SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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RAFAL PYCIOR,

Plaintiff,

- v -

NEW LINE STRUCTURES, INC., THE CHETRIT GROUP, LLC,135 WEST 52ND STREET OWNER, LLC, SENTECH ARCHITECTURAL SYSTEMS, LLC.,

Defendants.

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INDEX NO. 151878/2016

MOTION DATE 10/20/2022, 10/20/2022, 10/20/2022

MOTION SEQ. NO. 007 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 366, 380, 381, 382, 393, 394, 395, 397, 400

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 367, 391, 392, 396, 398, 401

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 383, 384, 385, 386, 387, 388, 389, 390, 399, 402, 403, 404, 405

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

In this personal injury action, plaintiff claims that he was injured on June 4, 2015 while working as a glazier for third-party defendant Crowne Architectural Systems, LLC (Crowne) at a construction site owned and/or managed by defendants 135 West 52nd Street LLC (135 West) and The Chetrit Group, LLC (Chetrit).

PROCEDURAL BACKGROUND

Pursuant to a contract entered into between 135 West and defendant New Line Structures Inc. (New Line), New Line was hired to oversee the construction/renovation of residential

condo/commercial space at issue here. New Line retained Crowne to perform work on the premises, and Crowne retained defendant/third-party defendant Sentech Architectural Systems (Sentech).

Plaintiff claims he was injured while in the process of opening a large crate weighing over 6,000 pounds that contained large glass panels known as fins. The glass panels were purchased by Crowne for use at the construction site, and were ordered from Sentech who in turn ordered them from a manufacturer located in China. The crates of panels were trucked to Crowne's warehouse, where they were stored for a period of time before being moved to the construction site. On the accident date, the crate was placed on a flatbed truck, and plaintiff claims that the crate broke apart as he was in the process of opening it, causing the panels to fall over, pinning his foot and dangling him off the side of the truck.

The complaint asserts causes of action under Labor Law §§§ 240(1), 241(6) and 200, as well as common-law negligence. In motion sequence 007, Sentech moves for summary dismissal of all claims and cross claims asserted against it, and for summary judgment on its contractual indemnity cross claim against Crowne. In motion sequence 008, plaintiff moves for partial summary judgment on liability against all defendants on his Labor Law § 240(1) claim. In motion sequence 009, defendants move for summary dismissal of plaintiff's Labor Law §§§ 200, 240(1) and 241(6) claims, or alternatively, for summary judgment on their third-party claims for contractual indemnification against Crowne. In response, Crowne cross-moves for summary dismissal of plaintiff's Labor Law §§ 240(1) and 241(6) claims and defendants/third-party plaintiff's cross claims for contractual indemnity.

MOTION SEQUENCE 007

Sentech's motion for summary dismissal is granted as there is no evidence that it breached any contract with the defendants, or that it owed and breached a duty to plaintiff. Indeed, the plaintiff does not even oppose the motion.

While defendants claim that there are issues of fact concerning Sentech's improper design of the glass panels, their opposition provides no evidentiary basis regarding this claim. Even if the glass was improperly designed, defendants fail to demonstrate how improperly designed glass panels had any relation to the crate breaking apart and injuring plaintiff.

MOTION SEQUENCE 008

In motion sequence 008, plaintiff moves for partial summary judgment on his Labor Law §240(1) claim. Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant part:

> 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, aligns, 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 a scaffold or other protective device proves inadequate to shield a worker from injuries caused by the application of the force of gravity to an object or person (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001]). The statute imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury (*see Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 [1993]).

The hazards subject to the protection of Labor Law §240(1) encompass gravity-related accidents such as falling from a height or being struck by or coming into contact with a falling

object (*see Ross*, 81 NY2d at 501). However, not every worker who falls at a construction site is covered by the protections of Labor Law 240 §(1), and a distinction is made between those accidents proximately caused by the failure to provide an enumerated safety device and those caused by a general hazard specific to a workplace (*Makaris v Port Auth. of N.Y. & N.J.,* 76 AD3d 805, 808 [1st Dept 2010]). The former gives rise to liability under the statute, while the latter does not (*id.*). Additionally, the accident must be attributable, at least in part, to the failure to provide or use, or to the inadequacy of, a proper safety device of the kind enumerated in the statute *(see Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]).

Here, the parties disagree as to whether the accident was proximately caused by a violation of the statute. Plaintiff argues that he was engaged in a protected activity at the time of his accident, the accident occurred as a result of an elevation-related risk, and his injuries were caused by an inadequate or non-existent safety device. He relies on his expert's affidavit, in which the expert opines that plaintiff should have been provided with additional nylon straps, similar to those that were used to secure the crate to the flatbed, and that the straps should have been equipped with a device that would have allowed for the slow release of tension and for greater control over the force of gravity while the crate was being opened. Plaintiff's expert also maintains that the crate should have been lowered to the ground with a hoist before plaintiff attempted to remove the glass panels.

Defendants contend that the accident does not fall within the scope of Labor Law §240(1) because it did not involve an elevation or gravity-related risk or hazard, as the frames did not fall from a height and plaintiff did not suffer an injury caused by an elevation-related risk.

In order to prevail on a "falling object" claim, the plaintiff must demonstrate the existence of a hazard contemplated under the statute and the failure to use, or the inadequacy of a

safety device of the kind enumerated in the statute (*see Narducci*, 96 NY2d at 269; *Ross*, 81 NY2d at 501). It must also be shown that at the time the object fell, it was either being hoisted or secured or required securing in order to satisfy the purpose of the plaintiff's work (*see Fabrizi v 1095 Ave. of the Am. L.L.C.*, 22 NY3d 658, 662-63 [2014]; *Outar v City of New York*, 5 NY3d 731, 732 [2005]). Liability does not attach simply because an object fell and injured a worker, rather, the plaintiff must show that the object fell because of the absence or inadequacy of an enumerated safety device (*see Fabrizi*, 22 NY3d at 663; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757 [2008]).

In this matter, plaintiff has demonstrated his prima facie entitlement to summary judgment as a matter of law against defendants, as the accident involved an elevation-related risk because the panels were objects that required hoisting or securing to satisfy the purpose of plaintiff's undertaking (*Outar*, 5 NY3d at 732; *Grant v Solomon R. Guggenheim Museum*, 139 AD3d 583 [1st Dept 2016]).

Contrary to defendants' contentions, the fact that the panels that fell were on or near the same level of height as plaintiff does not render Labor Law § 240(1) inapplicable to this accident. Each of the five panels in the crate were approximately 20 feet long and weighed about 1500 pounds, and the flatbed of the truck was approximately three feet off the ground and the panels were positioned in the flatbed vertically at a height of approximately 27 inches. Based on these facts, plaintiff demonstrates that he was exposed to an elevation-related risk as the panels that toppled over were capable of generating a significant amount of force and plaintiff was injured due to the application of the force of gravity on the panels (*see Grant*, 129 AD3d at 584; *Marrero v 2075 Holding Co.*, 106 AD3d 408, 409 [1st Dept 2013]). Defendants fail to raise a triable issue in opposition.

Plaintiff further established that this accident occurred, in part, due to the absence of a safety device, based on his expert's unrebutted opinion that plaintiff was not provided with a safety device, such as a hoist or additional canvas straps, which would have enabled him to slowly release the tension of the strap in a controlled manner (*see Ali v Sloan-Kettering Inst. for Cancer Research*, 176 AD3d 561 [1st Dept 2019]; *Grant*, 129 AD3d at 584).

MOTION SEQUENCE 009

In motion sequence 009, defendants move for summary judgment and a dismissal of plaintiff's claims under Labor Law § 200, Labor Law § 240(1), and Labor Law § 241(6). Crowne filed a cross motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims and New Line's contractual liability claims. As discussed above, plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim, and therefore his Labor Law §§ 200 and 241(6) claims remain to be decided.

Labor Law § 200

Labor Law § 200 codifies a landowners' and general contractors' common-law duty to maintain a safe workplace (*Ross,* 81 NY2d at 505). Where a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, the owner or general contractor may be held liable only if it exercised some supervisory control over the operation (*id.*), and authority to control the activity bringing about the injury must be sufficient so as to enable it to avoid or correct an unsafe condition (*Rizzuto v L.A. Wenger Contracting Co.,* 91 NY2d 343, 352 [1998], quoting *Russin v Louis N. Picciano & Son,* 54 NY2d 311 [1981]).

Defendants contend that the evidence establishes they did not direct or control plaintiff's work, relying on plaintiff's testimony that his instructions came from his supervisors at Crowne only and that he did not take any direct instructions from Chetrit and 135 West. Moreover,

plaintiff was unsure if New Line gave instructions to supervisors at the site or whether it was entitled to provide direction to Crowne, and he mistakenly believed that safety personnel on site were employed by New Line and in any event, he did not observe them at the site.

Defendants also assert that Crowne was responsible for the means and methods of its own work, and was guided in performing glass installation by a Job Hazard Analysis document, which Crowne had generated. Defendants further rely on the contractual language between New Line and Crowne, providing that "Trade Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work."

In opposition, plaintiff asserts that defendants were required to establish, implement, and observe all safety, health and environmental protection measures during performance of the work, and that it employed a significant number of supervisory personnel at the site. He contends that New Line's project superintendent oversaw and checked Crowne's work and would instruct Crowne's supervisor about the work. Further, plaintiff maintains that New Line had the authority to stop unsafe work and practices, and the site safety company CRSG, an agent of the owner/New Line, was on site daily and had the authority to stop work.

Plaintiff's testimony establishes that he received instructions only from his employer, and that no one in defendants' employ instructed or supervised his work with the panels. That defendants had and exercised responsibilities related to overall job safety is insufficient. Defendants thus demonstrate that they may not be held liable for the means and methods of plaintiff's work and he raises no triable issue in opposition (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] [dismissing Labor Law § 200 and common-law negligence claims related to plaintiff's use of saw because defendants did not provide it, direct him on how to use it, or supervise his use of it]; *see also Ruisech v Structure Tone Inc.*,

208 AD3d 412, 415 [1st Dept 2022] ["regular inspection of the site or the authority to stop any unsafe work is a general level of supervision that is not sufficient to warrant holding [defendants] liable"]; *DaSilva v Toll First Ave., LLC*, 199 AD3d 511, 513 [1st Dept 2021] ["(T)he authority . . . to ensure the overall safety of the work site and to stop any unsafe work does not rise to the level of supervision and control required to hold owners and general contractors liable"]).

In addition to liability for a dangerous condition arising from the manner or methods of a plaintiff's work, liability can also arise when the accident is caused by a dangerous condition at the worksite, if it was either created by the owner or general contractor or about which they had prior notice (*Makaris v Port Auth. of N.Y. & N.J.,* 76 AD3d 805, 808 [1st Dept 2010]).

Here, there is no evidence that the accident involved a defective condition. It is clear from plaintiff's testimony that the crate "disintegrated" or opened from the weight of the panels after plaintiff cut the last strap on the crate. There is no evidence that the crate, by itself, was defective, and plaintiff testified that the crate looked fine to him before he began to cut the straps, and his expert does not identify any defect regarding the crate itself. Plaintiff therefore fails to raise a triable issue as to whether the accident occurred due to a defective condition (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475 [1st Dept 2014] [dismissing Labor Law § 200 and common law negligence claims as alleged dangerous condition arose from means and methods of plaintiff's work]).

Labor Law § 241(6)

Plaintiff does not oppose dismissal of his Labor Law § 241(6) claim (NYSCEF 389, fn1), and it is thus dismissed.

Indemnification:

Defendants move for summary judgment on their third-party claims for indemnification against Crowne, arguing that if they are found liable to plaintiff, they are owed contractual and common-law indemnity from Crowne. Crowne opposes and seeks dismissal of these claims.

In relevant part, the indemnification provision in the contract between New Line and Crowne provides that Crowne must:

> …indemnify, defend and hold harmless [Chetrit, 135 West, New Line]: from and against all claims or causes of action, lawsuits, damages, losses judgments, liens and expenses (including, but not limited to, reasonable attorney's fees and legal costs and expenses), for personal or bodily injury, sickness, disease or death or injury to or destruction of tangible property including loss of use arising from, or in connection with, the performance of the services by Trade Contractor under this Agreement irrespective of the cause and/or type of such injury, cost, damage or loss.

An agreement by a subcontractor to indemnify an owner or general contractor for the latter's own negligence is "against public policy and void, and unenforceable" (*Cackett v. Gladden Properties, LLC,* 183 AD3d 419, 422 [1st Dept 2020], quoting General Obligations Law § 5–322.1[1]). However, "[a] contractual clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence" (*Dreyfus v MPCC Corp.,* 124 AD3d 830 [2d Dept 2015]).

A party must prove that they are free from active negligence in order to be entitled to summary judgment on a contractual indemnification cause of action (*See Herrero v 2146 Nostrand Avenue Associates, LLC*, 193 AD3d 421 [1st Dept 2021]). For common-law indemnity, "the predicate . . . is vicarious liability without actual fault on the part of the proposed indemnitee" (*Metadijia Atanasoki v Braha Industries, Inc.*, 124 AD3d 705 [2d Dept 2015]). As New Line defendants have been found free from negligence here (*supra*.), they establish that they are entitled to indemnity from Crowne, and Crowne raises no triable issue in opposition.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of second third-party Sentech Architectural Systems LLC for summary judgment (motion seq. No. 007) is granted, and the second third-party complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that motion of plaintiff for partial summary judgment (motion seq. No. 008) is granted as to plaintiff's Labor Law § 240(1) claim only; and it is further

ORDERED, that the motion of defendants/third-party plaintiffs for summary judgment (motion seq. No. 009) is granted to the extent of:

(1) dismissing plaintiffs' Labor Law §§ 241(6) and 200 and common law negligence claims as against said defendants; and

(2) granting summary judgment on defendants' third-party contractual and common-law indemnity claims against third-party defendant Crowne Architectural Systems, Inc. a/k/a Crowne Consulting LLC a/k/a Crowne Architectural Systems, LLC;

and it is further

ORDERED that the cross-motion for summary judgment (motion seq. No. 009) is denied; and it is further

ORDERED that the parties shall appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on April 26, 2023, at 11:00 a.m.

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3/31/2023
DATE

DAVID B. COHEN, 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