SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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ADALBERTO CARRASQUILLO,

Plaintiff,

- v -

1211 6TH AVENUE PROPRETY OWNER, L.L.C., 1211 6TH AVENUE PROPERTY MANAGEMENT LLC,1211 6T AVENUE SYNDICATION PARTNERS JV, L.P., CUSHMAN & WAKEFIELD, INC., PBM, LLC,

Defendant.

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INDEX NO. 155675/2018

MOTION DATE 12/19/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

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1211 6TH AVENUE PROPRETY OWNER, L.L.C., 1211 6TH AVENUE PROPERTY MANAGEMENT LLC, CUSHMAN & WAKEFIELD, INC.

Plaintiff,

-against-

INTEGRITY SCAFFOLD SERVICE GROUUP LLC

Defendant.

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Third-Party
Index No. 595477/2020

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 137, 138, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 177

were read on this motion to/for SUMMARY JUDGMENT.

Background

This action arises out of an injury sustained by plaintiff to his thumb while moving a scaffolding rig. On August 9, 2016, plaintiff, a window washer, and his work partner reported to

the 8th floor roof deck at 1211 6th Avenue, New York, New York (NYSCEF Doc. No. 165 at 2). From there, plaintiff and his partner could access the exterior windows of the building using a Spider Rig (Carrasquillo Dep. 30:12). The rig, owned by defendant 1211 6th Ave Property Owner, LLC, was situated on a metal track on the 8th floor roof. In order to use the rig, plaintiff and his partner had to manually push the rig to the edge of the roof. Plaintiff contends that the wheels on the rig were rusted, thus, after pushing for a short period of time, the rig came to a sudden and complete stop. When the rig suddenly stopped moving, plaintiff jammed his right thumb on the rig handles due to the resistance of the stuck rig (NYSCEF Doc. No. 112 at 3).

Plaintiff and his partner eventually moved the rig to the edge of the roof and completed their window cleaning task. Afterward, plaintiff made a report to the on-site manager regarding the incident and his injury, alleging that the cam rollers on the wheels were rusted. Plaintiff subsequently brought an action against the property owner (1211 6th Ave Property Owner, LLC), the building's managing agent (Cushman & Wakefield, Inc.) and various related entities (together referred to in this decision as "owners"), and the contractor who subcontracted plaintiff's company to do the window cleaning (PBM, LLC) claiming violations of Labor Law §§ 200, 202, 240(1), 241(6) and common law negligence. The owners brought a third-party complaint for contractual indemnification and breach of contract to procure insurance against the maintenance and repair contractor responsible for maintaining the window washing rigs and scaffolds (Integrity Scaffold Service Group, LLC, hereafter "Integrity").

Preliminary Procedural Findings

The parties have 120 days after the note of issue is filed to make summary judgment motions.

A cross motion, by definition, is made by a party targeted in the original motion against the original movant. If you want to make a motion against a party who has not already moved against you, then the only way to do it is to make your own motion. In other words, if plaintiff made a motion against defendant A only, then defendant A cannot make a cross-motion against defendant B; defendant A may cross move against plaintiff, but must make its own motion against defendant B. Of course, that motion against defendant B must be within 120 days of the filing of the note of issue.

Here, some of the parties have mislabeled untimely motions as cross-motions. Therefore, before getting into the merits of the plethora of papers, this Court will explain what will be considered and why.

Procedural Analysis of Motion Sequence 3

The note of issue was filed in early May 2022; that means all motions had to be filed by early September 2022.

Owners timely moved, in June, for summary judgment against two parties only: plaintiff and Integrity. That means only plaintiff and Integrity were allowed to cross-move on that motion. In November, plaintiff cross-moved against Owners and defendant PBM. PBM, however, never made a motion and so there was no cross-motion to make against PBM. If plaintiff wanted to move against PBM, then he had to bring his own motion by early September; there is no avoiding the deadline by calling something a cross motion when it is not. Therefore, the Court only considers plaintiff's papers as against the owners and not against PBM.

PBM filed its own "cross-motion", also in November. PBM "cross moved" against plaintiff and Integrity. PBM's papers are not considered for two independent reasons. First,

because plaintiff's "cross motion" against PBM is a nullity, so is PBM's "cross motion" against plaintiff. Second, if PBM wanted relief against plaintiff, it should have timely moved by early September.

PBM also cross-moved against Integrity. And although Integrity did make a timely motion for summary judgment (MS 4), it did not move against PBM. While the Court routinely ignores the error when a cross-motion is filed under the incorrect sequence number, PBM's "cross-motion", even if it was filed under the correct sequence number, would still be improper. Because Integrity never sought relief against PBM, PBM's "cross-motion" against Integrity is not considered here.

And so, Motion Sequence 3 is the Owners' motion against plaintiff and Integrity and plaintiff's cross motion against the owner.

Procedural Analysis of Motion Sequence 4

In Motion Sequence 4, Integrity timely moved against plaintiff (in a "me too" branch to dismiss his claims against Owners) and also against Owners (regarding claims for insurance coverage). In October, the Owners cross-moved against PBM, but, as explained, PBM never timely moved against the Owners and so the Owner's "cross motion" is not considered here.

In summary, the papers considered in these consolidated motions and cross-motion cover the issues between plaintiff and the owners and Integrity and the owners. They are Owners' motion for summary judgment on plaintiff's Labor Law §§ 200, 202, 240(1) and 241(6) claims (under MS 003), as well as summary judgment on their claims for indemnification and breach of contract against Integrity (the company contracted to maintain the rig). Also considered is plaintiff's cross-motion (MS 003) for summary judgment against Owners on plaintiff's Labor

Law §§ 200 and 202 claims and Integrity's separate motion for summary judgment against plaintiff and Owners (MS 004).

The parties' contentions (from papers considered)

Owners contend that all of plaintiff's claims should be dismissed. As for plaintiff's common law negligence claim, Owners assert they did not have any notice of a dangerous condition existing on the property at the time and were not the cause of the alleged rust to the wheels. They further claim they had no control over plaintiff's work because he worked for a subcontractor that was contracted by PBM, not the Owners. They also contend that because plaintiff did not sustain his injury while cleaning windows, it cannot be said that they failed to provide a safe means for cleaning windows. As for plaintiff's claims under Labor Law § 240(1), Owners claim that plaintiff's injury was not sustained by an elevation risk and therefore falls outside the purview of § 240(1). Additionally, Owners argue that because plaintiff was not working on a construction site or engaged in excavation or demolition work at the time of his accident, he cannot sustain a claim under Labor Law § 241(6).

Moreover, Owners claim that they are entitled to summary judgment against Integrity for their contractual indemnity claims because Integrity, who contracted with Owners, was responsible for ensuring the rig worked properly and agreed to indemnify Owners. Thus, Owners contend that if this Court finds Owners liable to plaintiff, then any wrongdoing is attributable to Integrity and Owners should be granted indemnification under such circumstances. Owners further argue that Integrity breached their contract by failing to provide insurance to the Owners' property manager as an additional insured.

In response, Integrity filed a separate motion for summary judgment (004) in support of dismissal of plaintiff's claims against Owners and for dismissal of Owners' indemnification claims against Integrity. Integrity incorporates the arguments of Owners ("me too") against plaintiff and adds that the rig was not defective. Integrity contends that the rust on the rig's cam roller was not the reason that it abruptly stopped moving. Additionally, Integrity claims that it inspected the rig the following day and performed all necessary maintenance on the rig throughout the year. Integrity further asserts Owners' third-party complaint for contribution and indemnification should be dismissed because Integrity was not negligent in its servicing of the spider rig as Integrity performed monthly maintenance checks and inspections, as required by the parties' contract.

Integrity further maintains that it had no obligation to provide insurance coverage for the property manager, 1211 6th Avenue Property Management LLC, as Integrity complied with its contractual obligations and purchased a policy that provided additional insured coverage to any entity required in the written contract between the parties. Finally, Integrity contends that indemnification of the Owners is inappropriate because the Owners failed to mitigate their damages, specifically because Owners did not bring an indemnification claim against PBM – the contractor responsible for contracting plaintiff's employer.

Plaintiff filed a cross-motion for summary judgment against Owners contending that they had actual and constructive notice of the defective wheel. Plaintiff claims that the rust on the cam roller was an obvious defect that took months to build up. Furthermore, plaintiff argues that the prior inspection reports of the rig and the repeated testing and servicing of the rig should have given Owners notice of any defects to the rig. Plaintiff asserts if summary judgment is not appropriate, at the very least there is a question of fact as to whether Owners had notice of the

rusted cam roller. With regard to Labor Law § 202, plaintiff maintains that he was injured in the process of setting up to wash the windows, in line with the requirements of the statute. Plaintiff claims that moving the rig was a part of the window washing process that entitles plaintiff to summary judgment.

In response to plaintiff's cross-motion, Owners assert that plaintiff was not injured in furtherance of completing his window washing task. Rather, they claim that plaintiff's injury is outside the scope of a Labor Law § 202 claim because he was not washing windows at all. They contend that section 202 envisions relief for injuries that occur from risks associated with window washing (such as falling from a height) and plaintiff's injury is a jammed thumb that can occur to any laborer no matter the task for the day. Owners maintain they had no notice of the alleged defect, stating that the rig was inspected a month before plaintiff's accident and all repairs, including replacement of the wheel cams, were completed. Additionally, they claim that plaintiff's expert report is based on conclusions that are not drawn from reliable facts because plaintiff's expert never performed an inspection of the rig itself.

Plaintiff maintains that pushing the scaffold rig into place is an "integral part of cleaning windows," and that the special protections of § 202 are not limited to actual cleaning of windows. Plaintiff's expert confirmed rust formation was the result of long-term conditions that would warrant sufficient time for adequate notice; plaintiff asserts that his expert is not basing his opinions on mere speculation.

Integrity also alleges that plaintiff was not performing window cleaning that exposed him to the danger of falling from a height. Additionally, Integrity asserts a comparative fault defense as it was plaintiff's own responsibility to inspect the scaffold and make sure it was safe prior to using it.

Finally, addressing Integrity, plaintiff incorporates arguments contained in his earlier papers, alleging both actual and constructive notice as a result of the rust development on the wheels of the rig. Plaintiff highlights that Owners do not cite any case law in support of their position and further contend that attacking an expert's qualifications does not mean the expert's opinion is inadmissible; it merely goes to the weight of the evidence.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v. Lac d'Amiante Du*

Quebec, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

Owners' motion and Plaintiff's cross-motion for Summary Judgment -- Labor Law § 200 & § 202

Labor Law § 200 "codifies landowners' and general contractors' common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY3d 494, 505, 601 NYS2d 49 [1993]). "[R]ecovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation . . . [A]n owner or general contractor should not be held responsible for the negligent acts of others over whom the owner or general contractor had no direction or control" (*id.* [internal quotations and citation omitted]).

"Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." (*Comes v New York State Electric and Gas Corp.*, 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168 [1993].) A property owner will be liable "for injuries allegedly suffered by a worker due to a defective condition on its premises if it had actual *or* constructive notice of the condition." (*Shipkoski v Watch Case Factory Associates*, 292 A.D.2d 589, 590, 741 N.Y.S.2d 57 [2d Dept 2002] [internal quotations and citations omitted]).

"A defendant is charged with constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy it" (*Lopez v Dagan*, 98 AD3d 436, 438, 949 NYS2d 671 [1st Dept 2012]).

"Labor Law § 202 requires the application of comparative negligence principles because statutory liability is predicated on a violation of the Industrial Code which constitutes only some evidence of negligence" (*Brown v Christopher St. Owners Corp.* 2 AD3d 172, 173, 769 NYS2d 513 [1st Dept 2003] [internal quotations and citations omitted]). Additionally, a claimant must cite to applicable Industrial Code provisions that were allegedly violated (*see Castillo v West End Towers LLC*, 175 NYS3d 726, 727 [1st Dept 2022] [affirming dismissal of a Labor Law § 202 claim when the plaintiff failed to cite to the Industrial Code provisions that were allegedly violated]).

The Court denies the branch of plaintiff's cross-motion for summary judgment on Labor Law claims brought pursuant to § 200 and § 202. Owners successfully raised an issue of fact as to whether they were on notice of any potential defects regarding the rig. As owners of the rig, they had a duty to ensure that the rig was safe. They contracted with Integrity to perform maintenance and repairs on the rig. In his testimony, Owners' representative claimed only serious issues would be reported to him, and that he had never seen the work Integrity performed nor had he ever accompanied Integrity on any projects (NYSCEF Doc. No. 117 Toland Depo. 22:2-23:17). He further claimed issues would be reported to other staff members or security before they would be reported to him (*id*. at 23:2-4). Additionally, the rig maintenance was recorded in a logbook that was maintained by Integrity (*id*. at 25:12-17). This testimony raises an issue of fact as to what the Owners knew, when they knew it, and whether there was any defect with the rig that caused plaintiff's alleged injuries.

Similarly, the Court denies the branch of Owners' motion seeking summary judgment on § 200 and § 202. An issue of fact exists as to the cause of the sudden stop. Plaintiff submitted an expert report that indicated the rusting on the wheels was the likely culprit, and the expert opined

that the rust had been on the wheels for an extended period of time (NYSCEF Doc. No. 163 at 18). Moreover, Integrity submitted its own expert report directly refuting plaintiff's expert, ultimately claiming that plaintiff was responsible for his injury, not the defendants (NYSCEF Doc. No. 196 at 11).

This Court cannot decide on summary judgment what caused the rig to stop moving or what the Owners knew about the state of the rig and when they knew it. The exact cause of the rig's abrupt stop (whether it was due to rust, something stuck in the track or something else) is not something that can be resolved on these motions.

Owners' Motion for Summary Judgment – Labor Law § 240(1) & § 241(6)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "Labor Law § 240(1) 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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) . . . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

The Court grants the branch of Owners' summary judgment motion with respect to Labor Law § 240(1). Plaintiff was pushing the rig toward the edge of the roof at the time of his injury. He did not fall off the roof and was not standing on a lifted device or scaffolding from which he could fall and injure himself. This statute encompasses injuries that are the result of accidents occurring from heightened surfaces or gravity-related injuries. In short, 240(1) is inapplicable because plaintiff's injury has nothing to do with the pull of gravity. This claim is severed and dismissed.

Finally, the Court grants the branch of Owners' motion with respect to Labor Law 241(6) as the plaintiff declined to offer sufficient opposition this claim. Despite listing numerous Industrial Codes, plaintiff failed to demonstrate how a violation of any Industrial Code was a proximate cause of his injury. Therefore, plaintiff's § 241(6) claims are severed and dismissed.

Owners' Contractual Indemnification and Contribution Claims against Integrity

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue

and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

Integrity signed an agreement promising to indemnify certain entities. Pursuant to the contract, Integrity agreed "to indemnify, hold harmless, protect and defend Owner Indemnified Parties [sic] from and against any and all liabilities, losses, and damages," (NYSCEF Doc. No. 151 at 3). The contract identifies the Owner as 1211 6th Ave Property Owner, LLC, and the Owners' Agent as Cushman & Wakefield (*id*. at 1).

Owners contracted with Integrity in an effort to ensure the rig was maintained and in safe condition. Integrity inspected the rig once a month, per the contract requirements, and replaced the cam roller wheels at least one month before plaintiff's accident. The rig, however, was at least 50 years old, and there is no indication that Owners requested, or that Integrity suggested, and Owners declined, more frequent visits from Integrity given the age of the rig. Although the existence of these contracts indicates Owners attempted to take appropriate steps to maintain the rig, there is a question of fact as to whether Owners were aware of the rust buildup and whether they should have required more frequent servicing of a rig that was approximately half a century old with obvious indications of rust on the wheels. Because Owners have not established that they were free of negligence, Owners are not entitled to contractual indemnification and contribution from Integrity on this summary judgment motion.

Owners' Common Law Indemnification claim

"Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept

2006] [internal quotations and citations omitted]). "[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia*, 259 AD2d at 65).

This branch of the motion is denied as premature because there has been no finding that any party has been negligent or free of negligence. Therefore, common law indemnification and contribution claims cannot be granted as a matter of law at this time.

Owners' Breach of Contract Claim – Additional Insureds

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Markov v Katt*, 176 AD3d 401, 402-403, 109 NYS3d 295 [1st Dept 1995]).

In an insurance agreement, "where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent" (*Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386, 388, 825 NYS2d 46 [1st Dept 2006] [internal quotations and citations omitted]).

The subject contract between the parties requires commercial general liability insurance with "Owner, Owner's Agent and Callahan Capital Properties LLC. . . named as additional insureds," (NYSCEF Doc. No. 123 at 7). Accordingly, the contract defines the owner as 1211 6th Avenue Property Owner LLC, and the Owner's Agent as Cushman & Wakefield (*Id*. at 1). While Owners contend that 1211 6th Avenue Property Management LLC is a successor in interest to Callahan Capital Properties LLC, the previous property manager, the contract itself clearly and unequivocally names the parties considered additional insured for purposes of coverage. Integrity

purchased insurance coverage that covered all named additional insureds (NYSCEF Doc. No. 130 at 11).

There is no evidence that the Owners specifically informed Integrity about the change in property manager or requested that the policy be changed. Therefore, Owners failed to demonstrate that Integrity failed to procure the proper insurance coverage stated in the parties' contract. In other words, Integrity named who the contract required it to name but the Owners changed entities and never updated the requirements in their contract with Integrity. Thus, that branch of Owners' motion for summary judgment on breach of contract for failing to name certain entities as additional insureds, when those entities were never required to be named, is denied.

Integrity's Summary Judgment Motion as to Plaintiff's Claims

Integrity's motion for summary judgment dismissing plaintiff's §§ 200 and 202 claims is denied. In a "me too" attempt, Integrity adopted Owners' arguments, only adding that the scaffold was not defective. Integrity presented its own mechanical engineer for a deposition, who stated that the "orange [rust] will not interrupt when you are pushing it left and right," (Serra Depo. 35:1-3). Plaintiff's expert, however, opined that due to the buildup of rust, the rig "experienced resistance to rolling and was abruptly stopping and/or jerking on or about the time of the Plaintiff's accident," (NYSCEF Doc. No. 163 at 19). Obviously, the exact cause of the abrupt stop is unclear and cannot be decided on summary judgment. Because of this, the negligence of any party related the stopping of the rig cannot be ascertained as a matter of law. Accordingly, Integrity's motion for summary judgment dismissing plaintiff's §§ 200 and 202 claims is denied.

Integrity's motion for summary judgment dismissing plaintiff's §§ 240(1) and 241(6) claims is granted. Once more, Integrity fully adopts Owners' arguments dismissing those claims. Because plaintiff's accident had nothing to do with a gravity related incident, plaintiff's § 240(1) claim should be dismissed. As previously stated, plaintiff offered no opposing arguments to Integrity's or Owners' summary judgment motions dismissing the § 241(6) claims. Therefore, these claims are dismissed, although the Court observes that plaintiff did not bring any direct claims against Integrity.

Integrity's Summary Judgment Motion as to Owners' Claims

The motion for summary judgment dismissing Owners' claims for contractual indemnification is denied. Integrity claims plaintiff's accident did not arise from any occurrence related to Integrity's performance of work (or lack thereof) on the rig, and there has been no such finding; therefore, the indemnification clause of the parties' contract is not yet triggered. Integrity even states there is no evidence of a defect in the scaffold. The Court cannot make that factual finding on these papers. Contrary to Integrity's claims, plaintiff raised an issue of fact that there was rust on the scaffold and that this rust caused the accident. That prevents the Court from reaching a conclusion about which party is negligent and issues of contractual indemnity are premature. Furthermore, as Owners clearly showed, the parties were engaged in a contractual agreement that called for indemnification on behalf of Integrity. Pursuant to the contract, Integrity agreed "to indemnify, hold harmless, protect and defend Owner Indemnified Parties from and against any and all liabilities, losses, and damages," (NYSCEF Doc. No. 151 at 3).

For the same reasons the Owners' breach of contract claim for failing to name additional insureds was denied (see above), Integrity's motion for summary judgment dismissing Owners'

claim for breach of contract is granted. Integrity named the entities required by the contract – but apparently property owners changed entities and never notified Integrity. Because Integrity did what the contract required, it cannot be said to be in breach. Thus, Integrity's summary judgment motion dismissing Owners' claims for breach of contract is granted.

Summary

At the core of this action is what caused the rig to stop short and who was at fault; those are issues of fact and must be decided by the jury.

Accordingly, it is hereby

ORDERED that the branch of the Owners' motion (MS003) for summary judgment is denied with respect to its claim for contractual indemnification against Integrity because Owners did not show they were free of negligence; Owners' breach of contract claim against Integrity is denied because Integrity did provide insurance to the entities required by the contract and the branch of the motion to dismiss plaintiff's claims is granted to the extent that plaintiff's claims based on Labor Law §§ 240(1) and 241(6) are severed and dismissed; and it is further

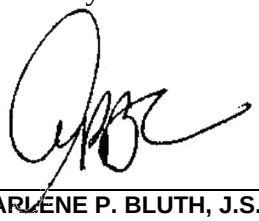
ORDERED that the branch of plaintiff's cross-motion for summary judgment against Owners on Labor Law §§ 200 and 202 is denied due to the issues of fact described above; and it is further

ORDERED that the branch of plaintiff's "cross motion" for summary judgment against PBM, which is actually an untimely motion and not a cross-motion, is denied as untimely; and it is further

ORDERED that PBM's cross-motion for summary judgment, which is actually an untimely motion and not a cross-motion, is denied as untimely; and it is further

ORDERED that Integrity's motion (MS004) for summary judgment is granted to the extent it seeks dismissal of plaintiff's §§ 240(1) and 241(6) claims and dismissal of Owner's breach of contract claim because Integrity did provide for additional insureds pursuant to the terms of the contract; and it is further

ORDERED that Owners' cross motion for summary judgment against PBM, which is actually an untimely motion and not a cross-motion, is denied as untimely.



2/06/2023

DATE

ARLENE P. BLUTH, J.S.C.

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