SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 157409/2020

MOTION DATE 03/19/2024

MOTION SEQ. NO. 007

STEVEN BORDONARO,

Plaintiff,

- v -

E.C. PROVINI CO., INC.,BATH & BODY WORKS, LLC,L BRANDS, INC, 441 LEXINGTON AVENUE CO. LIMITED PARTNERSHIP, L BRANDS STORE DESIGN & CONSTRUCTION, INC.,ELITE DELIVERY SYSTEMS, LLC, and GORDON PROPERTY GROUP,

DECISION + ORDER ON MOTION

Defendant.

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E.C. PROVINI CO., INC.

Third-Party
Index No. 596019/2020

Plaintiff,

-against-

CBI DRYWALL, CORP., ELITE DELIVERY SYSTEMS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 219, 224, 235, 236, 239, 240, 241, 242, 243, 244, 249, 250

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

Upon the foregoing documents, and after a final submission date of September 26, 2024 Defendants E.C. Provini Co. ("Provini"), Bath & Body Works, LLC ("BBW"), L Brands, Inc., L Brands Store Design and Construction, Inc. (collectively "Moving Defendants") motion for summary judgment dismissing Plaintiff's Complaint or alternatively granting summary judgment on its third-party claim for contractual indemnification against Third-Party Defendant CBI Drywall, Corp. ("CBI"), and dismissal of all crossclaims is granted in part and denied in part.

I. Background

On August 1, 2019, CBI employed Plaintiff as a carpenter at the Bath and Body Works at 441 Lexington Avenue (the "Site") (NYSCEF Doc. 176 at 13-14; 37; 50). Provini was the general contractor (*Id.* at 56). On the date of Plaintiff's accident, he was unloading cabinets and counters from a truck using a pallet jack (*Id.* at 107-108).[1] Plaintiff used a pallet jack to move a thousand-pound cabinet out of the truck (*Id.* at 209). Plaintiff lost control, and the weight of the cabinet pushed Plaintiff off the truck (*Id.* at 218-9; 232). As a result, Plaintiff allegedly fractured his left leg and tore his left rotator cuff. He now sues for damages pursuant to New York Labor Law §§ 240(1), 241(6), and 200.

II. 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]).

[1] Plaintiff referred in his deposition to the device as a "pump jack." However, multiple other parties, the Industrial Code, and First Department precedent refer to an instrument known as a "pallet jack." It is this Court's understanding that the pump jack or "pump truck" used by Plaintiff is a kind of pallet jack and the terms are used interchangeably.

B. Labor Law § 240(1)

The branch of the motion seeking dismissal of Plaintiff's Labor Law § 240(1) cause of action is denied. The Court of Appeals has instructed Courts to interpret Labor Law §240(1) liberally to accomplish its purpose of ensuring workers are properly protected against elevation related hazards (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). The First Department recently analyzed the insufficiency of pallet jacks as a safety device when workers move large loads from the back of trucks (*see Schoendorf v 589 Fifth TIC I LLC*, 206 AD3d 416, 417 [1st Dept 2022]) and found that a pallet jack was insufficient in view of the weight of the elevator platform and the force it was able to generate (*Id.* citing *Ali v Sloan-Kettering Inst. For Cancer Research*, 176 AD3d 561 [1st Dept 2019]; *see also Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491 [1st Dept 2017]). While Moving Defendants rely on the Court of Appeals case *Toefer v Long Is. R.R.*, 4 NY3d 399 (2005), they fail to apply the "force of gravity" test described in subsequent Court of Appeals case law (*see Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009]; *see also Ali v Sloan-Kettering, supra*). Here, it is Plaintiff's testimony that the force of gravity on the thousand-pound cabinet pushed him off the truck. Plaintiff and other witnesses testified that the accident could have been prevented had a forklift been provided, and that it was not infeasible to have a forklift on site (NYSCEF Doc. 180 at 42; 48-49).

C. Labor Law §241(6)

Moving Defendants' motion seeking dismissal of Plaintiff's Labor Law § 241(6) claim is granted in part and denied in part. Here, Plaintiff asserts a violation of Labor Law § 241(6) predicated on a violation of Industrial Code 23-1.5(c).[2] However, there is no evidence that the

[2] 12 NYCRR 23-1.5(c) states that "(1) [n]o employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition. (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon. (3) All

pallet jacks used by Plaintiff were defective – rather Plaintiff argues that the pallet jacks were insufficient, and he should have been provided a forklift. Because there is no evidence that the pallet jacks were defective, Industrial Code 23-1.5(c) is inapplicable. Moreover, Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code 23-1.27 is dismissed as the First Department has already found that section does not apply to pallet jacks (*Wegner v State Street Bank & Trust Co. of Connecticut Nat. Ass'n*, 298 AD2d 211 [1st Dept 2002]).

However, the motion is denied as it related to Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-9.8. Certain sections of this provision apply to pallet jacks and prohibit pallet jacks from being operated on uneven surfaces which would "make upsetting likely" (*see* 12 NYCRR § 23-9.8[d] and [e]). Here, Moving Defendants have not met their burden on summary judgment to show that there were no violations of 12 NYCRR § 23-9.8. Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-6.1[3] likewise survives as there is an issue of fact as to whether the cabinet was an "excess load" pursuant to § 23-6.1(d).

D. Labor Law § 200

The branch of the motion seeking dismissal of Plaintiff's Labor Law § 200 claim is granted in part and denied in part. Where a plaintiff's injury is caused by a dangerous condition, liability attaches if the owner or general contractor had actual or constructive notice of it (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). On the other hand, where an injury was caused by the manner and means of the work, including the equipment used, and owner or general contractor may be liable if they exercised supervisory control over the injury producing

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safety devices, safeguards and equipment in use shall be kept sound and operable and shall be immediately repaired or restored or immediately removed from the job site if damages."

[3] In pertinent part, 12 NYCRR 23-6.1(d) provides that "[m]aterial hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer."

work (*id.*). Here, there is no evidence that Bath & Body Works, LLC ("BBW"), L Brands, Inc., and L Brands Store Design and Construction, Inc., exercised any control over Plaintiff's work, nor is there evidence that Plaintiff's injury was caused by a dangerous condition on the premises. Therefore, the Labor Law § 200 claim is dismissed as to these Defendants. However, there is an issue of fact as to whether Provini's refusal to provide a forklift caused Plaintiff's accident.

E. Contractual Indemnification and Crossclaims

Because there are triable issues of fact as to Provini's own negligence, and there has been no finding of negligence against CBI, any grant of contractual indemnification against CBI is premature (*York v Tappan Zee Constructors,* LLC, 224 AD3d 527, 529 [1st Dept 2024]; *Bradley v NYU Langone Hospitals*, 223 AD3d 509, 511-512 [1st Dept 2024]). For the same reason, dismissal of any crossclaims for contribution and common-law indemnification is denied.

Accordingly, it is hereby,

ORDERED that Defendants E.C. Provini Co., Bath & Body Works, LLC, L Brands, Inc., and L Brands Store Design and Construction, Inc.'s, motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 240(1) claim is denied; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 200 claim is granted only as to Defendants Bath & Body Works, LLC, L Brands, Inc., and L Brands Store Design and Construction, Inc., and Plaintiff's Labor Law § 200 claims against these Defendants are dismissed; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 200 claim against Defendant E.C. Provini is denied; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claim predicated on violations of Industrial Code §§ 23-1.5 and 1.27 is granted, and is otherwise denied; and it is further

ORDERED that Defendants' motion for summary judgment on its third-party claim for contractual indemnification is denied, without prejudice, as premature; and it is further

ORDERED that Defendants' motion for summary judgment dismissing all crossclaims asserted against them is denied, without prejudice, as premature; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

1/24/2025
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