SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

THOMAS J. ORR, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF LEON KARTSANIS

- v -

URBAN AMERICAN MANAGEMENT CORP. et al.

INDEX NO. 160847/2016

MOT. DATE

MOT. SEQ. NO. 003

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is an action for personal injuries sustained by the original plaintiff, Leon Kartsanis, while working at 546 Main Street on Roosevelt Island (the "building"). Now, defendants Urban American Management Corp. ("UA") and Urban Greenfit SPV, LLC ("UG" and together with UA collectively "Urban") move for summary judgment on their crossclaim for contractual indemnification against Wellspring Wireless, Inc. d/b/a H2O Degree ("Wellspring"). Wellspring opposes the motion and cross-moves for summary judgment dismissing the complaint against it. Urban and plaintiff oppose Wellspring's cross-motion to the extent Wellspring seeks relief against them. The motion was timely brought after note of issue was filed. However, the cross-motion was filed beyond the 120-deadline set forth in the preliminary conference order.

At the outset, the court must address the untimely cross-motion and determine whether it can be properly considered. The court may consider an untimely cross motion for summary judgment in the absence of good cause where a timely motion for summary judgment was made seeking "nearly identical" relief (*Filannino v. Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]). The reasoning behind this rule is that the court may search the record and grant summary judgment to any party without the necessity of a cross-motion. (*Id.*) Therefore, the court can certainly consider the cross-motion as to Urban's crossclaim for contractual indemnification. As for the balance of the motion seeking dismissal of plaintiff's complaint, the court finds that Wellspring has demonstrated good cause for the late cross-motion. Wellspring's counsel asserts that it did not receive one of the deposition transcripts until July 16, 2020 "through no fault of their own but rather due to an obviously unintended oversight" and "was unable to obtain [the] signed transcript until August 17, 2020 because [the witness] was no longer employed by [Wellspring] and he had difficulty getting his signature notarized because of Covid 19 challenges." Further, plaintiff does not assert any prejudice as a result of the late cross-motion. Therefore, the court will consider the cross-motion in its entirety.

Dated: 3/1/21

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

The building was owned by UA and was undergoing renovation of its heating system thermostats at the time of plaintiff's accident. In connection with that work, UA contracted with Wellspring to replace the thermostats in the building with new wireless ones (the "project"). In turn, Wellspring hired non-party Ramco Electrical Contracting Corp. ("Ramco"), Kartsanis' employer, as the sub-contractor to perform the work. On June 24, 2013, while Kartsanis was preforming electrical work, he claims that he fell on debris scattered in a material storage room at the building. Plaintiff asserts claims pursuant to Labor Law §§ 241[6] and 200 as well as for common law negligence.

The contract between UA and Wellspring entitled Software License Agreement provides in relevant part as follows:

> Contractor agrees to indemnify, defend, and hold Owner harmless from any and all demands, claims, suits, judgements, or other liability, loss or damage, including attorneys' fees, costs and expenses incurred by Owner arising out of Owner's use of and/or Contractor's development of the H20 Software.

Urban argues that this provision requires Wellspring to indemnify UA "for any claim, loss or judgement arising from, or in connection with, the development of the H20 thermostat Software" and thus "for any loss related suffered by Mr. Karsanis who was allegedly injured as he was developing the H20 software when installing one of Wellspring's thermostats pursuant to the Urban-Wellspring agreement."

However, Wellspring contends that assuming *arguendo* that Kartsanis sustained the claimed injury in the manner he testified to at his deposition, plaintiff was not developing the H2O software while he was installing one of Wellspring's thermostats. Wellspring points to the Oxford English Dictionary definition of develop and urges the court to read the indemnification provision literally and in context with he "totality of the Software License Agreement".

Wellspring further points to the testimony of John Hatzihristodoulou, who was its project manager for the project. Hatzihristodoulou testified that Kartsanis never told him about an injury at work. Rather, he claims that he observed Kartsanis with his arm in a cast after the alleged incident occurred and Kartsanis told him that he injured his arm at the gym. Wellspring has also provided a copy of a notarized statement by Hatzihristodoulou confirming this account. This statement was allegedly prepared at the request of Philip Campione, employed by CCC Contracting Inc. ("CCC"), which also worked on the project. Wellspring's counsel explains: "CCC thereafter retained subcontractors Ramco [], Edge Electric and Dijos to do the subject installations. Dijos subsequently took over the work of Edge Electric because they were not performing their job. The plaintiff's brother was the owner of Edge Electric." On these facts, Wellspring maintains that triable issues of fact as to whether Kartsanis' accident even occurred preclude Urban's motion for summary judgment.

Further, Wellspring argues the merits of plaintiff's claims, asserting that Kartsanis' accident did not occur in an actual "work area", Wellspring did not have exclusive control over the storage room nor did it direct or control Kartsanis' work. Wellspring additionally argues that the alleged condition was open and obvious. Finally, Wellspring maintains that the Industrial Code provisions alleged in plaintiff's bill of particulars, to wit, Industrial Code § 23-1.7[e][1] and [2], are inapplicable.

On reply, Urban disputes Wellspring's reading of the contract. Meanwhile, plaintiff argues that Labor Law § 200 applies to all workplaces, Wellspring's claim that it did not have exclusive control of the "materials storage room" is unsupported and belied by the proof on this record, and it is irrelevant whether Wellspring directed or supervised Kartsanis' work. Plaintiff further contends that Wellspring should have but failed to provide proof regarding inspections it performed of the "materials storage room" where Kartsanis' accident occurred. Plaintiff maintains that even if a dangerous condition is open and obvious, the defendant's responsibility to keep the premises in a reasonably safe condition remains. Finally, as to the Section 241[6] claim, plaintiff maintains that the location of the Kartsanis' accident was a "working area" as defined under Industrial Code § 23-1.7[e][2].

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first consider the cross-motion as to plaintiff's claims. Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.7[e][2] was violated as a matter of law.

At the outset, by failing to oppose Wellspring's motion as to the Industrial Code § 23-1.7[e][1] claim, plaintiff's Section 241[6] claim premised upon the violation of that provision is granted without opposition.

Industrial Code § 23-1.7[e][2] states in pertinent part as follows:

> Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

The court agrees with plaintiff that the location of the plaintiff's alleged accident as he claims was a "working area" as defined under this provision of the Industrial Code. There is no dispute on this record that the alleged accident location was in constant use by various contractors as a work area for the storage of construction material at the building. Otherwise, a triable issue of fact as to whether plaintiff actually tripped on debris as he claimed precludes summary judgment to Wellspring. Accordingly, Wellspring's motion to dismiss plaintiff's Section 241[6] claim premised upon a violation of Industrial Code § 23-1.7[e][2] is denied.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that

the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

There is no dispute that Wellspring can properly be held liable under Section 200. The court agrees with plaintiff that Wellspring has not met its burden on this motion by establishing lack of constructive notice regarding the condition of the "materials storage room". Further, even if the allegedly dangerous condition was open and obvious, this would only raise an issue of fact as to Kartsanis' comparative negligence (*see i.e. Jackson v. Fenton*, 38 AD3d [2d Dept 2007]). Thus, this branch of Wellspring's motion must also be denied.

The court now turns to Urban's crossclaim for 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]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

Contrary to Urban's contention, the contract does not require Wellspring to indemnify them for Kartsanis' personal injury claim. The indemnification clause itself is quite specific and narrow. It requires indemnification for claims "arising out of Owner's use of and/or Contractor's development of the H20 Software." It is undisputed that Kartsanis' accident did not arise out of Urban's use of the software. Installation of a thermostat cannot reasonably fall within the development of software. The court agrees with Wellspring that the plain meaning of the term "development of… software" does not support Urban's interpretation. Development of software is the process of creating/designing software, an otherwise intangible piece of intellectual property. It cannot be construed to include the installation of hardware using that software. Otherwise, the court rejects Urban's contention, implicit or otherwise, that the parties intended for Wellspring to indemnify them for a personal injury action arising from the installation of a thermostat.

Accordingly, Urban's motion for summary judgment on its crossclaim for contractual indemnification is denied and Wellspring's cross-motion is granted to the extent that this crossclaim is severed and dismissed. Even if Wellspring's cross-motion is untimely, the court searches the record and reaches the same result.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Urban's motion for summary judgment is denied; and it is further

ORDERED that Wellspring's cross-motion is granted only to the extent that plaintiff's Labor Law § 241[6] claim premised upon the violation of Industrial Code § 23-1.7[e][1] is severed and dismissed and Urban's crossclaim for contractual indemnification against Wellspring is also severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/1/21
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.