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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

DANIEL PURCELL and JENNIFER PURCELL,

Plaintiffs,

- against-

METLIFE INC., BRAUSE REALTY INC. and JRM CONSTRUCTION MANAGEMENT LLC,

Defendants.

INDEX NO. 113495/09

MOTION SEQ. NO. 001

METLIFE INC., and JRM CONSTRUCTION MANAGEMENT LLC,

Third-Party Plaintiffs,

- against -

NORTH EASTERN FABRICATORS, INC.,

Third-Party Defendant.

INDEX NO. 590061/10

METLIFE INC., and JRM CONSTRUCTION MANAGEMENT LLC,

Second Third-Party Plaintiffs,

-against-

H & L ELECTRIC, INC., and SWEENEY & HARKIN CARPENTRY AND DRY WALL CORP.,

Second Third-Party Defendants.

INDEX NO. 590282/11

The following papers were read on these motions for summary judgment and severance.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 005 and 007 are hereby consolidated for disposition.

This lawsuit arises from a construction site accident that occurred on March 9, 2009, on the eighth floor roof of the MetLife Building, located at 27-01 Queens Plaza North in Long Island City, New York. While carrying a steel beam on his left shoulder, plaintiff David Purcell (Purcell), an iron worker, allegedly slipped on wet plywood at the construction site, and sustained neck and shoulder injuries requiring surgery. The accident occurred during the course of his employment with third-party defendant North Eastern Fabricators, Inc. (North Eastern), a steel contractor. Purcell insists that MetLife Inc. (MetLife) and JRM Construction Management LLC (JRM), the general contractor, had a duty to provide safe footing on the work site. The complaint alleges claims for liability under common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

After issue was joined and discovery completed on the main action and the third-party action, defendants/third-party plaintiffs/second third-party plaintiffs MetLife and JRM (together, defendants) moved for summary judgment in Motion Sequence 005, pursuant to CPLR 3212, dismissing the complaint and any and all cross-claims against them, and for contractual indemnification against North Eastern, or, in the alternative, for conditional summary judgment on their third-party claim for contractual indemnification against North Eastern.[1]

Plaintiffs Purcell and his wife (who sues derivatively) cross-move for partial summary judgment on the issue of defendants' liability under Labor Law § 241(6).

North Eastern cross-moves for summary judgment, pursuant to CPLR 3212 and

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[1] The law firm of Ahmuty, Demers & McManus, previously counsel for both JRM and MetLife, made the motion for summary judgment dated May 2, 2011. However, shortly thereafter, on July 29, 2011, the firm of Morris, Duffy, Alonso & Faley took over the representation of MetLife and filed a cross-motion which adopted and incorporated all the arguments set forth in the initial May 2, 2011 summary judgment motion.

Workers' Compensation Law § 11, seeking an order dismissing the third-party complaint and all cross-claims in their entirety, and submits within same opposition to defendants/third-party plaintiffs' motion for summary judgment. North Eastern contends that granting contractual indemnification to JRM and MetLife is violative of General Obligations Law § 5-322.1. Both JRM and MetLife oppose the cross-motion.

In motion sequence 007, second third-party defendant, Sweeney & Harkin Carpentry and Dry Wall Corporation (Sweeney & Harkin),[2] a subcontractor on the same construction project, moves for severance. In the alternative, Sweeney & Harkin asks the court to vacate the Note of Issue, strike the case from the Trial Calendar, or set a date for a preliminary conference so that discovery may be scheduled for the second third-party action. Plaintiffs' Note of Issue has been vacated, and the case has been marked off the Trial Calendar. Second third-party defendant H & L Electric, Inc. (H & L), an electrical subcontractor hired by JRM, cross-moves for severance, or, in the alternative, for the court to extend the time for H & L to conduct and complete discovery, to move for summary judgment, and to also set the matter down for a discovery conference. Plaintiffs do not oppose the motion and cross-motion to sever. However, JRM and MetLife oppose severance.

BACKGROUND

Brause Realty, Inc. (Brause Realty)[3] is the owner/developer of 27-01 Queens Plaza North, also known as the MetLife Building. The 400,000-square-foot building was fully leased by MetLife as its operational headquarters for over 1,500 employees in 2001. Non-party

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[2] An examination of the pleadings shows that the name of the firm is spelled both "Sweeney & Harkin" and "Sweeny & Harkin." However, the company name is listed as "Sweeney & Harkin" on Internet reference sources (*see e.g.* http:/www.yellowpages.com/new york-ny/sweeney-and-harkin-carpentry-dry-wall-corp. [accessed Dec. 21, 2011]). Accordingly, the name of the company is spelled "Sweeney & Harkin" throughout the decision.

[3] The action was discontinued against defendant Brause Realty on May 4, 2011.

Barclays Services Corporation (Barclays Services) is a subtenant of MetLife.

In a contract with Barclays Services, JRM was hired as the general contractor to complete an interior buildout of the space rented by Barclays Services at the building, which included infrastructure work on the eighth floor roof setback, including installing two generators, two chillers, pump packages and switch gears for air conditioning system work. The construction work on the eighth floor began in January of 2009.

Laborers hired by JRM were responsible for cleaning up debris at the work site on a daily basis, and placing it into a dumpster for removal. Subcontractors, however, were contractually obligated to put their debris in one spot, and then laborers would remove it.

By purchase order dated January 23, 2009, JRM and North Eastern entered into a subcontract agreement. North Eastern became responsible for installing steel framing for the building's air conditioning towers. The subcontract agreement required that North Eastern indemnify JRM for liability arising out of its work, and to procure general liability insurance with JRM named as an additional insured. North Eastern complied with its insurance obligations. In order to finish the project, JRM hired other subcontractors, including Sweeney & Harkin and H & L. While work was being performed on the eighth floor, the roofing membrane was protected through the installation of marine-grade plywood by Sweeney & Harkin over the roofing membrane and on the area where the work was to be done. The plywood essentially covered 5,000 square feet, with 32 square feet per member. It was allegedly secured with screws and metal straps, and the pieces were sandbagged around the perimeter to create a continuous fixed path for workers.

On the day of plaintiff's accident, it was raining. On the eighth-floor setback, North Eastern steel workers, ironworkers, steam fitters and electricians were working installing steel beams, electrical and HVAC piping. The plywood was allegedly not covered, nor was there any sand or salt placed on the plywood. At the time of his accident, Purcell already had been

working for three hours at the construction site.

In his deposition, Purcell claims that at approximately 10:15 A.M. on March 9, 2009,, he slipped on wet plywood after stepping over some refuse and debris. Purcell described the debris on the roof as consisting of loose gravel, fixed pipes that were connected to the building and an existing AC unit, and electrical pipe wire. Purcell admits to carrying a heavy steel beam which was four to five feet long and weighing 40 to 60 pounds. He claims that he lost his footing when he slipped on a wet spot on the plywood. He further claims that as he slipped, the plywood shifted and he lost his balance, forcing him to jerk his neck and shoulder. After his accident, James Gaffney (Gaffney), Purcell's supervisor, walked over to see if he was all right. Subsequently, Purcell called in an accident report to the North Eastern office, and Gaffney drove Purcell to his car in New Jersey. Purcell then drove to the office of an orthopedic surgeon.

Purcell and his wife commenced this action against the building owner, lessee, and general contractor on September 18, 2009. MetLife and JRM impleaded North Eastern into the lawsuit, alleging that the company controlled and directed Purcell's actions. Subsequently, a second third-party action was commenced against Sweeney & Harkin and H & L, two other subcontractors on the work site.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless

of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Partial Summary Judgment

1. Common-Law Negligence and Violation of Labor Law § 200

Purcell failed to oppose those portions of the motion for summary judgment seeking to dismiss the common-law negligence and violation of Labor Law § 200 claims. Defendants met their prima facie burden of demonstrating their entitlement to summary judgment dismissing those claims alleging a violation of Labor Law § 200 and common-law negligence.

Labor Law § 200 codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work[4] (*see Comes v New*

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[4] The statute states, in relevant part, as follows:

"1. All places to which this chapter applies shall so be constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All

York State Elec. & Gas Corp., 82 NY2d 876 [1993]; *see also Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]; *Brown v Brause Plaza, LLC,* 19 AD3d 626, 628 [2d Dept 2005]). Courts have held that the term "owner" is not limited to the titleholder of the property where the accident occurred, but can encompass a person "who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit" (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Scaparo v Village of Ilion,* 13 NY3d 864, 866 [2009]; *Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856 [4th Dept 2000]).

An owner, lessee or contractor will be held liable for a violation of Labor Law § 200 and common-law negligence when the injury complained of falls into one of two categories: (1) those involving the manner in which the work is performed, or (2) those where workers are injured as a result of a dangerous condition at the work site (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

If the work site accident is the result of the "means and methods" used by the contractor to do its work, then Purcell must show that defendants directed, supervised or controlled the work during which the claimed injury occurred (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Ortega v Puccia*, 57 AD3d at 61). "[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007]). The fact that a party retains general supervisory duties over the entire project, or retains inspection privileges for observing the work progress, is insufficient to constitute supervision and control of the work site to impose liability under Labor Law § 200 (*see O'Sullivan v IDI Constr. Co.*, 28

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machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Hoelle v New York Equities Co.*, 258 AD2d 253, 253-254 [1st Dept 1999]).

By contrast, if the accident arises from a dangerous condition on the work site, then Purcell must demonstrate that defendants either created the dangerous condition leading to the accident, or failed to remedy the dangerous condition of which they had either actual or constructive notice (*see Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]; *Azad v 270 5th Realty Corp.*, 46 AD3d 728 [2d Dept 2007]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]).

Purcell contends that the accident resulted from both the way the work was done, and because of a dangerous condition. Under the "means and methods" standard (*see Rizzuto*, 91 NY2d at 352), there is no indication that JRM or MetLife supervised, directed or controlled any of the work done by Purcell on the roof. Certainly, MetLife had no role in directing the construction work. There is also no triable issue of fact as to JRM's control of the work site, as JRM only coordinated the work of the subcontractors, including the project work schedule. Coordination of the work is insufficient for a finding of negligence (*see e.g. McGarry v CVP 1 LLC*, 55 AD3d 441, 442 [1st Dept 2008]; *Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 468-469 [1st Dept 1998]).

In his deposition testimony, Purcell testified that he did not take instruction from anyone other than Gaffney, the lead foreman for North Eastern. All the equipment for his work came from his employer. Each time that Purcell made a complaint about the conditions at the work site, he made the complaint directly to Gaffney and to no one else. Gaffney testified that he was "running the job," which included the ability to tell North Eastern employees how to do their work. Gaffney further testified that under its contract with JRM, North Eastern was obligated to insure the safety of its employees. Purcell also testified that he attended weekly safety meetings which were held by North Eastern for North Eastern employees. Although both JRM

and North Eastern had the authority to stop the work if it was raining too hard, that fact alone does not amount to supervision of North Eastern's work.

David B. McWilliams (McWilliams), JRM's on-site coordinator, testified that his general supervisory duties involved interacting with North Eastern's project manager and coordinating the construction to make sure that the work progressed in accordance with the project's plans and specifications. He also stated that JRM in no way supervised the methods by which North Eastern executed its steel framing work. Although the manner in which the work was being performed may have contributed to the accident, it cannot be said as a matter of law that it was the sole proximate cause.

With respect to the dangerous condition standard, Purcell failed to provide sufficient evidence that the defendants created the problem, or had notice of the dangerous condition that caused his injuries. In order to demonstrate constructive notice, a claimant must show that the dangerous condition was visible and that it existed "for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Contrary to plaintiffs' arguments, defendants did not create the hazardous condition. First, the testimonial evidence shows that Sweeney & Harkin installed the plywood and sandbags. Next, the evidence shows that the electrical piping for the project was not installed by defendants. There was also no evidence presented regarding how long the hazardous wet spot or debris was present on the plywood (*see Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]). More importantly, there is no indication that the rain stopped prior to the accident, thereby allowing defendants an opportunity to remove the water from the platform. Under these circumstances, Purcell fails to make a prima facie showing that defendants

created the alleged dangerous conditions. Regarding the question of notice, McWilliams testified that JRM never received any complaints regarding unsafe working conditions on the roof. John Fisher (Fisher), North Eastern's project manager, testified that when he visited the job site, he only observed existing conduit which had been installed on the roof. Fisher also testified that he was not aware of any problems concerning the plywood, or of any complaints related to the plywood or debris on the platform. While Purcell did testify that he made a complaint about the condition of the plywood and existing pipes to Gaffney "right before" his accident, he also stated that he had no reason to believe that his complaint was relayed to defendants.

The Court finds that defendants have demonstrated, as a matter of law, that they (1) lacked the control over North Eastern's work or (2) created, or possessed actual or constructive notice of the dangerous conditions leading to Purcell's injuries, MetLife and JRM's motion for summary judgment is granted insofar as it seeks dismissal of the cause of action for common-law negligence and violation of Labor Law § 200.

2. Violation of Labor Law § 240(1)

Labor Law § 240(1), commonly known as the "Scaffold Law" (*see Ryan v Morse Diesel, Inc.*, 98 AD2d 615, 615 [1st Dept 1983]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]), provides, in relevant part:

> "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."

"Labor Law § 240(1) requires owners and contractors to provide workers with appropriate safety devices to protect against 'such specific gravity-related accidents as falling

from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Novak v Del Savio*, 64 AD3d 636, 637-638 [2d Dept 2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The statute, however, does not encompass "*any and all* perils that may be connected in some tangential way with the effects of gravity" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501). Rather, "Labor Law § 240(1) is implicated where protective devices prove 'inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*Brown v VJB Constr. Corp.*, 50 AD3d 373, 376 [1st Dept 2008], quoting *Ross*, 81 NY2d at 501; *see also Scharff v Sachem Cent. School Dist. at Holbrook*, 53 AD3d 538 [2d Dept 2008]).

Defendants argue that Purcell's contention that defendants are strictly liable for his injury pursuant to Labor Law § 240(1) is without merit. Specifically, defendants maintain that Purcell's accident was not gravity-related and thus, it is not within the ambit of Labor Law § 240 (1).

All the witnesses uniformly testified that a work platform made of plywood was placed atop the roof membrane. Purcell allegedly slipped and lost his footing on a wet spot after stepping over some debris. After he slipped, Purcell alleges that the plywood shifted, and he could not recover his balance. However, Purcell testified that he did not fall to the plywood work platform, nor did he fall off the roof. Instead, he dropped the steel beam that he was carrying to the plywood work platform, grabbed his shoulder, and knelt down on the plywood. This is not a circumstance where a hoisting or security device of the type enumerated in the statute would have been expected or necessary. Nor was gravity related to the cause of the accident. Therefore, the Court finds that Labor Law § 240(1) is not implicated here (*compare Smith v Hovnanian Co., Inc.*, 218 AD2d 68, 70-71 [3d Dept 1995], with *Jock v Landmark Healthcare*

Facilities, 62 AD3d 1070, 1071-1072 [3d Dept 2009]; *Brown*, 50 AD3d at 377). Accordingly, the Court grants that branch of defendants' motion to dismiss the claim premised on Labor Law § 240(1).

3. Violation of Labor Law § 241(6)

In contrast to Labor Law § 200, § 241(6)[5] "imposes a nondelegable duty upon owners, contractors and their agents to protect workers by holding those parties liable for breaches of particular safety regulations containing specific standards" (*Musillo v Marist College*, 306 AD2d 782, 783 [3d Dept 2003]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross*, 81 NY2d at 504-505). "In order to state a claim under Labor Law § 241(6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (*Reilly v Newireen Associates*, 303 AD2d 214, 218 [1st Dept 2003], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *see Walker v Metro-North Commuter R.R.*, 11 AD3d 339 [1st Dept 2004]). Recovery under this section is dependent on Purcell's ability to set forth the relevant and specific safety provisions of Part 23 of the New York State Industrial Code (12 NYCRR 23-1.1 et seq.), which were allegedly violated (*see Walker*, 11 AD3d at 340; *see also Ross*, 81 NY2d at 505). In addition, the provision must be applicable to the facts of the case (*see Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2d Dept 2002]). Moreover, an owner or general contractor may raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence (*see Long v*

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[5] The statute provides, in pertinent part, as follows:

"All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places . . ."

Forest-Fehlhaber, 55 NY2d 154, 161 [1982]; *Misicki*, 12 NY3d at 515; *Ross*, 81 NY2d at 502, n 4).

Purcell also claims violations of Article 1926 of the Occupational Safety and Health Administration rules and regulations (OSHA), which may not support liability under Labor Law § 241(6), because that federal statute is limited to the safety practices of employers (*see Kocurek v Home Depot*, 286 AD2d 577 [1st Dept 2001]). Moreover, although plaintiffs allege a violation of OSHA regulations, OSHA standards have been deemed insufficient, as a matter of law, to sustain a claim under section 241(6) (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247 [1st Dept 1999]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311 [2d Dept 1997]; *Pellescki v City of Rochester*, 198 AD2d 762, 763 [4th Dept 1993] ["A violation of OSHA regulations by an employer does not impose a nondelegable duty on an owner or general contractor under Labor Law § 241(6)"]).

While plaintiffs originally listed numerous violations of the Industrial Code, they abandoned their reliance on all of them except for 12 NYCRR 23-1.7(d) and (e), 12 NYCRR 23-1.11, and 12 NYCRR 23-1.22.

Section 23-1.7(d),[6] entitled "Slipping hazards," states that:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Section 23-1.7(e), entitled "Tripping and other hazards," reads as follows:

> "(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause

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[6] Industrial Code § 23-1.7, entitled "Protection from General Hazards" contains subsections that are clearly inapplicable to this case, for example: (a) "Overhead hazards"; (b) "Falling Hazards"; and (c) "Drowning Hazards."

> tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Defendants' lack of control over North Eastern's work assignment does not negate their liability under section 241(6) (*see Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]; *Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 259 [1st Dept 2001]). Consequently, this regulation required defendants to guard against Purcell's working on a slippery surface. The Court finds that the sworn statements and depositional evidence are sufficient to establish that Purcell's injuries were related to a slipping hazard. Therefore, Purcell's Labor Law § 241(6) claim, pursuant to 12 NYCRR 23-1.7(d), survives.

Nonetheless, there are factual issues with respect to the asserted defense of comparative negligence. Defendants' liability should be considered and determined at the same time as the issue of whether Purcell was comparatively negligent for failing to ask his co-workers for assistance in carrying the heavy steel beam (*see Tann v Herlands*, 224 AD2d 230, 230-231 [1st Dept 1996]). As well, North Eastern's foreman, Gaffney, made the decision to continue working despite the rain. Since material issues of fact exist, neither plaintiffs nor defendants are entitled to summary relief with regard to section 23-1.7(d).

The Court finds that Industrial Code § 23-1.7(e), which deals with tripping hazards, does not apply to the facts of this case. Purcell testified that he slipped rather than tripped on the wet plywood, and as a result, the description of the accident provided by Purcell unequivocally fails to fit the regulation's requirement of tripping. Liability under 12 NYCRR 23-1.7(e) also depends upon a showing by Purcell that he was injured in a passageway, as required by section (e)(1), or in a working area, as required by section (e)(2). The "passageway" section of the regulation

does not apply to a plaintiff who "slipped in an open area of the construction site, and not within a defined walkway or passageway" (*Morra v White*, 276 AD2d 536, 537 [2d Dept 2000]; *see also Lenard v 1251 Americas Assoc.*, 241 AD2d 391, 392 [1st Dept 1997] [plaintiff was injured in an open area rather than in a passageway]).

Industrial Code § 23-1.7 (e)(2), which also deals with tripping hazards, mandates that floors or other work areas be free of dirt and debris, as well as sharp projections and materials. Although the evidence shows that the place of injury was a working area rather than a passageway, the Court finds that this regulation does not apply because Purcell did not trip, and the water that he slipped on is not debris or any of the obstructions listed in the regulation. Thus,12 NYCRR 23-1.7 (e)(2) may not serve as a predicate to a Labor Law § 241(6) violation in this case. Accordingly, defendants are entitled to summary judgment dismissing, in part, the section 241(6) claim based on Industrial Code § 23-1.7(e).

Section 23-1.11, entitled "Lumber and Nail Fastenings," reads as follows:

> "(a) The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.
>
> (b) The lumber dimensions specified in this Part (rule) are nominal or trade size except as otherwise specifically stated with the words "full size" and except in the case of ladders.
>
> (c) All nails shall be driven full length and shall be of the proper size, type, length and number to provide the required strength at all joints.
>
> Only double-headed or screw-type nails shall be used in the construction of scaffolds."

The Court determines that Industrial Code 12 NYCRR 23-1.11 is inapplicable to the facts of this case since there is no evidence in the record that the nails and lumber which were part of the construction of the plywood work platform were defective or improperly installed at the time of

Purcell's accident. In addition, there is no indication that the dimensions of the wood boards were anything but nominal or trade sized.

Plaintiffs also cite to Industrial Code § 23-1.22(b)(2) as a basis for imposing liability on defendants. The regulation entitled "Structural Runways, Ramps and Platforms," provides, in relevant part:

> "(b) Runways and Ramps.
>
> * * *
>
> (2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal of equivalent strength.
>
> Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed."

Purcell's only basis for relying on this specific section is Gaffney's affidavit which describes the plywood as a ramp. However, the term "ramp" is not defined in Industrial Code § 23-1.4., and there is also no evidence in the record before the Court that the construction of the alleged ramp caused Purcell's injuries. Accordingly, Purcell's claim premised on section 23-1.22 is dismissed.

The Court finds that there is no evidence showing that Purcell's accident was caused by an alleged violation of section 23-1.7(e), section 23-1.11, or section 23-1.22(b)(2), and thus dismissal of those parts of plaintiff's claim which rely on these regulations is granted. Nonetheless, as discussed above, there are triable issues of fact related to the alleged violation of Industrial Code § 23-1.7(d). Accordingly, dismissal of plaintiffs' claim of an alleged violation of Labor Law § 241(6) based on Industrial Code § 23-1.7(d) is denied.

B. Defendants' Motion and Cross-Motion against North Eastern for Contractual Indemnification and North Eastern's Cross-Motion to Dismiss the Third-Party Complaint

Defendants concede that North Eastern has not breached its contractual obligation to afford additional insurance coverage to JRM. As such, JRM agrees to discontinue its breach of contract claim against North Eastern.

Additionally, there is no dispute that defendants are prohibited from filing a common-law indemnification claim against North Eastern since North Eastern is Purcell's employer, and defendants concede that Purcell did not sustain a grave injury within the meaning of Workers' Compensation Law § 11 (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]; *Dudek v Metropolitan Transp. Auth. of State of New York*, 24 AD3d 21 [2d Dept 2005]). Accordingly, the motion seeking common-law indemnification is deemed moot and North Eastern's cross-motion seeking dismissal of defendants' common-law indemnification claim is granted.

Regarding defendants' claim for contractual indemnification, North Eastern denies any responsibility for Purcell's injuries and challenges defendants' reliance on the subcontract agreement's indemnification clause. Defendants assert, however, that a claim for contractual indemnification lies since North Eastern's negligence also contributed to Purcell's injuries. Specifically, defendants maintain that North Eastern, having control of its own workspace, failed to stop Purcell from carrying the heavy steel beam by himself, which contributed to his injuries, or to stop work on a rainy day. In response, North Eastern claims that the indemnification provision found in the purchase order between the parties is void and unenforceable pursuant to General Obligations Law § 5-322.1 since it purports to indemnify defendants for their own negligence. General Obligations Law § 5-322.1 (1) prohibits certain construction agreements in which the promisor agrees to indemnify the promisee against liability for the promisee's sole

negligence. However, the Court finds that the indemnification agreement at issue here is not void and unenforceable. It reads as follows:

> "As pertains to any Work provided by Subcontractor [North Eastern] under this Purchase Order, Subcontractor agrees to defend and save harmless the Contractor [JRM] and transferee of the Work . , . from all liability for injuries to any person, employees or property, and from damages by any fire, in any way caused by Subcontractor, its agents, employees, subcontractors or their employees or agents or persons, firms or corporations to whom Subcontractor sublets work, caused by, or incidental to, the execution of the Work, and from all damages, judgments, charges and other related expenses arising or to arise, through any act or omission of any of the said persons" (Brunson Jr.'s affirmation in Support of Cross-Motion, exhibit L, Purchase Order at 2, ¶ 8).

"'[T]he right to contractual indemnification depends upon the specific language of the contract'" (*Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2d Dept 2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [4th Dept 1995]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]; *Van Kipnis v Van Kipnis*, 43 AD3d 71, 77 [1st Dept 2007], *affd as mod* 11 NY3d 573 [2008]). The "interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance" (*Kafka Constr. v New York City School Constr. Auth.*, 40 AD3d 1038, 1039 [2d Dept 2007]).

In this case, the Court finds that the indemnification agreement is clear and unambiguous, and was in effect at the time of Purcell's accident. Under the express terms of the subcontract agreement between JRM and North Eastern, there is a broad clause for conditional indemnification. North Eastern is required to indemnify JRM, as well as MetLife as the "transferee of the Work," for North Eastern's negligence (Brunson Jr.'s affirmation in Support of Cross-Motion, exhibit L, Purchase Order at 2, ¶ 8). The contractual language provides that the clause is only triggered when an accident is (1) caused by North Eastern or its

agents; (2) caused by or is incidental to North Eastern's work; or (3) arose through an act or omission of North Eastern. By its terms, the indemnification clause applies since Purcell's accident comes within the parameters of the indemnification clause. Furthermore, given these facts, the Court finds that the indemnification provision does not implicate General Obligations Law § 5-322.1(1), and accordingly is enforceable (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]; *Velez v Tishman Foley Partners*, 245 AD2d 155 [1st Dept 1997]).

While North Eastern claims that it is free of any negligence in this matter, there has been no determination yet as to which party, if any, was actively negligent and proximately caused Purcell's injuries. The only cause of action remaining against defendants is the one predicated on an alleged violation of Labor Law § 241(6), which is not based on any active negligence on the part of defendants. Therefore, defendants may obtain a conditional order granting contractual indemnification; ultimate relief will depend upon a determination of whether, or to what extent, North Eastern was negligent.

C. Second Third-Party Defendants' Severance Motion and Cross-Motion

CPLR section 603 provides that:

> "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others."

In turn, CPLR section 1010 provides that:

> "The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

The Court has considerable discretion in deciding whether severance is appropriate

(*see Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]; *Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73 [1st Dept 2002]; *Quiroz v Beitia*, 68 AD3d 957 [2d Dept 2009]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2d Dept 2006]; *see also* CPLR 603; CPLR 1010). However, a severance motion should not be granted where there are common factual and legal issues involved in the claims, "and the interests of judicial economy and consistency will be served by having a single trial" (*Ingoglia v Leshaj*, 1 AD3d 482, 485 [2d Dept 2003]; *Vieyra v Briggs & Stratton Corp.*, 184 AD2d 766, 767 [2d Dept 1992]).

Sweeney & Harkin and H & L argue that severance is warranted since discovery is complete in both the main and the third-party action but is not complete in the second third-party action. Additionally, Sweeney and Harkin and H & L maintain that the second third-party action does not involve a legal issue that is connected to the main action. Purcell's action is premised on violation of the Labor Law, while the second third-party action seeks contractual indemnification for the costs involved in litigating the main action. The Court agrees and finds that severance is appropriate here.

Severance of the second third-party action is warranted, based on: (1) the completion of discovery in the main and third-party actions; (2) the delay that would be created in the absence of severance; and (3) the prejudice to plaintiffs, who are ready for trial (*see Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803, 808 [2d Dept 2009]; *Abreo v Baez*, 29 AD3d 833 [2d Dept 2006]; *Wassel v Niagara Mohawk Power Corp.*, 307 AD2d 752 [4th Dept 2003]). While all the actions arise from the same underlying accident, the claims themselves are different, involving different discovery, different parties and different proof. Accordingly, the second third-party defendants' motion and cross-motion seeking severance is granted and the second third-party action is severed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the portion of defendants/third-party plaintiffs/second third-party plaintiffs MetLife Inc. and JRM Construction Management LLC's motion and cross-motion for summary judgment dismissing the common-law negligence and the Labor Law §§ 200 and 240(1) claims is granted; and it is further,

ORDERED that the portion of MetLife Inc. and JRM Construction Management LLC's motion and cross-motion for summary judgment dismissing the Labor Law § 241(6) claim is granted as to all Industrial Code claims except as to the claim based on Industrial Code § 23-1.7(d), which is denied; and it is further,

ORDERED that the portion of MetLife Inc. and JRM Construction Management LLC's motion and cross-motion which seeks conditional summary judgment for their contractual indemnification claim is granted in the event that third-party defendant North Eastern Fabricators, Inc. is found negligent; and it is further,

ORDERED that North Eastern's cross-motion for summary judgment dismissing the third-party complaint and all cross-claims in their entirety is granted to the extent of dismissing MetLife Inc. and JRM Construction Management's causes of action claiming common-law indemnification and/or contribution and breach of contract for failing to procure insurance; and it is further,

ORDERED that plaintiffs' cross-motion for partial summary judgment on their Labor Law § 241(6) claim is denied; and it is further,

ORDERED that the severance motion and cross-motion of second third-party defendants H & L Electric, Inc. and Sweeney & Harkin Carpentry and Dry Wall Corporation are granted, and the action against them is severed, and is continued as to the remaining parties; and it is further,

ORDERED that H & L Electric, Inc. and Sweeney & Harkin Carpentry and Dry Wall Corporation are directed to serve a copy of this order with notice of entry on the Trial Support

Office, which shall effect severance of the second third-party action; and it is further,

ORDERED that the parties in the underlying action and first third-party action are directed to appear for a status conference on June 27, 2012 at 11:00 A.M. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that the parties in the second third-party action are directed to appear for a preliminary conference on June 27, 2012 at 11:00 A.M. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that Metlife Inc. is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court; who is directed to enter judgment accordingly.

FILED

APR 24 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-30-12

PAUL WOOTEN *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**