two blank fields for "Comments" and "Prevention."

The second report (located in the same exhibit) appears to be a copy of the first report, though the date has been altered – specifically the February 21, 2016 was scratched out and replaced with February 15, 2016. The first page is otherwise identical to the second. The second page also appears to be a copy of the first report's second page, though the "Comments" and "Prevention" sections are filled in (*id.*). Specifically, the "Comments" section states "[e]mployee is back working with no concern or further damage to his shoulder" and the "Prevention" section states "this happened on a Monday and was reported by [plaintiff] on Thursday" (*id.*).

Celtic's Payroll Records

Plaintiff submits Celtic's payroll records for the week of the accident, which indicate that February 15, 2016 was a Monday. According to this document, no Celtic employee worked that day. The court further notes that February 15, 2016 was President's Day, a holiday. This record further indicates that February 21, 2016 was a Sunday, and no Celtic employee worked that day.

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]). 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]).

Plaintiff's motion for Leave to Amend (Motion Sequence Number 003)

Plaintiff seeks leave, post note of issue, to amend the complaint. Specifically, plaintiff seeks to change the date of the accident, as alleged in the complaint, from February 15, 2016 to February 16, 2016.

Pursuant to CPLR 3025 (b), leave to amend shall be freely granted upon a showing of merit, so long as there are no new allegations of fact or new theories of liability, and there is no prejudice to a defendant (see *Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 490 [1st Dept 2018]; *D'Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011]).

"A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*O'Halloran v. Metropolitan Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017] [internal quotation marks and citations omitted]). "Prejudice does not occur simply because a defendant . . . has to expend additional time preparing its case. Rather, prejudice occurs when the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-655 [1st Dept 2009]).

Here, plaintiff's proposed amended date has a basis in the evidence provided to the court – i.e. plaintiff's testimony, supported by Celtic's payroll records. Accordingly, plaintiff's proposed amendment has merit. In opposition, defendants articulate no prejudice with respect to changing the alleged date of the accident. Moreover, such a correction to the complaint in no way interferes with the facts laid out by the evidence submitted to the court, nor does it prevent defendants from arguing that such a date is inaccurate based on the same evidence.

Further, defendants' argument that the motion for leave to amend should be denied because it is made post note of issue is unpersuasive as CPLR 3025 explicitly allows for such a

motion to be made "at any time" (CPLR 3025 [b]; *see e.g. D'Elia v City of New York*, 81 AD3d at 684 [allowing post note of issue amendment of pleadings]).

Accordingly, leave is granted for plaintiff's proposed amendment.

The Labor Law §240 (1) Claim (Motion Sequence Number 002 and 003 and defendants' cross motion)

Brookline moves, and defendants cross-move, for summary judgment dismissing the complaint as against them. Plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim as against 767 Fifth and Petretti only.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in 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]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d

513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] 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 NY Stock Exchange*, 13 NY3d 599, 603 [2009]). Therefore, in order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Initially, 767 Fifth and Petritti do not challenge that they are proper Labor Law defendants. Brookline, however, argues that it cannot be held liable under the Labor Law because, as the HVAC subcontractor, it is not a proper Labor Law defendant.

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). Therefore, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it

must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.,* 4 NY3d 861, 863-864 [2005]).

Here it is uncontested that Brookline contracted with Petretti, on behalf of 767 Fifth, to install the HVAC system at the Premises. It is also uncontested that Brookline hired Celtic – plaintiff's employer – to install the HVAC system.

Brookline argues that it did not have the authority to supervise or control Celtic's installation work. This argument is unpersuasive where, as here, the duty at issue is non-delegable – i.e. Brookline cannot delegate its Labor Law responsibilities to Celtic. The question then is whether Brookline obtained from Petretti or 767 Fifth the non-delegable duty to conform to the requirements of the Labor Law in the first place. Brookline does not provide a copy of its contract with Petretti which would set forth the scope of Brookline's contracted duties. Therefore, Brookline has not met its prima facie burden of establishing that it is not an agent of the owner or general contractor, such that the non-delegable duties of the Labor Law would not apply to it. Brookline raises no other argument with respect to the Labor Law § 240 (1) claim alleged against it.

Accordingly, Brookline has not established its prima facie entitlement to summary judgment dismissing the section 240 (1) claim as against it. The fact that Brookline's motion is unopposed does not change this outcome, as Brookline did not meet its prima facie burden (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Next, with respect to 767 Fifth and Petretti, plaintiff raises two theories of section 240 (1) liability – (1) falling object and (2) unsecured ladder. Reviewing the facts and evidence presented plaintiff alleges he fell when he was struck by a portion of the ductwork that he was installing when the Lift failed. Further, plaintiff claims his injuries were caused by being struck

by the Lift and the falling ductwork and not from a fall off a ladder. Therefore, plaintiff's accident and subsequent injuries were caused by a falling object, not by an insufficiently secured ladder.

In order to recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, a plaintiff must demonstrate that the object that fell – i.e., the ductwork on the Lift – was in the process of being hoisted or secured at the time of the accident, or that it "was a load that required securing for the purposes of the undertaking at the time it fell" (*Cammon v City of New York,* 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; *Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 595 [1st Dept 2015]). In addition, where a device was provided, "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*see Nelson v Ciba-Geigy,* 268 AD2d 570, 572 [2d Dept 2000]).

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim as against 767 Fifth and Petretti, because he has established that the ductwork that struck him was a load that was in the process of being hoisted and/or secured at the time of his accident (*Rzymski v Metropolitan Tower Life Ins. Co.,* 94 AD3d 629, 629 [1st Dept 2012] [Labor Law § 240 (1) applied to steamfitter knocked off ladder by insufficiently secured pipe on which he was working]).

In opposition to plaintiff's prima facie showing and in support of their own cross motion for summary judgment, defendants (including 767 Fifth and Petretti) failed to raise a triable issue of fact as to whether the accident occurred as alleged by plaintiff, or whether plaintiff was the sole proximate cause of his injury.

First, defendants argue that plaintiff's accident was unwitnessed. However, that "plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in [his] favor" (*Casabianca v Port Auth. of N.Y. & N.J.*, 237 AD2d 112, 113 [1st Dept 1997]; *Campbell v 111 Chelsea Commerce, L.P.,* 80 AD3d 721, 722 [2d Dept 2011]). Rather, in such situations, to raise a question of fact, 767 Fifth and Petretti must call plaintiff's credibility into question (*see Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462 [1st Dept 1993] ["Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented"]; *Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] ["where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate"]).

To that end, defendants argue that plaintiff's credibility has been called into question because his testimony regarding the date of the accident is at odds with the date of the accident found in Petretti's records and on the C-3 Report. Therefore, defendants argue, a possibility exists that the accident never happened in the first place. Defendants also rely on Hernandez's testimony for the same proposition.

However, the discrepancies in Petretti's records and the C-3 Report (listing either blank dates, scratched out dates or dates when no one was working) do not call into question whether the accident, in fact, happened. Plaintiff's clear and consistent testimony was that the accident happened on the day after president's day – which was February 16, 2016. That date is further supported by Celtic's own worker logs, which show that plaintiff did not work on the dates listed in the various records, but that he did work on February 16, 2016. Therefore, the dates on C-3

Report and Petretti's two reports are insufficient to create a question of credibility with respect to whether the accident occurred as plaintiff described it.

However, Hernandez's testimony is sufficient to raise an issue of fact. Hernandez testified that he did not remember working with plaintiff or even whether he worked at the Premises in 2016 (Hernandez tr at 13, 20). Hernandez testified that he did not recall having a problem with a Lift on the job site and if there had been a problem with a lift, he would have remembered such an occurrence (*id.* at 24). Hernandez's testimony is evidence that plaintiff's accident did not occur, creating a question as to plaintiff's credibility.

Defendants also essentially argue that plaintiff was the sole proximate cause of his accident because plaintiff chose to use the Lift – which he described as battered and in poor condition – rather than finding a substitute lift. This argument is unpersuasive. Initially, a plaintiff cannot be the sole proximate cause of his accident where 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]). Here, the failure of the Lift was a cause of plaintiff's accident, therefore, plaintiff cannot be the sole proximate cause of his accident (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted]). "[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"]).

Further, Kevin Faul – Celtic's project manager, testified that each Celtic team was assigned a lift (Faul tr at 24). According to plaintiff, the Lift was provided for his team's use. Therefore, defendants' argument that plaintiff should have gone to get a different, safer, safety

device than the one he was provided is also unpersuasive, as that would improperly shift the non-delegable burden for protecting plaintiff to plaintiff himself.

At most, the alleged negligence on plaintiff's part – using the lift that he was provided by his employer, rather than another lift that was not assigned to him – 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]).

767 Fifth and Petretti have raised an issue of fact sufficient to defeat plaintiff's prima facie entitlement to judgment as a matter of law as against them. Further defendants failed to establish their prima facie entitlement to summary judgment dismissing the complaint as against them.

Accordingly, plaintiff, 747 Fifth and Petretti are not entitled to summary judgment on plaintiff's Labor Law § 240 (1) claim as against 767 Fifth and Petretti.

The Labor Law § 241 (6) claim (Motion Sequence Number 002 and defendants' cross motion)

Brookline moves, and defendants cross-move, for summary judgment dismissing the Labor Law § 241 (6) claims against them. Plaintiff does not move for any relief with respect to this claim.

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 duty upon owners, contractors and their agents "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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, except for Industrial Code §§ 23-1.5 (c) (3) and 23-6.1 (b), plaintiff does not oppose the dismissal of the alleged Industrial Code violations. Thus, they are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [holding plaintiff abandoned reliance on certain Industrial Code sections by failing to address them in opposition to defendant's summary judgment motion]). As such, Brookline and defendants are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on those abandoned provisions, and only Industrial Code 12 NYCRR 23-1.5 (c) (3) and 6.1 (b) will be addressed.

Industrial Code 12 NYCRR 23-1.5 (c) (3)

Industrial Code section 23-1.5 governs the general responsibilities of employers. Subsection 23-1.5 (c) provides, in pertinent part, the following:

> "(c) Condition of equipment and safeguards.
>
> * * *
>
> "(3) All safety devices, safeguards and equipment shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

Industrial Code 12 NYCRR 23-1.5 (c) (3) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Becerra v Promenade Apts. Inc.,* 126 AD3d 557, 558 [1st Dept 2015]).

In its motion, Brookline argues that this provision is inapplicable to Brookline because it applies only to employers. However, an owner, general contractor or agent of either "may be held liable for violation of those provisions [of the Industrial Code that reference an 'employer'], even though they impose obligations on the employer, since they have a nondelegable duty to provide adequate safety precautions" (*Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017]).

Here, as discussed above, a question of fact remains as to whether Brookline is an agent of the owner or general contractor, such that it obtained the nondelegable duty to protect plaintiff and the coordinate duty to be governed by Industrial Code section 23-1.5 (c) (3). Therefore, Brookline is not entitled to summary judgment dismissing this claim as against it.

In their cross motion, defendants make two arguments. The first is that section 23-1.5 (c) (3) is not sufficiently specific. This argument is without merit (*Becerra v Promenade Apts. Inc.,* 126 AD3d at 558). Their second argument is identical to Brookline's. 767 Fifth and Petretti have not contested that they are proper Labor Law defendants, and so section 23-1.5 (c) (3) applies to them (*Rubino v 330 Madison Co., LLC*, 150 AD3d at 604). As to the remaining

defendants – Boston Properties, Inc. and Boston Properties Management, Inc. – defendants do not discuss their relation to the Property, the Project or plaintiff. Therefore, as with Brookline, a question of fact remains as to whether those entities are proper Labor Law defendants.

Accordingly, Brookline and defendants are not entitled to summary judgment dismissing that portion of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.5 (c) (3) as against them.

Industrial Code 12 NYCRR 23-6.1 (b)

Industrial Code section 23-6 governs material hoisting. Subsection 23-6.1 (b) provides, in pertinent part, the following:

> "Maintenance. Material hoisting equipment shall at all times be maintained in good repair and proper operating condition with sufficient inspections to insure such maintenance. All defects affecting safety shall be immediately corrected either by necessary repairs or replacement of parts, or such defective equipment shall be immediately removed from the job site."

Here, while Brookline argues that section 23-6.1 (b) is too general to support a claim under the Labor Law, it provides no case law supporting this point, or any argument or analysis in support of its position.[1] Therefore, Brookline has failed to meet its prima facie burden with respect to this claim.

Defendants do not argue as to whether section 23-6.1 (b) is sufficiently specific to support a claim, rather, they argue that it explicitly excludes forklifts, which makes it inapplicable to the facts of the present case.[2] While section 23-6 does not govern "forklift

[1] The entirety of Brookline's argument with respect to this claim is: "12 NYCRR §§ 6.1 (a)-(k) are general requirements, none of which remotely apply to the case at bar" (NYSCEF Doc. No. 106, at 15).

[2] The entirety of defendants' argument with respect to this claim is: "The entire subpart of 23-6 excludes forklifts of the kind involved in this incident" (NYSCEF Doc. No. 154, at 10).

trucks" (*see* Industrial Code 12 NYCRR 23-6.1 [a]), defendants make no argument and provide no evidence supporting a finding that the Lift is, in fact, a forklift truck, rather than "material hoisting equipment." Therefore, defendants have not met their prima facie burden with respect to this claim.

Accordingly, Brookline and defendants are not entitled to summary judgment dismissing that portion of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-6-1 (b) as against them.

The Common-law Negligence and Labor Law § 200 Claims (Motion Sequence Number 002 and Defendants' Cross Motion)

Brookline moves, and defendants cross move, for summary judgment dismissing plaintiff's 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 circumstances of the accident: (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 e.g. Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund*

Co., Inc., 104 AD3d 446, 449 [1st Dept 2013]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, the accident was caused by the means and methods of the work – i.e. the maintenance and use of the Lift. An owner or general contractor may only be held liable under the means and method analysis if they exercised supervision or control over the injury causing work (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability (under means and methods analysis) can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"])

There is no evidence demonstrating that Brookline or defendants had the authority to supervise or control plaintiff's use of the Lift at the Premises. In addition, importantly, plaintiff does not oppose the dismissal of the Labor Law § 200 claim as against these defendants.

Accordingly, Brookline and defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

Brookline's Third-Party Claims Against Celtic (Motion Sequence Number 002)

Brookline moves for summary judgment on its third-party claims for contractual and common-law indemnification against third-party defendant Celtic.

Contractual Indemnification

"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

Brookline and Celtic entered into a "standard form of agreement between contractor and subcontractor," dated July 24, 2015, for the installation of HVAC at the Project at the Premises (the Agreement). The Agreement includes an indemnification provision that provides, in pertinent part, the following:

> "To the fullest extent permitted by law, [Celtic] shall indemnify and hold harmless the Owner, [Brookline], and employee of either of them from and against claims . . . arising out of or resulting from performance of the Subcontractor's Work, [provided] that such claim . . . is attributable to bodily injury . . . cause[d] in whole or in part by negligent acts or omissions of [Celtic] . . . ."

(Brookline's notice of motion, exhibit R; NYSCEF Doc. No. 124).

Brookline argues that, because it was free from negligence, the indemnification provision is triggered and Celtic must defend and indemnify Brookline. However, the indemnification provision requires plaintiff's accident to arise from Celtic's negligence before it is triggered. Brookline does not address whether Celtic was negligent. To the extent that Brookline argues that Celtic's insurer has failed to accept tender of defense and indemnification, or to acknowledge that Brookline is an additional insured pursuant to Celtic's insurance contract, such

a claim is properly made by the additional insured claimant against the insurer, not the insured. Celtic's insurer is not a party to this action.

Accordingly, Brookline is not entitled to summary judgment on its third-party contractual indemnification claim as against Celtic.

Common-Law Indemnification

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011]).

As plaintiff was employed by Celtic, Workers' Compensation Law § 11 applies to this case. Under section 11, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, [except] when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.,* 3 NY3d 408, 412-413 [2004]). A grave injury is defined as

> "[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

(Worker's Compensation Law § 11).

Here, plaintiff has not alleged a grave injury. Therefore, Brookline's claim against Celtic for common-law indemnification is barred by Worker's Compensation Law § 11.

Accordingly, Brookline is not entitled to summary judgment on its third-party claim for common-law indemnification against Celtic.

The parties remaining arguments have been considered and they are unavailing.

CONCLUSION AND ORDER

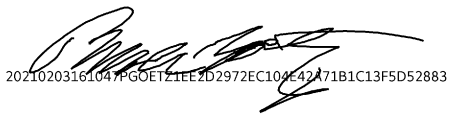
For the foregoing reasons, it is hereby

ORDERED that the motion of defendant/third-party plaintiff Brookline Mechanical, Inc. (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it, and for summary judgment in its' favor on its third-party claims against third-party defendant Celtic Sheet Metal, is granted to the extent that the common-law negligence and Labor Law § 200 claims against it is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff William Jacob's motion (motion sequence number 003) for summary judgment in his favor on his Labor Law § 240 (1) claim as against defendants 767 Fifth Partners, LLC (767 Fifth) and Petretti & Associates, LLC (Petretti) is denied; and it is further

ORDERED that the cross motion of defendants 767 Fifth, Petretti, Boston Properties, Inc. and Boston Properties Management, Inc. for summary judgment dismissing the complaint as against them is granted to the extent that Labor Law § 241 (6) claims premised on the abandoned Industrial Code provisions against them, as well as the common-law negligence and Labor Law

§ 200 claims against them are dismissed, and the motion is otherwise denied.



2/3/2021
DATE

PAUL A. GOETZ, J.S.C.

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