SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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CHRIS NYANTEH, FALASHA CAMPBELL,

Plaintiff,

- v -

590 MADISON AVENUE, LLC., SHAWMUT WOODWORKING & SUPPLY, INC.,TOURNEAU, LLC,

Defendant.

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INDEX NO. 150077/2021

MOTION DATE 07/13/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

590 MADISON AVENUE, LLC, TOURNEAU, LLC

Plaintiff,

-against-

ECLIPSE CONTRACTING CORP

Defendant.

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Third-Party
Index No. 595417/2021

SHAWMUT WOODWORKING & SUPPLY, INC.

Plaintiff,

-against-

ECLIPSE CONTRACTING CORP., THE KNOLLER COMPANY

Defendant.

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Second Third-Party
Index No. 595710/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 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, 106, 107, 110, 111, 112, 113, 114, 115, 116, 117, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

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

Upon the foregoing documents, Third-Party Defendant Eclipse Contracting Corp.'s ("Eclipse") motion for summary judgment dismissing Third-Party Plaintiffs 590 Madison Avenue, LLC, Tourneau, LLC ("Torneau"), and Shawmut Woodworking & Supply, Inc.'s ("Shawmut")

Third-Party Complaint is denied. Plaintiff Chris Nyanteh's ("Nyanteh") motion for summary judgment on his Labor Law § 240(1) and 241(6) claim is granted in part and denied in part.

I. Background

This is an action arising from personal injuries sustained as a result of alleged violations of the New York Labor Law (*see generally* NYSCEF Doc. 5). Nyanteh was injured while working for non-party Alliance Industries on December 2nd, 2020 (NYSCEF Doc. 67 at 13:18-20; 24:7-10). Nyanteh was renovating a duct at 590 Madison Avenue, New York, New York (the "Worksite") (NYSCEF Doc. 67 at 33:9-15; 37). 590 Madison Avenue LLC was the building owner and leased the Worksite to Torneau who was renovating the premises to a luxury watch store. Plaintiff was on the second floor of the Worksite (NYSCEF Doc. 67 at 42). There were numerous other workers, including carpenters, electricians, plumbers, iron workers, and other laborers (NYSCEF Doc. 67 at 43:9-11).

Plaintiff moved an A-frame cart belonging to another trade (NYSCEF Doc. 67 at 80:12-25). As Plaintiff was moving the cart, the cart tipped over causing structural metal sheets on the cart to fall on him (NYSCEF Doc. 67 at 81: 3-19). An incident report corroborated that the frame was "top heavy" due to the structural metal sheets (NYSCEF Doc. 67 at 133:20-25; NYSCEF Doc. 102). Plaintiff testified he was looking for the owner of the cart, but they were not on his floor (NYSCEF Doc. 67 at 89:16-20). Plaintiff testified if the cart had not been moved, he could not continue working (*id.* at 89:21-25). Plaintiff testified the general contractor was not present on the floor (NYSCEF Doc. 67 at 93:2-4). Plaintiff further testified he complained to the general contractor about the A-frame carts obstructing erection of the ducts (*id.* at 94:2-16). Plaintiff alleged laborers were not cleaning up debris which caused the cart's wheels to get stuck (NYSCEF Doc. 67 at 106:9-13).

Mr. Rosati, a representative of Shawmut, was assigned to the Worksite where Plaintiff was injured (NYSCEF Doc. 69 at 10:6-13). Torneau contracted Shawmut (*id.* at 17). Shawmut contracted with Eclipse (*id.* at 19). Mr. Rosati conceded Shawmut laborers were responsible for insuring paths were clear of debris and in compliance with OSHA standards (*id.* at 28:4-8). Mr. Rosati testified Eclipse was responsible for installing the metal which injured Plaintiff (*id.* at 35-36). Mr. Rosati admitted it was Shawmut and the foremen of the representative trades' responsibility to make sure that subcontractors' materials did not get in the way of other subcontractors' work (*id.* at 48:19-25). Mr. Rosati conceded the second floor was "cramped" because materials were kept there (*id.* at 127:9-13).

An Eclipse representative, John Fitzgerald, admitted that the metal sheets which injured Plaintiff were delivered to Eclipse (NYSCEF Doc. 72 at 21:20-25). Mr. Fitzgerald testified he had "no idea" who moved the metal sheets to the second floor. (*id.* at 22:2-8). Mr. Fitzgerald conceded that moving an A-frame cart on a floor with obstructions could cause the cart to tip over (*id.* at 26). Mr. Fitzgerald admitted Eclipse employees were present at the Worksite on the date of the accident. However, Mr. Fitzgerald could not confirm whether his foreman worked on the second floor (*id.* at 48:7-11).

The principal of Eclipse, Noel Brady, was deposed. He stated that excess metal would be piled on A-frame carts at the end of the day and a laborer from Shawmut would put it into a dumpster (NYSCEF Doc. 71 at 25:4-6). He likewise admitted the metal would be transported on A-frames (*id.* at 25:22-23). He testified he was not aware of other trades moving Eclipse carts (*id.* at 33:17-22). Mr. Brady admitted Eclipse's carts would be kept throughout different floors (*id.* at 39:7-8).

II. Pending Motions

A. Eclipse Motion

Third-Party Defendant Eclipse now moves for summary judgment seeking dismissal of the Third-Party Complaint. Eclipse argues it is entitled to summary judgment because it did not cause the accident. Defendants/Third-Party Plaintiffs oppose. They argue there is a valid and enforceable contractual indemnification clause. Moreover, they argue there are issues of fact as to the contribution and common-law indemnification claims asserted against Eclipse because there are varying accounts as to how Eclipse's A-frame cart loaded with metal sheets made its way to the second floor. Defendants/Third-Party Plaintiffs further oppose on the basis that Eclipse's expert, Charles Temple, P.E., submitted a speculative and conclusory expert affidavit. Plaintiff also opposes Eclipse's motion. Plaintiff agrees with Defendants/Third-Party Plaintiffs that there exist triable issues of fact as to how Eclipse's cart and building materials ended up on the second floor.

B. Plaintiff's Cross-Motion

Plaintiff cross-moves for summary judgment on his Labor Law § 240(1) and § 241(6) claims. Plaintiff argues that he is entitled to summary judgment on his § 240(1) claims because sheets of metal fell from a height and hurt Plaintiff while engaged in renovation work.[1] Plaintiff provided an expert affidavit of Walter Konon, P.E., who opined that the obstruction of the passageway by Eclipse's A-frame cart coupled with the debris on the floor caused Plaintiff's injury. In opposition, Eclipse argues there is an issue of fact as to whether Plaintiff was the sole proximate cause of his accident. Defendants/Third-Party Plaintiffs oppose and argue that Plaintiff was a recalcitrant worker.

[1] For the sake of brevity, the Court omits discussion of Plaintiff's §241(6) claims, which have become academic as a result of granting Plaintiff's §240(1) claim.

III. Discussion

A. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]).

B. Plaintiff's Cross-Motion

Plaintiff's cross-motion on his Labor Law § 240(1) claim is granted. Labor Law § 240(1) is to be construed as liberally as possible in order to accomplish its purpose (*Mananghaya v Bronx-Lebanon Hospital Center*, 165 AD3d 117, 122 [1st Dept 2018]). Pursuant to § 240(1), owners and contractors have a nondelegable duty to protect workers from risks associated with erection, demolition, repairing, altering, painting, or cleaning a structure. The burden is on owners and contractors to provide safety devices, or to ensure that such devices are properly placed and operated, to give protection to workers (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]).

Here, it is undisputed Plaintiff was engaged in work covered by § 240(1). Nor is it disputed that Defendants/Third-Party Plaintiffs are statutory owners/contractors. It is undisputed Shawmut was to ensure trades' materials did not get in the way of other subcontractors' work (NYSCEF Doc. 69 at 48:19-25). Shawmut knew that the second floor, where Plaintiff was working, was more

cramped due to the presence of various construction materials (*id.* at 127:9-13). Nonetheless, Plaintiff was instructed to perform duct work on the second floor and was forced to move Eclipse's improperly placed A-Frame cart to continue his work due to the absence of any Shawmut employees on the floor. When moving the cart, which was improperly placed, it is undisputed that it tipped over causing metal sheets to fall on Plaintiff from an elevation. Plaintiff therefore established his prima facie entitlement to Labor Law § 240(1) (*see also Ali v Sloan Kettering Institute for Cancer Research*, 17 6 AD3d 561 [1st Dept 2019]; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408 [1st Dept 2013]).

While Defendants/Third-Party Defendants attempt to oppose by arguing that Plaintiff knew he should not have moved the A-frame cart, this is insufficient to defeat his Labor Law § 240(1) claim. Comparative negligence is not a defense to a Labor Law § 240(1) claim (*Rodas-Garcia v NYC United LLC*, 225 AD3d 556 [1st Dept 2024]; *Pirozzo v Laight Street Fee Owner LLC*, 209 AD3d 596 [1st Dept 2022]). Shawmut and its subcontractors allowed an A-frame cart with multiple sheets of heavy metal to remain unattended and to obstruct Plaintiff's work. The improper placement, and the fact it was left unattended, constitutes a violation of Labor Law § 240(1). The contention that Plaintiff should have moved the cart with a coworker or wait for Shawmut or Eclipse merely amounts to comparative negligence (*Devlin v* AECOM, 224 AD3d 437 [1st Dept 2024]; *Morales v 2400 Ryer Avenue Realty, LLC*, 190 AD3d 647, 648 [1st Dept 2021]). Because Plaintiff's Labor Law §240(1) claim is granted, Plaintiff's Labor Law § 241(6) claim is denied as academic (*Malan v FSJ Realty Group II LLC*, 213 AD3d 541, 542 [1st Dept 2023]).

C. Third-Party Defendant's Cross-Motion

i. Common Law Contribution and Indemnification

The Court rejects Third-Party Defendant's argument that it did not cause the accident as there is a triable issue of fact as to whether Third-Party Defendant was, in part, responsible for the improperly placed A-frame cart. Therefore, the Court cannot dismiss the contribution claims asserted against Third-Party Defendant (*see, e.g. Royland v McGovern & Company, LLC*, 203 AD3d 677 [1st Dept 2022]; *Goya v Longwood Hous. Dev. Fund Co., Inc.*, 192 AD3d 581, 585 [1st Dept 2021]). Eclipse's own representative testified Eclipse's carts were spread out amongst the floors and that he was unaware of other trades moving Eclipse carts (NYSCEF Doc. 71 at 33:17-22 and 39:7-8). As there has yet to be any finding of affirmative negligence against Defendants/Third-Party Plaintiff, but merely liability for a statutory violation, it is premature to dismiss the common-law indemnification claim (*Gutierrez v. Turner Towers Tenants Corp.*, 202 AD3d 437, 439 [1st Dept 2022]; *Pena v Intergate Manhattan LLC*, 194 AD3d 576 [1st Dept 2021]).

ii. Failure to Procure Insurance

Cross Movants' motion for summary judgment seeking dismissal of the failure to procure insurance claim is denied. Here, there is a blanket additional insured endorsement which shows that Defendants/Third-Party Plaintiffs should be considered additional insureds under Eclipse's policy (NYSCEF Doc. 77). However, the entire policy has not been produced and therefore this Court cannot determine that Eclipse has complied with its insurance requirements. Specifically, Eclipse was supposed to maintain insurance on a primary and non-contributory basis (NYSCEF Doc. 70). The additional insured endorsement does not show this requirement was satisfied.

Moreover, no party produced correspondence from the carrier explaining the denial of coverage. Based on this record, the Court cannot dismiss the failure to procure insurance claim. [2]

iii. Contractual Indemnification

Eclipse mistakenly relies on a series of case law dealing with incorporation of a clause from a prime contract into a subcontract (*see, e.g. Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2010]). This case is distinguishable because there is no "prime contract" and "subcontract" but rather a "universal contract" which was entered between Eclipse and Shawmut followed by more specific "work orders." This is not a case where a general contractor enters into an agreement with an owner, and then the general contractor incorporates provisions from that agreement into a subcontract with an entirely different party. Here, Eclipse was a signatory to an agreement with Shawmut which contained an indemnification clause (NYSCEF Doc. 91). Moreover, the indemnification clause at issue contains savings language to the extent it states indemnification shall be provided "to the fullest extent permitted by applicable law" (*Herrero v 2146 Nostrand Avenue Associates*, LLC, 193 AD3d 421 [1st Dept 2021]; *Guzman v 170 West End Ave. Associates*, 115 AD3d 462 [1st Dept 2014]). Because there exists an enforceable indemnification clause, and there are issues of fact as to Eclipse's negligence, the Court cannot dismiss the contractual indemnification claim (*York v Tappan Zee Constructors,* LLC, 224 AD3d 527, 529 [1st Dept 2024]; *Bradley v NYU Langone Hospitals*, 223 AD3d 509 [1st Dept 2024]).

Accordingly, it is hereby,

ORDERED that Eclipse's motion for summary judgment is denied; and it is further

[2] Although Eclipse argues this claim is abandoned, Defendants/Third-Party Plaintiffs expressly opposed dismissal of the failure to procure insurance claim in their attorney's affirmation.

ORDERED that Plaintiff's cross-motion seeking summary judgment on his Labor Law § 240(1) claim against 590 Madison Avenue, LLC, Tourneau, LLC, and Shawmut Woodworking & Supply, Inc. is granted, and the remainder of the motion is denied as moot; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

This constitutes the Decision and Order of the Court.

9/3/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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