SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

----------X

OSCAR MARTINEZ,

Plaintiff,

- against -

505 ST. MARKS AVE. REALTY LLC, REALTY WITHIN REACH INC., JOY CONSTRUCTION CORPPORATION, DANICA GROUP LLC, DANICA PLUMBING & HEATING CORP. and COPPER PLUMBING & HEATING LLC,

Defendants.

----------X

JOY CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

- against -

ALL ABOUT AC CORPORATION,

Third-Party Defendant.

----------X

DANICA GROUP LLC and DANICA PLUMBING & HEATING CORP.,

Second Third-Party Plaintiff,

- against -

COPPER III HEATING & PLUMBING and COPPER SERVICES LLC,

Second Third-Party Defendants.

----------X

505 ST. MARKS AVE. REALTY, LLC,

Third Third-Party Plaintiffs,

- against -

ALL ABOUT AC CORP., DANICA GROUP LLC, DANICA PLUMBING & HEATING CORP., COPPER III HEATING & PLUMBING and COPPER SERVICES LLC,

Third Third-Party Defendants.

----------X

Index No.: 500291/2016
Motion Seq. Nos.: 11, 12, 13, 15, 16, 17, 18, 19

**DECISION AND ORDER**

[*Caption Continued*]

----------X
JOY CONSTRUCTION CORPORATION,
Fourth Third-Party Plaintiffs,
- against -

D AND G MASONRY CORP OF NY and D AND G MASONRY CORP,
Fourth Third-Party Defendants.
----------X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motions for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 11) 362-387, 518-524, 530-534, 578-607, 701; (Motion 12) 388-414, 527-528, 562-571, 608-637, 681, 687, 706-710; (Motion 13) 415-445, 529, 558-559, 638-640, 685; (Motions 15 and 17) 472-477, 510-515, 535-539, 540-544, 641-645, 650-679, 689-698; (Motion 16) 479-509, 526, 560, 646-648, 683, 702-703; (Motions 18 and 19) 561, 572-576, 688, and 711-715 were read on these motions for summary judgment.

This action arises from an accident that occurred on March 12, 2015, while the plaintiff was performing air conditioning installation work at a construction site for a multi-story residential apartment building located at 505 St. Marks Street, in the County of Kings, City and State of New York. The plaintiff alleges that he sustained personal injuries when he fell through an opening in the floor which was not properly covered or guarded in his work area, causing him to fall one story into a sub-basement, onto concrete cinder blocks.

Defendant 505 St. Marks Ave. Realty LLC (hereinafter 505) owned the site, and defendant Joy Construction Corporation (hereinafter Joy) was the general contractor for the project. Defendants Danica Group LLC, Danica Plumbing & Heating Corp. (hereinafter Danica) and Copper Plumbing & Heating, LLC, Copper III Heating & Plumbing and Copper Services LLC (hereinafter Copper) were plumbing sub-contractors hired by Joy. D and G Masonry Corp of NY and D and G Masonry Corp. (hereinafter D&G) were hired by Joy to perform masonry work on the subject building. Plaintiff was employed by third-party defendant AA A/C Corporation, which was the HVAC subcontractor for the project.

The plaintiff moves for summary judgment (Motion 16) against 505 as the owner, and Joy as the general contractor, under Labor Law §§240(1) and 241(6). Defendant 505 seeks summary judgment (Motion 11) on the plaintiff's Labor Law §§ 200 and 241(6) claims; summary judgment against defendants Joy, Danica, Copper, AA A/C and D&G for contractual indemnification and requiring those defendants to defend and indemnify 505, including for attorneys' fees and any and all expenses incurred by 505 in the defense of the action; and requiring that they hold harmless 505 in whole for the amount of any recovery obtained by the plaintiff against it; and granting summary judgment to 505, and dismissal of all cross-claims and counter-claims asserted against it. Defendant Joy seeks partial summary judgment (Motion 12) on plaintiff's Labor Law § 200 and common law negligence claims; dismissal of all cross-claims and counter-claims asserted against it based on common law indemnification and/or

contribution; and summary judgment against AA A/C based on contractual indemnification. Defendants Copper seek summary judgment (Motions 18 and 19) against Joy and dismissal of its claims for contractual indemnification, and dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims, as well as dismissal of all cross-claims for common-law indemnification and contribution.[1] D&G seeks summary judgment (Motion 13) on Joy's complaint, and dismissal of all cross-claims. Defendants Danica seek summary judgment (Motions 15 and 17) and dismissal of the plaintiff's complaint and all cross-claims.[2] After oral argument and upon careful consideration of the parties' submissions, the motions are decided as set forth below.

On July 31, 2013, 505 and Joy entered into an agreement wherein Joy was appointed to act as the general contractor for the construction project at the premises. On December 9, 2013, Joy and AA A/C entered into a contract for AA A/C to perform HVAC work at the premises. Thereafter, on February 26, 2014, Joy and Danica entered into an agreement for Danica to perform plumbing work at the premises. Joy and D&G entered into a contract on May 27, 2014, for masonry work to be performed on the building. On March 31, 2015, Joy and Copper entered into an agreement for Copper to perform plumbing work at the premises. Danica and Copper entered into a Master Subcontract Agreement on or about September 1, 2011 for Copper III to complete plumbing work on all of Danica's existing contracts.

According to the plaintiff's deposition testimony, at the time of the accident he had been working approximately two or three months on the construction project. He and his supervisor, "Zerafin", were installing air conditioning ducts on the basement level of the site. Just prior to the accident, "Zerafin" was standing on a scaffold installing a duct, and the plaintiff was standing on the concrete slab below when "Zerafin" asked plaintiff to retrieve scissors from an adjoining room. In order to reach that room, the plaintiff had to walk over a plywood board that was covering an opening in the floor leading to the sub-basement level. Plaintiff testified that the opening was used by the trades to move equipment to and from the sub-basement. The opening also had hoses running through it carrying water. He observed plumbing, electrical and air conditioning equipment in the area of his fall. Plaintiff testified that he did not place the plywood over the opening, and that prior to the accident he never touched the plywood. There was no barrier of any kind preventing the plaintiff from walking on the plywood. He was not given any safety devices to protect him from falling, and there were no safety rails around the opening. The board was not secured to the floor, and when the plaintiff stepped on the plywood, it shifted and slid out from under him, causing him to fall through the opening to the sub-basement below. He observed grey bricks in the sub-basement when he fell. At the time of the accident, plumbing subcontractors were working in the sub-basement, and on previous occasions the plaintiff observed plumbers working on the basement level in the area of the opening.

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, except owners of one and

[1] Motion sequence number 19 was filed by Copper with a corrected notice of motion, and was erroneously designated as a separate motion. It is substantively identical to motion sequence number 18.
[2] Motion sequence number 17, filed by Danica on August 3, 2020, is identical to its motion filed on July 2, 2020 under sequence number 15.

> two-family dwellings who contract for but do not direct or control the work, 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.

The statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993).

To prevail under Labor Law § 240(1), the plaintiff must prove a violation of the statute, i.e. that the owner or general contractor failed to provide adequate safety devices, and that the absence of that protection was the proximate cause of the injuries. *Allan v DHL Express [USA]*, Inc., 99 AD3d 828 (2d Dept 2012); *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003). The statute applies to risks related to elevation, and "are limited to such specific gravity-related accidents as falling from a height." *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 (2d Dept 2000) (holding that "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials").

Furthermore, the Appellate Division, Second Department has ruled that summary judgment on the issue of liability is warranted pursuant to Labor Law § 240(1), where plaintiff submitted evidence that he fell through an uncovered opening, that no safety device was in place to protect him from the uncovered opening and the violation of § 240(1) was the proximate cause for his injuries. *See Brandl v Ram Builders*, 7 AD3d 655 (2d Dept 2004). *See also Armentano v Broadway Mall Properties, Inc.*, 70 AD3d 614, 615 (2d Dept 2010) (Labor Law § 240(1) applied where plaintiff was injured when he fell through an opening in the floor that had been covered only by an unsecured piece of plywood); *Robertti v Chang*, 227 AD2d 542, 542-43 (2d Dept 1996) (plaintiff was entitled to summary judgment where he was injured while carrying a heavy beam across a temporary floor made up of plywood pathways laid over overlapping corrugated metal decking sheets, causing it to partially collapse).

The plaintiff has demonstrated his prima facie entitlement to judgment against 505 and Joy on his Labor Law § 240(1) claim through documentary evidence, his deposition testimony and the testimony of the defendants. The undisputed deposition testimony and documentary evidence established that defendant 505 was the sole owner of the premises at the time of the accident, and defendant Joy was the general contractor on the project. It is also undisputed that the plaintiff was not given any safety devices, and that he fell when an unsecured piece of plywood covering an opening leading to the sub-basement shifted, causing him to fall to the floor below. In opposition, the defendants have failed to raise a triable issue of fact that the plaintiff was the sole proximate cause of the accident. The admissible evidence demonstrates that the plaintiff's fall was related to the risks of working at an elevation, and that he was not given any safety devices to prevent the fall as he performed his work in the area of the opening. *See Ross v*

*Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494. Likewise, the evidence shows that there were no safety rails or warning signs, and the area was not blocked off to prevent the workers from walking on the plywood. As such, the plaintiff's motion for summary judgment (Motion 16) on his Labor Law § 240(1) claim against defendants 505 and Joy is granted.

The plaintiff also seeks summary judgment based on Labor Law § 241(6), predicated on a violation of the Industrial Code, 12 NYCRR 23-1.7 (b), which provides:

> (b) Falling hazards.
> (1) Hazardous openings.
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit.
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
> (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
> (b) An approved life net installed not more than five feet beneath the opening; or
> (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

Labor Law § 241(6) imposes a nondelegable duty on 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." *See Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983 (2d Dept 2014); *see also Perez v 286 Scholes St. Corp*., 134 AD3d 1085, 1086 (2d Dept 2015). To prevail on a Labor Law § 241(6) cause of action, a plaintiff must allege and prove a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. *See Misicki v Caradonna*, 12 NY3d 511 (2009); *Ross v Curtis-Palmer Hydro-Elec*. Co., 81 NY2d 494. However, even if a plaintiff establishes as a matter of law that the defendant violated a concrete specification of the Industrial Code, granting summary judgment on that claim is not appropriate. In *Rizzuto v L.A. Wenger Contr. Co*., 91 NY2d 343, 351 (1998), the Court of Appeals held that a violation of the Industrial Code is not conclusive with respect to defendant's liability, and merely constitutes "some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances." *See also Seaman v Bellmore Fire Dist.*, 59 AD3d 515 (2d Dept 2009); *Chrisman v Syracuse Soma Project, LLC*, 192 AD3d 1594 (4th Dept 2021). Accordingly, the branch of the plaintiff's summary judgment motion based on a violation of Labor Law § 241(6) must be denied.

Defendant 505 seeks summary judgment and dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims (Motion 11). 505 also seeks dismissal of the plaintiff's Labor Law § 241(6) claim. On the record at oral argument, plaintiff's counsel withdrew the § 200 and common-law negligence claims against defendant 505. As such, that prong of 505's motion, seeking summary judgment on the plaintiff's Labor Law § 200 and common-law negligence claims is granted as unopposed. The balance of 505's motion seeking summary judgment on the plaintiff's Labor Law § 241(6) claim is denied for the reasons stated above.

Defendant Joy also seeks summary judgment and dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims (Motion 12). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed." *Ortega v Puccia*, 57 AD3d 54, 61 (2d Dept 2008). Where a plaintiff's injuries arise not from the manner in which the work was being performed, but rather from an allegedly dangerous condition on the property, a property owner will be liable under a theory of common-law negligence when the owner created the complained-of condition, or when the owner failed to remedy a dangerous or defective condition of which it had actual or constructive notice. *See Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543 (2d Dept 2010); *LaGiudice v Sleepy's Inc*., 67 AD3d 969 (2d Dept 2009); *Bridges v Wyandanch Community Dev. Corp*., 66 AD3d 938 (2d Dept 2009). The same analysis applies to general contractors regardless of their lack of direction or control over the means and methods of the work performed. *See Wynne v B. Anthony Constr. Corp*., 53 AD3d 654 (2d Dept 2008). A general contractor has a duty to ensure that the construction site is safe for the workers.

In the instant matter, the issue involves a dangerous condition on the construction site, and not the means and methods of the work performed by the plaintiff. According to the testimony of Joy's Assistant Superintendent, James Rossiter, Joy was responsible for site safety; undertook the duty to inspect the areas where there were openings to ensure they were securely covered; was responsible for fastening and unfastening the cover when required; and was supposed to tape off the area where the cover was not secure. Thus, Joy is not entitled to summary judgment on plaintiff's Labor Law § 200 and common-law negligence claims because issues of fact exist as to whether it either created or had actual or constructive notice of the unsecured plywood. *See Gordon v American Museum of Natural History*, 67 NY2d 836 (1986) (a defendant has constructive notice of a hazardous condition on property when it is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it).

The Danica defendants seek summary judgment and dismissal of the plaintiff's complaint (Motions 15 and 17). On the record at oral argument, plaintiff's counsel represented that the plaintiff did not oppose dismissal of the §§ 240 and 241(6) Labor Law claims against Danica, and therefore the branches of Danica's motion seeking dismissal of those claims are granted on consent. However, the balance of Danica's motion seeking dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims is denied. The conflicting deposition testimony of the parties' witnesses concerning, inter alia, whether the plumbers were working in and around the subject opening, and whether they may have played a role in removing the covering

and/or failing to secure it or block the area to prevent workers from walking near the opening, raise issues of fact that preclude summary judgment.

Turning to the issue of indemnification between the defendants, "[t]he right to contractual indemnification depends upon the specific language of the contract." *See Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 722 (2d Dept 2011) quoting *George v Marshalls of MA, Inc*., 61 AD3d 925, 930 (2d Dept 2009). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." *See Alayev v Juster Assoc., LLC*, 122 AD3d 886, 887 (2d Dept 2014). In a contractor-subcontractor context, "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1100 (2d Dept 2009), quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp*., 58 AD3d 660 (2d Dept 2009).

Further, it is well-settled that a party seeking common-law indemnification must prove its own lack of negligence, as well as actual negligence on the part of the proposed indemnitor, or in the absence of such negligence, that the proposed indemnitor directed, supervised, and controlled the work giving rise to the injury. *See Campoverde v Fabian Bldrs., LLC*, 83 AD3d 986 (2d Dept 2011). Moreover, as a general proposition, "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the [relative] degree of fault attributable to the parties." *See Mendelsohn v Goodman*, 67 AD3d 753, 754 (2d Dept 2009).

As a threshold matter, defendant Joy does not oppose 505's summary judgment motion seeking contractual indemnification, and therefore that prong of 505's motion is granted as unopposed. However, the prongs of 505's motion seeking contractual indemnification, holding 505 harmless in whole for any recovery obtained by the plaintiff, and dismissal of all cross-claims and counter-claims from its subcontractors, Danica, Copper, AA A/C and D&G, are denied. 505 bases its claim for indemnification on contracts entered into between 505 and Joy; between Danica and Copper by way of subcontracts between Joy and Danica and Joy and Copper; between Joy and AA A/C; and between Joy and D&G. Defendant 505 has not asserted a cross-claim against D&G. 505 argues that it is free from negligence. However, to obtain summary judgment based on contractual indemnification 505 must show not only show that it was free from negligence, but that there is a causal connection between the proposed indemnitor's work and the plaintiff's accident. *See Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718.

Here, 505 has failed to meet its prima facie burden demonstrating that it was free from negligence, and issues of fact exist concerning whether the plaintiff's accident arose out of the proposed indemnitors' work on the project. Moreover, while there are contracts between other parties that, in general terms, contain language indemnifying the "owner," "an intent to benefit [a] third party must be shown, and absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular [contract]." *Dormitory Auth. of the State of N.Y. v Samson Constr. Co*., 30 NY3d 704, 710 (2018). 505 has failed to establish that it was the intended beneficiary under the indemnification contracts. Further, there is no indemnification

contract between 505 and Danica, and 505 has not asserted a cross-claim for indemnification against D&G.

Joy's summary judgment motion (Motion 12) seeking dismissal of all cross-claims and counter-claims asserted against it based on common law indemnification and for contribution by 505, Danica, Copper AA A/C and D&G is denied. Issues of fact exist as to Joy's negligence and the degree of fault, if any, attributable to the other defendants in the happening of the accident that preclude a grant of its common-law indemnification claims. Likewise, Joy's summary judgment motion seeking contractual indemnification against AA A/C is denied. Joy argues that its contract with AA A/C, which states that it will be indemnified "to the fullest extent permitted by law," for any claims "arising out of or resulting from performance of the Work [of AA A/C]" entitles it to indemnification. However, as set forth above, Joy must first demonstrate that it was free from negligence, and that a particular act or omission in the performance of such work by AA A/C was causally related to the accident. Joy has failed to eliminate triable issues of fact in the happening of the accident, and that it was free from negligence, and is therefore not entitled to contractual indemnification from AA A/C as a matter of law.

The Copper defendants are not entitled to summary judgment (Motions 18 and 19) against Joy on their cross-claims for contractual indemnification, and for dismissal of all cross-claims for common-law indemnification. Copper Services entered into an agreement with Joy after the plaintiff's accident occurred, and the Master Subcontract Agreement of September 1, 2011, between Danica and Copper does not name Joy, and is insufficient to trigger the indemnification clause as to Joy. Further, issues of fact exist as to the identity of the plumbing subcontracting company and the employment, direction and supervision of the plumbers who were on site on the date of plaintiff's accident. There is conflicting evidence from the witnesses and affidavits offered by Danica and Copper as to the work being performed by the plumbers, the location of the work, which company was performing it, and who directed and supervised the work.

Lastly, D&G's motion for summary judgment (Motion 13) seeking dismissal of all claims for common-law contribution, and for dismissal of Joy's contractual indemnification claim is denied. The subcontract between Joy and D&G of May 27, 2014, requires D&G to indemnify and hold harmless Joy for all claims "arising out of or resulting from" the performance of D&G's work on the subject project. Further, the Hold Harmless Agreement of July 30, 2014, requires D&G to indemnify, defend and hold harmless Joy for claims "arising out of or in connection with or as a result of the Subcontractor's [D&G's] Work . Issues of fact exist concerning whether the plaintiff's accident arose from D&G's work at the subject project. Specifically, Joy has raised questions of fact as to whether D&G was negligent in removing the plywood covering, or was negligent in the placement of hoses in the area of the opening. The issue of D&G's negligence in the happening of the plaintiff's accident also precludes summary judgment on D&G's motion seeking dismissal of all claims for common-law contribution.

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that 505's motion for summary judgment (Motion 11) is granted as unopposed only as to those branches of the motion seeking dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims, and its contractual indemnification claim against Joy; the remainder of 505's motion is denied; and it is further

**ORDERED**, that Joy's motion for summary judgment (Motion 12) is denied in its entirety; and it is further

**ORDERED**, that D&G's motion for summary judgment (Motion 13) is denied in its entirety; and it is further

**ORDERED**, that Danica's motion for summary judgment (Motions 15 and 17) is granted as unopposed only to the extent that plaintiff's Labor Law §§240(1) and 241(6) claims are dismissed; the remainder of the motion is denied in its entirety; and it is further

**ORDERED**, that plaintiff's motion for summary judgment against 505 and Joy (Motion 16) is granted only as to the plaintiff's Labor Law § 240(1) claim; the remainder of the motion is denied; and it is further

**ORDERED**, that Copper's motion for summary judgment (Motions 18 and 19) is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: January 5, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.