Bashant v 400 Rella Realty Assoc. L.P.
2022 NY Slip Op 30905(U)
March 22, 2022
Supreme Court, New York County
Docket Number: Index No. 150718/2016
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

---X

BRET BASHANT,

Plaintiff,

- v -

400 RELLA REALTY ASSOCIATES L.P., CALI REALTY CORP., 400 RELLA REALTY ASSOCIATES, L.L.C.,

Defendant.

---X

INDEX NO. 150718/2016

MOTION DATE N/A

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

400 RELLA REALTY ASSOCIATES L.P., CALI REALTY CORP., 400 RELLA REALTY ASSOCIATES, L.L.C.

Plaintiff,

-against-

ABM AIR CONDITIONING & HEATING, INC.

Defendant.

---X

Third-Party
Index No. 595908/2016

The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 125, 126, 132, 133, 134, 135, 136, 137, 139, 140, 141

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 128, 129, 130, 131, 138, 142, 143

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

This is an action to recover damages for personal injuries allegedly sustained by a worker on May 22, 2013, when, while working at 400 Rella Boulevard, Suffern, New York (the Premises), he was injured while trying to prevent an object from falling from the back of a truck.

In motion sequence number 003, third-party defendant ABM Air Conditioning & Heating, Inc. (ABM) moves, pursuant to CPLR 3212, for summary judgment dismissing the

Labor Law §§ 240 (1) and 241 (6) claims as against defendants/third-party plaintiffs 400 Rella Realty Associates, L.L.C. (400 Rella) and Mack-Cali Realty Corporation i/s/h/a Cali Realty Corp. (Mack) (collectively defendants), and for summary judgment dismissing defendants' third-party complaint as against them.

In motion sequence number 004, plaintiff Bret Bashant moves, pursuant to CPLR 3025, for leave to amend the complaint and bill of particulars, and pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against defendants.

In connection with motion sequence number 003, defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for summary judgment in their favor on their contractual indemnification claims against ABM.

Motion Sequence Numbers 003 and 004 are consolidated for disposition.

BACKGROUND

On the day of the accident, 400 Rella was an owner of the Premises. Mack was also an owner and the manager of the Premises. 400 Rella, through Mack, hired ABM to perform ongoing HVAC preventative maintenance at the Premises. In connection with this general maintenance, Mack hired ABM to replace an HVAC compressor unit (the Project). Plaintiff was employed by ABM as a service technician.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was an HVAC service technician for ABM. His responsibilities for ABM included HVAC system repairs and installation. Plaintiff's supervisor was Ward Reynolds, who was responsible for ABM's service and installation departments. Reynolds would assign plaintiff to a job and inform him of the scope of that job.

On the day of the accident, Reynolds assigned plaintiff to the Project to swap out an HVAC compressor on the roof of the Premises and replace it with a new three-and-a-half-foot by two-foot steel 1,000-pound compressor (the Compressor). Plaintiff had serviced the HVAC unit at the Premises "a dozen times" prior to the accident (plaintiff's tr at 179).

Plaintiff was directed to arrive at the Premises "at 5:00 in the morning because the crane was going to be there at 5:30" (*id.* at 183). Plaintiff arrived around 5:30 AM and met with a coworker, Ray Garcia, who arrived at approximately 5:45 AM in an ABM "rack" truck (the Truck) carrying the Compressor (*id.* at 194). The Truck was equipped with a lift gate, a hydraulic tailgate that could be lowered to the ground. Shortly after 5:45, another ABM employee, Mark Hanby, arrived.

A crane was required to remove and lower the old compressor to the ground, and to raise the new Compressor to the roof. Plaintiff and his coworkers waited until 6:00 AM for the crane to arrive. When it didn't arrive at 6:00 AM, plaintiff testified that he believed "that the crane wasn't coming" (*id.* at 197). Garcia left to make some telephone calls to inquire about the crane's whereabouts.

When Garcia returned, the workers still did not know when the crane would arrive. Garcia then informed plaintiff that they had to remove the Compressor from the flatbed, because Garcia needed to take the Truck to another location by 7:00 AM (*id.* at 202-203).

Then, plaintiff testified, after a brief discussion about what to do, around 6:30 AM, he and Hanby "took a crowbar and put the compressor on rollers" – two to three-inch thick steel pipes – in order to roll the Compressor manually to the lift gate so they could lower it to the ground (*id.* at 197). To do this, plaintiff stood on the flatbed by the cab of the Truck and pushed the Compressor. Hanby pulled. They stopped, as needed, to reposition the rollers. Once they

moved the Compressor towards the Truck's lift gate, plaintiff "saw that the tailgate was down about six to seven inches" (*id.* at 234).

According to plaintiff, Hanby tripped due to the difference in height, causing him to jump down off the Truck while the Compressor was still moving (*id.* at 234-235). The Compressor then moved on to and over the lift gate, causing the Compressor to dip down until it came into contact with the slightly lowered lift gate. Plaintiff testified that he "grabbed" the Compressor to stop its forward momentum and to prevent it from rolling off the back of the lift gate (*id.* at 235). In doing so, plaintiff was injured.

More specifically, plaintiff testified that the Compressor tilted down when it rolled onto the lift gate. Then, when it struck the lift gate, the lift gate dropped another eight inches, causing the Compressor to continue moving and "drag [plaintiff] down" (*id.* at 240). Plaintiff believed the Compressor had dropped "about a foot to 16, 18 inches" (*id.* at 266).

According to plaintiff, the crane showed up at 7:30 AM.

At his deposition plaintiff was shown a Workers' Compensation C3 report. He confirmed that he had filled the form out. He also confirmed that the report did not include any information about the lift gate moving or dropping.

Deposition Testimony of Mark Hanby (ABM's Employee)

Mark Hanby testified that on the day of the accident, he was employed by ABM. His duties included driving and operating rack trucks. He was present at the Premises on the day of the accident. ABM's job was to replace a compressor on the roof. Garcia brought the Compressor to the Premises on the Truck. He did not recall whether a crane was present at the time of the accident.

Hanby testified that he had no recollection of the accident or of assisting plaintiff with removing the Compressor from the Truck. He did not recall removing a compressor the size of the Compressor from the back of a truck (Hanby tr at 19), nor did he recall ever using pipes to roll a compressor off a truck (*id.* at 23). He did recall plaintiff claiming that he had hurt his back (*id.* at 13), though he did not know how it happened (*id.* at. 17).

Deposition Testimony of Robert Keefe (Mack's Director of Property Management)

Robert Keefe testified that on the day of the accident he was Mack's senior director of property management. Mack is a real estate investment trust and building manager.

Mack owned and managed the Premises, a three-story office building (Keefe tr at 12-13). Keefe did not visit the Premises with any regularity. Mack hired a company to provide a building engineer for the Premises who was responsible for general building maintenance and repairs. Mack also hired companies to provide cleaning services, landscaping and HVAC maintenance. Specifically, Mack hired ABM to service the HVAC units at the Premises.

Keefe was shown a copy of Mack's contract with ABM and confirmed it was a HVAC maintenance and repair contract for the Premises. He was then shown an invoice that called for the replacement of a compressor at one of the HVAC units at the Premises and confirmed it was for the subject Compressor replacement. The invoice also indicated that non-party Superior Crane Rental (Superior) supplied the crane for the Premises. The crane was rented by ABM. Mack did not direct ABM's work.

Keefe did not know plaintiff, did not witness the accident, and first learned of it when the instant lawsuit was filed.

Deposition Testimony of Ward Reynolds (ABM's Service Manager)

Ward Reynolds testified that on the day of the accident, he was ABM's service manager. His responsibilities included scheduling, ordering parts, and general operations. As part of its work, ABM maintained a fleet of vehicles, including rack trucks with lift gates capable of supporting 1000 pounds (Reynolds tr at 57).

ABM did not perform maintenance on their trucks. Rather, they used outside mechanics if a vehicle needed repairs. Reynolds was unaware of any specific issue with any of ABM's rack trucks or whether they were sent out for repair after plaintiff's accident. He did not recall any complaints made about the lift gates (*id.* at 80).

At his deposition, Reynolds was shown a copy of a contract between ABM and Mack. He confirmed that it was a "preventative maintenance only service agreement" for the Premises (*id.* at 36). It required ABM to perform quarterly maintenance of the HVAC at the Premises. Plaintiff's work was not performed directly under this agreement, but by a supplemental service ticket for additional work (*id.* at 37).

Reynolds was then shown a copy of a crane rental agreement from Superior and confirmed that ABM rented a crane from Superior for work at the Premises on the day of the accident. Reynolds confirmed that the agreement was also an invoice, and that it indicated that the crane had been delivered at 6:00 AM and that plaintiff had signed off on the crane's delivery (*id.* at 90).

If Superior was running late, they would typically call ABM. Reynolds testified that he did not receive such a call and was never informed that the crane was running late.

Reynolds was not present at the Premises on the day of the accident and has no personal knowledge of the accident. At some time after the accident, plaintiff informed Reynolds of the

accident. Reynolds prepared a written record of his conversation with plaintiff, though he could not recall exactly when he had prepared it. Reynolds testified that while he remembered writing this record, he could not remember any of the conversations he had related to what was in the report.

The Crane Rental Agreement

ABM and Superior entered into a "Crane Rental Agreement" (the Crane Agreement) for services to be provided on May 22, 2013, the date of the accident, at the Premises (ABM's notice of motion, exhibit N). It contains several boxes including "On Job" and "Leave Job" and two sections marked "Have Signed at Start of Job" and "Have Signed at End of Day" (*id.*)

The Crane Agreement states that the crane arrived at the Premises at 6:00 AM and left at 9:00 AM. It is signed twice. According to Reynolds, both signatures on the Crane Agreement belong to plaintiff.

DISCUSSION

> "[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]).

Plaintiff's Motion for Leave to Amend the Complaint (Motion Sequence Number 004)

Plaintiff moves, pursuant to CPLR 3025, for leave to amend his complaint to correct the accident date from May 23, 2013 to the correct date of May 22, 2013. This part of plaintiff's motion is unopposed, and is granted, *nunc pro tunc*.

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 003 and 004 and Defendants' Crossmotion)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. ABM moves, and defendants cross-move, for summary judgment dismissing the same claim as against them.

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 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 [2004]).

As an initial matter, as the owners of the Premises, 400 Rella and Mack do not contest that they are proper Labor Law defendants. They do, however, raise several threshold arguments regarding whether Labor Law § 240 (1) is applicable to this accident.

First, defendants argue that this accident falls outside of the scope of the Labor Law § 240 (1), because falls from the back of a flatbed truck are not the type of elevation related hazards contemplated by this provision (*see, e.g., Toefer v Long Is. R.R.,* 4 NY3d 399, 407 [2005] [worker who fell from back of a flatbed truck after being struck in the head with a launched object was not afforded the protections of Labor Law § 240 (1)]). However, *Toefer* does not create a blanket ban on gravity related injuries merely because they occurred on the back of a truck (*see, e.g. Myiow v City of New York,* 143 AD3d 433, 436 [1st Dept 2016] [13-foot fall from the back of a flatbed truck fell within the scope of section 240 (1)]).

Further, the First Department has held that injuries arising from heavy objects that fall from the back of flatbed trucks fall within the scope of Labor Law § 240 (1) (*see Ali v Sloan-*

Kettering Inst. for Cancer Research, 176 AD3d 561 [1st Dept 2019] [300 pound air conditioning coil that fell while being unloaded from a truck was within the scope of section 240 (1)]; *Grant v Solomon R. Guggenheim Museum*, 139 AD3d 583, 584 [1st Dept 2016] [section 240 (1) applied where a plaintiff was injured when a 1500 pound crate he was preparing to offload from the back of a flatbed truck tipped onto him]). Accordingly, a gravity related accident that involves the uncontrolled descent of a large object does not remove it from the protections of Labor Law § 240 (1) merely because the object was on the back of a flatbed truck.

Next, defendants argue that the Compressor fell only a short distance, such that the height differential was de minimis. This argument is unpersuasive. While the Compressor dropped only a short distance – 8 to 16 inches – such "'an elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object [one-thousand pounds] and the amount of force it was capable of generating, even over the course of a relatively short descent'" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]).

Turning now to the specifics of the accident, plaintiff argues that his accident occurred when the unsecured Compressor fell while it was in the process of being lowered to the ground and that defendants' failure to procure a proper safety device – namely a crane – violated Labor Law § 240 (1).

Plaintiff's testimony establishes that the unsecured one-thousand-pound Compressor was in the process of being lowered from the back of the truck when it fell. Because of its weight, the unsecured Compressor "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]; *Ali v Sloan-Kettering Inst. for Cancer Research*,

176 AD3d 561 [1st Dept 2019]). Therefore, the failure to provide hoisting equipment, such as a crane or a device designed to secure the Compressor as it was being lowered from the truck would be a violation of Labor Law § 240 (1).

Accordingly, on his papers, plaintiff has established prima facie entitlement to summary judgment in his favor on his Labor Law § 240 (1) claim. That said, in their opposition, defendants raise several arguments that give rise to questions of fact that preclude a finding in plaintiff's favor.

Specifically, defendants argue that plaintiff's own testimony about the accident is suspect and challenged by documentary evidence in the record. In support of this position, defendants cite to the Superior Invoice, which indicates that a crane arrived at the Premises at 6:00 AM, approximately half an hour before the accident allegedly took place. Further, according to Reynolds, plaintiff's signature appears twice on the Superior Invoice – once adjacent to the check-in time, and once adjacent to the check-out time (Reynolds tr at 90). This evidence calls into question the credibility of plaintiff's testimony that the crane was not present at the time of the accident. Credibility issues are the purview of the jury (*see e.g. Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] [quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"]).

Further, this credibility issue goes to the heart of this action. Specifically, if the crane was present at the time of the accident, then a sufficient safety device would have been provided to plaintiff and there would be no violation of section 240 (1) (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["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"]). Moreover, if plaintiff was aware of the crane's presence, but chose not to use it, his failure to do so could be determined to be recalcitrant (*see e.g. Harris v Rodriguez*, 281 AD2d 158, 158 [1st Dept 2001] ["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"] [internal quotation marks and citations omitted]).

In sum, essentially there are two credible versions of the accident. One, where plaintiff was not provided with a sufficient safety device – i.e. a crane – and one where he was provided with one but did not use it. "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" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]).

Thus, plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim and, likewise, defendants are not entitled to dismissal of the same.

Plaintiff's Motion for Leave to Amend the Bill of Particulars (Motion Sequence Number 004)

Plaintiff moves, pursuant to CPLR 3025, for leave to amend his bill of particulars to include three Industrial Code provisions. CPLR 3025 (b) provides the following, as relevant:

> "Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just . . . . Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Leave to amend a pleading "'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420 [1st Dept

2014], quoting *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). In addition, a motion to amend should be granted unless the proposed amendments are "palpably insufficient or clearly devoid of merit" (*WDF, Inc. v Trustees of Columbia Univ. in the City of N.Y.*, 170 AD3d 518, 519 [1st Dept 2019] [internal quotation marks and citation omitted]).

Plaintiff seeks, by motion filed 120 days after the note of issue, to amend the bill of particulars to include violations of Industrial Code 12 NYCRR 23-6.1 (d), (h), and (j) (1), each of which relate to the maintenance or operation of material hoists. Upon review of the subject proposed Industrial Code provisions, plaintiff has failed to establish the merits of his proposed amendment. Specifically, plaintiff has not established that the proposed Industrial Code provisions are applicable to plaintiff's accident.

Industrial Code 12 NYCRR 23-6.1 (d)

Industrial Code 12 NYCRR 23-6.1 (d) provides in pertinent part, as follows:

> "Material hoisting equipment shall not be loaded in excess of the live load for which it was designed. . . . Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portion of such loads during transit. Suspended loads shall be securely slung and properly balance before they are set in motion."

Section 23-6.1 (d) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Martinez v 342 Prop. LLC,* 128 AD3d 408, 409 [1st Dept 2015]).

Here, plaintiff's accident was not caused by a load that was improperly trimmed or improperly slung or balanced. To the extent that plaintiff argues that the Compressor's weight exceeded the lift gate's designed live load, plaintiff has not put forth any evidence evincing the lift gate's load rating or otherwise establishing the lift gate's safety statistics and, notably, plaintiff's expert does not opine that the lift gate was overloaded. Accordingly, plaintiff has

failed to establish the merits of this claim and he is not entitled to amend his bill of particulars to include this claim.

Moreover, given that defendants were not made aware that plaintiff's claims would specifically involve issues surrounding the lift gate's load rating, they would be materially prejudiced by the inclusion of a claim predicated on this Industrial Code violation (*see Tri-Tec Design, Inc.,* 123 AD3d at 420 [The type of prejudice necessary to warrant denial of the motion requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"]).

Industrial Code 12 NYCRR 23-6.1 (h)

Industrial Code 12 NYCRR 23-6.1 (h) provides the following:

> "Tag Line. Loads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines."

This provision is not sufficiently specific to support a Labor Law § 241 (6) claim (see *Morrison v City of New York,* 5 AD3d 642, 643 [2d Dept 2004]). Therefore, plaintiff's motion seeking to add this claim to his bill of particulars is devoid of merit.

Industrial Code 12 NYCRR 23-6.1 (j) (1)

Industrial Code 12 NYCRR 23-6.1 (j) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*Carroll v Metropolitan Life Ins. Co.*, 264 AD2d 336, 337 [1st Dept 1999]). It provides in pertinent part, as follows:

> "Hoist Brakes, capable of stopping and holding 150 percent of the rated capacity of the hoist, shall be provided for every material hoist."

To the extent that plaintiff alleges that the lift gate's failure was caused by the failure of a hoist break, his claim is unsupported by any facts in evidence. Plaintiff does not establish that the lift gate had a hoist break or, if it did, what that rated capacity was. Accordingly, plaintiff

has failed to establish the merits of this claim and he is not entitled to amend his bill of particulars to include this claim.

Further, as with section 23-6.1 (d), because defendants were not made aware that plaintiff's claims would specifically involve issues surrounding the lift gate's braking system (if such exists), they would be materially prejudiced by the inclusion of a claim predicated on this Industrial Code violation at such a late date (*see Tri-Tec Design, Inc.*, 123 AD3d at 420)

Given the foregoing, plaintiff's motion to amend the bill of particulars to add three violations of the Industrial Code is denied.

The Labor Law § 241 (6) Claims (Motion Sequence Numbers 003 and 004 and Cross Motion)

Plaintiff moves for summary judgment in his favor on his Labor Law § 241 (6) claims. ABM moves, and defendants cross-move, for summary judgment dismissing same as against defendants.

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, section 241 (6) "require[s] reference to outside sources to

determine the standard by which a defendant's conduct must be measured. . . . In other words, . . . to establish liability under this provision, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation" *Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012] [internal quotation marks and citations omitted]).

Here, plaintiff's complaint does not plead a violation of an applicable Industrial Code regulation. Plaintiff's bill of particulars only alleges a generalized violation of Industrial Code 12 NYCRR 23-1.7 (plaintiff's notice of motion, exhibit 6; NYSCEF Doc. No. 109). Notably, however, no party addresses the section 23-1.7 claim. That said, a court may search the record and determine whether an unaddressed Industrial Code provision is inapplicable to a case (*see e.g., Kempisty v 246 Spring St., LLC,* 92 AD3d 474, 475 [1st Dept 2012] [finding "upon a search of the record, that the section 241 (6) claims premised on [several undiscussed Industrial Code violations] . . . are inapplicable under the circumstances presented, and should be dismissed"]).

Section 23-1.7 governs protection from general hazards. It has eight sub-sections, none of which apply to the facts of this case.[1] Accordingly, the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12 NYCRR 23-1.7 is dismissed. Further, as noted above, plaintiff's motion to amend to add several alleged violations of the Industrial Code was denied.

Thus, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim as against them and plaintiff is not entitled to summary judgment in his favor on the same.

[1] The sub-sections are, as follows: (a) overhead hazards, (b) falling hazards [hazardous openings], (c) drowning hazards (d) slipping hazards, (e) tripping hazards, (f) vertical passages, (g) air contaminated work areas and (h) corrosive substances. Plaintiff's alleged injury does not arise from a violation of these provisions.

The Common-law Negligence and Labor Law § 200 Claims (Defendants' Cross Motion)

Defendants cross-move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

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 Compressor was removed from the truck. The record is devoid of any evidence that defendants had the authority to supervise or control the performance of the injury producing work, i.e. the determination of how to lower the Compressor from the truck. Notably, plaintiff does not oppose this part of defendants' cross motion.

Thus, defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Defendants' Contractual Indemnification Claim Against ABM (Motion Sequence Number 003 and Defendants' Cross Motion)

ABM moves for summary judgment dismissing defendants' contractual indemnification claims against it. Defendants cross-move for summary judgment in their favor on the same claim.

"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).

<u>*Additional Facts Relevant to this Claim*</u>

On October 1, 2010, ABM and 400 Rella entered into an "Agreement" (the ABM Agreement) for "HVAC Preventative Maintenance" for the Premises (ABM's notice of motion, exhibit K; NYSCEF Doc. No. 98). It explicitly named ABM as the Contractor and 400 Rella as the Owner, though it notes that 400 Rella has a "principal place of business C/O Mack-Cali Realty Corporation" (*id.*).

The ABM Agreement required ABM to "furnish all the labor, machinery, materials and equipment to perform the operations, including all work orders listed on EXHIBIT A . . . from October 1, 2010 through December 31, 2013" (*id.*).

Exhibit A describes the scope of ABM's work. That work includes: (1) four regular inspections per year, (2) preparing equipment for shutdown in the fall and startup in the spring, the furnishing of emergency services between "8:30 AM and 5:00 PM" (*id.*). It also notes that "[a]ny work performed beyond the scope of this contract" would be billed at a separate, increased rate, via an invoice (*id.*).

The ABM Agreement includes an indemnification provision that provides, in pertinent part, the following:

> "To the fullest extent permitted by law, [ABM] shall defend, indemnify and save harmless [400 Rella] and/or any of its parents, affiliated or subsidiary entities, companies, corporations, partnerships . . . partners, officers, directors, members, trustees, agents, employees, successors and/or assigns (collectively "Agents") from and against any and all claims . . . on account of bodily or personal injury . . . 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 . . ."

(*id.*, section 8 [d]) (the Indemnification Provision).

ABM argues that this accident arose from work that occurred at 6 AM – and therefore the accident was not within the ABM Agreement's delineated scope of work, which limited emergency work to work between 8:30 AM and 5:00 PM.

This is inaccurate, as the scope of work within the ABM Agreement contemplated emergency work beyond business hours. Specifically, the ABM Agreement's scope of work directly noted that any work beyond the written scope of work would be afforded a differing pay scale. Therefore, the scope of work contemplated work outside of the listed timeframes, such as the Project.

Here, it is uncontested that plaintiff's work involved maintenance on the HVAC units at the Premises. It is also uncontested that the work on the day of the accident involved the HVAC units that are the subject of the ABM Agreement. It is further uncontested that ABM was present at the Premises to perform repairs on that HVAC unit, at defendants' request, and that an invoice for the work was generated by ABM. Accordingly, the 6 AM Project at the Premises did, in fact, "aris[e] out of or in connection with or relat[e] to the operations . . . in connection with or

pursuant to" the ABM Agreement. Thus, plaintiff's accident triggered the subject Indemnification Provision.

Next, ABM argues that, while the ABM Agreement names 400 Rella as the owner (and, therefore an indemnified party), a question of fact exists as to whether the Indemnification Provision covers Mack. Specifically, they argue that Mack has not established that it is an "Agent," as defined by the Indemnification Provision (*id.*, section 8 [d]). However, the ABM Agreement is signed on behalf of 400 Rella by "Mack-Cali Realty Corporation [i.e. Mack], general partner" (ABM's notice of motion, exhibit K; NYSCEF Doc. No. 98 [the ABM Agreement]). Further, Keefe testified that a Mack employee signed the ABM Agreement (Keefe tr at 27).

The ABM Agreement was authenticated by both ABM and defendants. ABM provides no evidence to counter the ABM Agreement's recitation that Mack is the "general partner" of 400 Rella (ABM's notice of motion, exhibit K; NYSCEF Doc. No. 98). The Indemnification Provision contemplates indemnity for 400 Rella's "partnerships" and "partners" (*id.* section 8 [d] [the Indemnification Provision]). Accordingly, Mack, as the general partner of 400 Rella, is an indemnified party under the ABM Agreement's Indemnification Provision.

Thus, as defendants have established their freedom from negligence, they are entitled to summary judgment in their favor on their contractual indemnification claim as against ABM, and ABM is not entitled to the dismissal of the same.

The Remaining Third-Party Claims as Against ABM

ABM seeks dismissal of the entirety of the third-party complaint against it (which includes claims for contractual indemnification (discussed above), common-law indemnification and contribution and breach of contract for the failure to procure insurance. However, ABM

raises no specific arguments with respect to any of these claims. Accordingly, the part of ABM's motion seeking dismissal of the third-party complaint is denied.

The parties remaining arguments have been considered and were found unavailing.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of third-party defendant ABM Air Conditioning & Heating, Inc., motion sequence number 003, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims against defendants/third-party plaintiffs 400 Rella Realty Associates, L.L.C. and Mack-Cali Realty Corporation i/s/h/a Cali Realty Corp., and for summary judgment dismissing the third-party complaint against it is granted insofar as the Labor Law 241 (6) claim is dismissed and the remainder of the motion is denied; and it is further

ORDERED that the motion of plaintiff Bret Bashant, motion sequence number 004, pursuant to CPLR 3025, for leave to amend the complaint and bill of particulars, and pursuant to CPLR 3212, for summary judgment in plaintiff's favor on the Labor Law § 240 (1) and (241 (6) claims against defendants is granted to the extent that leave to amend the complaint is granted, *nunc pro tunc*, to amend the date of the accident, and the motion is otherwise denied; and it is further

ORDERED that the part of defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent that the common-law negligence and Labor Law §§ 200 and 241 (6) claims are dismissed against them, and the motion is otherwise denied; and it is further

ORDERED that the part of defendants' cross motion, pursuant to CPLR 3212, for summary judgment in their favor on their contractual indemnification claims as against ABM is granted.

3/22/2022				WILLIAM PERRY, J.S.C.		
DATE						
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE