Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JORGE BARBECHO

Plaintiff(s),

- against -

T&R CONSTRUCTION CORP. and WEST 123 LLC

Defendant(s).

T&R CONSTRUCTION CORP. and WEST 123 LLC

Third-Party Plaintiff(s),

- against -

NAPOLEON CONTRACTING CORP.

Third-Party Defendant(s)

Index Number 20878/09

Motion Date November 1, 2011

Motion Cal. Number 4

Motion Seq. Number 4

The following papers numbered 1 to 28 read on this motion by third-party defendant Napoleon Contracting Corp. (Napoleon) for summary judgment dismissing the third-party causes of action for common-law indemnification and contribution, contractual indemnification, and breach of contract to procure insurance asserted against it; and, by separate notice of motion, plaintiff moves for partial summary judgment on the Labor Law § 240 (1) cause of action asserted against defendants and third-party plaintiffs T&R Construction Corp. (T&R) and West 123 LLC (West) and for an order directing an immediate trial on damages, and for an order precluding T&R, West, and Napoleon from offering evidence from any witnesses not produced in accordance with a so-ordered stipulation dated July 13, 2011; and on this cross motion by T&R and West for summary judgment dismissing plaintiff's complaint against them or, in the alternative, for summary judgment in favor of T&R on the third-party claim for contractual indemnification against Napoleon.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits ..... 1 - 8
Notice of Cross Motion - Affidavits - Exhibits ..... 9 - 12
Answering Affidavits - Exhibits ..... 13 - 20
Reply Affidavits ..... 21 - 28

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Plaintiff was employed as a carpenter by Napoleon, which was hired by T&R, the general contractor, to perform woodwork in the lobby of the premises owned by West. On December 18, 2008, plaintiff allegedly sustained injuries while installing wood paneling in the lobby. To reach the upper portion of the wall, plaintiff was standing on an A-frame ladder, which was situated on the platform of a scaffold and resting against the wall in a closed position. Plaintiff also nailed a wooden plank at the base of the ladder to hold it in place. As plaintiff ascended the ladder, the scaffold flipped and the ladder moved, causing him to fall to the ground. Plaintiff subsequently commenced this action against T&R and West under Labor Law §§§ 240 (1), 241 (6), and 200 and common-law negligence. Thereafter, T&R and West instituted a third-party action against Napoleon alleging common-law indemnification and contribution, contractual indemnification, and breach of contract to procure insurance.

With respect to the cross motion by T&R and West, in the absence of a court order or rule to the contrary, CPLR § 3212 (a) requires summary judgment motions to be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown (*see Brill v City of New York*, 2 NY3d 648 [2004]). A cross motion for summary judgment made after the expiration of the statutory period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made on grounds nearly identical to that of the cross motion (*see Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]). In this case, T&R and West's cross motion for summary judgment is untimely as it was made returnable two days beyond the court-ordered deadline of September 27, 2011 (*see Buffolino v City of New York*, ___ AD3d ___, 2012 NY Slip Op 924 [2d Dept 2012]; *Hernandez v 35-55 73rd St., LLC*, 90 AD3d 709 [2d Dept 2011]). Indeed, the cross motion by T&R and West and plaintiff's motion both seek summary judgment on plaintiff's claim under Labor Law § 240 (1) asserted against T&R and West, and the cross motion and Napoleon's motion both seek summary judgment on the third-party claim for contractual indemnification against Napoleon. However, the remaining issues presented by the cross motion are not nearly identical. Specifically, T&R and West's cross motion also

seeks summary judgment on their liability to plaintiff under Labor Law §§ 241 (6) and 200 and common-law negligence, which are not raised in either plaintiff or Napoleon's timely summary judgment motions. Under these circumstances, the branches of the cross motion by T&R and West for summary judgment dismissing plaintiff's claims under Labor Law §§ 241 (6) and 200 and common-law negligence asserted against them are time-barred and will not be considered herein.

The court will now address the branch of plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim against T&R and West, and that branch of the cross motion by T&R and West for summary judgment dismissing said cause of action asserted against them. To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]), a claim under Labor Law § 240 (1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (*see Plass v Solotoff*, 5 AD3d 365 [2d Dept 2004]). On his motion, plaintiff established a *prima facie* case of liability under Labor Law § 240 (1) by demonstrating that he fell from an elevated height and was not provided with any safety devices, which proximately caused his injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2d Dept 2007]; *Lopez v Melidis*, 31 AD3d 351 [2006]; *Sztachanski v Morse Diesel Int'l, Inc.*, 9 AD3d 457 [2d Dept 2004]; *Tavarez v Weissman*, 297 AD2d 245 [1st Dept 2002]). Plaintiff testified at his deposition that he was standing on the fifth rung of an A-frame ladder, which was placed at his supervisor's direction on the platform of a five or six-foot high scaffold, and that the scaffold and the ladder moved as he ascended the ladder, causing him to fall to the ground and sustain injuries.

In opposition and in support of their cross motion, T&R and West assert that plaintiff's own negligent conduct in supporting a ladder against a wooden plank that he nailed at the base of the ladder, rather than any violation of Labor Law § 240(1), was the sole proximate cause of plaintiff's accident. However, plaintiff's comparative negligence, if any, will not shield T&R and West from liability under Labor Law § 240 (1) (*see Stolt v General Foods Corp.*, 81 NY2d 918 [1993]). While plaintiff may have been negligent in placing a closed A-frame ladder against the wall from atop the scaffold and supporting the ladder with a wooden plank, plaintiff's conduct cannot be considered the sole proximate cause of his injuries (*see Chlebowski*, 58 AD3d at 663; *Rudnik*, 45 AD3d at 829; *O'Connor v Enright Marble & Tile Corp.*, 22 AD3d 548 [2d Dept 2005]; *Torres v Monroe College*, 12 AD3d 261 [1st Dept 2004]). Where, as here, the owner or contractor failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of the

plaintiff's injury, the "negligence, if any, of the injured worker is of no consequence" (emphasis added) (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Tavarez*, 297 AD2d at 247). Based on the foregoing, the branch of plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim against defendants is granted, and that branch of the cross motion by T&R and West for summary judgment dismissing said cause of action asserted against them is denied.

Next, the court turns to that branch of Napoleon's motion for summary judgment dismissing the third-party claim for contractual indemnification asserted against it, and the branch of the cross motion by T&R and West seeking summary judgment in favor of T&R on said cause of action. Here, the record contains no evidence that there was a written agreement between T&R and West and Napoleon in effect at the time of plaintiff's accident requiring Napoleon to indemnify T&R. The deposition testimony of Medzid Koljenovic, the owner of Napoleon, indicates that Napoleon was awarded the job after it submitted to T&R a bid proposal, but Napoleon and T&R and West never entered into a written contract thereafter. Also, the bid proposal governing Napoleon's work did not contain any contractual indemnification provisions. Moreover, T&R and West's reliance upon *Flores v Lower E. Side Serv. Ctr.* (4 NY3d 363 [2005]) and *Geha v 55 Orchard St., LLC* (29 AD3d 735 [2d Dept 2006]) to support their contention that the prior course of conduct between Napoleon and T&R is sufficient to give rise to an enforceable contract for indemnification is misplaced because those cases involved situations where the parties had written contracts that were unsigned. By contrast, a written indemnification agreement between Napoleon and T&R and West, signed or unsigned, never existed. Additionally, the court rejects T&R and West's argument that any agreement to procure insurance between Napoleon and T&R should be recognized as an indemnification agreement because the law is well-settled that an agreement to procure insurance is not an agreement to indemnify or hold harmless (*see Kinney v Lisk Co.*, 76 NY2d 215 [1990]). Thus, inasmuch as there is no writing whereby Napoleon expressly agreed to indemnify T&R and West, the third-party cause of action for contractual indemnification asserted against Napoleon is dismissed (*see Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606 [2009]; *Temmel v 1515 Broadway Assocs., L.P.*, 18 AD3d 364 [1st Dept 2005]).

Similarly, Napoleon established its entitlement to judgment as a matter of law dismissing the third-party cause of action for breach of contract for failure to procure insurance asserted against it by demonstrating that, at the time of plaintiff's accident, there was no enforceable written agreement between Napoleon, T&R and West requiring Napoleon to procure insurance naming T&R and West as additional insureds on Napoleon's insurance policy. As discussed above, Mr. Koljenovic testified at his deposition that Napoleon, T&R and West never had a written contract regarding the subject construction project. The bid proposal simply stated that "[a]ll necessary insurance is in effect for the duration of this

project," which Napoleon procured. In addition, T&R and West did not submit any opposition to the branch of Napoleon's motion seeking summary judgment dismissing the third-party cause of action for breach of contract to procure insurance asserted against Napoleon and, therefore, failed to raise a triable issue of fact.

With respect to the branch of Napoleon's motion for summary judgment dismissing the third-party causes of action for common-law indemnification and contribution, Napoleon, plaintiff's employer, established its *prima facie* entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a "grave injury" as defined in Workers' Compensation Law § 11 (*see Fried v Always Green, LLC*, 77 AD3d 788 [2d Dept 2010]; *Dechnik v Fortunato Sons, Inc.*, 58 AD3d 793 [2d Dept 2009]; *Martelle v City of New York*, 31 AD3d 400 [2d Dept 2006]). Also, T&R and West did not oppose Napoleon's motion these grounds and, thus, failed to raise a triable issue of fact. In the absence of a "grave injury," the third-party causes of action seeking common-law indemnification and contribution against Napoleon are dismissed.

Finally, the court will address the branch of plaintiff's motion for an order pursuant to CPLR § 3126 precluding T&R, West, and Napoleon from offering any affidavits, statements, or other evidence by or on behalf of Joe Frerer, a nonparty witness, who was not produced for a deposition in accordance with a so-ordered stipulation dated July 13, 2011. As a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed," a court may issue an order, inter alia, "prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony" (CPLR § 3126 [2]). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the trial court (*see Workman v Town of Southampton*, 69 AD3d 619 [2d Dept 2010]). Here, the July 13, 2011 so-ordered stipulation provided that a deposition of Mr. Frerer was to be held on August 2, 2011, but such deposition was never conducted. The court, in its discretion, finds that Napoleon offered a reasonable excuse for failing to produce Mr. Frerer, who is no longer employed by Napoleon, for a deposition on August 2, 2011 (*see e.g. Mohammed v 919 Park Place Owners Corp.,* 245 AD2d 351 [2d Dept 1997]; *Schneider v Melmarkets Inc*., 289 AD2d 470 [2d Dept 2001]). Napoleon maintains that, after Mr. Koljenovic's deposition on June 24, 2011, all parties became aware that Mr. Frerer was no longer in Napoleon's employ. In July, Mr. Frerer initially agreed to appear for the deposition on August 2, 2011; however, when attempting to confirm his appearance on the day before the deposition was scheduled to take place, he refused to take or return calls from Napoleon's counsel. On that same day, Napoleon's counsel notified all parties of this turn of events. Thereafter, on August 24, 2011, Napoleon, in response to plaintiff's demands dated July 21, 2011, provided plaintiff with Mr. Frerer's last known address and telephone number. In view of the foregoing, the branch of

plaintiff's motion for an order precluding T&R, West, and Napoleon from offering evidence related to Mr. Frerer is denied.

Accordingly, the motion by Napoleon for summary judgment dismissing the third-party causes of action for common-law indemnification and contribution, contractual indemnification, and breach of contract to procure insurance asserted against it is granted. The branch of plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) cause of action asserted against T&R and West is granted, and the matter will be set down for an inquest on the issue of damages following a trial on the remaining causes of action against T&R and West. In addition, the branch of plaintiff's motion for an order precluding T&R, West, and Napoleon from offering evidence from any witnesses not produced in accordance with a so-ordered stipulation dated July 13, 2011, is denied. The cross motion by T&R and West for summary judgment dismissing plaintiff's complaint against them or, in the alternative, for summary judgment in favor of T&R on the third-party claim for contractual indemnification against Napoleon is denied in its entirety.

Dated: March 19, 2012

DARRELL L. GAVRIN, J.S.C.