SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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SERGIO A. VILLABONA,

Plaintiff,

- v -

ADAMS & COMPANY REAL ESTATE, LLC, ADAMS & CO. REAL ESTATE, INC., AC W 48 W 37 2018 LLC,

Defendants.

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INDEX NO. 162143/2018

MOTION DATE 12/13/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

ADAMS & COMPANY REAL ESTATE, LLC, ADAMS & CO. REAL ESTATE, INC., AC W 48 W 37 2018 LLC

Plaintiff,

-against-

ATLAS WELDING & BOILER REPAIR, INC.

Defendant.

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Second Third-Party
Index No. 595566/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for DISMISS.

BACKGROUND

The underlying matter concerns a workplace accident that occurred on June 25, 2018, in the basement at 48 West 37th Street, New York, NY (Subject Premises). Plaintiff, an electrician

employed by Matros Automated Electrical Construction Corp (Matros), was seeking out the building's superintendent when he fell into an uncovered and unguarded sump pump pit.

AC W. 48 W 37 2018 LLC (AC) was the owner of the Subject Premises on the date of the incident, and Adams & Co. Real Estate Inc. (Adams) was the managing agent. Adams & Co. Real Estate LLC (Adams LLC) entered into a contract with Atlas Welding & Boiler Repair, Inc. (Atlas) for the performance of certain boiler repair work to be performed at multiple locations which included the Subject Premises.

PENDING MOTIONS

On July 22, 2022, plaintiff moved for summary judgment on its claims under Labor Law §240(1) and §241(6).

On August 25th, 2022, Adams, Adams LLC and AC cross-moved for summary judgment and dismissal of said claims.

On October 3, 2022, Atlas moved for an order pursuant to CPLR §1010, dismissing the second third-party action; or in the alternative; (ii) pursuant to CPLR §603, severing the second third-party action; or in the alternative; (iii) vacating the Note of Issue and setting this matter down for a new preliminary conference.

On December 13, 2022, the court heard oral argument and reserved decision. The motions are consolidated herein and determined as set forth below.

ALLEGED FACTS

Plaintiff was injured at approximately 11:00 a.m. on June 25, 2018, when he fell into an uncovered pit in the basement of the Subject Premises. Plaintiff estimates the pit was approximately 10 to 12 feet deep, two feet wide, and three to four feet long. While the pit was usually covered, it was not covered that morning.

Plaintiff worked for Matros since 2015 as a mechanic and foreman. The general scope of his job was doing layouts and mechanical work, such as building electrical rooms, running conduit, and installing wire. Matros was performing electrical work at the Subject Premises, an 18-story commercial office building. It began its work there sometime between August and October 2017. Plaintiff was the on-site foreman and supervisor for Matros and supervised five workers. During the construction at the Subject Premises in June of 2018, there were four of five different trades working including carpenters, electricians, and welders.

Matros was fitting a cooling tower on the rooftop of the building, which ran from the basement to the roof. Matros did not build the cooling tower, but installed the electricity, running conduit, and pulling wire for same. Safety equipment was provided by Matros, including harnesses. Adams did not tell Matros how to perform the work. There was no general contractor. No one else directed plaintiff's work.

On June 25, 2018, plaintiff arrived at the Subject Premises at approximately 6:30 a.m., and started work at 7:00. Plaintiff gave Matros' workers instructions for 10 to 15 minutes, and then scoped the job. Plaintiff was working in the basement and on the 5th, 11th, 17th and 18th floors. Sometime after 10:30 a.m., plaintiff was working on the 11th floor. He had been looking for Claude, the superintendent for the Subject Premises. Plaintiff wanted to let Claude know what work Matros was going to be performing because it might have impacted tenants or other building occupants.

Plaintiff was told Claude was in the basement. Plaintiff took a break from his work and he and one of his workers, Pedro Santos (Pedro), took the freight elevator to the basement to find Claude. After plaintiff got off the elevator, he and Pedro walked to the left, and opened the door.

Pedro was in front of plaintiff, who while walking and looking up at some pipes fell in the open pit.

There were pipes in the pit and plaintiff's legs hit the pipes inside the pit, cutting his right leg. As he fell, plaintiff's left arm got hooked on the edge of the opening, and the pipes and his arms sticking out kept him from falling further. He was immediately pulled out of the pit by Pedro, and another worker.

There was no protection around the pit, no railings or warning signs.

Anthony Collins (Collins) works for Adams, he manages commercial buildings and performs the maintenance in those buildings. Claude was his supervisor at the Subject Premises.

In the basement there was the boiler, the building super's office, a supply room, a locker room, and an electrical room. There was also a shop where tools, including ladders, were kept. On June 25, 2018, Collins was operating the freight elevator, which required use of a key. Only building employees had the key. About five minutes before plaintiff was hurt, Collins brought him and Pedro to the basement. Collins did not know the sump pit doors were open at the time. Had he known he would not have let them into the basement.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient

to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

The Claim Under Section 240(1) of the Labor Law is Dismissed

In relevant part, Labor Law § 240(1) provides that contractors and owners, and their agents who erect a building or structure shall furnish or erect "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." It is well settled that "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity' " (*Nieves v. Five Boro Air Conditioning & Refrig. Corp.,* 93 N.Y.2d 914, 915–916, quoting *Ross v. Curtis–Palmer Hydro–Elec. Co., supra,* at 501; *see, Misseritti v. Mark IV Constr. Co.,* 86 N.Y.2d 487, 490).

Rather, 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 Associates*, 96 N.Y.2d 259, 267 (2001). Moreover, Labor

Law § 240(1) only applies to "exceptionally dangerous conditions posed by elevation differentials at work site" rather than the usual and ordinary hazards of construction. *See Misseritti v. Mark IV Const. Co., Inc.*, 86 N.Y.2d 487, 491 (1995).

The uncontroverted testimony makes clear that plaintiff and his fellow employers from Matros were working on 11th floor, 5th, 17th and 18th floor of the premises on the date of the accident. None of these floors contain the pit which plaintiff alleges he fell into. Plaintiff testified that he was taking a break from the work performed to look for the building superintendent. Moreover, plaintiff testified he could not proceed with the work in the basement until he coordinated it with Claude as it would affect the tenants of the building. These facts distinguish this matter from the cases relied upon by plaintiff, where workers were exposed to an elevation risk in their work area. The area which contained the pit was not located within plaintiff's work area on that date and time and therefore it was not the nature of his work that exposed him to same. Because the pit area was not part of the plaintiff's work, there was no requirement for him to be provided with any specific safety devices in the area of the pit, making Labor Law § 240(1) inapplicable to this case.

Plaintiff did not take any of his tools with him when he went to look for the Super, nor did he take his hard hat or any other safety equipment. The fact that plaintiff decided to look up at some pipes on the way to find the Super does not mean that he was performing a protected task or that this became his work area.

The Labor Law § 240(1) claim is dismissed because plaintiff's stepping into the opening of the hole in the basement was not caused by defendants' failure to provide safety devices to protect against an elevation-related hazard (*Geonie v. OD & P NY Ltd.*, 50 A.D.3d 444, 445

(2008).*see Piccuillo v. Bank of N.Y. Co.,* 277 A.D.2d 93, 94 [2000]; *D'Egidio v. Frontier Ins. Co.,* 270 A.D.2d 763, 765 [2000], *lv. denied* 95 N.Y.2d 765 [2000]).

The facts of this matter are akin to the circumstances in *Geonie*, where the Appellate Division, First Department held that the lower court properly dismissed plaintiff's Labor Law § 240(1) claim because the plaintiff's incident was not caused by the defendants' failure to provide adequate safety devices. Plaintiff was questioned during his deposition regarding the safety equipment used for his work at the project and listed: benders, sawzall, drills, hammer drills, laser. He was provided this equipment because these tools were required to perform electrical work at the premises. None of these items bear any relevance on the issue of whether plaintiff was provided adequate safety devices to prevent an elevated risk because none of his work was related to the pit at issue. Plaintiff testified that he was given a safety harness by Matros to use when required, however, he was not wearing a harness at the time of his accident because none of his work required use of same. As such these circumstances mirror those in *D'Egidio*, which was relied upon by the *Geonie* court in which there was no evidence in the record indicating that plaintiff's work was proximately related to the proximity to the floor opening which warranted the use of the type of safety devices contemplated by Labor Law §240(1).

Plaintiff Is Entitled to Summary Judgment Under Labor Law Section 241(6) Based on A Violation of Industrial Code §23-1.7(b)(1)(i)

Labor Law § 241(6) provides:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Plaintiff alleges that the defendants violated Industrial Code §23-1.7(b)(1)(i) and (iii).

Industrial Code §23-1.7 is titled "Protection from general hazards". Subsection (b) is titled "Falling hazards". It provides, in pertinent part:

> (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).
> ...
>
> (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.

The First Department has held that a violation of Industrial Code section §23-1.7(b)(1) is sufficient to support a violation of Labor Law §241(6). *Greca*, 200 A.D.3d 415; *Clarke v. Empire Gen. Contracting & Painting Corp*., 189 A.D.3d 611 (1 Dept. 2020); *Sotarriba*, 179 A.D.3d 599; *Sanchez*, 168 A.D.3d 491.

For the reasons stated above, the Court does not find the record supports a violation of Industrial Code §23-1.7(b)(1)(iii), because there is no evidence that plaintiff was required to work by the pit, rather he was passing the pit to find the Super.

However, the Court finds that plaintiff has established a *prima facie* case for liability under Industrial Code §23-1.7(b)(1)(i) and the defendants have failed to raise a triable issue of fact in regard to same. Here the open pit was not "guarded by a substantial cover fastened in place or by a safety railing". Thus Industrial Code §23-1.7(b)(1)(i) was violated.

Defendants argue that plaintiff's motion is insufficient and Mr. Bellizzi's expert opinion flawed "because plaintiff has not provided a scintilla of evidence confirming the exact dimensions of the pit". However, there is competent evidence, through plaintiff's testimony that the pit is approximately 10 to 12 feet deep and two feet by three or four feet long. The Owner is in possession of the Subject Premises, and defendants' argument that the measurements might not be accurate are belied by their failure to provide differing measurements.

Atlas' Motion to Sever the Second Third Party Action is Granted

Pursuant to a letter dated July 13, 2022, in which defense counsel sought to tender the defense and indemnity of the within matter to the insurance carrier for Atlas, defendants alleged that an employee of Atlas asked a building employee to open the sump pit and then left that pit uncovered until the time of plaintiff's accident.

To assess Atlas' request for dismissal or severance, a review of the procedural history of this action is appropriate.

Plaintiff's accident occurred in June 2018, and this action was commenced in December 2018. Issue was joined in March 2019. Plaintiff's Verified Bill of Particulars is dated April 16, 2019. A preliminary conference was held in this matter on July 15, 2019, and defendants commenced a third-party action against plaintiff's employer on January 9, 2020, which was discontinued on October 20, 2020.

Plaintiff was deposed in 2019, and Collins was deposed in November 2021. Plaintiff filed his Note of Issue on May 6, 2022, and moved for summary judgment in June 2022. It was not until July 18, 2022, that defendants filed a Second Third-Party Complaint against Atlas. Atlas served a Verified Answer with discovery requests on August 26, 2022. To date no discovery has been provided to Atlas by any party.

Atlas submits the affidavit of John Bradley (Bradley). Bradley was the boiler mechanic present at the Subject Premises on Atlas' behalf on the date of plaintiff's accident. Bradley states that the trap doors to the sump pit were already opened when he arrived at the Subject Premises and that he never opened the doors over the sump pit, nor did he ever request that the sump pit be opened. He did not need the sump pit open to perform any aspect of his work.

CPLR §1010 permits a court to dismiss a third-party action without prejudice, order a separate trial or take any other action which it deems just, in its discretion, where the "controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." N.Y. C.P.L.R. 603 (McKinney).

As the First Department held in *Admiral Indemn. Co. v. Popular Plumbing & Heating Corp*., 127 A.D.3d 419 (lst Dept. 2015):

> … severance of the third-party action for contribution and indemnification was a proper exercise of discretion. Popular impleaded third-party defendant Yeung's more than one month after the note of issue was filed in the main action and provided no reasonable justification for its delay. Popular, which was hired by Yeung's to relocate some of the sprinkler heads, had a direct contractual relationship with Yeung's and was therefore aware of its identity and its role in the sprinkler replacement project from the outset. While the main action is trial-ready, there is outstanding discovery in the third-party action, including depositions and documentary discovery. If the actions are not severed, Yeung's will be prejudiced since it will be precluded from conducting meaningful discovery or from making dispositive motions (*see Torres v Visto Realty Corp.*, 106 AD3d 645 [1st Dept 2013]). Further, although the main action and the third-party action are based on the same nucleus of facts, they involve disparate issues of law. Contrary to Popular's argument, there is no possibility of inconsistent verdicts since Yeung's liability for common-law indemnification and contribution in the third-party action is contingent upon a finding that Popular is liable in the main action.

Admiral Indemn. Co. v. Popular Plumbing & Heating Corp., 127 A.D.3d 419 (2015). *See also, Falk v. Palm Beach Home for Adults*, 71 A.D.2d 963, 964 (2d Dept 1979).

Defendants have failed to put forth any reasonable excuse for their nearly four-year delay in commencing the second third party action. The Subject Premises is owned by Adams who is in possession of all invoices relevant to the maintenance thereof, including invoices for boiler repair. Adams' own superintendent created an incident report on June 25, 2018, which indicates that the plaintiff's accident took place in the boiler room of the building.

Defense counsel's explanation for the delay is that he was unable to commence the action against Atlas sooner because he didn't get Atlas' invoices from his client and because he had previously thought the Atlas employee on site on the date of loss was named 'Big Mike" when, in reality the boiler repair person was known as "Big John". However, defendants have always known Atlas was present in the boiler room on the date of the subject incident and counsel's failure to procure information from his own client is hardly a reasonable excuse for a three-to-four-year delay in impleading a party.

Atlas has a right to conduct discovery pursuant to CPLR §3101 and to make dispositive motions based on the outcome of that discovery. The present impediments to Atlas being able to exercise these rights are entirely the result of defendants delay in commencing this action. Based on the foregoing, the motion to sever the second third party action is granted.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment as to liability is granted to the extent of finding defendants are liable pursuant to Labor Law Section 241(6) due to a violation of Industrial Code §23-1.7(b)(1)(i) and is otherwise denied; and it is further

ORDERED that defendants' cross-motion is granted to the extent of dismissing the cause of action asserted pursuant to Labor Law §240(1) and the part of the Labor Law §241(6) claim

predicated on a violation of Industrial Code §23-1.7(b)(1)(iii) and is otherwise denied; and it is further

ORDERED that the motion of Atlas Welding & Boiler Repair, Inc. is granted to the extent of severing the second third party action; and it is further

ORDERED that the clerk of the court shall mark his records to reflect the severance; and it is further

ORDERED that the parties to the severed action shall appear for a virtual preliminary conference on January 30th, 2023, at 10:00 am; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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12/13/2022
DATE

SABRINA KRAUS, J.S.C.

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