O'Donovan v New York & Presbyt. Hosp.
2021 NY Slip Op 30738(U)
March 12, 2021
Supreme Court, New York County
Docket Number: 160411/2016
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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JEREMIAH O'DONOVAN, GAIL O'DONOVAN,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL, TRYSTATE MECHANICAL, INC.,SHADOW TRANSPORT, INC.,TITAN DEMOLITION & SALVAGE, LLC,BAY CRANE SERVICE, INC.,TITAN INDUSTRIAL SERVICES CORP.

Defendant.

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INDEX NO. 160411/2016

MOTION DATE 11/20/2020, 11/30/2020

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 153, 154, 155, 156, 157, 158, 159, 160, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 209, 210, 211, 212, 213, 214, 215, 216, 217

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 208

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

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on November 19, 2016, when, while working at a construction site located at the New York-Presbyterian Lower Manhattan Hospital, 170 William Street, New York, New York (the premises), he was struck by an insufficiently secured and/or rigged 17-foot-long pipe lowered from the roof of the premises.

In motion sequence number 005, plaintiffs Jeremiah O'Donovan (plaintiff) and Gail O'Donovan move, pursuant to CPLR 3212, for summary judgment in their favor on the Labor

Law § 240 (1) claim as against defendants The New York and Presbyterian Hospital (NYPH) and Trystate Mechanical, Inc. (Trystate).

In motion sequence number 006, defendant Bay Crane Service, Inc. (Bay Crane) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

Defendant Shadow Transport, Inc (Shadow) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it.

NYPH and Trystate cross-move, pursuant to CPLR 3212, for summary judgment dismissing the common law negligence and Labor Law § 200 claims as against them, and for summary judgment in their favor on their cross claims for contractual indemnification against Shadow.

Defendant Titan Industrial Services Corp (Titan) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against it.

FACTUAL AND PROCEDURAL BACKGROUND

On the day of the accident, NYPH was the owner of the Premises. NYPH hired Trystate to provide mechanical contracting services for a project at the premises that entailed the replacement of the rooftop cooling towers (the project). Trystate hired Titan to dismantle the existing cooling towers. Trystate also hired Shadow to physically remove the cooling towers from the rooftop and to dispose of them thereafter. Pursuant to a rental agreement with Shadow, Bay Crane provided the crane for the removal of the cooling towers. At the time of the accident, plaintiff was employed by non-party M&L Mechanical of New York (M&L) and was at the premises as a special employee of Shadow.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was a union steamfitter employed by M&L but was working for Shadow. He explained that, though he worked for M&L, "when Shadow needed us, they would take us from M&L" (plaintiff's tr at 24). His foreman on the day of the accident was a Shadow employee, and Shadow provided all of the equipment plaintiff used that day. In addition, Shadow provided the master rigger for the project, Luca Williams.

Shadow was at the site to remove demolished "air-conditioning equipment off the roof" (*id.* at 29). To do so, Shadow used a large crane to lower the pieces of equipment from the roof to street level, placing the discarded equipment onto a large flatbed truck and, ultimately, driving it offsite.

Once the crane arrived at the site, plaintiff and other Shadow employees cleared the street, set up the crane, and shut the street down in preparation for lowering large pipes from the roof. Plaintiff, who was at street level during the crane's operation, was primarily responsible for unhooking the pipes once they landed on the flatbed (*id.* at 92). He was not involved in rigging the pipes to the crane on the rooftop. He also did not control the crane itself.

The accident occurred during the first hoist of the day. Williams directed plaintiff to stand near the flatbed to "unhook the rigging when it came down" (*id.* at 105). The workers on the roof secured a 17-foot-long, one ton pipe with curved ends (the pipe) to the crane's sling, and the crane began lowering the pipe from the roof. Plaintiff could not remember whether the pipe was secured by a tag line – a guide designed to control a load's lateral movement – in addition to the sling.

Before the pipe was lifted, Williams told plaintiff to stand near the flatbed. During the lifting operation, no one gave him any instructions about where to stand or whether he needed to move.

Immediately before the accident, plaintiff was standing near the flatbed truck, watching the pipe being lowered, when "just before it land[ed] . . . something jerked and [the pipe] swung around and it hit [plaintiff] and it knocked [him] backwards" (*id.* at 138). Specifically, the pipe struck plaintiff in the head, back and left leg.

Plaintiff testified that Michael O'Brien, a Trystate employee, witnessed the accident and assisted him shortly after it happened, helping him get up and walk away from the work area.

Deposition Testimony of Michael O'Brien (Trystate's Vice President of Operations)

O'Brien testified that, at the time of the accident, he was Trystate's vice president of operations. Trystate was the "mechanical contractor" hired by NYPH to remove and replace the cooling towers (O'Brien tr at 15). Trystate hired Titan to demolish the existing cooling towers. It also hired Shadow to remove the demolished cooling towers and piping from the roof, and to install the new cooling towers. Shadow was responsible for obtaining the crane and trucks needed to perform its work.

As part of his duties at the project, O'Brien performed walkthroughs of the rooftop and the street level work areas. He prepared overall plans for the removal and reinstallation of the towers but did not direct Titan or Shadow as to how to perform their work. Specifically, O'Brien stated that Shadow provided the "competent rigger on site and he had a plan. It was his decision" (*id.* at 52).

O'Brien was present on the street at the time of the accident. In the morning, Shadow's workers arrived, set up the crane, and cordoned off the area. Then, O'Brien held a general safety

meeting. Afterwards, Shadow began operations. Shadow determined that the crane would lower the pipe directly onto the flatbed, where it would be secured for removal from the site. According to O'Brien, the Pipe was attached to a tag line to assist in guiding it onto the flatbed (*id.* at 130).

O'Brien witnessed the accident. He was sitting on the back bumper of his car, watching the crane operation from approximately 75 feet away (*id.* at 62). He witnessed plaintiff and another Shadow employee standing near the flatbed as the pipe was lowered from the roof. He heard Williams say "stand clear" when the pipe was approximately 15 feet above the flatbed. O'Brien did not know whether Williams's statement was addressed to anyone in particular (*id.* at 73). O'Brien stated that:

> "[W]hile they were lowering the pipe onto the flatbed there was a three-inch pipe nipple and valve that was attached to that piece of pipe that must have landed or laid onto the flatbed truck and snapped off. . . causing the pipe to spin and hit[] [plaintiff]"

(*id.* at 76). O'Brien clarified that he did not see the valve snap off, but he learned that it had after the accident (*id.* at 81). O'Brien further noted that the foregoing description referred to the second attempt to land the pipe on the flatbed. The previous attempt had been aborted moments before because the pipe did not land smoothly.

O'Brien was shown two accident reports related to the accident and confirmed that he prepared both. Although both reports were dated November 19, 2016, the second had an annotation reflecting that it was prepared on November 21, 2016. He prepared the first report within hours of the accident and the second report two days later, after speaking with his boss at Trystate.

Deposition Testimony of Gerard Phair (Shadow's Employee)

Gerard Phair testified that, on the day of the accident, he was employed by Shadow. His duties included "landing equipment on the roof, picking equipment off the roof [and] landing equipment on trucks" (Phair tr at 13). He was the signalman that day, responsible for communicating with the crane operator to assist in lowering loads.

At the time of the accident, Phair stood adjacent to the flatbed truck while performing his work. Plaintiff stood approximately 10 to 12 feet away from Phair, also near the flatbed.

At that time, the pipe was being lowered from the roof in a vertical position, hanging from a sling. The plan was to land the pipe, end first, directly onto the flatbed and slowly lay it down so it laid horizontally on the truck. Once it was in position above the flatbed, Phair would manipulate the pipe by hand into position to be laid down. According to Phair, Shadow made three attempts to land the pipe. The first two were unsuccessful because, both times, the pipe pivoted to the left (towards plaintiff) upon touching the flatbed. At some point, recalled Williams, Phair told plaintiff to move because he was "in a bad spot" (*id.* at 71). Phair later testified that Williams made the same comment during the third attempt.

During the third attempt, the pipe again began to pivot towards plaintiff. Phair testified that "[w]hen [the pipe] started to pivot, I told [plaintiff to] get the F out of the way. And I moved and he didn't move quick" (*id.* at 97). Plaintiff was then struck by the pipe.

When asked what plaintiff's role in the work that day entailed, Phair testified that plaintiff was primarily there to "observe" and that he did not actively participate in any of the hoist work (*id.* at 140).

Deposition Testimony of Luca Williams (Shadow's Master Rigger)

Luca Williams testified that, on the day of the accident he was Shadow's master rigger at the project. His duties included overseeing the entire rigging operation, including the lowering of the demolished pipes and the hoisting of the new components to roof of the premises. He supervised all Shadow employees at the project, including plaintiff.

Williams testified that Shadow had hired plaintiff on multiple prior occasions as "one of my nine helpers" (Williams tr at 25). Williams explained that, whenever Shadow "needed steamfitters, [it] would call [M&L] and they would send us [plaintiff] . . ." (*id.* at 26). M&L would pay plaintiff, and Shadow would then reimburse M&L. According to Williams, plaintiff was hired as a general laborer to assist in the removal and installation of the rooftop cooling units at the premises in accordance with Trystate's requirement that Shadow "provide steamfitters" on the project (*id.* at 36).

Williams testified that, immediately prior to the accident, he was on one side of the flatbed, plaintiff was on the other side, and Phair was on the flatbed itself, attempting to guide the pipe onto the surface of the truck. Williams then testified to the following:

> "The pipe wasn't a clean vertical pipe, it had an L on the bottom. So when we were landing it on the truck, it kept pivoting towards [plaintiff's] side . . . . So I told [plaintiff] to move, not to be there. You are in a bad spot . . . . I gave him a warning each time that we tried to touch down"

(*id.* at 46). According to Williams, plaintiff did not move.

Williams also testified that, immediately before the pipe struck plaintiff, it was hanging in a vertical position and the bottom end had just touched the flatbed before it suddenly "swung" horizontally off the flatbed towards plaintiff before striking him (*id.* at 77). Williams also

testified that the pipe "pivoted" and struck plaintiff (*id.* at 117). Finally, Williams testified that he and Phair had the authority to pause the lifting operation if there was a safety issue.

Deposition Testimony of Salvatore Capobianco (Shadow's Driver)

Salvatore Capobianco testified that, on the day of the accident, he was Shadow's truck driver at the project. Besides operating the flatbed truck, he also acted as a foreman (Capobianco tr at 12 ["I'll come up with a game plan for the job . . . I run the men, I make decisions"]). His supervisor was Williams, Shadow's master rigger.

Capobianco was situated on the roof at the time of the accident, acting as "the competent man and the signalman on the roof" (*id.* at 49). Aside from Shadow workers, Titan was also present on the roof. Once Shadow rigged a pipe to the crane, Titan would then dismantle the pipe from the structure so that the crane could lower it to the street. The pipe was rigged to be lowered in a vertical position.

Capobianco did not witness the accident. He recalled that, after the accident, they decided to land the pipe on the street and re-rig it to be lifted, horizontally rather than vertically, onto the flatbed by using two slings (one on each end). They were able to successfully land the pipe on the flatbed in this manner.

Deposition Testimony of Philip Bernardo (Bay Crane's Vice President of Administration)

Philip Bernardo testified that, on the day of the accident, he was Bay Crane's vice president of administration. At the deposition, he was shown a copy of a "Standard Bare Rental Agreement" (the Rental Agreement) between Shadow and Bay Crane and confirmed its authenticity.

Bernardo testified that, pursuant to the Rental Agreement, Bay Crane leased a crane to Shadow, but that Shadow "would be supplying the crew and the crew would be [Shadow's]

employee[s]" (Bernardo tr at 12). Bernardo confirmed that Bay Crane did not supply any workers or equipment for use at the project aside from the crane itself.

The Trystate Accident Reports

On November 19, 2016, the day of the accident, O'Brien prepared an accident report for Trystate stating, in pertinent part, as follows:

> "[Plaintiff] was standing on the street next to the flatbed truck where the pipe was being landed onto when the pipe slipped and spun into his direction hitting on [] both legs knocking him on to the ground"

(plaintiff's notice of motion, exhibit O; NYSCEF Doc. No. 139).

Additionally, O'Brien prepared a second accident report, also dated November 19, 2016 (with a handwritten annotation stating "Filled Out 11/21/16"), which adds additional details to the accident report, specifically:

> "[Plaintiff] was standing on the street next to the flatbed trailer when the accident happened. The pipe was a vertical 12" by 17' long hanging by a metal sling, which was done correctly. The accident happened while trying to land the pipe onto the flatbed tractor trailer"

(*id.*, exhibit P; NYSCEF Doc. No. 140). The second report also explained that the Pipe had a 90 degree bend in it which prevented it from landing on the flatbed successfully and, while trying to land the Pipe on the flatbed, "the sling became slack, causing the pipe to shift" and that "while trying to land the pipe onto the ground, the tail end of the pipe swung around hitting [plaintiff] in both legs . . . ." (*id.*).

LEGAL CONCLUSIONS

"[T]he 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. Failure to make such prima facie showing requires denial

of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). 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]).

Special Employment Issues

Shadow argues that the Workers' Compensation Law (WCL) bars plaintiff's claims against it, and, therefore, it is entitled to the summary dismissal of the complaint and all cross claims against it.

"Workers' compensation benefits are '[t]he sole and exclusive remedy of an employee against his employer for injuries in the course of employment.' This precludes suits against an employer for injuries in the course of employment" (*Weiner v City of New York*, 19 NY3d 852, 854 [2012], quoting *Gonzales v Armac Indus.*, 81 NY2d 1, 8 [1993]).

Shadow argues that it is undisputed that plaintiff was Shadow's special employee at the time of the accident. It also argues that plaintiff's special employment is the equivalent of general employment for the purposes of limiting liability to a special employer pursuant to the WCL.

Shadow is correct. "A special employee is one who is transferred for a limited time of whatever duration to the service of another, and limited liability inures to the benefit of both the

general and special employer" (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007] [internal quotation marks and citations omitted]).

Accordingly, the WCL's limitation of liability against an employer applies equally to a general and a special employer. Thus, Shadow is entitled to dismissal of plaintiff's direct claims as against it.

With respect to the contribution and indemnification cross claims against Shadow, WCL § 11 provides, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but 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]). Here, it is undisputed that plaintiff did not suffer a grave injury as defined in WCL § 11. Accordingly, Shadow is entitled to dismissal of all common-law indemnification and contribution claims as against it.

However, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). Accordingly, the court will consider the contractual indemnification cross claims against Shadow below.

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 240 (1) claim as against NYPH and Trystate only. Titan moves, and Bay Crane and Shadow cross-move, for summary judgment dismissing the same.[1]

Labor Law § 240 (1), also known as the Scaffold Law, provides, as 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]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is

[1] As noted above, the § 240 (1) claim against Shadow is barred by Workers Compensation Law § 11.

contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

As an initial matter, NYPH and Trystate argue that plaintiff has failed to establish that they are the owner and contractor, and that Labor Law section 240 therefore does not apply to them. However, NYPH admitted in its answer that it was the owner of the premises on the day of the accident (NYPH answer, ¶ 3 [NYPH "admits that on November 19, 2016 [it] owned the premises known as 170 Williams Street"]; NYSCEF Doc. No. 127).

Their motion papers are devoid of any evidence that Trystate was a general contractor. Nevertheless, there is sufficient evidence to establish that Trystate was an agent of NYPH for the purposes of the Labor Law.

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties 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] [internal citations omitted]).

Here, Trystate does not dispute that NYPH, via its contract with Trystate (NYSCEF Doc. No. 131), delegated to Trystate the entirety of responsibility for the replacement of the cooling tower at the premises, including the hiring of all necessary subcontractors – namely Shadow and Titan – to undertake that work (*see* O'Brien tr 15-18). Accordingly, Trystate obtained the

authority to supervise and control the work and became a statutory agent of NYPH (*id.*). Therefore, Trystate is a proper Labor Law defendant.

Titan and Bay Crane also argue that they are not proper Labor Law defendants because they were not owners, general contractors or agents of either. It is undisputed that Titan and Bay Crane are not owners or general contractors.

In addition, it is undisputed that Titan was the demolition contractor at the Project, responsible for dismantling the pipe from the existing cooling unit on the roof. Titan had no responsibility for, or authority to supervise or control, the rigging or lowering of the pipe, which is the subject of plaintiff's accident. Accordingly, Titan is not an agent for the purposes of the Labor Law and, since it is not a proper Labor Law defendant, it is entitled to dismissal of the Labor Law § 240 (1) claim against it.

It is also undisputed that Bay Crane leased the crane to Shadow pursuant to the Rental Agreement (NYSCEF Doc. No. 173), which provided that Bay Crane was not required to (and did not) provide rigging equipment (or any other equipment aside from the crane itself), operators, laborers or supervisors for the Project (Bernardo tr at 12). Given the foregoing, Bay Crane had no responsibility for, or the authority to supervise or control, the rigging or lowering of the pipe. Accordingly, Bay Crane is not an agent for the purposes of the Labor Law and, since it not a proper Labor Law defendant, it too is entitled to dismissal of the Labor Law § 240 (1) claim against it.

With respect to the applicability of the Labor Law itself, plaintiff has alleged, as noted previously, that he was struck by an insufficiently and/or improperly secured object – the pipe – that was in the process of being lowered from the roof to the street level at the premises. Therefore, as the pipe was being hoisted/lowered at the time of the accident, 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]; *Ray v City of New York*, 62 AD3d 591, 591 [1st Dept 2009] [section 240 (1) implicated where a beam being lowered onto a steel tower began swaying, despite use of tag lines, and struck plaintiff]).

Plaintiff alleges, and the record sufficiently establishes, that the pipe was unable to land safely on the flatbed truck because it was insufficiently secured. Specifically, due to its irregular L shape, the pipe repeatedly swung and/or pivoted to the left on every attempt to rest it on the flatbed (Phair tr at 71; Williams tr at 46, 77). In addition, the record establishes that the pipe swung/pivoted off of the flatbed due to its shape and the manner in which it was rigged while it was being lowered to the flatbed, i.e., hanging vertically from a single point of contact, rather than horizontally from two points of contact. Accordingly, without an additional safety device to prevent the pipe from swinging/pivoting, it was inadequately secured to protect plaintiff from harm, thereby violating Labor Law § 240 (1) (*see e.g. Runner v New York Stock Exch., Inc.,* 13 NY3d, 599, 604 [2009]; *Cammon, supra*).

In opposition, NYPH and Trystate argue that (1) plaintiff was the sole proximate cause of his accident because he was standing near the flatbed when he had no reason to do so and (2) plaintiff was a recalcitrant worker because he failed to heed Williams's warning to move away from the flatbed. However, neither of these arguments are sufficient to overcome plaintiff's prima facie entitlement to summary judgment.

As to sole proximate cause, "there can be no liability under section 240 (1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 290 [2003]). Additionally, "where 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" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted]).

In any event, any allegation that plaintiff was not supposed to stand in the location where he was standing at the time of the accident goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) claim because the statute imposes absolute liability once a violation is shown (*Hewitt v NY 70th St. LLC*, 187 AD3d 574, 575 [1st Dept 2020] ["even if . . . plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence which is not a defense to a Labor Law § 240 (1) claim"]; *see also Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]). Accordingly, plaintiff was not the sole proximate cause of his accident.

Nor was plaintiff a recalcitrant worker. "The recalcitrant worker defense requires a showing of 'the injured worker's deliberate refusal to use available and visible safety devices in place at the work station'" (*Harris v Rodriguez*, 281 AD2d 158, 158 [1st Dept 2001]). Notably, "an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely" (*Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *see also Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993] ["an instruction by the employer or owner to avoid . . . engaging in unsafe practices is not itself a 'safety device'"]; *Luna v Zoological Soc. of Buffalo, Inc.*, 101 AD3d 1745, 1746 [4th Dept 2012]). Accordingly, plaintiff was not recalcitrant when he failed to heed Williams's warning to move away from the flatbed truck immediately before the accident.

Finally, NYPH and Trystate also appear to argue that plaintiff's summary judgment motion must be denied because there is a question of fact as to plaintiff's credibility due to purported conflicting versions of how the accident happened (*see 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"]). However, NYPH and Trystate do not set forth conflicting theories of how the accident happened. Accordingly, this argument fails to raise a question of fact sufficient to overcome plaintiff's prima facie entitlement to judgment on the Labor Law § 240 (1) claim.

Thus, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim as against NYPH and Trystate.

The Labor Law § 241 (6) Claim (Motion Sequence Number 006 and Shadow's and Titan's Cross Motions)

Bay Crane moves for summary judgment dismissing the Labor Law § 241 (6) claim against it. Shadow and Titan each cross-move for the same relief as against them. Notably, plaintiff does not seek any relief with respect to his Labor Law § 241 (6) claims, and NYPH and Trystate do not seek to dismiss the same.

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 nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, as discussed above, Shadow, Titan and Bay Crane are not proper Labor Law defendants. Accordingly, this claim cannot lie as against these entities and plaintiff does not oppose the dismissal of this claim as against them.

Thus, Shadow, Titan and Bay Crane are entitled to summary judgment dismissing the Labor Law § 241 (6) claim against them.

The Common-law Negligence and Labor Law § 200 Claims (Motion Sequence Number 006 and NYPH, Trystate, Shadow, and Titan's Cross Motion)

NYPH, Trystate and Bay Crane move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. Shadow and Titan cross-move for summary judgment dismissing the same claim against them.

Initially, as discussed above, Shadow, as the special employer of plaintiff, is entitled to the dismissal of this claim against it pursuant to the WCL.

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 kind of situation involved: (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]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*Soller v Dahan*, 173 AD3d 803, 805 [2d Dept 2019], quoting *Sullivan v New York Athletic Club of City of N.Y.,* 162 AD3d 955, 958 [2d Dept 2018]; *see also LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

However, where an injury stems from a dangerous condition inherent in the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner [or contractor] created the dangerous condition [causing an injury] or when the owner [or contractor] failed to remedy a dangerous or defective condition of which he or she had actual or

constructive notice'" (*Bradley v HWA 1290 III LLC*, 157 AD3d 627, 630 [1st Dept 2018], quoting *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, the accident was caused by the means and methods of the work, i.e., the manner in which the pipe was rigged and lowered to the flatbed. The motion papers are devoid of any evidence that NYPH or Trystate had the authority to supervise or control the performance of the injury producing work, such as determining how to rig and lower the pipe. Accordingly, NYPH and Trystate are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

While Trystate had general supervisory control over the demolition and removal of the rooftop water towers, such general control is insufficient to impute liability under section 200, since even where an entity "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

Similarly, Bay Crane did not have the authority to supervise or control the performance of the work. It merely leased the crane to Shadow and did not provide any workers, operators or supervisors for the project.

Although Titan was responsible for the demolition of the pipe, it had no involvement in rigging it and lowering it from the roof to the flatbed truck on the street below. It is undisputed that plaintiff was not injured by the demolition of the pipe but rather by the manner in which it was lowered from the roof, and there is no evidence that Titan supervised this work (*Naughton*, 94 AD3d at 11).

Finally, plaintiff's argument that the accident was caused not by the means and methods of the work, but by a dangerous condition inherent in the premises unsupported by any evidence (*Bradley*, *supra*; *see also Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008] ["Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises"]).

Thus, NYPH, Trystate, Bay Crane and Titan are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Trystate's Contractual Indemnification Cross Claim Against Shadow (Trystate's Cross Motion)

NYPH and Trystate cross-move for summary judgment in Trystate's favor on its contractual indemnification cross claim against Shadow. Shadow cross-moves for summary judgment dismissing the same against it.

"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

On August 16, 2016, Trystate and Shadow entered into a subcontract agreement, bearing PO# C16004004, for work at the Project (the Trystate/Shadow Agreement) (plaintiff's notice of motion, exhibit G; NYSCEF Doc. No. 132). The Trystate/Shadow Agreement contains an indemnification provision that provides, in pertinent part, as follows:

> "To the fullest extent permitted by law, [Shadow] agrees to indemnify, hold harmless and defend [Trystate] and . . . owner . . . (the "Indemnified Parties") from and against any and all liability for loss, damage or expense for which the Indemnified Parties may be held liable by reason of injury (including death) to any person . . . arising out of or in any manner connected with the work to be performed for the Indemnified Parties . . . even for, and if caused in part by, any act, omission, negligence, or strict liability of the Indemnified Parties"

(*id.*, ¶ 22).

Here, plaintiff's accident arose out of Shadow's work at the project; specifically, the method of rigging and lowering the pipe. Accordingly, Trystate is entitled to contractual indemnification from Shadow. Although Shadow was plaintiff's employer, Workers' Compensation Law § 11 does not, as noted above, prevent recovery against an employer based on a contractual indemnification provision (*Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]).

Shadow argues, in effect, that the indemnification provision cannot apply because plaintiff was not explicitly performing work at the time of the accident. However, this argument is unpersuasive given that the subject indemnification provision covers injuries "to any person" (*id.*, ¶ 22). Thus, Trystate is entitled to summary judgment in its favor on its cross claim for contractual indemnification against Shadow, and Shadow is not entitled to the dismissal of the same.

Trystate's Contractual Indemnification Cross Claim Against Titan (Titan's Cross Motion)

Titan cross-moves for summary judgment dismissing Trystate's cross claim against it for contractual indemnification. However, since Titan does not set forth any argument regarding the said cross claim, it has not established its prima facie entitlement to dismissal thereof.

The Common-Law Indemnification and Contribution Cross Claims Against NYPH and Trystate (Trystate's Cross Motion)

NYPH and Trystate move for summary judgment dismissing all common-law indemnification cross claims against them. "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]).

Here, because the common-law negligence and Labor Law § 200 claims against NYPH and Trystate have been dismissed, any claim for common-law indemnification must likewise be dismissed, since the negligence of those defendants did not cause plaintiff's accident.

With respect to the contribution claims, "[a]n essential requirement for contribution is that the parties must have contributed to the same injury" (*Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2d Dept 2018] [internal quotation marks and citation omitted]). Here, as discussed above, because NYPH and Trystate were not negligent, they did not contribute to plaintiff's injury.

Thus, NYPH and Trystate are entitled to summary judgment dismissing all cross claims for common-law indemnification and contribution against them.

The Common-Law Indemnification and Contribution Claims Against Titan (Titan's Cross Motion)

Titan cross-moves for summary judgment dismissing all common-law indemnification and contribution claims against it. However, Titan does not raise any argument with respect to the common-law indemnification and contribution claims alleged against it. Nevertheless, Titan is entitled, by operation of law, to the dismissal of all such common-law indemnity and contribution claims against it since the Labor Law § 200 and common-law negligence claims against it have been dismissed. Therefore, for the purpose of these claims, it cannot be said that Titan is liable to any co-defendant under theories of common-law indemnification or contribution. Thus, Titan is entitled to summary judgment dismissing all cross claims for common-law indemnification and contribution against it.

The parties' remaining arguments are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that the motion by plaintiffs Jeremiah O'Donovan and Gail O'Donovan (motion sequence number 005), pursuant to CPLR 3212, for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim as against defendants The New York and Presbyterian Hospital and Trystate Mechanical, Inc. is granted; and it is further

ORDERED that defendant Bay Crane Service, Inc.'s motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted, and the complaint against it is dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the branch of The New York and Presbyterian Hospital and Trystate Mechanical, Inc.'s cross motion (motion sequence 005), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claim and all cross claims for common-law indemnification and contribution against them is granted; and it is further

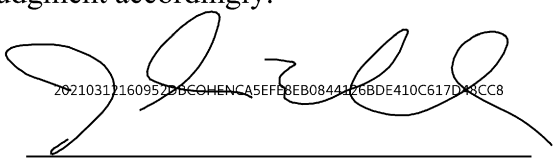
ORDERED that the branch of The New York and Presbyterian Hospital and Trystate Mechanical, Inc.'s cross motion (motion sequence 005), pursuant to CPLR 3212, for summary judgment in their favor on their contractual indemnification claim against defendant Shadow Transport, Inc. is granted; and it is further

ORDERED that defendant Titan Demolition & Salvage, LLC's motion (motion sequence 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, is granted to the extent of dismissing the complaint and all common-law indemnification claims asserted against it, and is otherwise denied; and it is further

ORDERED that defendant Shadow Transport Inc.'s cross motion (motion sequence 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, is granted to the extent of dismissing the complaint and all common-law indemnification claims asserted against it, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



3/12/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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