SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER **PART** 08

Justice

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INDEX NO. 159885/2017

MIGUEL RAMOS,

Plaintiff,

- v -

MOTION DATE 05/23/2023, 05/25/2023, 05/25/2023, 05/25/2023

FORD FOUNDATION, HENEGAN CONSTRUCTION CO., INC.,COMMODORE CONSTRUCTION CORP., EUROTECH CONSTRUCTION CORP., AND SAFWAY ATLANTIC, LLC,

MOTION SEQ. NO. 006 007 008 009

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 272, 273, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 297, 301, 306

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 228, 229, 230, 231, 232, 233, 274, 298, 302, 307

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 275, 278, 279, 280, 293, 294, 295, 299, 303, 305

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 276, 300, 304, 308

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

Upon the foregoing documents, it is ORDERED that these motions are decided as follows.

This is a labor law action arising from personal injuries sustained at a construction site. Specifically, plaintiff Miguel Ramos was struck by a falling object while working at the premises located at 320 East 43rd Street, New York, New York (the "premises"), on September 22, 2017.

There are four motions for summary judgment in this labor law action which are hereby consolidated for the court's consideration and disposition in this single decision/order.

In motion sequence 6, defendants and second and third third-party plaintiffs The Ford Foundation s/h/a Ford Foundation ("Ford") and Henegan Construction Co., Inc. ("Henegan") move to dismiss plaintiff's complaint and any and all crossclaims against them as well as for summary judgment against third third-party defendants Harbour Mechanical Corporation ("Harbour") and Celtic Sheet Metal, Inc. ("Celtic"). In response, plaintiff cross-moves for leave to amend his bill of particulars to expound the alleged violations of Industrial Code § 23-5.1(i) and opposes Ford and Henegan's motion to dismiss his complaint against him. Harbour and Celtic also oppose Ford and Henegan's motion.

In motion sequence 7, defendant Safway Atlantic LLC ("Safway") moves for summary judgment dismissing plaintiff's complaint and all crossclaims. There is no opposition to Safway's motion.

In motion sequence 8, plaintiff moves for partial summary judgment on liability on his Labor Law § 240[1] claim against Ford, Henegan, Commodore Construction Corp. ("Commodore"), Eurotech Construction Corp. ("Eurotech") and Safway. Safway, Ford and Henegan oppose plaintiff's motion. [1]

Finally, in motion sequence 9, Celtic moves for summary judgment dismissing Harbour's claims for common law indemnification and contribution against it as well as all crossclaims. There is no opposition to Celtic's motion, either.

The court will first consider plaintiff's motion and the parties' arguments as to plaintiff's claims.

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[1] Although plaintiff moves with respect to Commondore and Eurotech, plaintiff discontinued his claims against these parties via stipulations filed at NYSCEF Document Numbers 188 and 187, respectively.

Applicable law

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Motions as to plaintiff's direct claims (motion sequences 7, 8 and a portion of motion sequence 6)

Plaintiff is suing for an accident which occurred on September 22, 2017. On that date, Ford owned the premises and hired Henegan to serve as general contractor/construction manager for work being performed thereat. In turn, Henegan hired Safway to install scaffolding at the premises as well as Harbour. Harbour hired Celtic as a sub-subcontractor.

On the date of the accident, plaintiff was employed by Celtic as a field foreman. At the time of his accident, plaintiff was on the 11th floor of the scaffold with his coworker, Julie, measuring a piece of iron pipe. Plaintiff's coworker, Ralo, was six stories above him dismantling

the penthouse level of scaffolding. There is a dispute as to who instructed Ralo to dismantle the scaffold and plaintiff claims that he instructed Ralo not to dismantle the scaffold. In any event, plaintiff claims that after he heard a noise from above, he saw an unsecure foot brace fall from the upper portion of the scaffold, which struck him. Plaintiff did not fall. Before the impact, plaintiff testified that he raised his arm to protect himself, and the foot brace struck his elbow.

Plaintiff has asserted claims for violation of Labor Law §§ 240[1], 241[6] and 200/common law negligence against Ford, Henegan and Safway.

At the outset, Safway's unopposed motion for summary judgment (motion sequence 7) is granted. At oral argument, the parties argued that it was unclear if Safway might have installed the subject scaffolding, but even if it did, which the parties have not established, they have otherwise failed to raise a triable issue of fact as to whether Safway would be liable to them on any claim. Accordingly, Safway's motion is granted and plaintiff's claims and all crossclaims against Safway are severed and dismissed.

Labor Law § 240[1]

In support of his motion for partial summary judgment, plaintiff asserts that the defendants failed to secure the foot brace which struck him and that he was not provided proper overhead protection in the area he was directed to work, a shaftway which was open vertically, and therefore is entitled to summary judgment on the issue of liability on his Labor Law § 240[1] claim. Plaintiff has also provided an expert affidavit asserting that there should have been netting in place so objects could not fall and strike workers below where the scaffold was being dismantled.

Ford and Henegan oppose plaintiff's motion and move for summary judgment dismissing plaintiff's claims. Ford and Henegan argue that plaintiff has not met his burden since there was

no inadequate or missing safety device and that the foot brace which struck plaintiff was an integral part of the structure being dismantled. Thus, defendants argue that plaintiff's injury was not the result of an elevation-related risk within the purview of Section 240[1], but rather the result of a typical construction site hazard. Defendants further argue that Ralo's inadvertent act of bumping into the foot brace and causing it to fall was not foreseeable and constituted a superseding act that broke any causal connection between a violation of the Labor Law and plaintiff's injuries.

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, … in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed.

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 (*Runner v. New York*

Stock Exchange, Inc., 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Here, plaintiff has established that he was struck by a falling object that was not secured by screws, bolts, slings, irons ropes or other devices and that plaintiff was not otherwise provided any overhead protection while workers worked above him to dismantle the scaffold. Thus, plaintiff has established that he was injured by a falling object and that his accident was caused by the failure to provide an enumerated safety device under Section 240 [1] (*see i.e. Gonzalez v Paramount Group, Inc.*, 157 AD3d 427 [1st Dept 2018]). Accordingly, plaintiff has demonstrated a prima facie Section 240[1] claim.

The court rejects defendants' argument that Ralo's act of bumping the foot brace constitutes a superseding cause or that a falling object during the course of scaffold dismantlement does not fall within the ambit of Section 240[1]. The scaffold foot brace required securing based on the nature of work, i.e., dismantling the scaffold while there were workers working underneath (*see i.e. Rutkowski v. New York Convention Ctr. Dev. Corp.*, 146 AD3d 686 [1st Dept 2017] [defendants did not show that any securing device would have defeated the task of removing the lighting bar]).

Accordingly, plaintiff's motion (sequence 8) for partial summary judgment on his labor law § 240[1] claim against defendants Ford and Henegan is granted and Ford and Henegan's motion sequence 6 as to plaintiff's Section 240[1] claim is denied.

Labor Law § 241[6] and plaintiff's cross-motion to amend

Ford and Henegan also move for summary judgment dismissing plaintiff's Section 241[6] claim, while plaintiff cross-moves to amend his bill of particulars to "expound the alleged violations of Industrial Code § 23-5.1(i)" and otherwise opposes defendants' motion.

The court will first consider the cross-motion, since its disposition necessarily impacts defendants' motion as to plaintiff's Section 241[6] claim. Leave to amend a pleading pursuant to CPLR 3025[b] should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice (*Seda*, *supra* at 470).

Plaintiff's original bill of particulars alleged a violation of Industrial Code § 23-5.1[i] and that the defendants were negligent and/or violated the Labor Law "[i]n failing to provide workers, and in particular this plaintiff, with protection from falling objects, debris and/or metal braces/scaffold parts;" and "in failing, neglecting and omitting to provide safety devices, for proper protection and to guard against and eliminate the hazard of falling objects, debris and/or metal braces/scaffold parts". There is no opposition to the cross-motion for leave to serve the amended BP annexed to plaintiff's moving papers. Therefore, plaintiff's cross-motion for leave to serve an amended BP is granted.

The court now considers the parties' substantive arguments as to plaintiff's Labor Law § 241[6] claim. Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide

> reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-5.1[i] was violated as a matter of law and has abandoned all other alleged violations by failing to raise any opposition to that branch of defendants' motion. Accordingly, defendants' motion dismissing all but the alleged violation of Industrial Code § 23-5.1[i] is granted without opposition.

Industrial Code § 23-5.1[i] states in pertinent part as follows:

> **(i)** Overhead protection. Overhead protection when required for any scaffold shall consist of planking not less than two inches thick full size, exterior grade plywood not less than three-quarters inch thick or material of equivalent strength. Such planks used for overhead protection shall be laid tight, shall extend the full length and width of the working platform. Such overhead protection shall be located not more than 10 feet above the surface of the working platform. Such overhead protection shall not be used to support any person, material, tools or equipment.

It is undisputed that no overhead protection was provided to plaintiff or otherwise present to protect workers working below where the scaffold was being dismantled. Indeed, plaintiff testified at his deposition that he was working in an open shaftway and clearly see without obstruction up to the area where Ralo was working. Therefore, plaintiff has alleged sufficient facts to support this alleged Industrial Code violation and defendants' motion for summary judgment dismissing plaintiff's Section 241[6] claim premised upon a violation of Industrial Code § 23-5.1[i] is denied.

Labor Law § 200 and common law negligence

Finally, defendants move for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claim. Section 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Defendants argue that plaintiffs' Section 200 and common law negligence claims must be dismissed because neither directed the means and methods of plaintiff's work. In turn, plaintiff asserts that Henegant did exercise supervisory control over plaintiffs' work and that defendants have otherwise failed to demonstrate that they lacked constructive notice of the dangerous condition of lack of overhead protection.

A Labor Law § 200 claim may arise because of both a dangerous condition on the premises and a danger created by the means or manner in which the injury-producing work is performed (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2d Dept 2011]). Since plaintiff argues that his injuries were caused by both the lack of overhead protection and the way the

scaffold was dismantled (with employes working below the scaffolding being dismantled), this is a hybrid case. As such, defendants were required to establish a lack of notice, and they have wholly failed to do so. Accordingly, defendants' motion for summary judgment dismissing the Section 200 claim is denied.

Even if defendants had established notice, the summary judgment on Section 200 and common law negligence would still be denied as to Henegan because there is a factual dispute as to who instructed Ralo to dismantle the scaffolding above plaintiff, there is testimony that Mike Lyons of Henegan instructed Ralo to do so and Henegan otherwise testified that they had supervisory authority over the work being performed at the site including having a site safety plan, performing walkthroughs, hiring a site safety company and the ability to stop the work.

Balance of motion sequence 6 and sequence 9

The remainder of the motions concern the third-party claims. Ford and Henegan seek summary judgment on their crossclaim against Harbour for contractual indemnification as well as for contractual indemnification against Celtic, while on motion sequence 9, Celtic moves for summary judgment dismissing plaintiff's and Harbour's third-party claims against it.

Henegan hired Harbour to perform infrastructure work involving risers and major ductwork in the building located at the premises. Harbour subcontracted piping to non-party Timbal Mechanical and the duct work to Celtic. Harbour's Project Manager testified that he reviewed the job with subcontractors and interfaced with Henegan regarding walkthroughs and any outstanding issues. Otherwise, Harbour was not in the business of erecting or dismantling scaffolds and there is no evidence that Harbour had any employees present at the premises on the date of plaintiff's accident.

Henegan's contract with Harbour provides in relevant part as follows:

> To the fullest extent permitted by law. Subcontractor shall indemnify, defend and hold harmless Owner, Construction Manager, Owner's design and project management consultants, the building landlord, and their directors, officers, employees, agents and representatives (collectively, the "Indemnitees") from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of, in connection with or resulting from Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

Meanwhile, Harbour's contract with Celtic also contains an indemnity provision which reads:

> To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless Harbour Mechanical Corporation (the "contractor"), affiliated, associated, or subsidiary entities, their officers, directors, agents, employees and partners (hereafter collectively to as "Harbour") from any and all claims, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought or assumed against Harbour by any person or firm, arising out of, attributable to, or in connection with or as a consequence of the performance of the Work of the Subcontractor under this agreement (contract), as well as any additional work, extra work, or add-on work, whether caused in whole or part by the Subcontractor including any sub-subcontractors therefor and their employees.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations

Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

The court rejects Harbour's argument that neither Ford nor Henegan can obtain contractual indemnification because they are statutory defendants under the labor law. Nor do the defendants need to show that Harbour was negligence under the applicable indemnity provision. However, defendants have failed to show that the Henegan/Harbour indemnification provision was triggered: "Subcontractor shall indemnify, defend and hold harmless Owner, Construction Manager.... from and against all claims.... including, but not limited to, attorney's fees, arising out of, in connection with or resulting from Subcontractor's Work." Since plaintiff's injuries did not arise or result from Harbour's infrastructure work or was otherwise connected to said work, but rather, was due to Ralo's dismantlement of the scaffolding, with Henegan being one of the allegedly responsible entities to do so, neither Ford nor Henegan are entitled to contractual indemnification from Harbour. Accordingly, motion sequence 6 against Harbour is denied. Further, Harbour has otherwise established that it is entitled to summary judgment dismissing Ford and Henegan's third-party claims against it (common law contribution and indemnification and breach of contract for failure to procure insurance) and therefore the court searches the record and grants summary judgment to Harbour dismissing Ford and Henegan's third-party action against it.

As Celtic points out in opposition to motion sequence 6, neither Ford nor Henegan have asserted crossclaims or third-party claims against Celtic. In any event, there is no contract obligating Celtic to indemnify Ford, and the court rejects defendants' argument that Ford or Henegan are "affiliated, associated, or subsidiary entities, their officers, directors, agents,

employees and partners" of Harbour pursuant to the Harbour/Celtic contract. Accordingly, that portion of motion sequence 6 seeking relief against Celtic is denied.

Finally, the court considers Celtic's unopposed motion for summary judgment dismissing plaintiff's claim and Harbour's third-party claim for common law indemnification and contribution against it. Celtic has established without opposition that plaintiff did not suffer a grave injury and therefore cannot maintain a claim for personal injuries against his employer pursuant to Workers Compensation Law § 11. Accordingly, plaintiff's claim against Celtic is severed and dismissed. Similarly, Harbour's third-party claims for common law indemnification and contribution against Celtic must also be dismissed.

Conclusion

In accordance herewith, it is hereby

ORDERED that motion sequence 6 is granted to the extent that plaintiff's Labor Law § 241[6] claim premised upon violations of all but Industrial Code § 23-5.1[i] is severed and dismissed;

ORDERED that motion sequence 6 is otherwise denied; and it is further

ORDERED that the court searches the record and dismissed Ford and Henegan's second third-party complaint against Harbour; and it is further

ORDERED that motion sequence 7 by Safway is granted in its entirety and all claims and crossclaim against Safway are severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence 8 by plaintiff for partial summary judgment on his Labor Law § 240[1] claim against Ford and Henegan on the issue of liability is granted; and it is further

ORDERED that motion sequence 9 by Celtic for summary judgment dismissing plaintiff's claims against Celtic and Harbour's third-party claims for common law indemnification and contribution against Celtic is granted and these claims are severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is here-by expressly rejected and this constitutes the decision and order of the court.

9/17/2024
DATE

LYNN R. KOTLER, 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