De La Cruz v V & C Realty II Corp.
2021 NY Slip Op 30435(U)
February 16, 2021
Supreme Court, Kings County
Docket Number: 503204/2017
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 503204/2017
Motion Date: 10/19/20
Mot. Seq. No.: 7-12

---X
ARTEMIO DE LA CRUZ,
Plaintiff,
-against-

V & C REALTY II CORP,
KITA MANAGEMENT, INC.
and VCL CONSTRUCTION, INC.,
Defendants.
---X
V & C REALTY II CORP. ,
Third-Party Plaintiff,
-against -

WSC GROUP LLC and WS CONSTRUCTION, INC .,

Third-Party Defendants.
---X

DECISION/ORDER

The following papers were read on these motions and cross-motions:

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Upon the foregoing papers, the motions are decided as follows:

In this action to recover damages for personal injuries suffered as a result of a worksite accident, the following motions are before the Court:

In Mot. Seq. No. 7, defendant V&C REALTY II CORP. ("V&C Realty") moves for an order pursuant to CPLR §3212 granting summary judgment in its favor dismissing plaintiff's Labor Law § 200 claim insofar as asserted against it and granting it summary judgment against third-party defendants, WSC GROUP, LLC and WS CONSTRUCTION, INC. (collectively "WSC") on its claims for contribution, common law indemnity, contractual indemnity and breach of contract to procure insurance.

In Mot. Seq. No. 8, defendant VCL CONSTRUCTION, INC. ("VCL Construction") moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the plaintiff's complaint in its entirety insofar as alleged against it and all cross-claims.

In Mot. Seq. No. 9, the plaintiff, ARTEMIO DE LA CRUZ, moves for an order pursuant to CPLR 3212 granting him summary judgment against defendants V&C Realty and VCL Construction on his claims pursuant to Labor Law §§ 240(1) and 241(6).

In Mot. Seq. No. 10, third-party defendant WSC moves for an order pursuant to CPLR 3212 dismissing V&C Realty's third-party claims for common law indemnification as plaintiff did not suffer a "grave injury"; granting them summary judgment dismissing V&C Realty's claim for breach of contract for failure to procure insurance and denying V&C Realty's motion

for summary judgment on its third-party claim for contractual indemnification as there has been no finding of negligence on the part of WSC.

In Motion Seq. No. 11, third-party defendant WSC moves for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law 240(1) claim, granting them summary judgment dismissing plaintiff's Labor Law 241(6) claims and denying plaintiff's motion for summary judgment.

In Motion Seq. No. 12, the plaintiff moves for leave to serve an Amended Bill of Particulars to allege a litany of violations of the Industrial Code which were not alleged prior to the filing of the Note of Issue.

The above motions and cross-motions are consolidated for disposition.

Background:

The plaintiff, ARTEMIO DE LA CRUZ, commenced this action claiming that he suffered injuries on January 27, 2017 as a result of being struck by falling concrete, dirt and other material while working in the course of his employment with third-party defendant WSC. The accident occurred while the plaintiff was working on a construction project at the premises located at 49-18 Vernon Blvd, Queen, New York which involved the construction of a five-story mixed use building. Defendant V&C Realty was the owner of the premises and defendant VCL Construction was the alleged general contractor. VCL Construction denies that it was the general contractor and claims that it was a construction manager who lacked the authority to supervise and control the activities that brought about plaintiff's accident.

Plaintiff began working at the site in December of 2016. At that time, there was already a large excavation ditch present at the site. From December 2016 up until the accident, WSC was involved in the installation of shoring along certain portions of the walls of the excavation. On the day of the accident, WSC was installing protections along the portion of the excavation ditch near the entrance gate, which provided the workers entry to the site. To accomplish this task, WSC had an excavator remove soil from the wall at which point employees of WSC, including plaintiff, would level the soil on the ground with shovels. Plaintiff's accident occurred when he began to remove soil from this wall at which time a piece of cement or dirt fell from the top of the wall and struck him on this ankle.

Mot. Seq. No. 7:

A. V&C Realty's Motion for Summary Judgment Dismissing Plaintiff's Labor Law 200(1) and Common Law Claims Against it:

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*DiMaggio v. Cataletto,* 117 A.D.3d 984, 986, 986 N.Y.S.2d 536; *see Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Wadlowski v. Cohen,* 150 A.D.3d 930, 931, 55 N.Y.S.3d 279). "[W]hen a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether there is evidence that the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition" (*Reyes v. Arco Wentworth Mgt. Corp.,* 83 A.D.3d 47, 49, 919 N.Y.S.2d 44; *see Chowdhury v. Rodriguez,* 57 A.D.3d 121, 130, 867 N.Y.S.2d 123). When a worker at a job site is injured as a result of the "means and methods" of the performance of the work, the property owner's liability under Labor Law § 200 and for common-law negligence is determined by whether the property owner had the authority to supervise and control the means and methods of the work (*see Sullivan v. New York Athletic Club of City of N.Y.,* 162 A.D.3d 955, 958, 80 N.Y.S.3d 93).

Here, through the testimony of Anthony Ciaccio, one of the two principles of V&C Realty, V&C Realty demonstrated, prima facie, that it did not create the condition that allegedly caused plaintiff's injuries and that it did not have actual or constructive notice of the condition and a reasonable amount of time within which to correct the condition. Mr. Ciaccio also demonstrated that V&C Realty did not have control over the work site. Accordingly, V&C Realty demonstrated its prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common law claims. The parties that opposed the motion failed to raise a triable issue of fact. That branch of V&C Realty's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law claims is therefore **GRANTED**.

B. V&C Realty's Motion for Summary Judgment on its Third-Party Claims against WSC for Common Law Indemnity and Contribution:

The Workers' Compensation Law limits third party claims for common-law indemnity and contribution against employers in personal injury actions to cases in which the employee, acting within the scope of his or her employment, sustained a statutorily enumerated "grave injury" (Workers' Compensation Law § 11; Castillo v. 711 Group, Inc., 41 AD3d 77, 79 [2007], citing *Castro v. United Container Mach. Group, Inc.,* 96 N.Y.2d 398, 401 [2001]; *see also Angwin v. SRFP Partnership, L.P.,* 285 A.D.2d 568, 569 [2001]). Here, since the plaintiff is not alleging a grave injury as defined in Workers' Compensation Law § 11, that branch of V&C Realty's motion for summary judgment on its third-party claims for common-law indemnity and contribution against WSC is **DENIED**.

C. V&C Realty's Motion for Summary Judgment on its Third-Party Claims against WSC for Contractual Indemnity:

Paragraph 10.1 of the contract between V & C Realty and WSC provides as follows:

> ARTI CLE 10 . 1 10. 1. 1. To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and their agents from and against claims, damages, losses and expenses, including but not limited to attorney' s fees, arising out of or resulting from performance of the Contractor' s Work or work of the Subcontractors hired by the Contractor, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, caused in whole or in part by negligent acts or omissions of the Contractor, Subcontractor the Subcontractor' s Subsubcontractors anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or

> obligations of indemnity which would otherwise exist as to a party or person described in the Article 10.

Here, by the clear wording of the above contractual indemnification provision, WSC's obligation to indemnify V&C Realty is contingent upon a finding that plaintiff's injuries arose out of WSC's negligence. Thus, to be entitled to summary judgment on its claim against WSC for contractual indemnity, V&C Realty had the burden, in the first instance, to establish as a matter of law that WSC's negligence was a substantial factor in causing the accident. No such showing has been made. Accordingly, that branch of V&C Realty's motion for summary judgment against WSC on its claim for contractual indemnification is **DENIED**.

D. That Branch of V&C Realty's Motion for Summary Judgment on its Third-Party Claims against WSC for Failure to Procure Insurance:

The contract between WSC and V&C Realty required V&C to purchase insurance and name V&C as an additional insured. The contract provides as follows:

> 10.2.1 The Owner, their agents, officers, directors and employees are to be named as an additional insured on a primary, noncontributory basis to the Contractor' s Comprehensive General Liability using appropriate ISO forms that include Premises Operations Liability, Contractual Liability, Advertising and Personal Injury Liability and Products/ Completed Operations Liability with Completed Operations Additional Insured status (CG2010 or CG2037) or by using a company specific endorsement that provides equivalent protection. The owner, their agents, officers, directors and employees shall be named as additional insured under all Comprehensive General Liability policies of subcontractors hired by the Contractor, Contractor shall provide waiver of subrogation for Owners and their agents by endorsement to the GL policy 10.2. 2 basis Coverage written on an occurrence shall be maintained without interruption from date of commencement of all contractor' s work until expiration of the applicable statute of limitations relating to latent defect in construction of or improvement to real property of the state in which the work is performed.

V&C Realty maintains that it made a request to both WSC and its carrier that it be defended and indemnified against plaintiff's claims and that its request was denied.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (R*odriguez v. Savoy Boro Park Assocs. Ltd. P'ship,* 304 A.D.2d 738, 739). Here, WSC concedes that its contract with V&C Realty obligated it to procure insurance for V&C Realty but maintains that it complied with its contractual obligation. In this regard, in opposition to V&C Realty's motion for summary judgment, WSC annexed a copy of the insurance policy that it procured with Southwest Marine and General Insurance Company which provides coverage in the amount of $1,000,000 per occurrence. The policy includes as additional insureds "[a]ny person or organization for whom [WSC is] performing operations when [WSC] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [WSC's] policy."

The Court holds that WSC's opposition raises triable issues of fact as to whether WSC complied with its contractual obligation to procure insurance for V&C Realty in accordance with its contract with V&C Realty. Further, WSC correctly maintains that to the extent V&C Realty is claiming that Southwest Marine wrongfully disclaimed coverage, the appropriate remedy was to pursue a declaratory judgment action against Southwest Marine (*see Garcia v. A&P*, 231 A.D.2d 401, 402).

Mot. Seq. No. 8

A. VCL Construction's Motion for Summary Judgment Dismissing Plaintiff's Complaint in its Entirety.

VCL Construction contends that its role on the project was that of a construction manager and that it lacked authority to supervise or control the work that the plaintiff was involved in at the time of the accident. For these reasons, VCL Construction contends that it is not liable under the Labor Law or in common law negligence. In support of its contention, VCL Construction submitted a copy of its contract with V&C Realty, a copy of the contract between V&C Realty and WSC, the affidavit of Ken Schafer, its project manager, and the deposition testimony of the various witness.

The contract between V&C Realty and VCL Construction clearly identifies VCL Construction as a construction manager, not as a general contractor. The contract imposed upon VCL Construction various managerial responsibilities, including monitoring the progress of the work, compiling a work schedule, reviewing contractors' design documents, reviewing contractors' bids and contracts and maintaining the project's budget. § 3.3.15 of the contract specifically provided that VCL Construction "shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's rights and responsibilities under the Contract Documents" and that it "shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or Multiple Prime Contractors, Subcontractors, or their agents or employees, or any other persons or any other persons or entities performing portions of the Work."

The contract between V&C Realty and WSC reflects that WSC role on the job was intended to be that of a general contractor. The contract imposed upon WSC broad and comprehensive responsibilities at the construction site, including safety obligations and supervision over the workers and the performance of their work. § 3.3.1 of the contract provided:

> The Contractor [WSC] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be

> solely responsible for, and have control over construction means, methods, techniques , sequences, and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.

In his affidavit, Ken Schafer stated that his role on the job as VCL Construction's project manager consisted of monitoring the progress of WSC's work, ensuring that the project was being done on time, coordinating materials for the job and paying the contractors as the various phases of their work were completed. He averred that he was not responsible for monitoring jobsite safety, a responsibility that he maintained belonged to WSC. Mr. Schafer stated that VCL Construction did not have the authority to manage or supervise the means and/or methods any of WSC's work or supervise any employees in their performance of that work. He also maintained that he did not actually engage in any of these function at any time. He averred that VCL Construction did not have any responsibilities with respect to shoring at the excavation ditch

Meng Wang, the President of VCL Construction, testified that VCL Construction was not responsible for job site safety and that such responsibility belonged to WSC. He maintained that even if he observed a dangerous condition at the work site, he did not have the authority to stop the work or require that the improper work be redone or corrected. Mr. Wang testified that VCL Construction did not manage the means and/or methods any of the contractor's work or supervise any employees in their performance of that work. His only meetings with WSC had to do with

payment. WSC was required to bills to VCL Construction in order to get paid. He further testified that he and Ken Schafer were present at the site only a couple of times a week for ten to fifteen minutes to ensure that the work was being done in a timely manner and proceeded on schedule.

Although Anthony Ciaccio, one of the principles of V&C Realty testified that it was his belief that VCL Construction was responsible for site safety and shoring the excavation ditch, the contract between with V&C Realty and VCL Construction Manager does not bear this out. Indeed, Mr. Ciaccio testified that he was not too familiar with the provisions of the contracts. Other than his assumption that VCL Construction was responsible for these matters, he could point to no evidence to support his assumption.

A construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 200, 240(1), 241(6) and the common law. Nonetheless, a construction manager becomes responsible under the Labor Law and the common law if it has been delegated the authority and duties of a general contractor or if it functions as an agent of the owner of the premises (*see Walls v. Turner Constr. Co.,* 4 N.Y.3d 861, 798 N.Y.S.2d 351, 831 N.E.2d 408; *Russin v. Louis N. Picciano & Son,* 54 N.Y.2d 311, 317–318, 445 N.Y.S.2d 127, 429 N.E.2d 805; *see also Comes v. New York State Elec. & Gas Corp.,* 82 N.Y.2d 876, 878, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Pino v. Irvington Union Free School Dist.,* 43 A.D.3d 1130, 843 N.Y.S.2d 133). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Linkowski v. City of New York,* 33 A.D.3d 971, 974–975, 824 N.Y.S.2d 109; *see Walls v. Turner Constr. Co.,* 4 N.Y.3d at 863–864, 798 N.Y.S.2d 351, 831 N.E.2d 408; *Russin v. Louis N. Picciano & Son,* 54 N.Y.2d at 317–318, 445 N.Y.S.2d 127, 429 N.E.2d 805). To impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Rodriguez v. JMB Architecture, LLC*, 82 A.D.3d at 951, *Linkowski v. City of New York,* 33 A.D.3d 971, 824 N.Y.S.2d 109; *Damiani v. Federated Dept. Stores, Inc.,* 23 A.D.3d 329, 331–332, 804 N.Y.S.2d 103). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally Aranda v. Park E. Constr.,* 4 A.D.3d 315, 316, 772 N.Y.S.2d 70; *see also Armentano v. Broadway Mall Props., Inc.,* 30 A.D.3d 450, 817 N.Y.S.2d 132; *Loiacono v. Lehrer McGovern Bovis,* 270 A.D.2d 464,

704 N.Y.S.2d 658). In determining whether a party is liable under the Labor Law and the common law, some of the relevant factors the Court should consider are the party's contractual obligations, whether there is a general contractor on site, the party's duty to oversee the construction site and the trade contractors and whether the party acknowledged that it had authority to control the activities at the work site and to stop any unsafe work practices (*Walls,*4 N.Y.3d at 864, 831 N.E.2d at 411).

Here, VCL Construction demonstrating though the submission of admissible proof that it was the construction manager on the project and that it lacked authority to supervise or control the activity which brought about plaintiff's injuries. VCL Construction therefore demonstrated its prima facie entitlement to summary judgment dismissing plaintiff's complaint insofar as asserted against it, in its entirety, as well as all cross-claims. The plaintiff and WSC failed to raise a triable issue of fact. Accordingly, VCL Construction's motion for summary judgment dismissing plaintiff's complaint and all cross-claims insofar as asserted against it is **GRANTED**.

Mot. Seq. Nos. 9 & 12

A. Plaintiff's Motion for Summary Judgment against VCL Construction on his Claims Pursuant to Labor Law §§ 240(1) and 241(6):

Inasmuch as plaintiff's claims against VCL Construction have been dismissed, that branch of plaintiff's motion for summary judgment against VCL Construction on his claims pursuant to Labor Law § § 240(1) & 241(6) must be **DENIED**.

B. Plaintiff's Motion for Summary Judgment against V&C Realty on his Claims Pursuant to Labor Law § 240(1):

Labor Law § 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured (*see Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 267–268, 727 N.Y.S.2d 37, 750 N.E.2d 1085; *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 500–501, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 514–515, 577 N.Y.S.2d 219, 583 N.E.2d 932; *Jiron v. China Buddhist Assn.,* 266 A.D.2d 347, 698 N.Y.S.2d 315). "These special hazards do not encompass

any and all perils that may be connected in some tangential way with the effects of gravity. Rather, they 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" (*Gonzalez v. Turner Constr. Co.,* 29 A.D.3d 630, 631, 815 N.Y.S.2d 179). "The fact that the force of gravity was involved is not enough, by itself, to support the plaintiff's claim" (*Zdunczyk v. Ginther,* 15 A.D.3d 574, 575, 792 N.Y.S.2d 496). "[T]o establish liability under Labor Law § 240(1) a plaintiff must show more than simply that an object fell, thereby causing injury to a worker (*see Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280, 288–289, 771 N.Y.S.2d 484, 803 N.E.2d 757). A plaintiff must show that 'the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute' " (*Turczynski v. City of New York,* 17 A.D.3d 450, 451, 793 N.Y.S.2d 132, quoting *Narducci v. Manhasset Bay Assoc., supra* at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085).

Here, the plaintiff was not injured as a result of a specific gravity-related accident such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. Indeed, in *Natale v. City of New York*, 33 A.D.3d 772, 774, 822 N.Y.S.2d 771, 774, the Court held that Labor Law § 240(1) does not apply in the circumstances of this case. The plaintiff in *Natale* was injured while installing a gas line. While one of his coworkers was excavating a three-foot deep trench along a sidewalk with a backhoe, the plaintiff was working in the trench and was struck by a falling segment of the overhanging concrete sidewalk slab. In dismissing the Labor Law § 240(1) claim, the Court stated:

> Here, the hazard Natale encountered "was not related to elevation differentials, as contemplated by the statute and [he] was therefore not entitled to the type of protection afforded by Labor Law § 240(1)" (*Hamann v. City of New York,* 219 A.D.2d 583, 631 N.Y.S.2d 181; *see Gampietro v. Lehrer McGovern Bovis,* 303 A.D.2d 996, 997, 757 N.Y.S.2d 657; *O'Connell v. Consolidated Edison Co. of N.Y.,* 276 A.D.2d 608, 609–610, 714 N.Y.S.2d 328; *Vitaliotis v. Village of Saltaire,* 229 A.D.2d 575, 646 N.Y.S.2d 356). "[T]he piece of concrete did not fall 'while being hoisted or secured,' nor did it fall 'because of the absence or inadequacy of a safety device of the kind enumerated in the statute' (*Narducci v. Manhasset Bay Assoc., supra* at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085), and thus the statute is inapplicable" (*Matter of Fischer v. State of New York,* 291 A.D.2d 815, 816, 737 N.Y.S.2d 204).

(33 A.D.3d at 774, 822 N.Y.S.2d at 774).

As in *Natale*, the piece of concrete that injured the plaintiff did not fall while being hoisted or secured nor did it fall because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*see also*, *Ferreira v Village of Kings Point*, 68 A.D.3d 1048, 1050; *O'Connell v. Consolidated Edison Co. of N.Y.*, 276 A.D.2d 608; *Vitaliotis v. Village of Saltaire*, 229 A.D.2d 575 [dismissing plaintiff's §240 claim where the plaintiff was injured by the collapse of a retaining wall while working in a trench]; *Hamann v. City of New York*, 219 A.D.2d 583 [dismissing §240 claim where plaintiff was struck by a "boulder which moved apparently as a result of excavation he was performing in a trench]). Accordingly, that branch of plaintiff's motion for summary judgment against V&C Realty on his claim pursuant to Labor Law § 240(1) is **DENIED** and plaintiff's claim pursuant to Labor Law § 240(1) is **DISMISSED**.

C. Plaintiff's Motion for Summary Judgment against V&C Realty on his Claim Pursuant to Labor Law § 241(6) and Plaintiff's Motion to Amend his Bill of Particulars:

Labor Law § 241(6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." To prevail on a cause of action under section 241(6), a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor in the Industrial Code (*see Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82). Although the plaintiff did not allege any violations of the Industrial Code in his complaint and bill of particulars, plaintiff now seeks summary judgment on his claim pursuant to Labor Law § 241(6) based on violations of Industrial Code §§23-4.2(g) and 4.2(k).

Industrial Code § 23-4.2(g) provides:

> All sides or banks, slopes, and areas in and adjacent to any excavation shall be stripped and cleared of loose rock or any other material which may slide, fall, roll or be pushed upon any person located in such excavation.

Industrial Code § 4.2(k) provides:

> Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.

After plaintiff's motion for summary judgment was filed, the plaintiff moved for leave to amend his bill of particulars to allege violations of the above two sections of the Industrial Code as well as a laundry list of other Industrial Code violations (Mot. Seq. No. 12). Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025[b]; *Urias v. Daniel P. Buttafuoco & Assoc., PLLC,* 173 A.D.3d 1244, 104 N.Y.S.3d 712). Here, to the extent the plaintiff seeks to amend his Bill of Particulars to allege violations of the above two Industrial Code provisions, the proposed amendments are not palpably insufficient or patently devoid of merit (*see Noetzell v. Park Ave. Hall Hous. Dev. Fund Corp.,* 271 A.D.2d 231, 705 N.Y.S.2d 577). A motion for leave to amend to identify certain relevant Industrial Code provisions may properly be granted even after a note of issue has been filed where, the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendants (*see Tuapante v. LG–39, LLC,* 151 A.D.3d 999, 1000, 58 N.Y.S.3d 421; *Galarraga v. City of New York,* 54 A.D.3d 308, 310, 863 N.Y.S.2d 47).

Here, plaintiff's motion to amend his bill of particulars to allege violations of the above two sections of the Industrial Code is **GRANTED**. The plaintiff adequately made a showing of merit, the amendments involve no new factual allegations, raise no new theories of liability and would not cause any prejudice to the defendants. The same is not true of the remaining newly pleaded Industrial Code violations, and as to those violations, plaintiff's motion to amend is **DENIED**.

Turning to plaintiff's motion for summary judgment against V&C Realty on his Labor Law § 241(6), as the Appellate Division, Second Department explained in *Seaman v. Bellmore Fire District:*

> [W]here such a violation is established [a violation of the Industrial Code], it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and "thereby reserve[s], for resolution by a jury, the issue of whether

> the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *see Long v. Forest–Fehlhaber,* 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Daniels v. Potsdam Cent. School Dist.,* 256 A.D.2d 897, 898, 681 N.Y.S.2d 852).

Seaman v. Bellmore Fire Dist., 59 A.D.3d 515, 516, 873 N.Y.S.2d 181, 182–83). Thus, even if the plaintiff demonstrated as a matter of law that that there were violations of the above two provisions of the Industrial Code and that such violations were a substantial factor in causing his injuries, plaintiff motion for summary judgment against V&C Realty on his Labor Law § 241(6) must still be **DENIED**.

Mot. Seq. No. 10

As discussed above, since the plaintiff is not alleging a "grave injury", that branch of third-party defendant WSC's motion for an order pursuant to CPLR 3212 dismissing V&C Realty's third-party claims for contribution and for common law indemnification is **GRANTED.** Likewise, as discussed above, since WSC negligence has not been established as a matter of law, that branch of WSC's motion for an order denying V&C Realty's motion for summary judgment on its claim for contractual indemnity is also **GRANTED**. Finally, with respect to that branch of WSC's motion for an order pursuant to CPLR 3212 dismissing V&C Realty's third-party claim for breach of contract to procure insurance, as discussed above, the motion must be denied as there are triable issue of fact as to whether WSC complied with its contractual obligation to procure V&C Realty with the correct insurance.

Mot. Seq. No. 11

For the reasons discussed above, that branch of defendant WSC's motion for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law 240(1) is **GRANTED** and that branch of its motion for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's Labor Law 241(6) claims is **DENIED.**

For all of the above reasons, it is hereby

ORDERD that the motions and cross-motions are decided as indicated above. Any Relief that specifically granted above is denied.

This constitutes the decision and order of the Court.

Dated: February 16, 2021

PETER P. SWEENEY, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020