SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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TIMOTHY CUNNINGHAM,

Plaintiff,

- v -

CITY OF NEW YORK, LIRO ENGINEERS, INC.,LIRO CONSTRUCTORS, INC.,LIRO HOLDINGS, INC.,LIRO GIS AND SURVEY, P.C.,TC ELECTRIC, LLC,

Defendant.

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INDEX NO. 150564/2018

MOTION DATE 08/19/2022, 09/06/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 291, 292, 293, 294, 295, 310, 311, 312, 313, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 262, 263, 264, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 314, 315, 316, 317, 318, 329, 330, 331, 332

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

This action arises out of an incident that occurred in a Manhole (#35) fronting 110 William Street, New York, NY on February 6, 2017, at about 10:30 PM, resulting in severe injuries to Plaintiff Timothy Cunningham.

Background

New York City Transit Authority (NYCTA), as lessee of the City of New York (the "City") to run transit facilities, contracted with defendant TC Electric ("TCE") to remove and replace the

tunnel electrical cables damaged in Hurricane Sandy. Liro[1] was hired by NYCTA to act as Consultant Construction Managers and ensure the timely completion of the project. Plaintiff Cunningham was an employee of NYCTA's Environmental Engineering Division (EED) and was charged with inspecting for asbestos on the worksites. Plaintiff was responsible for ensuring that asbestos, if any, would be abated before the tube rehabilitation would start.

On the evening of February 6, 2017, Cunningham was dispatched to inspect the area for asbestos in Manhole # 35. While walking on a catwalk in the manhole to collect a sample, he fell off the catwalk and was severely injured.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Motion 004 The City of New York's Motion

Defendant City seeks dismissal of all claims and causes of action based on Labor Law § 240(1), § 241(6), § 200 and common law negligence. The City claims the record does not support existence of a triable issue under Labor Law § 240(1) and § 241(6) because plaintiff's alleged fall

[1] Thera are several "Liro" entities named. For purposed of this decision, they will be referred to as "Liro."

occurred while he was performing an activity outside the protection granted by the statutes. City also claims no triable issue exits concerning plaintiff's Labor Law § 200 and common law negligence claims because City had neither created nor had actual or constructive notice of the alleged dangerous conditions nor possessed the authority to supervise or control the means and methods of Plaintiff's work.

Additionally, City also seeks summary judgment on its crossclaims asserted against TCE including for contractual indemnification and breach of contract for failure to procure insurance as required by the contract.

Motion 004 Liro's cross-motion against Plaintiff

Defendant Liro cross-moved and filed a summary judgment motion against plaintiff seeking dismissal of all claims and causes of action based on Labor Law § 240(1), § 241(6), § 200 and common law negligence.

Motion 005 TCE's summary judgement motion against Plaintiff

Defendant TCE moved for summary judgement motion against plaintiff to dismiss all claims based on the same Labor Law statutes and common law negligence theory, claiming they are not the owner, contractor or agent falling under the jurisprudence of Labor Law and the work performed by plaintiff at the time of accident falls outside the protection of law. Due to the homogeneous nature of the three motions, the court will analyze and adjudicate all claims together.

Labor Law § 240(1)

The Court of Appeals has held that "[w]hile the reach of section 240 (1) is not limited to work performed on actual construction sites (see, *Joblon v Solow*, supra, 91 NY2d, at 464), the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.'" *Martinez*

v City of New York, 93 N.Y.2d 322, 326. The high court made it very clear that "the statutory language must not be strained in order to encompass what the Legislature did not intend to include". *Id.* (internal citations omitted). "[P]laintiff's work as an environmental inspector…was merely investigatory and was to terminate prior to the actual commencement of any subsequent asbestos removal work. … Thus, plaintiff was not a person employed to carry out the repairs as that term is used in section 240(1)" *Id.* (internal citations omitted) Since its inception, *Martinez* has been the seminal case determining duties and responsibilities involved in asbestos inspection.

While the *Martinez* court rejected the "integral and necessary part" analysis employed by lower courts and believed the test had improperly enlarged the reach of the statutes, *Id.* that holding has been qualified by subsequent case law which focuses on whether the work at issue is "*ongoing* and *contemporaneous* with the other work that formed part of a single contract." *Prats v. Port Auth.*, 100 N.Y.2d 878, 881. (emphasis added) If the answer is affirmative, then the disputed work could be deemed within the realm protected by Labor Law § 240(1).

Here, plaintiff's work is highly similar to that of *Martinez* as it only involved asbestos inspection and excluded asbestos abatement. See NYSCEF Doc. No. 255 at page 136, lines 3-8. NYSCEF Doc. No. 256 at page 338, lines 11-19, page 245, lines 8-13. His work in the project is like that of an individual contractor who is solely charged with inspection of asbestos and the inspection work must be done before the commencement of any other contractors' work. See NYSCEF Doc. No. 254 at page 63, lines 21-25; page 64, lines 2-5. Put another way, his work was not ongoing or contemporaneous with any other work forming the same contract. Therefore, under the purview of either *Martinez* or *Prats*, plaintiff's work is not protected by § 240(1) because it is not the type of work enumerated in the statute and it fails the test set forth in *Prats*.

Additionally, plaintiff's work falls outside the protection of § 240(1) because the catwalk from which he fell was only used as a passageway to reach the duct bank that needed asbestos inspection. The First Department follows previous case law in the state "involving falls from planks come within one of two categories: those in which the plank was used as a passageway or stairway, and those in which the plank served as the functional equivalent of a scaffold, ladder or other device enumerated in the statute. When the plank has been used as a passageway or stairway, section 240 (1) has been held not to apply. *Paul v. Ryan Homes, Inc.*, 5 A.D.3d 58, 60; see also *Ryan v Morse Diesel, Inc.*, 98 AD2d 615 [1st Dept 1983] (stairway that was "not a tool used in the performance of plaintiff's work," but was "a passageway from one place of work to another" - not covered by § 240(1)).

Here, the catwalk at issue is like the plank in *Paul* and the stairway in *Ryan* and it serves the sole purpose as a passageway. Plaintiff stated in his deposition that he needed to walk through the catwalk to reach the middle duct bank and the bank was off the catwalk. Nowhere in the deposition did he mention that he had to stand on the catwalk to collect sample from the bank, in which case the catwalk would function as a scaffold and fall under the ambit of § 240(1). See NYSCEF Doc. No. 254 at page 110, lines 8-15; page 111, lines 2-3. Therefore, even if plaintiff fell from a certain height, the accident was not caused by the gravity-related hazards contemplated by § 240(1) and thus, falls outside the protection granted by the law. Plaintiff's Labor Law § 240(1) claim against City, TCE and Liro should be dismissed accordingly, and the court needs not address the issue of "whether TCE is the owner, contractor or agent defined by law to provide the necessary protection to plaintiff".

Labor Law § 241(6)

Labor Law § 241(6) states in pertinent part that "all areas in which *construction, excavation or demolition* work is being performed shall be so constructed … as to provide reasonable and adequate protection and safety to the persons employed therein…". To recover under § 241(6), plaintiff needs to establish that first, the type of work plaintiff was performing at the time of injury is within the coverage of the law, i.e., it is among construction, excavation or demolition work; second, which Industrial Code Rules have been violated by defendants.

The Court of Appeals "look to the regulations contained in the Industrial Code (12 NYCRR 23-1.4 [b] [13]) to define what constitutes construction work within the meaning of the statute." *Joblon v. Solow*, 91 N.Y.2d 457, 466. § (b)(13) of 23-1.4 defines construction work as "all work of the types performed in the construction, erection, alteration, *repair*, *maintenance*, painting or moving of buildings or other structures, …, includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, *pipe and conduit laying*, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose." The examples enumerated in the code, although not exhaustive, are all concrete work performed in construction, erection, alteration, repair, maintenance, painting or moving of buildings. Asbestos inspection does not fit in the spectrum neatly.

A look into the definitions of "excavation work" and "demolition work" would reach the same conclusion. See 12 NYCRR 23-1.4 (b)(16) & (19).

Coverage under Labor Law §241(6) is withheld where the alleged injury occurred outside the context of a construction, demolition or excavation work. See *Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 103. Since plaintiff could not lay the proper foundation for recovery under § 241(6),

the court does not need to decide if the specific Industrial Code violations cited by plaintiff in Verified Bill of Particulars substantiate his claims herein. Therefore, plaintiff's Labor Law § 241(6) claim against City, Liro and TCE should be dismissed.

Labor Law § 200 and Common Law Negligence

It is well-settled that Labor Law § 200 codifies and extends the common-law duty of an employer to provide his employees with a safe place to work, by placing him under an obligation concerning defects in the plant for the purpose for which the plant is used. *Gasper v Ford Motor Co.*, 13 N.Y.2d 104. Party charged with violation of Labor Law § 200 must be shown to have exercised *sufficient control* over work being performed to correct or avoid unsafe condition. *Rosas v Ishack*, 219 A.D.2d 633. (emphasis added) Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either *created* the dangerous condition that caused the accident or *had actual or constructive notice* of the dangerous condition that caused the accident. *Ortega v. Puccia*, 57 A.D.3d 54, 61. (emphasis added) "When a claim involves the manner in which the work is performed, meaning it arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor for common-law negligence or a violation of Labor Law § 200 is unavailable unless it is shown that the defendant had the *authority to supervise or control the performance of the work.*" *Abelleira v City of New York*, 120 A.D.3d 1163, 1164. (internal citations omitted, emphasis added)

Here, City has established a prima facie case to dismiss plaintiff's Labor Law § 200 and common law negligence claims. The Agreement of Lease between City and NYCTA establishes the fact that since 6/1/1953 it has been NYCTA that takes control and possession of the transit facilities and property including Manhole #35. City is the statutory owner of the premises without actual control over the work performed by plaintiff. See NYSCEF Doc. No. 170 at page 6, Article

II § 2.1. Nowhere in the record indicates that City had created the dangerous conditions that caused the accident or City had been informed of or had constructive notice of such conditions. See NYSCEF Doc. No. 186 at page 71, lines 2-3; page 87, lines 10-16.

By the same token, Liro has established a prima facie defense against those same claims: safety equipment needed for asbestos inspection was provided by NYCTA, not by Liro. See NYSCEF Doc. No. 257 at page 27, lines 2-16. NYCTA has its own procedures for doing the survey work and it was not Liro's responsibility to recommend safety equipment. *Id*. at page 28, lines 12-21. Liro had no role to play in air testing, providing the ladder and lighting or observing the inspection. *Id*. at page 40-44; Before February 6, 2017, Liro was not aware of the existence of catwalk in Manhole #35. *Id*. at page 44. In sum, Liro had no control over the inspection work performed in Manhole #35 and had no notice of the defective catwalk causing the accident. Nothing in the record indicates that Liro had created the dangerous condition in the Manhole.

Similarly, TCE has established that they had no control over plaintiff's work at the time of accident, not had they created or had notice of the dangerous condition: plaintiff was employed by EED of NYCTA, See NYSCEF Doc. No. 254 at page 60, lines 9-21. TCE had no authority to supervise the asbestos inspection or abatement work. *Id*. at page 69, lines 22-24. No one from TCE told plaintiff how to do his job. See NYSCEF Doc. No. 233 at page 203, lines 9-11. Plaintiff only took order from his boss, NYCTA employee Lechinski. See NYSCEF Doc. No. 234 at page 321, lines 19-23. The manhole was previously visited by NYCTA on January 17, 2017, and the decision to use a 30 feet ladder was made by NYCTA. See NYSCEF Doc. No. 236 at page 22, lines 13-19. Plaintiff testified that all the preparation work at Manhole 35 was done by NYCTA before he entered the manhole. See NYSCEF Doc. No. 254 at page 91, lines 12-19.

Therefore, without establishing the preconditions of Labor Law § 200 and common law negligence, plaintiff cannot hold City, Liro and TCE, all without actual control of the premises at the time of accident, responsible for claims based on such laws or the common law doctrine *Res Ipsa Loquitur*, which in New York requires defendant's *exclusive* control of the instrumentality causing the accident, a higher standard.

City's crossclaims against TCE for contractual indemnification and failure to procure the required insurance policy are denied as moot.

Since all Labor Law and common law negligence claims against City and TCE have been dismissed, the issue of whether City should have been indemnified against loss and liability arising out of such claims or TCE's failure to procure an insurance policy naming City as the insured is denied as moot. The Court agrees with TCE that the City's remaining contention, that of the costs of the litigation is appropriately brought as a declaratory judgment matter and not as an action against TCE. Accordingly, it is hereby

ORDERED that defendant The City of New York's summary judgment motion against plaintiff TIMOTHY CUNNINGHAM is granted, and all the Labor Law and common law negligence claims are dismissed; and it is further

ORDERED that defendants LIRO ENGINEERS, INC., LIRO CONSTRUCTORS, INC., LIRO HOLDINGS, INC., LIRO GIS AND SURVEY, P.C. summary judgment motion against plaintiff TIMOTHY CUNNINGHAM is granted, and all the Labor Law and common law negligence claims are dismissed; and it is further

ORDERED that defendant TC ELECTRIC, LLC summary judgment motion against plaintiff TIMOTHY CUNNINGHAM is granted, and all the Labor Law and common law negligence claims are dismissed; and it is further

ADJUDGED that City's motion for summary judgment as against defendant TC Electric LLC for contractual indemnification and penalty for failure to procure the required insurance policy are denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

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3/21/2023
DATE

LYLE E. FRANK, J.S.C.

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