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SHORT FORM ORDER

INDEX No. 07-7740
CAL No. 11-00596OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 7-14-11 (#005)
MOTION DATE 8-4-11 (#006)
ADJ. DATE 11-2-11
Mot. Seq. # 005 - MotD
006 - MD

---X

MICHAEL SHUCK and TINA SHUCK,

Plaintiffs,

- against -

SHARON S. WANG, REX Y. WANG and JMS DEVELOPMENT CORP.,

Defendants.

---X

JMS DEVELOPMENT CORP.,

Plaintiff,

- against -

PICONE ENERGY SYSTEMS, LLC.,

Defendant.

---X

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Upon the following papers numbered 1 to 46 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 21 - 32; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 33 - 35; 36 - 37; Replying Affidavits and supporting papers 38 - 41; 42 - 46; Other JMS' memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant/third-party plaintiff JMS Development Corp. and the motion by third-party defendant Picone Energy Systems, LLC are consolidated for the purposes of this determination; and it is

ORDERED that the motion by third-party defendant Picone Energy Systems, LLC for, inter alia, summary judgment dismissing the third-party complaint against it is denied; and it is

ORDERED that the motion by defendant/third-party plaintiff JMS Development Corp. for, inter alia, summary judgment dismissing plaintiffs' complaint against it is decided as follows.

Plaintiff Michael Shuck commenced this action to recover damages for personal injuries he allegedly sustained on May 13, 2004, while working at a construction site of a new home located at 173 Clancy Road, Manorville, New York. Plaintiff allegedly was injured when he tripped over a wooden stake that protruded from sand covering the surface of a pathway next to the building. Defendant JMS Development Corp. ("JMS"), the owners of the subdivision on which the subject premises was built, was responsible for the construction of the new home and acted as the general contractor for the project. Upon completion of the project, the premises allegedly was sold to defendants Sharon Wang and Rex Wang. At the time of the accident plaintiff was an employee of third-party defendant Picone Energy Systems, LLC ("PES"), a subcontractor hired to install a fireplace in the premises. The wooden stake over which plaintiff tripped was used to mark the location of a cesspool installed by the septic system subcontractor, Ed Cork & Sons Inc. ("ECS"). By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also asserts a claim by plaintiff's wife, Tina Shuck, for loss of consortium and reimbursement of medical expenses.

On March 12, 2008, JMS commenced a third-party action against PES alleging causes of action for contribution, and common law and contractual indemnification. PES joined issue and asserted counterclaims against JMS for contribution and common law indemnification. Although PES filed a second third-party action seeking similar relief against ECS, the parties subsequently executed a stipulation discontinuing the action and removing ECS' name from the caption. The Court's records indicate that defendants Sharon Wang and Rex Wang have not appeared in the matter.

JMS now moves for summary judgment dismissing plaintiff's complaint on the grounds Labor Law §240(1) is inapplicable under the circumstances of this case, and that it neither exercised control over plaintiff's work nor had actual or constructive notice of the alleged dangerous condition. JMS further asserts that plaintiff's claim under Labor Law § 241(6) must be dismissed, as it is premised on inapplicable sections of the New York Industrial Code. Alternatively, JMS seeks judgment in its favor over and against PES for contractual indemnification and an award of costs and attorney fees. Plaintiffs oppose the branches of JMS's motion seeking summary judgment dismissing their claims under Labor Law §§241(6) and 200, arguing triable issues exist as to whether JMS controlled and supervised plaintiff's work at the time of the accident, and whether it created or had actual or constructive notice of the dangerous condition. Plaintiffs further assert that triable issues exist as to whether JMS violated sections 23-1(e)(1) and 23-1.7(e)(2) of the New York Industrial Code.

PES moves for summary judgment dismissing the third-party complaint, arguing that JMS's claims for contribution and common law indemnification are barred by section 11 of the Workers' Compensation Law, since plaintiff did not suffer a grave injury as a result of the accident. PES further avers that JMS was solely responsible for plaintiff's accident and, therefore, it is not obligated and cannot be made to indemnify JMS for its own negligence. Alternatively, PES requests, pursuant to CPLR 603, an order severing the third-party action against it. In opposition, JMS argues that PES's motion should be denied, as PES failed to submit any evidence that JMS or its employees created or had actual or constructive notice of the alleged dangerous condition, or that it supervised or controlled plaintiff's work at the time of the accident. Additionally, JMS asserts that it is entitled to contractual indemnification, as the conduct giving rise to plaintiff's injuries arose out of the work performed by PES.

During his examination before trial, plaintiff testified that the accident occurred while he was walking along a pathway toward his vehicle, which had been parked on the street abutting the premises. He testified that unlike the first time he visited the construction site, the cesspool hole was no longer visible, and the premises appeared well groomed with a well defined pathway. Plaintiff testified that he was carrying a ladder on his right shoulder and looking straight ahead when his left foot came in contact with a small wooden stake protruding approximately two or three inches above the surface of the walkway. He testified that the wooden stake was located near the cesspool cover, and that its jagged edge led him to believe that it had been forcibly snapped in two. He also testified that the stake appeared to be a standard two-by-two inch spindle that was used for the installation of deck railings. Plaintiff further testified that he had no supervisor at the construction site, and that no one controlled or supervised his work while he was installing the fireplace.

During his examination before trial, Joseph Simeone testified that he was the president of JMS at the time of the plaintiff's accident, and that JMS was the owner and general contractor of the subject construction project. He testified that he would visit the premises once or twice a week to inspect the progress of the work done by subcontractors, and that JMS was solely responsible for the safety and clean-up of the construction site. Simeone testified that JMS's work at the construction site included, among other things, grading and landscaping the property, and installing the exterior decks. He testified that he placed markers near the cesspool to prevent anyone from driving over its cover, and that the markers consisted of two-by-four wooden posts which protruded four or five feet above the ground. He testified that he painted the top of the wooden posts orange, and that they would generally be pulled from the ground before the premises was landscaped. Simeone testified that he did not recall when or by whom the posts were removed, and that he did not receive any complaints about their presence at the construction site. He further testified that while he was aware of previous occasions where similar wooden posts have been broken by someone operating heavy machinery at the construction sites, he was the only one who operated a bulldozer used to grade the subject premises, and he did not recall running over any of the posts. An affidavit by Simeone further states that a review of a diary he kept during the construction of the residence indicates that he inspected the premises approximately one day prior to plaintiff's accident, and that there was no mention of him observing any wooden posts or stakes protruding from the sand near the location of the cesspool cover during such inspection.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Uni. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the Court notes that plaintiffs have voluntarily withdrawn their claim under Labor Law §240 (1) on the grounds that the accident, which occurred as a result of a ground level tripping hazard,

was not among the type of perils Labor Law §240 (1) was designed to prevent (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Favreau v Barnett & Barnett, LLC***, 47 AD3d 996, 849 NYS2d 691 [3d Dept 2008]). Therefore, the branch of JMS's motion seeking summary judgment dismissing plaintiffs' claim under Labor Law §240 (1) is denied, as moot.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner may be held liable in common-law negligence and under Labor Law §200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]).

Here, viewing the evidence in a light most favorable to plaintiffs, JMS has failed to establish its prima facie entitlement to summary judgment as a matter of law (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Andre v Pomeroy***, *supra*). Although JMS's president testified that he did not observe the alleged dangerous condition during an inspection of the premises he conducted one day prior to the accident, he indicated that he placed wooden posts near the cesspool cover and was aware of previous occasions where pieces of such posts were left protruding above ground because they were run over by heavy machinery. Despite denying that he ran over the wooden posts when he was grading the premises, JMS's president further testified that he did not know when, how, or by whom the wooden posts were removed. Considering his additional testimony that JMS was solely responsible for the clean-up and grading of the premises, and that no one else operated heavy machinery at the construction site, a triable issue exists as to whether JMS created the alleged dangerous condition (*see* ***Baillargeon v Kings County Waterproofing Corp.***, 60 AD3d 881, 875 NYS2d 576 [2d Dept 2009]; ***DiSalvo v Young Men's Christian Assn. of City of New York***, 51 AD3d 711, 858 NYS2d 310 [2d Dept 2008]; ***Fernez v Kellogg***, 2 AD3d 397, 767 NYS2d 864 [2d Dept 2003]). The branch of the motion by JMS for summary judgment dismissing plaintiffs' claim under Labor Law §200, therefore, is denied.

As for plaintiffs' claim under Labor Law 241(6), Labor Law § 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Ramos v Patchogue-Medford School Dist.***, *supra*; ***Hricus v Aurora Contrs., Inc.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to

have been breached must be a specific, positive command and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, 60 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Plaintiffs alleges in their bill of particulars violations by defendants of the following sections of the Industrial Code: 12 NYCRR §§ 23-1.7(d) (Slipping Hazards), 23-1.7(f) (Vertical Passages), 23-2.7(Stairway Requirements), 23-1.15(Safety Railings), 23-1.7 (e) (1) (Tripping Hazards in Passageways) and 23-1.7 (e) (2) (Tripping Hazards).

Here, JMS established, as a matter of law, their entitlement to summary judgment dismissing plaintiffs' claim alleging violations of 12 NYCRR §§ 23-2.7, 23-1.7 (f), and 23-1.15, as those provisions, which set forth safety requirements for stairways, vertical passages, and safety railings, are inapplicable under the circumstances of this case. 12 NYCRR § 23-1.7 (d), which provides for protection from slipping hazards caused by slippery conditions such as snow, ice, water or grease, also is inapplicable. Additionally, JMS demonstrated that the dirt walkway on which plaintiff allegedly tripped was located in a common area at the front of the building and, therefore, did not constitute a passageway for the purposes of 12 NYCRR § 23-1.7 (e) (1) (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, *supra*; ***Hertel v Hueber–Breuer Constr. Co.***, 48 AD3d 1259, 850 NYS2d 806 [4th Dept 2008]; ***Stairs v State St. Assoc.***, 206 AD2d 817, 615 NYS2d 478 [3d Dept 1994]). Plaintiff, who did not oppose dismissal of the claims for violation of these sections of the Industrial Code, failed to raise any triable issues. Nevertheless, JMS failed to establish, prima facie, the inapplicability of 12 NYCRR 23-1.7 (e) (2). Inasmuch as plaintiff allegedly tripped over wooden debris protruding from a dirt walkway where excavation and landscaping work were performed, and which had been utilized by workers carrying construction material and equipment to-and-from other areas of the worksite, a triable issue exists as to whether 12 NYCRR §23-1.7 (e) (2) has been violated (*see* ***Smith v Hines GS Props. Inc.***, 29 AD3d 433, 815 NYS2d 82 [1st Dept 2006]; ***Laboda v VJV Dev. Corp.***, 296 AD2d 441, 745 NYS2d 67 [2d Dept 2005]; ***Canning v RFD 82nd St.***, 285 AD2d 439, 727 NYS2d 336 [2d Dept 2001]). Accordingly, the branch of the motion by JMS for summary judgment dismissing plaintiff's cause of action under Labor Law § 241 (6) is granted to the extent that plaintiffs' claims alleging violations of 12 NYCRR §§ 23-2.7, 23-1.7 (f), and 23-1.15, 23-1.7 (d), and 23-1.7 (e) (1) are dismissed, and is otherwise denied.

With regard to the branch of JMS' motion for a judgment in its favor over and against PES on its third-party claims for contribution and/or contractual or common law indemnification, the parties' indemnification agreement states, in pertinent part, as follows:

> To the extent fully permitted by law the subcontractor agrees to hold the Contractor, including the contractor's agent and employees harmless from and against any and all losses, claims, damages, penalties, or expenses, including reasonable attorneys' fees arising from bodily injury or death to any person and/or property damage including loss of use arising out of or in any way relating to the work performed or omission caused by the subcontractor, agents, or employees of the subcontractor as well as subcontractors hired by the subcontractor under this contract

New York's Worker's Compensation Law §11 permits third-party indemnification claims against employers where such claim is based upon a provision in a written contract entered into prior to the

accident by which the employer expressly agreed to indemnification (*see* ***Rodrigues v N&S Blg. Contrs. Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Moreover, General Obligations Law §5-322.1 does not prohibit contractual indemnification where, as here, the parties agreement requires indemnification "[t]o the fullest extent of the law," thereby prohibiting PES from indemnifying JMS for JMS' own negligence (*see* ***Brooks v Judlau Contr. Inc.***, 11 NY3d 204, 869 NYS2d 366 [2008]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]). Nevertheless, since triable issues exist as to whether JMS's negligence, if any, caused or created the accident, it is premature at this juncture to reach the issues of contribution or contractual and common law indemnification (*see* ***McAllister v Construction Consultants L.I. Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]; ***Erickson v Cross Ready Mix, Inc.***, 75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]). Therefore, the branch of JMS' motion seeking summary judgment on its third-party claims against PES for contribution and/or contractual or common law indemnification is denied.

Based on the foregoing, the motion by PES for summary judgment dismissing the third-party complaint is denied, as premature (*see* ***Tarpey v Kolanu Partners, LLC***, 668 AD3d 1097, 892 NYS2d 447 [2d Dept 2009]; ***D'Angelo v Builders Group***, 45 AD3d 522, 524-525, 845 NYS2d 814 [2007]). It is noted that contrary to PES's assertion that the subject indemnification agreement is inapplicable because plaintiff's injury did not arise out of work it performed on the construction site, the indemnification agreement broadly requires PES to indemnify JMS for any injury or loss "arising out of or in any way relating to the work performed" by its employees. Thus, inasmuch as plaintiff injured himself while carrying his equipment back to his vehicle, his injuries will be deemed to have arisen out of PES's work (*see* ***O'Connor v Serge El. Co.***, 58 NY2d 655, 458 NYS2d 518 [1982]; ***Bailey v Macy's E., Inc.***, 78 AD3d 624, 913 NYS2d 105 [2d Dept 2010]; *see also* ***Morales v Spring Scaffolding, Inc.***, 24 AD3d 42, 802 NYS2d 41 [1st Dept 2005]). Lastly, PES's alternative request for severance of the third-party action pursuant to CPLR 603 is denied, as it failed to demonstrate any potential prejudice to its substantial rights absent such severance (*see* ***Shanley v Callanan Indus.***, 54 NY2d 52, 444 NYS2d 585 [1981]; ***Naylor v Knoll Farms of Suffolk County, Inc.***, 31 AD3d 726, 818 NYS2d 460 [2d Dept 2006]).

Dated: 24 Feb. 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION