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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

Angello et al.

-v-

NYC School Construction Authority et al.

INDEX NO. 109625-06

MOTION DATE

MOTION SEQ. NO. 07

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED

DEC 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-14-11

MARCY S. FRIEDMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDGMENT ☐ SETTLE ORDER/JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

GIOACCHINO AUGELLO et al.,

Plaintiff(s),

- against -

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, et al.,

Defendant(s).

Index No.: 109625/2006

DECISION/ORDER

In this Labor Law action, plaintiff sues for injuries sustained when, while working at a construction site, he was struck by rebar as it was being unloaded from a truck. Defendants New York City School Construction Authority (SCA), New York City Board of Education a/k/a New York City Department of Education, the City of New York (collectively the "City defendants") and Whitestone Construction Corp. (Whitestone) move for summary judgment dismissing plaintiff's complaint and all cross-claims against them, and for summary judgment on their third-party claims for indemnification against third-party defendant Messina Asphalt Corp. (Messina). By separate motion, defendant Raw Equipment Corp. (Raw) moves for summary judgment dismissing plaintiff's negligence claim and all cross-claims against it.[1] Plaintiff does not oppose dismissal of his claims under Labor Law § 200 and for common law negligence against the City defendants and Whitestone.

The following material facts are undisputed: The SCA hired Whitestone as the general

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[1] By order dated July 20, 2009, this court granted Raw summary judgment dismissing plaintiff's complaint against it. By order dated December 23, 2009, this court granted plaintiff leave to reargue, and upon reargument, reinstated plaintiff's negligence claim against Raw.

contractor for a project at a New York City high school which included replacement of sidewalks. (See Aff. of Marie Graves [SCA's Senior Project Officer], ¶ 4.) Whitestone hired Messina to replace the sidewalks and perform concrete work at the project. (Id.) Plaintiff was employed by Messina.

At the time of plaintiff's accident, Messina was unloading a bundle of rebar from a dump truck it owned. The rebar was approximately 20 feet long, and 150 pieces of rebar were bound together. (P.'s Dep. at 46.) As the rebar was longer than the truck bed, the rebar was stacked at an angle, with the higher end of the load resting on top of the metal tailgate at the rear of the truck bed. (Id. at 45-48.)

Plaintiff was not assisting in the unloading of the rebar. (See P.'s Dep. at 38.) He was standing next to the front of the truck on the driver's side as the rebar was being unloaded. (Id. at 44.) The driver of the truck attests, and it is not disputed, that in order to unload the truck, "the dump bed needed to be raised until the bundle's front-end would be angled higher than the rear-end and could then be slid out of the rear of the truck." (Ingenito Aff. In Opp. To Raw's Motion [P.'s Opp.], ¶ 7.) He had to raise the dump bed to a height of approximately 15 feet in order to be able to slide the rebar out of the truck. (Id., ¶ 8.) The driver further attests that the accident occurred as follows: "Unloading from this elevation, the bundle hit the ground with enough force to cause the bundle to separate and catapult away from the dump truck. I witnessed some of the pieces of rebar strike the nearby wall and some of the pieces" struck plaintiff. (Id., ¶ 9.)

Labor Law § 240(1)

Labor Law §240(1) provides:

> All contractors and owners and their agents, * * * in the erection,

> demolition, repairing, altering, painting, cleaning or pointing of a building 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.) "[A]n accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff's fall. (Id. at 287-289.)

While section 240(1) should be construed liberally so as to effectuate its purpose, it is well settled that the statute applies only to "elevation-related hazards." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Rocovich, 78 NY2d at 514.) The hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of 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, 78 NY2d at 514; Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001].)

As a threshold matter, the court rejects defendants' contention (See City Ds.' Memo. In Support at 22) that the protection of Labor Law §240(1) does not apply because the rebar was not being hoisted or secured at the time of plaintiff's accident. It is now settled that falling object liability "is not limited to cases in which the falling object is in the process of being hoisted or secured." (Quattrocchi v F.J. Sciame Constr. Co., 11 NY3d 757, 758-759 [2008]; see also Outar v City of New York, 5 NY3d 731 [2005], affg 11 AD3d 593 [2004]; Vargas v City of New York, 59 AD3d 261 [1st Dept 2009].)

The court also rejects defendants' apparent contention that plaintiff may not recover under § 240(1) because he was not unloading the rebar at the time of his accident. Plaintiff gave undisputed testimony that he was at the truck while it was being unloaded because he was waiting to load old cement onto the truck. (See P.'s Dep. at 38.) As it is uncontested that plaintiff was injured during the course of his employment as a construction worker, he is entitled to the protection of section 240(1) pursuant to its express terms.

The City defendants further argue that there was not a significant elevation differential between plaintiff and the load of rebar at the time of the accident. (See Ds.' Memo. at 26.) As the Court of Appeals recently held, a Labor Law § 240 claim is not categorically precluded by the mere fact that the falling object and the plaintiff were on the same level. (See Wilinski v 344 E. 92nd Hous. Dev. Fund Corp., ___ NY3d ___, 2011 NY Slip Op. 07477.) Moreover, it is undisputed in the instant case that the truck bed was in fact elevated to a height of 15 feet.

As defendants correctly contend, "Labor Law § 240(1) generally does not apply when construction workers are injured by material which falls as it is being loaded onto or unloaded from a truck." (Farrington v Bovis Lend Lease LMB, Inc., 51 AD3d 624, 625 [2d Dept 2008].)

Moreover, "[t]he task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed." (Jacome v State of New York, 266 AD2d 345, 346 [2d Dept 1999].) An elevation-related risk will be found, however, where the unloading of the truck involves the elevation of the materials that are being unloaded. (See Fontaine v Juniper Assocs., 67 AD3d 608, 609 [1st Dept 2009] [elevation-related risk involved where lumber that was being unloaded was "stacked at heights above plaintiff's head"]; Kobetitsch v P.M. Maint., 308 AD2d 510 [2d Dept 2003] [triable issue as to existence of elevation-related risk found where there was conflicting evidence as to whether gantry that was being loaded onto flatbed truck was 7 to 12 feet off the ground, or just a few inches above the truck bed, at the time it struck plaintiff]; see also Francis v Foremost Contr. Corp., 47 AD3d 672 [2d Dept 2008]. Compare Webster v Wetzel, 262 AD2d 1038 [4th Dept 1999] [no elevation-related risk where bed of truck not elevated at time of accident but, rather, rear gate of truck gave way and dumped materials onto plaintiff]; Jacome v State of New York, 266 AD2d 345, supra [no elevation-related risk where material that was being unloaded had not yet been lifted off truck bed, but slipped sideways and hit plaintiff].)

Here, as found above, there is no dispute that the bed of the truck had been elevated to the height of approximately 15 feet before the rebar fell from the truck bed, striking plaintiff. The court accordingly holds that the rebar was positioned at a sufficient elevation on the truck bed to pose an elevation-related risk from its unloading.

Notwithstanding the elevated height of the rebar, defendants fail to submit any evidence to demonstrate that Messina's method of unloading the rebar, without the use of a protective device, was adequate to protect plaintiff from the elevation-related risk. In short, defendants fail

to make a prima facie showing that a safety device was not required in order to unload the rebar from the truck. (See Fontaine, 67 AD3d at 609; see also Farrington, 51 AD3d at 626.) Defendants' motion must accordingly be denied.

Labor Law § 241(6)

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
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> 6. All 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.

It is well settled that this statute requires owners and contractors and their agents "'to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law §241(6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

In opposition to defendants' motion to dismiss plaintiff's section 241(6) claim, plaintiff relies solely upon Industrial Code § 23-2.1(a)(2).[2] (See P.'s Opp.,¶ 31, n 1.) While this section,

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[2] Section 23-2.2(a)(2) provides:
Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any

governing storage of material or equipment, is sufficiently specific to impose liability under § 241(6) (see Aragona v State of New York, 74 AD3d 1260 [2d Dept 2010]; Rosado v Briarwoods Farm, Inc., 19 AD3d 396 [2d Dept 2005]), it is inapplicable to the facts in this action. It is undisputed that the truck was being unloaded at the time of plaintiff's accident, and that the rebar was not being stacked or stored near the edge of the truck before the accident. (See McCombs v Cimato Enters., Inc., 20 AD3d 883 [4th Dept 2005]. Compare Fontaine, 67 AD3d at 609.) Accordingly, plaintiff's claim under § 241(6) should be dismissed.

Raw Equipment Corp.'s Motion

Raw moves for summary judgment dismissing plaintiff's negligence claim against it, on the grounds that it did not negligently load the rebar into the truck and, in the alternative, that any causal connection between the loading and plaintiff's accident was superseded by Messina's unloading of the truck. (Raw Aff. In Support, ¶¶ 52-53.)

In support of its contention that it did not negligently load the rebar, Raw submits the deposition of Luigi Messina, Messina's Secretary at the time of the accident, who testified that in his experience, it is proper to load rebar into a truck so that any overhang extends beyond the rear of the dump bed, rather than forward over the front of the truck. (See Dep. of L. Messina [Raw's Motion, Ex. G] at 67-68.) In opposition, plaintiff submits the affidavit of Messina's driver, Ingenito, who attests that Raw improperly positioned the rebar, and that it should have been positioned so that the higher end of the rebar extended over the front of the truck bed, rather than over the rear. (Ingenito Aff., ¶ 11.)

While Raw contends that the court should disregard Ingenito's affidavit on the grounds

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edge of a floor, platform or scaffold as to endanger any person beneath such edge.

that he was not disclosed an expert (Raw Aff. in Reply, ¶5), plaintiff does not claim, any more than Raw claims in offering Luigi Messina's testimony, that Ingenito is an expert. Moreover, Carmelo Messina, founder of Messina and Luigi Messina's father, testified that the custom and practice in the industry is to load rebar that is longer than the truck bed so that it extends over the front of the truck. (See Dep. of C. Messina [City Ds.' Motion, Ex. J], at 56-58.) Given this conflicting testimony, Raw fails to eliminate triable issues of fact as to whether its loading of the truck was negligent.

To the extent that Raw contends that Messina's unloading of the rebar constitutes a superseding cause of the accident, this contention is without merit. The unloading itself was foreseeable, whereas an intervening act is "not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct" so as to be "a superseding act which breaks the causal nexus." (Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315 [1980].) Further, while Raw argues that it was unforeseeable that the truck would be unloaded so close to a wall as to cause injury (see Raw Aff. In Support, ¶ 56), this contention is based solely on the affirmation of Raw's attorney which lacks probative value. While the rebar hit the wall, it is undisputed that it catapulted from the truck as a result of the positioning of the rebar and the need to elevate the truck bed. (See Ingenito Aff. in Opp. To Raw Motion, ¶¶ 9, 11.)

Raw's motion for summary judgment must accordingly be denied. Raw also moves for dismissal of all cross-claims against it. However, it fails to argue the basis for, or to submit any evidence in support of, its contention that these claims should be dismissed.

Indemnification

The City defendants and Whitestone move for summary judgment on their third-party

claims against Messina for contractual indemnification. Article 18 of Messina's contract with Whitestone provides in pertinent part:

> "The Subcontractor shall indemnify and hold the Contractor harmless from all liability, loss, cost or damage, including attorneys' fees from claims for injuries or death from any cause, while on or near the Project, of its employees or the employees of its subcontractors, or by reason of claims of any person or persons, including the Contractor, for injuries to person or property, from any cause occasioned in whole or in part by any act or omission of the Subcontractor . . . ."

(City Ds.' Motion, Ex. M.)[3] Thus, the indemnification provision requires Messina to indemnify defendants when a claim arises out of Messina's work, even if Messina has not been negligent. (See Brown v Two Exch. Plaza Partners, 76 NY2d 176 [1990]; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1st Dept 1999].)

As noted above, plaintiff does not oppose dismissal of his claims against the City defendants and Whitestone under Labor Law § 200 and for common law negligence. Moreover, the City defendants and Whitestone made a prima facie showing on their motion that they did not supervise and control Messina's work or have notice of any unsafe condition involving the unloading of the rebar. Accordingly, the City defendants' and Whitestone's motion for contractual indemnification against Messina should be granted on condition that the City defendants and Whitestone are held vicariously liable at trial to plaintiff under Labor Law § 240(1).

In so holding, the court rejects Messina's contention that the indemnification provision is unenforceable pursuant to GOL 5-322.1(1) because it permits indemnification of Whitestone and the City defendants for their own negligence. It is well settled that even where an indemnification provision is found to violate GOL 5-322.1(1), it is enforceable if the party

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[3] Although the City defendants are not named indemnitees under this provision, Messina does not argue that it is not obligated for that reason to indemnify them.

seeking indemnity is found to be free of negligence. (See Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 n5 [1997]. See also Hawthorne v South Bronx Community Corp., 78 NY2d 433 [1991]; Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990].)

To the extent the City defendants and Whitestone seek common law indemnification against defendant Raw, this branch of their motion should be denied. As held above, triable issues of fact exist as to whether Raw negligently loaded the rebar. (See Correia, 259 AD2d at 65.) The City defendants and Whitestone also fail to address the branch of their motion seeking dismissal of all cross-claims against them. Accordingly, this branch of their motion will be denied.

It is hereby ORDERED that the motion of defendants New York City School Construction Authority (SCA), New York City Board of Education a/k/a New York City Department of Education, the City of New York and Whitestone Construction Corp. for summary judgment is hereby granted only to the extent that it is

ORDERED that plaintiff's claims against them under Labor Law §§ 241(6) and 200, and for common law negligence are dismissed; and it is further

ORDERED that New York City School Construction Authority (SCA), New York City Board of Education a/k/a New York City Department of Education, the City of New York and Whitestone Construction Corp. are awarded judgment as to liability against defendant Messina Aslphalt Corp. for contractual indemnification, on condition that the City defendants and Whitestone are held vicariously liable at trial to plaintiff under Labor Law § 240(1), and an assessment of damages shall be held at the time of trial; it is further

ORDERED that the motion of Raw Equipment Corp. is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 14, 2011

MARCY FRIEDMAN, J.S.C.