

Soto v Maimonides Med. Ctr.
2021 NY Slip Op 31125(U)
March 11, 2021
Supreme Court, Kings County
Docket Number: 522517/2016
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 522517/2016
Seq 007, 008, 009 & 010

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

HUGO SOTO AND DEIRDRE TRUJILLO,

Plaintiff,

against

MAIMONIDES MEDICAL CENTER, AMERICON
CONSTRUCTION, INC., BROOKLYN HEALTHCARE
INVESTORS, LLC, DUNCAN INTERIORS, INC. I/S/H/A
DUNCAN INTERIORS, LLC,

Defendants.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1-4
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	5-11
Replying Affidavits	12-15
Exhibits	
Other	

MAIMONIDES MEDICAL CENTER, AMERICON
CONSTRUCTION, INC. AND BROOKLYN HEALTHCARE
INVESTORS, LLC,

Third-Party Plaintiffs,

against

CIROCCO & OZZIMO INC. AND DUNCAN INTERIORS, INC.
I/S/H/A DUNCAN INTERIORS, LLC,

Third-Party Defendants.

MAIMONIDES MEDICAL CENTER, AMERICON
CONSTRUCTION, INC. AND BROOKLYN HEALTHCARE
INVESTORS, LLC,

Second Third-Party Plaintiffs,

against

SITE SAFETY, LLC,

Second Third-Party Defendant.

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MAIMONIDES MEDICAL CENTER, AMERICON
CONSTRUCTION, INC. AND BROOKLYN HEALTHCARE
INVESTORS, LLC,

Third Third-Party Plaintiffs,

against

WEIR WELDING COMPANY, INC.,

Third Third-Party Defendant.

WEIR WELDING COMPANY, INC.,

Fourth Third-Party Plaintiff,

against

J.C. STEEL CORP.,

Fourth Third-Party Defendant.

Upon the foregoing papers¹, third-party defendant Site Safety, Inc.’s (“Site Safety”) motion for summary judgment motion (Seq. 007), plaintiffs² motion for partial summary judgment (Seq. 008), third-party defendant Duncan Interior’s motion for summary judgment (Seq. 009), third-party plaintiffs Maimonides Medical Center’s (“Maimonides”), Americon Construction, Inc.’s (“Americon”), and Brooklyn Healthcare Investors, LLC’s (“Brooklyn Healthcare”) cross-motion for summary judgment (Seq. 010), are decided as follows:

Introduction

Plaintiff commenced this action against Maimonides, Americon, Brooklyn Healthcare,

¹ This court will not consider Site Safety’s reply papers in further support of its cross-motion, as such papers are not authorized by CPLR 2214.

² All references to plaintiff in the singular within this Decision and Order are to plaintiff Hugo Soto.

and Duncan Interiors, Inc. (“Duncan”) for injuries he claims to have sustained as a result of an accident on September 26, 2016, caused by defendants’ negligence and violations of New York Labor Law §§ 200, 240(1), 241-a and 241(6). Maimonides, Americon, and Brooklyn Healthcare commenced three separate third-party actions against Cirocco & Ozzimo, Inc. (“C&O”) and Duncan, Site Safety, and Weir Welding Company, Inc. (“Weir”), asserting claims for contractual and common-law indemnification, contribution, and/or breach of contract. Weir also asserts the same third-party claims against J.C. Steel Corp.

Factual Background

Robert Johnson, a general superintendent for Americon at the time of the accident, testified at his deposition that Maimonides had a construction project on Maimonides’ property in 2016 (Johnson EBT, dated December 10, 2018 [“first EBT”], at 13). Maimonides engaged Americon as the general contractor/construction manager for the construction project (*id.* at 12-13, 25, 116). Mr. Johnson was the general superintendent for the construction project (*id.* at 25).

Americon hired C&O as the masonry subcontractor (*id.* at 24-25). Plaintiff was an employee of C&O, and was involved in pouring concrete for the project (plaintiff’s EBT, dated April 24, 2018 [“first EBT”] at 11 and 19). Plaintiff received his instructions from only C&O employees (plaintiff’s EBT, dated August 1, 2019 [“second EBT”] at 239). On the date of the accident, plaintiff was pouring concrete on the second floor (plaintiff’s first EBT at 18-20, 28). At his deposition, plaintiff was shown several photographs of the site of his accident. These photos, submitted as part of these motions, show orange netting and metal wire/cable at least partially surrounding the perimeter of various gaps in the floor. These photos also show wooden

planks at least partially covering these gaps.

At his deposition, plaintiff recognized these gaps as elevator shafts, and further recognized the netting, cable, and wooden planks (plaintiff's first EBT at 45-47, 113-15, 120). Plaintiff testified that these materials were in place "in the weeks" prior to his accident (*id.* at 46-49, 114, 120; plaintiff's second EBT at 213-14). Referring to one of the photographs that shows some netting, cable, and wooden planks, plaintiff testified that he saw those materials in place on the second floor one week prior to the accident (plaintiff's first EBT at 46). Plaintiff did not recall whether these protective materials were in place on the day of the accident (plaintiff's second EBT at 214). Plaintiff testified that employees of C&O had removed similar protective materials in the past (plaintiff's second EBT at 207).

At his deposition, Mr. Johnson also described these protective materials. He testified that, for the elevator shafts, the perimeter of the shaftway was partially surrounded by netting and covered by planks on which was spray-painted the word "hole" (Johnson first EBT at 52). The netting did not completely cover the perimeter of the hole (*id.* at 53). Mr. Johnson claimed that the portion of the hole not covered by netting was covered by plywood (*id.*). Mr. Johnson believed that Weir placed the netting and that Duncan placed the planking (*id.* at 53-54). Mr. Johnson testified that the plywood was removed from the subject opening so that the concrete pour could be finished (*id.* at 58-59). However, he also testified that the planking was not required to be removed to complete the task (*id.* at 144).

Plaintiff testified that he did not recall certain details about the accident (plaintiff first EBT at 44-45). Plaintiff submits the affidavit of James Hussey, a co-worker of plaintiff's, who

was working with plaintiff on the second floor when the accident occurred.³ He states that plaintiff was pumping concrete, then started to pull the concrete hose and “walked straight back but fell through the netting.” Mr. Hussey states that he was “about 5 feet from [plaintiff]” and “had just looked up and noticed in [a] split second [plaintiff’s] shirt disappear downward.” He heard someone shout that plaintiff had fallen. He saw that plaintiff had fallen to the floor below.

Thomas Cirocco, the vice president of C&O, testified that plaintiff was an employee of C&O Brick and Block, which provided the labor to C&O, on the date of the accident (Cirocco EBT, dated October 3, 2019 (“first EBT”) at 11, 25-28). Mr. Cirocco had the authority to direct the work of C&O Brick and Block personnel (*id.* at 31-33). He testified that concrete was being poured on the second floor of the project on the date of the accident (*id.* at 21). He also testified that he saw both Duncan and Americon employees possibly placing “exterior protection”, such as cable/wire and mesh/netting (*id.* at 42-44). He testified that he did not see any wooden planks at the floor gaps prior to the accident, but saw Americon employees place the plywood boards in place at the floor openings after the accident (*id.* at 108-110). He explained that, if C&O employees were pouring concrete on the floor which contained one of these opening, the plywood might need to be removed depending on the manner in which it was installed (*id.* at 81-83). However, Mr. Cirocco testified that neither the cable nor the netting should be removed (*id.* at 81).

Edward Spsychalsky, an owner of Duncan, testified at his deposition that Americon hired Duncan to construct drywall partitions and ceilings, exterior framing and sheeting, and “protection” (Spsychalsky EBT, dated February 26, 2019, at 18). Mr. Spsychalsky testified that, if

³ Mr. Hussey’s affidavit is not enumerated into separate paragraphs. The information referenced in this Decision and Order is found on the first page of the two-page affidavit.

Duncan was providing the carpentry work at the site, it also provided the wood used to cover floor openings (*id.* at 78). Mr. Spychalsky contends that Duncan did not remove or maintain these coverings once initially placed (*id.* at 65).

The contract between Duncan and Americon states that “[i]t is the intent of this Contract to have this Contractor provide all necessary labor and materials to furnish and install all of the Drywall, Carpentry, Blocking, Exterior Wall Framing, Sheeting, OSHA Protection and Ceilings Work including Rough Carpentry in accordance with the Contract Documents including, but not limited to the following” (Rider at page 1). Nowhere in the contract, including the rider, do the parties explain what is included in “OSHA Protection”. The contract also states that Duncan shall “[f]urnish all labor, material, engineering, tools, equipment and supervision as required to complete in its entirety all Drywall, Carpentry, Roof Protection, Temp Phasing Partitions & Barricade Work and Rough Carpentry in accordance with the drawings and specifications noted in the contract documents” (Rider, Section II, at ¶ 5). The contract does not explain what is meant by “Barricade Work”.

In addition to the circumstances of the accident, the instant motions concern the duties of parties to maintain the premises in a safe condition. Mr. Johnson testified at his deposition that he ran the site safety meetings, performed daily walkthroughs of the job site, and had the authority to stop work that he found to be unsafe (Johnson first EBT at 28-30, 35; Johnson EBT, dated September 26, 2019 [“second EBT”] at 17-19, 26, 69). Mr. Johnson testified that Site Safety was retained to perform “monthly or periodic inspections” or “safety audits” at the project (Johnson first EBT at 107 and 145). Mr. Johnson accompanied Site Safety on their walkthroughs (*id.* at 108). Mr. Johnson acknowledged that, unless Site Safety was physically there at the time,

it would not be consulted concerning the removal of protection (*id.* at 146). Site Safety was not at the project site on the date of the accident, and Mr. Johnson believes that, prior to the accident Site Safety was last at the site on September 1, 2016 (*id.* at 164, 174, 187).

Leonard Ellerby, Site Safety's Director of Quality Control, testified at his deposition that Site Safety performed monthly inspections at the Maimonides project (Ellerby EBT at 9, 16). He further testified as follows: When Mr. Ellerby performed his inspections, he met with Mr. Johnson or another project manager, who accompanied him during the inspections (*id.* at 19). During these walkthroughs, Mr. Ellerby took photographs of any non-complaint condition he observed and prepared a report (*id.* at 20-21). Site Safety did not have any involvement in the safety meetings at the project prior to the accident (*id.* at 28). Mr. Ellerby never stopped work on the project, nor did he have the authority to do so (*id.* at 28-29). If he saw an unsafe condition, Mr. Ellerby would speak with Mr. Johnson or anyone else accompanying him on his inspection and note it in his report (*id.* at 31). Mr. Ellerby claimed that he did not recall seeing any unprotected shaftways on the second floor of the project (*id.* at 32-33). He asserted that, if he had seen such lack of protection, he would have photographed it (*id.* at 33).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiffs' Claims Against Defendants

Plaintiffs seek summary judgment against defendants Maimonides, Americon and Brooklyn Healthcare only on Mr. Soto's claims for violation of Labor Law §§ 240(1), 241-a, and 241(6). Duncan seeks summary judgment dismissing all of plaintiffs' claims against it.

Negligence and violation of Labor Law § 200

Plaintiff does not seek summary judgment in favor of his claims for negligence and violation of Labor Law § 200. However, Duncan seeks summary judgment to dismiss those claims against itself. A subcontractor such as Duncan may be liable in negligence if its work created the condition that caused the accident, even if it did not supervise plaintiff's work (*Sledge v S.M.S. Gen. Contractors, Inc.*, 151 AD3d 782, 783 [2d Dept 2017]).

"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" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Because Duncan is not an owner or general contractor, or an agent of either, and no party argues otherwise, it is not liable for violation of Labor Law § 200 (*Tomyuk v Junefield Ass'n*, 57 AD3d 518, 521 [2d Dept 2008]).

As to common-law negligence, Mr. Spsychalsky, Duncan's owner, testified that, if Duncan was providing the carpentry work at the site, it also provided the wood used to cover floor openings (Spsychalsky EBT at 78). Mr. Spsychalsky testified that Duncan did not remove or maintain these coverings once initially placed (*id.* at 65). Mr. Johnson of Americon testified that Duncan placed the planking for the gaps in the floor (Johnson first EBT at 53-54). Mr. Cirocco testified that he saw both Duncan and Americon employees possibly placing "exterior protection", such as cable/wire and mesh/netting (Cirocco first EBT at 42-44). He testified that

he did not see any wooden planks at the floor gaps prior to the accident, but saw American employees place the plywood boards in place at the floor openings after the accident (*id.* at 108-110). Duncan asserts that Mr. Cirocco testified that C&O employees removed the planks. However, the testimony referenced (Circocco first EBT at 81-83 and Cirocco second EBT at 195-96) contain no such statements. Thus, there are disputed issues of fact concerning Duncan's installation of the wooden planks, which must be resolved at trial.

Labor Law § 240(1)

Labor Law § 240(1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). In order to receive protection under Labor Law § 240(1), plaintiff must prove that: (1) he was permitted or suffered to work on the construction project; and (2) he was hired by the owner, contractor or their agent to work at the site (*Gallagher v Resnick*, 107 AD3d 942, 944 [2d Dept 2013]). Plaintiff must also prove that defendants violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]). Defendants are liable under Labor Law § 240(1) if the injured worker's "task creates an elevation related risk of the kind that the safety devices listed in section 240(1) protect against" (*id.*, quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

Plaintiff has established that he was hired by defendants to work on a construction project and that he was at the construction site on the day of the accident to work. Defendants argue that plaintiff is not protected by Labor Law § 240(1) because he was not performing construction work at the precise moment of the accident, but rather taking a five to ten minute break (Cirocco

first EBT at 85-86). Such exact timing is not required. There is no dispute that plaintiff was on the premises for the purpose of performing construction work, and his actions at the time were related to his duty to pour concrete (*Gallagher*, 107 AD3d at 944; *Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2d Dept 2004] [“To myopically focus on a job title or the plaintiff’s activities at the ‘moment of the injury’ would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the ‘spirit of the statute’”]). Accordingly, plaintiff is protected by Section 240(1).

Plaintiff has further proven, through his own testimony and the affidavit of his co-worker, James Hussey, that Mr. Soto fell from a height because he was not using a safety device that would have prevented his fall. Maimonides, Americon, and Brooklyn Healthcare argue that plaintiff cannot meet his burden on summary judgment because he does not remember the accident. However, plaintiff submits the affidavit of Mr. Hussey, who was present with him at the time of the accident. Mr. Hussey states that: he was with plaintiff on the day of the accident, on the second floor; he saw plaintiff “disappear downward” from the floor while they were working; and that Mr. Hussey then saw plaintiff lying below a hole in the floor (Hussey Affidavit at 1). This testimony is sufficient to meet plaintiff’s burden.

Defendants also argue that plaintiff is the sole proximate cause because, they claim, plaintiff and other employees from C&O removed the wood planks. They cite Johnson’s testimony, but Johnson specifically stated that he did not know who removed the wood or when (Johnson first EBT at 58-59). Furthermore, Mr. Circocco testified that, if C&O employees were pouring concrete on the floor which contained one of these opening, the plywood might need to be removed depending on the manner in which it was installed (Circocco’s first EBT at 81-83).

Of course, Mr. Circocco also testified that he never saw any wooden planks in place at the holes in the floor prior to the accident (*id.* at 108-110). There is, however, no proof that plaintiff himself removed the wooden planks.

In addition, defendants argue that plaintiff is a recalcitrant worker because he did not use a harness. A recalcitrant worker must not simply neglect to wear protection, but must rather refuse a direct order to wear it (*Garbett v Wappingers Cent. School Dist.*, 160 AD3d 812, 815 16 [2d Dept 2018]; *Silvas v Bridgeview Inv'rs, LLC*, 79 AD3d 727, 731 [2d Dept 2010]). Plaintiff testified that he was never instructed to “tie off” (plaintiff first EBT at 26) and that tying off might itself risk accident (*id.* at 26-27). There is no evidence that plaintiff was instructed to use a safety device and refused to do so.

Fourth third-party defendant J.C. Steel, argues that plaintiffs’ motion is premature because its witness has not been deposed. The information possessed by its own witness is clearly within J.C. Steel’s control, and therefore cannot serve as the basis to oppose summary judgment (*Rodriguez v Farrell*, 115 AD3d 929, 931 [2d Dept 2014]). Accordingly, plaintiff’s motion is not premature as to J.C. Steel.

Separately, Duncan moves for summary judgment to dismiss this claim against it on the basis that it is neither the owner nor general contractor, nor the agent of either (*see, e.g., Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570 [2d Dept 2020]). There is no opposition to this aspect of Duncan’s motion, which is granted.

Labor Law § 241-a

Section 241-a states that “Any men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound

planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board". Plaintiff testified that the opening at issue was an elevator shaftway (plaintiff first EBT at 46). Mr. Johnson referred to the opening as a duct shaftway (Johnson first EBT's at 50). Even assuming that the shaftway intended to house an elevator, there is no evidence that the that planking was more than one story below the hole (or more than two stories above it) (*compare Canka v Coalition for the Homeless, Inc.*, 240 AD2d 355, 356 [2d Dept 1997]). Accordingly, plaintiff is not entitled to summary judgment on this claim.

Labor Law § 241(6)

Plaintiff seeks summary judgment in favor of his claim for violation of Labor Law § 241(6). Labor Law § 241(6) imposes on owners and contractors a non-delegable duty 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" (*Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 983 [2d Dept 2014]). To prove such a claim, plaintiff must prove a violation of a rule or regulation promulgated by the Commissioner of the Department of Labor (*Vita v New York Law School*, 163 AD3d 605, 608 [2d Dept 2018]).

Plaintiff asserts that defendants violated Industrial Code § 23-2.5(a)(2)(i), which states:

To minimize injuries from falls in shafts, a tight platform consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed not more than one story or 15 feet, whichever is less, in the shaft below the level where persons are working. In lieu of such platform, an approved life net installed in compliance with this Part (rule) may be provided. Such approved life net shall be installed in the shaft not more than one story or 15 feet, whichever is less, below the level where persons are working.

The record does not include certain pertinent information, such as the distance plaintiff fell. Additionally, there is a question of fact concerning whether the shaftway at issue intended to house an elevator. Accordingly, plaintiff is not entitled to summary judgment on this claim.

Duncan moves for summary judgment to dismiss this claim against it on the basis that it is neither the owner nor general contractor, nor the agent of either (*Fiore*, 186 AD3d 570). There is no opposition to this aspect of Duncan's motion, which is granted.

Defendants' Third-Party Claims against Site Safety and Duncan

Maimonides, Americon, and Brooklyn Healthcare assert third-party claims against Site Safety and Duncan for contractual indemnification, common-law indemnification, and contribution. Site Safety and Duncan separately move for summary judgment to dismiss some or all of these claims, and Maimonides, Americon, and Brooklyn Healthcare cross-move for summary judgment on these claims.

Site Safety

"The right to contractual indemnification depends upon the specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). Here, Site Safety contends there was no written contract, and defendants do not argue otherwise. Accordingly, this claim is dismissed.

Site Safety also moves for summary judgment to dismiss defendants' claims against it for common-law indemnification and contribution. To prove a claim for common-law indemnification, defendants must show that they were not negligent, and that Site Safety was "responsible for negligence that contributed to the accident or, in the absence of any negligence,

that [Site Safety] had the authority to direct, supervise, and control the work giving rise to the injury” (*Poalacin v Mall Properties, Inc.*, 155 AD3d 900, 909 [2d Dept 2017]). To succeed on a contribution claim, defendants must prove that Site Safety owed them or the main plaintiff a duty of reasonable care, and that the breach of such duty contributed to the alleged accident and injuries (*Guerra v St. Catherine of Sienna*, 79 AD3d 808, 809 [2d Dept 2010]).

Site Safety acknowledges that it was hired to report safety issues monthly. However, it characterizes its role in this regard as a minor one, largely due to the relative infrequency of its visits and its lack of authority to stop work. It also notes that C&O retained its own “concrete inspector” (Cirocco first EBT at 123-24), and that Mr. Johnson accompanied Site Safety on its inspections (Johnson EBT at 108). Even assuming its duty was limited in this way, Site Safety does not contend that it had no duty to report missing or insufficient protection for shaftways. Even if Site Safety was not the predominant safety officer on the site, it was required to report its safety concerns to Americon (Ellerby EBT at 20-21).

Site Safety mistakenly contends that a failure to do something cannot give rise to liability. Site Safety references cases in support of this contention that relate to a contracting party’s duty to a non-contracting party, as set forth in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136, 140 [2002]). Here, the claims are between parties to an unwritten agreement.

Site Safety further argues that it did not have notice of the missing protection around the shaftway. The facts about the presence of the various pieces of protection at the shaftway are disputed, or are otherwise unclear. Plaintiff testified that he saw such protection materials in place at the site, but he does not recall if they were in place on the day of the accident (plaintiff’s first EBT at 48-49, 114, 120; plaintiff’s second EBT at 213-14). Plaintiff also testified that

employees of C&O had removed similar protective materials in the past (plaintiff's second EBT at 207). Defendants counter plaintiff's testimony with Mr. Cirocco's assertion that he never saw wooden planks placed at the shaftways prior to the accident (Cirocco first EBT at 108). There is also differing testimony about when and whether any of the protective materials would have been removed in order for plaintiff to pour concrete. Accordingly, there are triable issues of fact concerning that status of the protection materials prior to the accident, and thus whether Site Safety should have noted the presence or absence of these materials and reported on them.

Duncan

Duncan and the other defendants each move for summary judgment on defendants' contractual indemnification claim against Duncan. Duncan's contract with Americon states, in paragraph 4(h), that:

To the fullest permitted by law, Subcontractor shall defend, indemnify and save harmless Americon...its agents, successors and/or assigns . . . from and against any and all claims . . . on account of bodily or personal injuries...directly or indirectly arising out of or in connection with or relating to the operations, attempted operations, or failure to perform operations in connection with or pursuant to this Agreement, whether or not due or claimed to be due in whole or in part to the active, passive or concurrent negligence or fault of the Subcontractor... .

The first page of the First Rider⁴ to this contract states that “[i]n the event of any inconsistencies between the provisions of the Rider and the other Contract Documents, this Rider shall control.”

Paragraph 3 of the First Rider states: “Obligation to Indemnify: To the fullest permitted by applicable law governing this Agreement, the Subcontractor agrees to defend, indemnify and hold harmless the Owner, the Contractor, and the Indemnitees from and against any claim . . .

⁴ There are two riders to the contract, which this court will refer to as the First Rider and the Second Rider, according to the sequence in which they were submitted.

attributable to personal injury, bodily injury...caused by, arising out of, resulting from or occurring in connection with the performance of the Work by, and/or any act or omission of the Subcontractor or its representative agents or employees... .”

Under either the original contract or the First Rider, Duncan’s indemnification is triggered by claims that arise out of its work, its actions or its inaction, regardless of any negligence it may have committed. As the discussion above concerning Duncan’s alleged negligence shows, the parties dispute whether Duncan was responsible for installing, or actually installed, the wooden planks near the floor gaps. Accordingly, there are triable issues of fact concerning Duncan’s duty to indemnify pursuant to contract.

Likewise, because Duncan’s negligence is unproven, and because it did not supervise plaintiff’s work, neither Duncan nor the other defendants are entitled to summary judgment on defendants’ claims for common-law indemnification or contribution (*Poalacin*, 155 AD3d at 909; *Guerra*, 79 AD3d at 809).

Lastly, defendants seek summary judgment on their claim for breach of contract. The contract between Duncan and Americon required Duncan to name defendants as additional insureds. Defendants assert that Duncan failed to do so, but defendants do not refer to any admissible evidence to support this factual assertion.

Conclusion

For the foregoing reasons, the various motions are resolved as follows:

(A) second third-party defendant Site Safety’s motion for summary judgment motion (Seq. 007) is granted to the extent that third-party plaintiffs Maimonides’, Americon’s, and Brooklyn Health’s claims for contractual indemnification are dismissed;


(B) plaintiffs' motion for partial summary judgment (Seq. 008) is granted to the extent that judgment on the claims against defendants Maimonides, Americon, and Brooklyn Health for violation of Labor Law § 240(1) is granted;

(C) defendant/third-party defendant Duncan Interior's motion for summary judgment (Seq. 009) is granted to the extent that plaintiff's claims against it for violation of Labor Law §§ 200, 240(1) and 241(6) are dismissed; Duncan's motion is denied with respect to common-law negligence; and

(D) defendants/third-party plaintiffs Maimonides', Americon's, and Brooklyn Health's cross-motion for summary judgment (Seq. 010) is denied.

This constitutes the decision and order of the court.

March 11, 2021
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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