Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Oswald Mendieta,

Plaintiff,

- against -

The City of New York, The New York City Industrial Development Agency, National Tennis Association, Inc., United States Tennis Association, Inc., Kohl Construction Group, and JH Mack LLC,

Defendants.

----------X

Index Number: 14342/09

Motion Date: 4/10/12

Motion Cal. Number: 12&13

Motion Seq. No.: 5&7

The following papers numbered 1 to 17 read on this motion by plaintiff for partial summary judgment; and motion by defendants, The City of New York, USTA National Tennis Center Inc. (sued herein as National Tennis Association, Inc.) (NTC), United States Tennis Association, Inc. (USTA), and JH Mack LLC d/b/a Kohl Construction Group (sued herein as Kohl Construction Group and JH Mack LLC) (JH Mack/Kohl), for summary judgment.

	Papers Numbered
Notice of Motion(Pltf)-Affirmation-Exhibits.....	1-4
Notice of Motion(Def's)-Affirmation-Exhibits.....	5-8
Affirmation in Support-Exhibits.....	9-11
Affirmation in Opposition to Plaintiff.....	12-13
Affirmation in Opposition to Defendants.....	14-15
Reply.....	16-17

Motion by plaintiff for partial summary judgment (Calendar No. 12) and motion by the City, NTC, USTA and JH Mack/Kohl for summary judgment (Calendar No. 13) are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions are decided as follows:

As a preliminary matter, plaintiff, in his opposition/reply affirmation, has discontinued the action against USTA and his Labor Law §200 and common law negligence causes of action against the City and NTC.

Also, the Court deems plaintiff's motion withdrawn as against the NYCIDA and further deems the motion amended to reflect that the owner of the subject premises on the date of plaintiff's accident was the City and not the NYCIDA, pursuant to the Amended Affirmation annexed to plaintiff's Affirmation in Further Support. The Court, sua sponte, further dismisses the complaint in its entirety against the NYCIDA.

Plaintiff's motion for partial summary judgment as to his Labor Law §240(1) claim against, inter alia, the New York City Industrial Development Agency (NYCIDA) was based upon defendants' response to plaintiff's Notice to Admit in which it was admitted that the NYCIDA owned the subject premises, the National Tennis Center in Flushing Meadow Park, 123-50 Roosevelt Avenue, in Queens County. However, in the motion by the City, NTC, USTA and JH Mack/Kohl for summary judgment, the City admitted via the affidavit of its Senior Insurance Claims Specialist, Christopher Dickerson, that it owned the subject property, corroborating the deposition testimony of Krista Halpin, employed by the New York City Economic Development Corporation, that the NYCIDA did not own the subject property in October 2008 but that the City owned the property and that the response to the Notice to Admit was wrong.

Plaintiff's counsel does not dispute such concession that the City and not the NYCIDA was the owner of the premises and seeks leave in his Affirmation in Further Support to substitute an amended affirmation in support of his motion, in which he recites that it is undisputed that the City owned the premises, in place and stead of his recital in his original affirmation that the NYCIDA undisputably owned the premises. Moreover, counsel states in his Affirmation in Further Support, "This affirmation is submitted in further support of plaintiff's motion for summary judgment pursuant to Labor Law §240(1) against defendants, THE CITY OF NEW YORK, NATIONAL TENNIS ASSOCIATION, INC., UNITED TENNIS ASSOCIATION, INC., KOHL CONSTRUCTION GROUP, and JH MACK LLC." Counsel omits the NYCIDA, which had been included in his original notice of motion. Therefore, plaintiff's motion is deemed withdrawn as against the NYCIDA. The Court notes that counsel's amended affirmation annexed to his Affirmation in Further Support, while changing his original statement to say that the City owned the premises rather than the NYCIDA, the balance of the affirmation is identical to the original affirmation, including the statement that "it cannot be disputed that the defendant, The New York Industrial Development Agency, is the owner of the subject premises". Therefore, the Court deems so much of the amended affidavit as contending that the NYCIDA was the owner of the premises and seeking summary judgment against all defendants, including the NYCIDA, as an inadvertent error and that plaintiff's intention was to withdraw his motion as against the

NYCIDA. Indeed, since plaintiff concedes that NYCIDA was not an owner of the subject property, and it is neither alleged nor demonstrated that it was an agent of the owner, and further, that there was no evidence or allegation of any wrongdoing or involvement on the part of NYCIDA whatsoever, there is no basis for maintaining this action against it and the complaint must be dismissed as against NYCIDA, as a matter of law.

Therefore, plaintiff's causes of action based upon a violation of §200 of the Labor Law and upon common law negligence are discontinued as against the City and NTC, and the action is discontinued as against USTA and dismissed as against NYCIDA in its entirety.

Motion by plaintiff for partial summary judgment on the issue of liability as to his cause of action under §240(1) of the Labor Law is granted as against the City, NTC and JH Mack/Kohl.

That branch of the motion by JH Mack/Kohl for summary judgment dismissing plaintiff's causes of action against it based upon Labor Law §200 and common law negligence is granted.

That branch of the motion by NTC and JH Mack/Kohl for summary judgment dismissing so much of the complaint against them as is premised upon a violation of §240(1) of the Labor Law is denied.

That branch of the motion by the City, NTC and JH Mack/Kohl for summary judgment dismissing so much of the complaint against them as is premised upon a violation of §241(6) of the Labor Law is granted.

That branch of the motion by by the City, NTC and JH Mack/Kohl for summary judgment dismissing all counterclaims and/or cross-claims for contractual or common law indemnification is deemed to be a discontinuance by said movants' of their cross-claims.

That branch of the motion by USTA dismissing plaintiff's causes of action against it under §§240(1) and 241(6) of the Labor Law and for dismissal of cross-claims is denied as moot, since plaintiff has discontinued the action against it and since no co-defendant has interposed a cross-claim against it.

Plaintiff, a worker employed by Union Drywall, a non-party, allegedly sustained injuries as a result of falling from a 10-foot tall A-frame ladder while installing sheetrock at the National Tennis Center on November 10, 2008. It is undisputed that the subject premises was, on the date of the accident, owned by the City, that the City leased the premises to NTC, that NTC entered into a contract with JH Mack/Kohl to construct the indoor tennis

training facility, that JH Mack/Kohl subcontracted with R&B Drywall, a non-party, to perform the drywall work, and R&B, in turn, entered into a sub-sub-contract with Union Drywall, plaintiff's employer, to perform said work.

Labor Law §240(1) is a strict liability provision that imposes upon owners, agents and general contractors absolute liability for any breach of the statutory duty that proximately causes injury (see Panek v. County of Albany, 99 NY 2d 452 [2003]). What is meant by "strict" or "absolute" liability in the Labor Law context is that any negligence on the part of plaintiff which contributes to his injuries is not a defense and will not diminish the owner's, agent's or contractor's liability under Labor Law §240(1), if it is established both that there was a violation of the statute and that the violation was a proximate cause of the injury (see Blake v. Neighborhood Housing Services of New York, 1 NY 3d 280 [2003]). Section 240(1), moreover, applies only to accidents and injuries arising from elevation-related hazards (see Rocovich v. Consolidated Edison Company, 78 NY 2d 509 [1991]).

Labor Law §240(1) is clearly implicated in this case, since plaintiff alleges that he fell from an elevated work site while engaged in the erection, demolition, repairing or alteration of a structure (see Beard v. State of New York, 25 AD 3d 989 [3rd Dept 2006]). Defendants do not dispute that plaintiff's alleged injuries resulted from an elevation-related accident that occurred while he was engaged in the construction of the premises. The City further admits that it was the owner of the subject property on the date of the accident.

The record on this motion also establishes that NTC, as the tenant that manages and controls the premises and which hired JH Mack/Kohl as the construction manager/general contractor to construct the indoor tennis training facility at the premises, is also to be classified as an "owner" with respect to liability under the Labor Law. Contrary to the contention of defendants' counsel, NTC's status as a tenant and not a titleholder does not shield it from liability under §240(1). Since NTC was in control of the premises and hired the contractor to perform the work which inured to NTC's benefit, it was an owner within the meaning of the Labor Law (see Scaparo v Village of Ilion, 64 AD 3d 1209 [4th Dept 2009]; Walp v ACTS Testing Labs, Inc, 28 AD 3d 1104 [4th Dept 2006]; Bush v Goodyear Tire & Rubber Co., 9 AD 3d 252 [1st Dept 2004]). Indeed, NTC is denominated as "Owner" in its contract with JH Mack/Kohl.

It is also clear, based upon the record on this motion, that JH Mack/Kohl was the general contractor within the meaning of the statute.

The argument of defendants' counsel that JH Mack/Kohl was not a general contractor but a construction manager and, therefore, not subject to liability under §240(1), is without merit. "The title by which a party is known is not determinative, however, and a party with essentially the same duties as a contractor or as an agent of the owner will be held to have the responsibilities of a contractor or owner under the Labor Law" (Aranda v Park East Construction, 4 AD 3d 315, 316 [2nd Dept 2004]). The Court notes that although there was a question of fact in Aranda as to whether the construction manager was also the de facto general contractor or agent of the owner, in our case, there is no such question of fact: JH Mack/Kohl not only had the same duties as a general contractor and hired the subcontractors and, indeed, there was no other general contractor, but it was actually designated as the contractor in the contract.

Jonathan Litt, CEO of JH Mack/Kohl, testified in his deposition that JH Mack/Kohl's business was that of "construction management, general contractor" (emphasis added). He acknowledged that he was doing a construction project at the National Tennis Center in November 2008 pursuant to a contract with NTC. Although he stated that the contract was "[t]o act as construction manager on behalf of the USTA", when asked, "What is the difference between the contract construction manager and the general contractor?", he responded, "Construction manager typically works at a fixed fee on top of a construction cost and cost plus and it is an open book. General contractor is a fixed price and closed books to the owner." Thereupon, when asked, "With regard to supervision at a job site, to your knowledge, is there any difference between the construction manager and the GC?", he replied, "No."

The contract between NTC and JH Mack/Kohl is annexed to defendants' companion motion for summary judgment. It is titled, "Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is also the Constructor; and where the Basis of Payment is the Cost of the Work plus a Fee and there is no Guarantee of Cost" (emphasis added). Moreover, §1.2, General Conditions, thereof states that the general conditions of the contract as to the construction phase is governed by the "General Conditions of the Contract of Construction" (referenced as AIA® A201™-1997) annexed as Exhibit "H" to the contract and incorporated by reference. The General Conditions of the Contract of Construction states that the contract is between the "Owner" and the "Contractor". Section 3.3.1 states, inter alia, "The Contractor shall supervise and direct the work, using the Contractor's best skills and attention. The Contractor shall be solely responsible for and have control over constructions means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract". Section 3.3.2 states, "The Contractor

shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors." Section 3.4.1 provides that the contractor shall provide and pay for labor and materials. Thus, the contract clearly describes the nature of JH Mack/Kohl's duties with regard to the Tennis Center construction as that of a general contractor, and that its titles of "contractor" and "construction manager" are synonymous. Indeed, §1.2, "General Conditions", of the contract states, inter alia, "The term 'Contractor' as used in A201™-1997 shall mean the Construction Manager."

Therefore, although JH Mack/Kohl is referred to in the contract as "construction manager", it is also referred to as the "constructor" and "contractor", and its duties with respect to the construction project at the subject premises were unequivocally those of a general contractor within the meaning of §240(1) of the Labor Law. Indeed, as explained by JH Mack/Kohl's CEO, Litt, there is no difference from a work perspective between the titles construction manager and general contractor, but that the only difference is in the nature and structure of the payment arrangements between the parties.

Therefore, the City and NTC are subject to §240(1) as owners, and JH Mack/Kohl is subject thereto as a general contractor.

As to the nature of the accident itself, a fall by a worker engaged in a protected activity from an A-frame ladder which broke and collapsed and, thus, failed to provide him with proper protection, establishes a prima facie case of liability under §240(1) of the Labor Law (see Sozzi v Gramercy Realty Co. No. 2, 304 AD 2d 555 [2nd Dept 2003]). "Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (Ross v Curtis-Palmer Hydro-Elec. Co. (81 NY 2d 494, 501 [1993][citations and emphasis omitted]). The unrebutted evidence, on this record, is that the ladder, which is one of the enumerated safety devices listed in §240(1), failed to protect plaintiff against a fall (see McCarthy v Turner Const. Inc., 52 AD 3d 333 [1st Dept 2008]). Contrary to the assertion of defendants' counsel that plaintiff did not indicate what caused him to fall, plaintiff testified in his deposition, "The ladder broke and I fell." When asked if the ladder moved in any way when he was on the ladder and he was measuring, he replied, "When I started measuring the ladder moved, and that's when I fell and I

had the accident." No evidence to the contrary is proffered by defendants so as to raise a triable issue of fact (see Wesley v Long Issland Power Authority, 284 AD 2d 391 [2nd Dept 2001]).

Finally, no evidence whatsoever is submitted in support of defendants' counsel's bare speculative contention that plaintiff's negligence was the sole proximate cause of his accident so as to raise a triable issue of fact.

Motion by JH Mack/Kohl for summary judgment dismissing plaintiff's causes of action against it based upon Labor Law §200 and common law negligence is granted.

Labor Law §200 is a codification of the common-law duty of an owner or contractor to maintain a safe construction area (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY 2d 343 [1998]). Where the unsafe condition of the work site was caused by the methods used by the contractor in performing the work, which is what plaintiff alleges, it must be established that the owner or contractor had supervisory control over the performance of the work in order to be liable under §200 (see Griffin v. NYC Transit Auth., 16 AD 3d 202 [1st Dept 2005]; Rippolo v. Mitsubishi Motor Sales of America Inc, 278 AD 2d 149 [1st Dept 2000]).

JH Mack/Kohl has presented sufficient evidence to show that it did not supervise or control plaintiff's work, thus establishing its prima facie entitlement to summary judgment dismissing plaintiff's cause of action against it based upon a violation of §200 of the Labor Law. Plaintiff's unrebutted testimony is that his supervisor was an individual by the name of Ricardo, who he says was "the super of the whole place." When asked, "What did Ricardo tell you to do? What were your instructions?", he replied, "Put up Sheetrock." When asked, "When you would need a ladder to install Sheetrock, where would you get it?", he replied, "I would ask the super Ricardo." He stated that Ricardo was not an employee of Union Drywall. Litt, in his deposition, testified that there was a different project supervisor employed by JH Mack/Kohl at various times and there were four in total: Mike Mikitock, Anthony Romano, Greg Gambino and Steve Klein.

Litt averred in his affidavit in support of the motion that Ricardo Russell was an employee of R&B. He also averred that plaintiff did not report to JH Mack/Kohl and that the latter did not provide direction or supervision to plaintiff. He averred that JH Mack/Kohl was not responsible for and had no direction, supervision or control over the means and methods of construction with respect to the work of the various subcontractors. He further averred in his affidavit, and stated in his deposition,

that JH Mack/Kohl did not supply any equipment or ladders to any subcontractors.

Plaintiff's counsel's sole opposition in this regard consists of his contention that there is a question of fact as to whether JH Mack/Kohl had the requisite supervisory control, based upon Litt's testimony that it had the authority to stop the work at the site if they observed any unsafe condition. However, JH Mack/Kohl's authority merely to check the safety of the work site and to stop the work if violations were found does not translate into the kind of authority to direct the work of plaintiff that the statute requires.

"The general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations"(Buccini v. 1568 Broadway Assocs., 250 AD 2d 466, 469 [1st Dept 1998]). Moreover, "the construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees" (Peay v. New Yor City School Const. Authority, 35 AD 3d 566, 567 [2nd Dept 2006], quoting Warnitz v. Liro Group, Ltd., 254 AD 2d 411, 412, quoting Buccini v. 1568 Broadway Assocs., 250 AD 2d 466 at 468-469, supra).

Therefore, JH Mack/Kohl may not be deemed to have exercised supervisory control over plaintiff merely because it was present at the work site and had the authority to halt work if it noticed that the subcontractors were not complying with safety requirements.

In the absence of any evidence showing that it had any direct control over the day-to-day work of plaintiff, JH Mack/Kohl may not be held liable under Labor Law §200(see Peay v. New York City School Const. Authority, 35 AD 3d supra; Warnitz v. Liro Group, Ltd., 254 AD 2d supra; Buccini v. 1568 Broadway Assocs., 250 AD 2d supra; Sainato v. City of Albany, 285 AD 2d 708 [3rd Dept 2001]).

Therefore, JH Mack/Kohl is entitled to summary judgment dismissing plaintiff's claim against it pursuant to §200 of the Labor Law. For the same reasons, since §200 of the Labor Law is a codification of common law principles of negligence, plaintiff's claim against JH Mack/Kohl based upon common law negligence must also be dismissed.

That branch of the motion by the City, NTC and JH Mack/Kohl for summary judgment dismissing so much of the complaint against

them as is premised upon a violation of §241(6) of the Labor Law is also granted. In order to establish a cause of action pursuant to §241(6), it must be demonstrated that there was a violation of a specific rule or regulation of the Industrial Code and that such violation was a proximate cause of plaintiff's injuries (see Parisi v. Loewen Dev. of Wappinger Falls, 5 AD 3d 648 [2nd Dept 2004]). Plaintiff, in his bill of particulars, merely alleges a violation of Industrial Code §23-1.21 in general, without specifying which of that section's numerous provisions are alleged to have been violated. Plaintiff's belated reference to §23-1.21(b)(1) of the Industrial Code for the first time in his opposition is insufficient to support a claim under §241(6) of the Labor Law. Therefore, so much of the complaint against the City, NTC and JH Mack/Kohl as is premised upon a violation of §241(6) of the Labor Law is dismissed.

Finally, that branch of the motion by by defendants for summary judgment dismissing all counterclaims and/or cross-claims for contractual or common law indemnification is deemed to be a discontinuance by the City and NTC of their cross-claims against JH Mack/Kohl. This Court notes that the City, NYCIDA, NTC and USTA interposed a joint answer and JH Mack/Kohl submitted a separate answer. JH Mack/Kohl's answer does not contain cross-claims or counterclaims. The answer by the City, NYCIDA, NTC and USTA contains four "counter complaints" against JH Mack/Kohl and one "cross complaint" against JH Mack/Kohl.

In the first instance, no such pleadings as a "counter complaint" and "cross complaint" exist under New York jurisprudence. The Court, therefore, deems these "counter complaints" and the "cross complaint" to be cross-claims, which assert claims for contribution and for common law and contractual indemnification against JH Mack/Kohl. Moreover, since the City and NTC, the remaining defendants asserting said cross-claims, are moving for this relief, and the same attorney represents all defendants, the Court is at a loss in understanding why defendants would, essentially, be seeking dismissal of their own cross-claims. Therefore, the Court deems this branch of the motion as a discontinuance by the City and NTC of their cross-claims, erroneously denominated in their answer as "counter complaint" and "cross complaint", against JH Mack/Kohl.

Accordingly, the motions are granted to the foregoing extent.

Dated: April 18, 2012

KEVIN J. KERRIGAN, J.S.C.