Supreme Court of the State of New York
County of Kings
Part LL1 M

MARLON MAIA DUTRA,

Plaintiff,

against

EVERGREEN GARDENS I LLC, EVERGREEN GARDENS II LLC, ALL YEAR MANAGEMENT LLC, ALL YEAR MANAGEMENT NY INC. AND BROOKLYN GC LLC,

Defendants.

EVERGREEN GARDENS I LLC, EVERGREEN GARDENS II LLC AND BROOKLYN GC LLC,

Third-Party Plaintiffs,

against

MAGELLAN CONCRETE STRUCTURES CORP.,

Third- Party Defendant.

MAGELLAN CONCRETE STRUCTURES CORP.,

Second Third-Party Plaintiff,

against

EXTREME BUILDING LLC,

Second Third-Party Defendant.

EVERGREEN GARDENS I LLC, EVERGREEN GARDENS II LLC AND BROOKLYN GC LLC,

Third Third-Party Plaintiffs,

against

EXTREME BUILDING LLC.,

Third Third-Party Defendant.

Index Number 523342/2017
Seqs. 005-007

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered

Notice of Motion and Affidavits Annexed	1–3
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	4–8
Replying Affidavits	9–13
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 005), Evergreen Gardens I LLC, Evergreen Gardens II LLC (collectively "Evergreen"), and Brooklyn GC, LLC (Brooklyn GC)'s motion for summary judgment (Seq. 006), and Magellan Concrete Structures Corp. (Magellan)'s motion for summary judgment (Seq. 007) are decided as follows:

Introduction & Procedural Posture

Plaintiff commenced this action for injuries he claims to have sustained on July 31, 2017, in a construction-related accident at 123 Melrose Street, Brooklyn. Plaintiff filed his note of issue on August 2, 2023. Now, plaintiff moves for summary judgment against defendants Evergreen and Brooklyn GC under Labor Law § 240 (1). Evergreen and Brooklyn GC move for summary judgment to dismiss plaintiff's Labor Law § 200 claim and for summary judgment on its third-party claims against Magellan. Finally, third-party Magellan moves for summary judgment on plaintiff's Labor Law §§ 241 (6) and 200 claims, and to dismiss all other claims against it.

Defendants All Year Management NY and All Year Management LLC have not appeared in the action. Third-Party defendant Extreme Building LLC has also failed to appear.

Factual Background

Accident

Plaintiff testified as follows: At the time of his accident, plaintiff was performing formwork as an employee of Extreme Building LLC (Extreme). Plaintiff was receiving metal forms from a co-worker who was standing above him on a 20-foot-tall A-Frame ladder. Plaintiff was working in the cellar of the building. There was a large hole in the ceiling above the cellar floor. The ladder was placed through this hole (Dutra EBT at 60–70).

Magellan owner Jonathan Rocchio and Brooklyn GC Site Manager Moshe Blum both testified that the area underneath the co-workers' ladder should have been deemed a Caution Access Zone (CAZ) because materials were being passed down from a height (Blum EBT at 62; Rocchio EBT at 27–28).

Plaintiff provides the following account: while working underneath his co-worker's ladder another co-worker on the floor above him was hammering a metal beam (Dutra EBT at 80–85; Rocchio EBT at 20–28). The hammering caused the beam to dislodge (Dutra EBT at 143). The beam then fell 25 feet, striking him in the right hand (Dutra EBT at 80–85). There was no netting or other safety devices to prevent the falling beam from striking the plaintiff at the time of his accident and the beam was not otherwise secured (*id.* at 122; 130).

Ownership and Authority

Evergreen owned 123 Melrose Street. Evergreen hired Brooklyn GC as the general contractor for the construction project at the property. Brooklyn GC hired Magellan to perform superstructure work (Rocchio EBT at 12). Magellan's owner Jonathan Rocchio testified that there were 30-60 Magellan employees on the job site doing concrete work (Rocchio EBT at 31).

Magellan sub-contracted with Extreme to perform formwork (Rocchio EBT at 13). Plaintiff was an employee of Extreme (Dutra EBT at 14). Extreme's foreman at the site was Joao Bueno (Rocchio EBT at 19). Plaintiff testified that he was directed by Bueno during the construction project (Dutra EBT at 33, 35).

According to site manager Moshe Blum of Brooklyn GC, the two constructions on 123 Melrose and 54 Knoll Street were collectively called "Evergreen Gardens" with Evergreen I and II respectively each owning a building (Blum EBT at 12). Blum testified that Yoel Goldman owned both corporate entities (Blum EBT at 16–17). Goldman does not deny ownership. Blum

testified that Evergreen Gardens I and II owned the properties of 123 Melrose and 54 Noll Street (Blum EBT at 17–18).

Mr. Rocchio testified that his company (Magellan) did not control or direct Extreme's work on a day-to-day basis (Rocchio EBT at 28-29). However, when Mr. Rocchio was asked, "Is it accurate to say that all the instructions to Magellan or employees came from Magellan or Extreme regarding the means and methods of their work?" He answered, "Yes" (Rocchio EBT at 21). Moreover, Brooklyn GC's Moshe Blum was asked, "Who was directing the work for the super structure work that was going on at this project? He answered, "It was Magellan" (Blum EBT at 71).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 200

Defendants Evergreen and Brooklyn GC move for summary judgment to dismiss plaintiff's Labor Law § 200 claim, and for summary judgment as to their third-party claims against Magellan.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d

Dept 2008]). "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." (*id.* at [internal citations omitted]). The law requires only that a party have the authority to control the means and methods of the work; that party does not need to have actually exercised that authority (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–19 [1981]).

As an initial matter, plaintiff does not oppose the dismissal of the Labor Law §200 and common law negligence claims against the movants. Plaintiff concedes "that the accident was caused by the means and methods of the work being performed but that the movants did not have the authority to supervise or control the work" (Plaintiff's Aff. in Opp. to motion seq. 006 at ¶ 2). As a result, plaintiff has conceded his Labor Law § 200 claim as to these defendants. Defendants Evergreen and Brooklyn GC's motion is granted in this respect.

Next, Third-Party Defendant, Second Third-Party Plaintiff Magellan moves to dismiss plaintiff's Labor Law § 200 claim.

Plaintiff testified that he received instructions to perform his work that day from the Extreme foreman Joao Bueno. Extreme was the sub-contractor hired by Magellan.

Furthermore, testimony from Magellan's owner, Mr. Rocchio, indicates that Magellan had the authority to supervise Extreme employees and did give them instructions (Rocchio EBT at 21). In addition, testimony from Mr. Blum, Brooklyn GC's site manager, indicates Magellan was directing work at the job site (Blum EBT at 40;71). This testimony creates a question of fact as to whether Magellan had the authority to supervise or control Extreme employees.

Accordingly, since there is evidence that Magellan had authority to control means and methods of work, their motion for summary judgment on Labor Law §200 is denied.

Labor Law § 240 (1)

Plaintiff moves for summary judgment against defendants Evergreen and Brooklyn GC under Labor Law § 240 (1). When evaluating liability under Labor Law § 240 [1]), a court should assess whether a plaintiff's accident was the direct consequence of a failure to provide adequate protection against an elevation-related risk (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

"With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured'" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267–68 [2001], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991] [alteration in original]). In that regard, "a plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking" (*Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2d Dept 2013]). It is irrelevant whether the object that fell was in the process of being hoisted or was stationary prior to falling (*Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017], citing *Outar v City of New York*, 286 AD2d 671 [2d Dept 2001] [affirmed 5 NY 3d 731 (2005)]).

Plaintiff contends he was injured by a falling beam while performing construction work. It is undisputed that there was no netting, safety device, or established safety zone present at the time the beam fell and hit the plaintiff. Moreover, plaintiff was working in an area below workers who were actively striking beams with hammers to dislodge those beams. Those beams

were not belayed or otherwise secured. Accordingly, plaintiff has made out his prima facie case for his Labor Law § 240 (1) (*Wein v E. Side 11th & 28th, LLC*, 186 AD3d 1579 [2d Dept 2020]).

Evergreen and Brooklyn GC oppose plaintiff's motion on the ground that there is "no admissible evidence [as to] where the beam came from, how it fell, or why it fell" (Aff. Opp. at 8). Further, they argue that since the accident was unwitnessed, discovery should be completed in order to more fully determine the circumstances of plaintiff's accident.

The fact that an accident was unwitnessed or that plaintiff was the sole witness would not preclude granting summary judgment for a plaintiff (*Wein v E. Side 11th & 28th, LLC*, 186 AD3d 1579 [2d Dept 2020]; *Inga v EBS N. Hills, LLC*, 69 AD3d 568, 569 [2d Dept 2010]).

Evergreen contends that plaintiff should not be granted summary judgment against Evergreen Gardens I LLC and Evergreen Gardens II LLC because they claim there is no evidence presented as to which entity owned the specific building where Plaintiff's accident occurred.

The record indicates that the construction project involved the erection of two buildings on the same block. The building with the address of 123 Melrose Street is where plaintiff's alleged accident occurred. The second building with 54 Knoll Street as its address is where the other construction site was located. The record also indicates that both of these buildings were owned by Evergreen I or II.

The contract between Evergreen and Brooklyn GC names "Evergreen Gardens LLC" as the owner. Yoel Goldman signed that contract on behalf of Evergreen Gardens LLC. There is testimony from Mr. Blum that Mr. Goldman owned both Evergreen I and Evergreen II. Mr. Blum also testified that "Evergreen" owned the construction site where plaintiff was working at the time of his alleged accident (Blum EBT at 18). For the purposes of resisting summary

judgment, there is sufficient evidence for a cause of action against both entities (*see Connell v Hayden*, 83 AD2d 30, 45 [2d Dept 1981]).

Further, no party offers admissible evidence to deny that an unsecured beam which was being moved was struck and fell a distance hitting plaintiff. Accordingly, plaintiff is entitled to summary judgment on his Labor Law §240(1) claim against Evergreen and Brooklyn GC.

Labor § 241 (6)

Magellan moves to dismiss plaintiff's Labor Law §241 (6) claims. Magellan seeks to dismiss plaintiff's Industrial Code violation claims. To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]).

Plaintiff has alleged the following Industrial Code violations: 23-1.5, 23-1.7 (b) & (e), 23-1.15 (a), (b), & (c), 23-1.16 (a)-(f), 23-1.30, 23-5.1 (a)-(k), 23-5.3 (a)-(h), 23-5.4 (a)-(e), 23-5.5 (a)-(h), and 23-5.6 (a)-(g).

Plaintiff's claim under Industrial Code provision 23-1.5- General responsibility of employers— does not specify the specific sub-provision which renders this part of his claim insufficient (*Toussaint v Port Auth. of NY*, 38 NY3d 89 [2022]).

Industrial Code 23-1.7 (b) states, "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection." In this case, the evidence shows that there was no overhead protection provided. Moreover, defendants admit this was an area that should have been a CAZ, which indicates that it was an area "normally exposed to falling material." Thus, defendant has not met

their burden of showing that there was no violation of this code section. Industrial Code 23-1.7 (e) does not apply because this case does not involve a tripping hazard.

As to the remaining provisions 23-1.15 (a), (b), & (c), 23-1.16 (a)-(f), 23-1.30, 23-5.1 (a)-(k), 23-5.3 (a)-(h), 23-5.4 (a)-(e), 23-5.5 (a)-(h), and 23-5.6 (a)-(g), the plaintiff does not offer evidence to support his claims that these provisions were violated.

Accordingly, defendant Magellan's motion to dismiss Labor Law § 241 (6) is granted as to Industrial Code provisions 23-1.5, 23-1.7 (e), 23-1.15 (a), (b), & (c), 23-1.16 (a)-(f), 23-1.30, 23-5.1 (a)-(k), 23-5.3 (a)-(h), 23-5.4 (a)-(e), 23-5.5 (a)-(h), and 23-5.6 (a)-(g), but denied as to Industrial Code provision 23-1.7 (b).

Indemnification

Defendants Evergreen and Brooklyn GC also seek summary judgment on their contractual indemnity claims against Magellan.

The right to contractual indemnification is established by the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Evergreen and Brooklyn GC entered into a contract with the following indemnification language:

> "[Brooklyn GC] shall assume on behalf of [Evergreen] . . . the defense of any action at law . . . which may be brought . . . against them in connection with or arising out of such claims. To the fullest extent permitted by law, the [Brooklyn GC] shall indemnify and hold harmless Evergreen from and against all claims … arising out of or resulting from the performance of the [Brooklyn GC's] work, provided that any such claim. . . (i) is attributable to bodily injury . . . or (ii) arises

> by reason of the Contractor's and/or its subcontractor's failure to comply with any laws, rules, regulations, orders, codes, ordinances, statues or other requirements of governmental authorities having production over the Project or (iii) is caused in whole or in part by any act or omission of [Brooklyn GC], its subcontractors or anyone for whose acts [Brooklyn GC] or its subcontractors may be liable . . . [.]"

Brooklyn GC and Magellan entered into a contract with the following indemnification language:

> "In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor [Magellan] shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor [Brooklyn GC], all entities the Contractor is required indemnify and hold harmless, the Owner [Evergreen] of the property … from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, *arising out of* [emphasis added] or resulting from the Work covered by this Contract Agreement …[.]"

Magellan and Extreme entered into a contract with the following indemnification language which is identical to Brooklyn GC and Magellan's above:

> "In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor, all entities the Contractor is required indemnify and hold harmless, the Owner of the property … from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, *arising out of* [emphasis added] or resulting from the Work covered by this Contract Agreement … [.]"

Brooklyn GC and Magellan entered into a contract with "arising out of" indemnification language. There is a valid indemnification clause between Evergreen and Brooklyn GC and between Brooklyn GC and Magellan. However, because a violation of § 241 (6) constitutes evidence of negligence, summary judgment on contractual indemnification is denied (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

Conclusion

Plaintiff's motion for summary judgment (Seq. 005) as to Labor Law § 240 (1) is granted. Defendants Evergreen and Brooklyn GC's motion (Seq. 006) for summary judgment to

dismiss plaintiff's Labor Law § 200 claim, and for summary judgment as to their third-party claims against Magellan is granted as to the Labor Law § 200 claim and denied as to the third-party indemnification claims. Third-party defendant Magellan's motion (Seq. 007) to dismiss plaintiff's Labor Law §§ 241 (6) and 200 claims is granted only to the extent of dismissing plaintiff's Labor Law § 241 (6) claim on Industrial Code provisions 23-1.5, 23-1.7 (e), 23-1.15 (a), (b), & (c), 23-1.16 (a)-(f), 23-1.30, 23-5.1 (a)-(k), 23-5.3 (a)-(h), 23-5.4 (a)-(e), 23-5.5 (a)-(h), and 23-5.6 (a)-(g), it is denied as to 23-1.7 (b). It is also denied as to Labor Law § 200.

This constitutes the decision and order of the court.

April 17, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court