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. 156864/2018

EDDER O. MIRANDA VELASQUEZ,

Plaintiff,

MOTION DATE 11/29/2023, 11/29/2023, 12/05/2023

- v -

MOTION SEQ. NO. 004 005 006

THE RINALDI GROUP, LLC, KENMARE AND MULBERRY ASSOCIATES, LLC,

DECISION + ORDER ON MOTION

Defendant.

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THE RINALDI GROUP, LLC, KENMARE AND MULBERRY ASSOCIATES, LLC

Third-Party
Index No. 565703/2019

Plaintiff,

-against-

ECI CONTRACTING, LLC, BENCHMARK CONTRACTING, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 162, 167, 168, 169, 174, 177, 178, 181, 182, 183, 184, 186

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 163, 165, 175, 179, 185, 187, 191, 192, 193

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 164, 166, 170, 171, 172, 173, 176, 180, 188, 189, 190

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

There are three summary judgment motions pending in this personal injury action arising from a construction site accident. In motion sequence 4, plaintiff moves for partial summary judgment

on his Labor Law § 240[1] claim against the defendants The Rinaldi Group, LLC (Rinaldi) and Kenmare and Mulberry Associates, LLC (K&M). Rinaldi and K&M along with third-party defendant ECI Contracting LLC (ECI) oppose plaintiff's motion.

In motion sequence 5, ECI moves for summary judgment dismissing any and all claims asserted against it or alternatively for contractual indemnification against third-party defendant Benchmark Contracting, Inc. (Benchmark). Rinaldi, K&M and Benchmark oppose ECI's motion.

Finally, in motion sequence 6, Rinaldi and K&M move for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claim, as well as against ECI and Benchmark for contractual indemnification, common law indemnification and breach of contract. Rinaldi and K&M further seek summary judgment dismissing all counterclaim or crossclaims asserted against them. ECI opposes Rinaldi and K&M's motion.

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

Applicable standard

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]).

At the outset, Rinaldi and K&M's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted without opposition. The court will first consider the facts and arguments relevant to plaintiff's claims.

Relevant facts as to plaintiff's claims

Plaintiff's accident occurred on March 26, 2018. On that date, plaintiff was working at a construction project located at 75 Kenmare Street, New York, New York (the project). The subject premises was owned by K&M, which hired Rinaldi as GC and construction manager for the project.

Although plaintiff could not recall the name of his employer, Benchmark's owner, Alan Raftery, testified that Benchmark employed plaintiff. Benchmark was retained by ECI Contracting to

perform concrete work at the project. At the time of the accident, plaintiff was building stairs that were poured with cement.

Plaintiff's accident occurred as he was taking down a pole that was used as part of the "form-work" as supporting material. Specifically, plaintiff was standing on a six-foot A-frame fiberglass ladder, which plaintiff had used earlier that day to remove approximately 20 poles. Plaintiff was also wearing a safety harness and was tied off to a nearby shoring pole at a lock point which was indisputably not secured. Plaintiff testified at his deposition as follows:

Q. … Did you have to crouch or bend in order to hold the pole on the left?

A. Yes, because it was moving. The entire ladder was moving, so I was thinking to prevent – in case this ladder falls, I will hold to it.

Q. All right. Mr. Velasquez, would it be correct that when you were on the ladder, your feet were approximately four feet above the ground; is that correct?

A. Exactly.

…

Q. And why did you choose to hold the left-sided pole at that particular location?

A. Because I was moving. Because the ladder was moving, and I thought for me not to fall at once, I was grabbing it.

Q. Okay. Before your accident happened, did the ladder move at all?

A. Yes.

Q. Okay. Before, I asked you if there were any problems that you had while using the ladder and you told me "no." Is that correct, or is that incorrect?

A. Exactly.

…

Because before, I said that I had no problems with the ladder, and it was moving. And now – and I said it was not moving, but it was moving. And

now, thinking about it, analyzing it, every time when one is in the ladder, the ladder is moving when one is moving.

...

Q. So what was the purpose of putting your left hand on that pole?

A. For that same reason. Because I was going to remove the nails form the other pole and because the ladder was moving, that's why I didn't want to fall to the other side and to avoid falling and be secure. ...

Q. Was the ladder tipping to the left side?

A. Exactly.

...

Q. Is the only thing that caused the ladder to tip to the left the movement of your own body?

A. Exactly.

After the ladder tipped to the left, plaintiff grabbed a pole which he didn't realize was not locked correctly. That pole then collapsed, and plaintiff testified that "it crushed my hand, hit my hand." As a result, plaintiff injured two fingers on his left hand – his index and middle fingers. In his bill of particulars, plaintiff asserts, *inter alia*, that he sustained a crush injury, a laceration requiring sutures, non-displaced facture and underwent surgery on his left index finger on April 4, 2018.

There is a factual dispute as to how plaintiff's accident exactly occurred. Plaintiff testified:

Q. After you touched the pole on the left side of the ladder with your left hand, what happened next?

A: Well, when I grabbed the pole like this (indicating). I did not notice that - sorry. I noticed that it was not locked correctly, and it fell at once, and it crushed my hand, hit my hand.

Q: Okay. And what did you see or observe that makes you believe it was not locked correctly? A: Because when I noticed when it fell at once, I saw it that it was not locked correctly. That's why the pole fell down at once.

...

Q: Now when you say the pole fell, do you mean it fell over, or do you mean that the smaller section of the pole fell into the larger section of the pole, or something else?

A: The small part fell into the bigger part, and I had my hand almost at that place, and that's when it squeezed my hand because I was holding it there, and it hit my hand.

However, Benchmark and ECI's witnesses claim that the shoring post did not operate in the manner plaintiff testified to. Specifically, they claimed that the shoring post could not retract unless both the outer collar/ring were loosened, and a securing pin removed. Further, they claim that without the pin, the post would have collapsed due to gravity. Thus there is a dispute as to whether the shoring post could retract in the manner plaintiff testified.

Parties' arguments as to plaintiff's claims

Plaintiff maintains that the movement of the ladder, the failure of the shoring post to remain erect and the fact that the shoring post was not secured, were all violations of Labor Law § 240(1) which proximately caused plaintiff's injury. Defendants contend that plaintiff was given proper protection as the ladder was not faulty and did not fail and it was only plaintiff's improper use of the ladder which caused it to move. Defendants further argue that plaintiff has not shown the shoring post was required to be secured for the purposes of the undertaking and that plaintiff's description of the accident is an impossibility.

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

The factual dispute regarding how plaintiff's accident occurred precludes summary judgment in favor of plaintiff. A jury could find plaintiff's account of the accident incredible in light of

conflicting testimony as to what would have happened if plaintiff pulled on the pole as he claims. Given this conflict, a jury could further discredit plaintiff's testimony about the ladder shifting and tilting as he claims.

Assuming *arguendo* that there wasn't a factual dispute about how plaintiff's accident occurred, the question is whether plaintiff may recover under Section 240[1]. Plaintiff has presented evidence in the form of his own sworn testimony that the ladder he was provided was not adequate for the task he was directed to perform. As a result of being provided an inadequate safety device, the operation of gravity on the pole caused it to fall and the height differential between the pole's starting position and where it landed, crushing plaintiff's hand, is sufficient to bring plaintiff's accident within the ambit of Section 240[1]. For at least these reasons, plaintiff's Section 240[1] claim awaits trial.

Remaining facts and arguments

The court now turns to the parties' remaining arguments. Rinaldi seeks summary judgment on their third-party claims against ECI and Benchmark for contractual indemnification, common law indemnification and breach of contract, as a matter of law and dismissing all counterclaims or cross-claims asserted against them. Meanwhile, ECI moves for summary judgment dismissing all claims asserted against it or alternatively for contractual indemnification against Benchmark.

Rinaldi entered into a contract with ECI which provides in relevant part as follows:

> The Trade Contractor (ECI) shall, to the fullest extent permitted by law and at its own cost and expense, indemnify and defend the Construction Manager (Rinaldi), the Architect, the Owner (K&M)… (the "Indemnitees"), and save them harmless from and against any and all claims, damages, losses, liabilities, suits, judgments,

> actions and all expenses (including attorneys fees' and disbursements) arising out of any act, error or omission or breach of the Trade Contract or infringement of any patent right by the Trade Contractor or any of its lower-tier trade contractors or suppliers of any tier in connection with the performance of the Work hereunder or otherwise arising out of, in connection with or as a consequence of the performance of the Work hereunder; provided that nothing herein shall require the Trade Contractor to indemnify or hold harmless an Indemnitee hereunder to the extent such claim is caused by the negligence of such Indemnitees. The foregoing indemnity shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist in favor of any Indemnitees hereunder. The foregoing indemnity shall include bodily, without limitation, injury and death of any employee of the Trade Contractor and shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable under any applicable workers compensation, disability benefits or other similar employee benefits acts… (Id. at Art. 12.2).

Meanwhile, Rinaldi entered into a subcontract with Benchmark which provides in pertinent part as follows:

> To the fullest extent permitted by the applicable law governing this Subcontract, the Subcontractor shall indemnify, protect, defend and save harmless the Contractor, the Contractor's sureties, if any, the Owner and all other entities Indemnitees as listed in the Prime Contract that the Contractor must indemnify under the Prime Contract, from and against any loss, damage, injury, cost or expense; and from and against any Claim, demand, liability, lawsuit, judgment, action or other proceeding arising from, to arise from, in connection with or as a result of any of the following:
>
> > 1. The negligent acts or omissions of the Subcontractor, its agents, servants, officers, employees, sub-Subcontractors or suppliers of any tier or any other person acting at the Subcontractor's request, subject to its direction, or on its behalf;
> >
> > 2. The loss of life or property, or injury or damage to the person, body or property of any person or persons whatsoever, that arises or results directly or indirectly arising out of or occurring in connection with the performance of its Work, the scope of its Work or the failure to fully and completely carry out the terms of the Subcontract by Subcontractor, its sub-subcontractors or suppliers (of any tier), its agents, servants, officers, employees, or any other person acting at the Subcontractor's request, subject to its direction, or on its behalf;…
>
> 11.2 In the event any such Claim, demand, liability, lawsuit, judgment, action or other proceeding , damage, or injury be made or asserted or threatened or

> incurred, whether or not same be based upon Contractor's, Contractor's surety, the Owner's or other Indemnitee's alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of the Contractor, the Owner or other Indemnitee, Subcontractor agrees to defend, indemnify and hold harmless the Contractor, and Owner, and all other Indemnitees, their officers, agents, servants and employee from and against any liability, loss, damage, or expense (including attorneys' fees, and including cost and attorney's fees incurred in enforcing this Indemnity). Notwithstanding the foregoing, whenever there is a provision in the applicable law governing this Subcontract making void and unenforceable any such indemnification of an indemnitee hereunder where such indemnitee is negligent or at fault, in whole or in part, then and only in such event such indemnification of an indemnitee hereunder shall apply only to the extent permitted by such applicable law but nothing herein set forth shall be deemed to preclude the indemnification of an indemnitee hereunder from any of the foregoing damages caused by, arising out of, resulting from, or occurring in connection with the negligence or any other fault of a party other than the indemnitee, whether or not such indemnitee(s) is partially negligent or at fault. Subcontractor's obligation under Article 11 shall not be limited by the provision of any worker's compensation or similar act.

"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]).

There is no dispute that neither Rinaldi nor Kenmare exercised supervision and control over the means and methods of plaintiff's work. Further, it is undisputed that plaintiff was a Benchmark employee performing work in furtherance of ECI and Benchmark's contracted for scope of work at the project and that Benchmark provided all equipment and directed plaintiff's work. Thus,

both indemnification provisions contained in ECI and Benchmarks contracts were triggered by the happening of plaintiff's accident.

The court rejects ECI's argument that there is a question of fact "as to whether Rinaldi's direction, control and level of oversight over the safety of the workers on site rises to the level of independent negligence on the part of Rinaldi." Although Rinaldi had a safety coordinator and superintendent onsite, there is no evidence from which a reasonable factfinder could conclude that Rinaldi was negligent in the occurrence of plaintiff's accident. Benchmarks' similar argument is rejected for the same reasons. Accordingly, defendants' motion sequence 6 is granted to the extent that they are granted summary judgment on their crossclaims for contractual indemnification against ECI and Benchmark and ECI's motion for summary judgment dismissing this claim is denied.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]). Although Rinaldi and K&M have demonstrated their freedom from active negligence, they have not established that either ECI or Benchmark were negligent in connection with plaintiff's accident. Accordingly, defendants are not entitled to summary judgment on their claim for common law indemnification.

Finally, Rinaldi and K&M have established that both ECI and Benchmark were required to procure and maintain general primary and excess liability insurance coverage under their respective contracts. ECI has provided proof that it satisfied its insurance requirements. Benchmark, however, has not. Instead, Benchmark argues that defendants have not met their burden of proof, which the court disagrees. Accordingly, Rinaldi and K&M's motion is further granted to the extent that they are awarded summary judgment on their claim for breach of contract against Benchmark.

The balance of Rinaldi and K&M's motion seeks dismissal of the various crossclaims asserted by ECI and Rinaldi against defendants, to wit, for contractual indemnification, common law indemnification, contribution and breach of contract. Since neither ECI nor Benchmark have pointed to a contract provision which they claim were breached by defendants, and defendants have otherwise demonstrated their freedom from negligence, all crossclaims and third-party claims against Rinaldi and K&M are hereby severed and dismissed.

The court is not going to dismiss unspecified claims or crossclaims, thus to the extent that any party has argued that such unspecified claims should be dismissed, that argument is rejected.

Finally, the court considers ECI's request for contractual indemnification against Benchmark. The contract between ECI and Benchmark provides as follows:

> To the fullest extent permitted by law, [Benchmark] shall defend, indemnify and hold harmless the Owner, ECI Contracting, LLC and all other additional insureds...from and against any and all claims...brought or assumed against any of the indemnitees by any person or firm, arising out of or in connection with or as a result or consequence of the performance of the Work of [Benchmark] under this

> Agreement...but only to the extent contributed to by the acts or omissions of [Benchmark] or any person or entity employed, either directly or indirectly, by [Benchmark].

Since there is no dispute that plaintiff's accident arose out or in connection with or as a result or consequence of the performance of Benchmark's work under the relevant agreement, and there is no dispute that ECI was not negligent in connection with plaintiff's accident, ECI is also entitled to summary judgment on its crossclaim for contractual indemnification against Benchmark.

Accordingly, it is hereby

ORDERED that plaintiff's motion sequence 4 is denied; and it is further

ORDERED that ECI's motion sequence 5 is granted to the extent that ECI is granted summary judgment on its crossclaim for contractual indemnification against Benchmark; and it is further

ORDERED that defendants' motion sequence 6 is granted to the following extent:

[1] plaintiff's Labor Law § 200 and common law negligence claims are severed and dismissed;

[2] defendants are granted summary judgment on their third-party claims for contractual indemnification against ECI and Benchmark; and

[3] defendants are granted summary judgment on their third-party claim for breach of contract for failure to procure insurance against Benchmark;

And it is further **ORDERED** that the balance of motions 4-6 are denied; and it is further

ORDERED that the issue of what amount third-party defendants ECI and Benchmark should reimburse defendants for defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and **determine**; and it is further

ORDERED that the issue of what amount third-party defendant Benchmark should reimburse third-party defendant ECI for defense costs incurred to date, with statutory interest, is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and **determine**; and it is further

ORDERED that defense counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the court.

11/18/2024
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