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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE James J. Golia Justice — IA Part 33

VICTOR GUAMAN,

Plaintiff(s),

– against –

VIEWEST OWNERS LTD., ORSID REALTY CORP., EVEREST SCAFFOLDING, INC., AND AWR GROUP,

Defendant(s).

Index Number 2846 2009

Motion Date April 5 2012

Motion Cal. Number 14 & 15

Motion Seq. No. 12 & 13

The following papers numbered 1 to 44 read on this motion by Everest Scaffolding, Inc. (Everest), for summary judgment dismissing the complaint insofar as asserted against it; motion by plaintiff Victor Guaman for summary judgment in his favor on his claims pursuant to Labor §§240 (1) and 241 (6); and cross motion by Viewest Owners Ltd., Orsid Realty Corp. and AWR Group, Inc., for summary judgment dismissing plaintiff's Labor Law §§240 (1) and 241 (6) claims, and, alternatively, for summary judgment against defendant Everest and third party defendant Central Construction Management, LLC (Central),on their claims for common law contribution and indemnification.

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

In this action plaintiff alleges violations of Labor Law §§ 200, 240(1) and 241(6) and seeks damages for personal injuries sustained in a construction accident that occurred on September 22, 2008, at 277 West End Avenue, in New York City (the "work site"). At the time of the accident, Viewest Owners Ltd. (Viewest) was the owner of the building located at 277 West End Avenue, New York, NY. Orsid Realty Corp. (Orsid) was the managing company for Viewest. AWR Group, Inc. (AWR) was hired by Viewest to renovate the building's facade and serve as general contractor on the project. Everest was a contractor for AWR who installed three sidewalk bridges at the work site in 2007.

Everest moves for summary judgment dismissing the complaint and all cross claims. By separate motion, consolidated herein for efficiency, plaintiff moves for summary judgment on his claims under Labor Law §§200, 240 (1) and 241 (6), and defendants Viewest, Orsid and AWR cross move for summary judgment dismissing the labor law claims or in the alternative , summary judgment on their claim for indemnification against Everest and Central.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace (*see Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876 [1993]). To be held liable under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury, to enable the owner or general contractor to avoid or correct the unsafe condition (*see Rizzuto v Wenger Contr. Co.,* 91 NY2d 343 [1998]; *Braun v Fischbach & Moore,* 280 AD2d 506 [2001]; *Rose v A. Servidone, Inc.,* 268 AD2d 516 [2000]).

Labor Law § 240(1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering ... 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) was enacted 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 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that

responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts,* 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240(1) is nondelegable and ... an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500).

"In order to prevail on a Labor Law § 240(1) cause of action, [a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries" (*Delahaye v Saint Anns School,* 40 AD3d 679, 682 [2007]; *see Berg v Albany Ladder Co., Inc.,* 10 NY3d 902, 904 [2008]; *Robinson v East Med. Ctr., L.P.,* 6 NY3d 550 [2006]).

Labor Law § 241(6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." This section requires owners and contractors at a construction site to " 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501–502 (1993). The regulations contained within the Industrial Code apply to owners and general contractors. *Id.* The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 349 [1998]; *Singleton v Citnalta Constr. Corp.,* 291 AD2d 393, 394 [2002]).

Plaintiff claims that he was injured on September 22, 2008, when he was attempting to exit scaffolding at the work site and was caused to fall from the scaffolding onto debris located on a sidewalk bridge installed by defendant Everest. These sidewalk bridges were installed in 2007, prior to work on the building's facade commenced and before any scaffolds had been built and placed at the work site. The sidewalk bridge was approximately 50 feet long and 10 feet high. There was a section of the sidewalk bridge that did not abut the building and was approximately 4 feet or 5 feet away from the wall of the building.

The record establishes that defendant Everest completed erecting the bridge approximately 19 months prior to the date of the accident and that Everest was not hired to maintain or repair the bridge during the course of the construction work or to supervise and control workers in their use of the bridge. Since Everest had no authority to supervise or control the work that caused the plaintiff's injuries, it cannot be found liable under Labor Law § 200 (*see Allen v Cloutier Constr. Corp.,* 44 NY2d 290, 299 [1978]; *Sprague v Peckham Materials Corp.,* 240 AD2d 392, 394 [1997]; *Noah v 270 Lafayette Assoc.,* 233 AD2d 108, 109 [1996])

The fact that the bridge was not built directly abutting the facade fails to present an issue of fact regarding Everest's negligence. Neither OSHA, the New York City Building Code, nor the New York City Administrative Code require that sidewalk bridges be placed directly against the building's facade. Further there is no requirement that the sidewalk bridge meet or exceed the length of the hanging scaffold.

Additionally, Administrative Code §27-1021(b)(6) mandates that parapet plywood walls, built above sidewalk bridges, be "at least three feet six inches [42 inches] high". Industrial Code 12 NYCRR §23-1.18(b)(2) contains the same 42-inch requirement. The record shows that the parapet wall on the sidewalk bridge erected by Everest was four-feet tall, which exceeded the Code's requirement. Both plaintiff and the project manager at the site testified that the parapet plywood wall erected by Everest was, in fact, four-feet tall. Thus, Everest may not be found liable under Labor Law section 200 or its counterpart, common law negligence based upon improper construction and erection of the sidewalk bridge (see e.g. Morales v Spring Scaffolding, Inc., 24 AD3d 42 [2005]).

At the time of the alleged accident, Everest, was neither a contractor nor an owner at the work site and therefore is not subject to the Labor Law § 240 (1) or § 241 (6) (*see Russin v Picciano & Son,* 54 NY2d 311, 318 [1981]; *Morris v Pepe,* 283 AD2d 558, 559-560 [2001]; *cf. Kehoe v Segal,* 272 AD2d 583, 584 [2000]).

Therefore, the branch of defendant Everest's motion seeking to dismiss plaintiff's claims as against it is granted.

Labor Law §§200, 240 and 241 impose duties on owners and contractors to provide a safe place to work. They do not apply to managing companies unless they are an agent of an owner or contractor **and** they exercise control over the work being done (*Russin v Louis N. Picciano & Son et al.*, 54 NY2d 311 [1981]; see also *Morales v Federated Department Stores, Inc*., 5 AD3d 744 [2004]). Orsid was the managing company for Viewest. Orsid had no involvement in the work being performed at the work site. Orsid did not oversee the work being performed, was not on site and did not control or direct the work being performed by Central. Therefore, the branch of the motion which seeks to dismiss the Labor Law claims against Orsid Realty is granted

In support of his motion, plaintiff submits deposition transcripts and the affidavit of its expert, Kathleen Hopkins, a New York City certified site safety manager with expertise in the field of occupational, industrial and general safety. The expert's affidavit is not accepted since plaintiff did not identify her in pretrial disclosure, and the defendants were unaware of Hopkins until they were served with her affidavit in response to the summary judgment motions, made after the plaintiff filed a note of issue and certificate of readiness

(*see Construction by Singletree, Inc. v Lowe,* 55 AD3d 861 [2008]). Furthermore, the expert's affidavit contains only conclusory opinions that have no probative value. (see *Brady v Bisogno & Meyerson*, 32 AD3d 410 [2006]; *Maldonado v Lee*, 278 AD2d 206 [2000]).

At his examination before trial, plaintiff testified that in or about June, 2008. he was told to work at the work site by his employer Central Construction Management, LLC (Central); that his job with Central consisted of work including (but not limited to) changing bricks, painting and removing fences from the roof of the subject premises; that he was given a shirt to wear while working at the location that read "AWR Group".

Plaintiff also testified that there was a sidewalk bridge between two buildings at the work site to facilitate the work being performed. There was a section of the sidewalk bridge that did not abut the building and was approximately 4 feet or 5 feet away from the wall of the building. The sidewalk bridge was approximately 50 feet long and 10 feet high. To access the fences on the roof and do his job, plaintiff had to use a hanging scaffold. The hanging scaffold was motorized with one motor on each end of the scaffold. When brought all the way down, the scaffold would not rest on the floor of the bridge because the scaffold was too large. Instead, the scaffold would rest on the plywood parapet along the edge of the bridge. The workers had to push against the building wall to move the hanging scaffold onto the piece of plywood along the edge of the sidewalk bridge in order to dismount to the sidewalk bridge platform. At the end of the day, the scaffold was lowered to the plywood parapet sitting on top of the sidewalk bridge.

Plaintiff further testified that on September 22, 2008, he was working with only the foreman on the scaffold. That day the sidewalk bridge had demolition material on it. At the end of the work day on September 22, 2008, at approximately 5:50 p.m., the scaffold was lowered onto the plywood parapet by the plaintiff and the foreman. The foreman immediately left his end of the scaffold and exited the sidewalk bridge, leaving plaintiff alone on the scaffold. The plaintiff could not exit the same way as the foreman did because there was material between where he was standing and where the foreman was standing before exiting. As plaintiff attempted to exit the scaffold onto the deck of the bridge, plaintiff placed one foot over the rail onto the outer side of the scaffold and was in the process of bringing his other leg over the rail when he felt the scaffold and plywood move. To avoid falling into the 4-5 foot gap between the bridge and the facade of the building, plaintiff pushed himself off the scaffold and fell onto the sidewalk bridge landing on his right hand, face and ultimately his entire body.

Dinko Orlic, project manager for AWR testified on their behalf as follows: the scope of the work done on the subject premises was exterior restoration, to wit, "facade work". There was a sidewalk bridge located along the southern facade between the building. At the

end of the day, the worker would usually lower the hanging scaffold to the bridge and not to street level. Orlic further testified that he was never there at the end of the work day to see the location where the hanging scaffold was lowered and secured for the night.

Jimmy Downs, testified on behalf of Everest as follows: he was the president and owner of Everest which was contracted by AWR to install a sidewalk bridge at the work site; Everest installed the bridge at West End Avenue, the side streets and near the service entrance; generally, a parapet is installed on a sidewalk bridge and the parapet is approximately 42 inches high.

Anibal Pucha of Central Construction testified as follows: the "parapet wall" was three or four feet away from the brick wall, and dismounting from the job location required two people. At night, the scaffold would rest on the sidewalk bridge.

The deposition testimony is sufficient to demonstrate that plaintiff fell from a scaffold platform because the scaffold moved. In opposition, defendants failed to raise a triable issue of fact as to the absence of a statutory violation or as to whether the plaintiff's own conduct was the sole proximate cause of his accident (*see La Veglia v St. Francis Hosp.,* 78 AD3d 1123, 1127 [2010]). The uncontroverted evidence that the scaffold failed and that no other safety device was provided either to prevent the scaffold from moving or to prevent plaintiff from falling demonstrates as a matter of law that the statute was violated and that the violation was a proximate cause of plaintiff's injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Williams v 520 Madison Partnership*, 38 AD3d 464, 464-465 [2007]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]). Therefore, the branch of plaintiff's motion for summary judgment on his Labor Law 240 (1) claim is granted and the branch of the cross motion for summary judgment dismissing plaintiff's Labor Law §240(1) claim is denied.

To support his Labor Law 241(6) claim, plaintiff alleges violations of Industrial Code §§ 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-2.4 and 23-5 of the Industrial Code.

The regulations set forth at 12 NYCRR 23-1.15, 23-1.16, and 23-1.17, which set standards for safety railings, safety belts, and life nets, respectively, are inapplicable here because the plaintiff was not provided with any such devices (*see Dzieran v 1800 Boston Rd., LLC,* 25 AD3d 336, 337 [2006]; *Luckern v Lyonsdale Energy Ltd. Partnership,* 281 AD2d 884, 887 [2001]; *Avendano v Sazerac, Inc.,* 248 AD2d 340, 341 [1998]; *Spenard v Gregware Gen. Contr.,* 248 AD2d 868 [1998]).

The regulation set forth at 12 NYCRR 23-1.8 requires site employees to be provided with eye protection, respirators, protective apparel, foot protection, water proof clothing and protection from corrosive substances and is not applicable to any facts in this case.

In addition, 12 NYCRR 23-1.7 (b) (1) is not applicable to the facts of this case, as that regulation applies to safety devices for hazardous openings, and not to an elevated hazard (*see* 12 NYCRR 23-1.7 [b] [1]; *Forschner v Jucca Co.*, 63 AD3d 996 [2009]*; Rau v Bagels N Brunch, Inc*., 57 AD3d 866, 868; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619).

12 NYCRR 23-1.7(f) states:

> Vertical passage. Stairways, ramps or runways shall be provided as a means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Since this case does not deal with access to working levels above or below ground, this provision is inapplicable (see e.g., *Miano v Skyline New Homes Corp*., 37 AD3d 563 [2007]; *Seepersaud v City of New York*, 38 AD3d 753 [2007]).

12 NYCRR 23-5.1(f), (h) is not sufficiently specific to serve as a basis for a Labor Law 241 (6) claim (*see Hawkins v City of New York*, 275 Ad2d 634 [2000].

12 NYCRR 23-5.8 (c) (1) provides that "the installation or horizontal change in position of every suspended scaffold shall be in charge of and under the direct supervision of a designated person". The record reveals that this provision was complied with.

It is also alleged that defendants violated 12 NYCRR 23-5.3. This provision states as follows:

> General provisions for metal scaffolds: Access. Ladders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level.

This section is inapplicable as plaintiff testified that he didn't want to move the fencing to get to the proper exiting area on the scaffold and the existence of a ladder would not have made a difference in the happening of the accident.

The Industrial Code violations cited by plaintiff are either inapplicable or not sufficiently specific to support a claim under Labor Law §241(6). Therefore, the branch of the motion by plaintiff which is for summary judgment in his favor on his claims under Labor Law §241(6), is denied and the branch of the cross motion for summary judgment dismissing plaintiffs claims pursuant to Labor Law 241(6) is granted.

Under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury, to enable the owner or general contractor to avoid or correct the unsafe condition (*see Rizzuto v Wenger Contr. Co.,* 91 NY2d 343 [1998]; *Braun v Fischbach & Moore,* 280 AD2d 506 [2001]; *Rose v A. Servidone, Inc.,* 268 AD2d 516 [2000]). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v New York State Elec. & Gas Corp., supra,* at 877). Here, the defendants Viewest and AWR established that they did not direct or control the plaintiff's work. Therefore, the branch of the cross motion which seeks to dismiss plaintiff's Labor Law §200 claims, as against Viewest and AWR, is granted, without opposition.

The branch of the cross motion for indemnification from Central is granted based upon the terms of the indemnification clause in the contract between the parties. General Obligations Law § 5-322.1 permits a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence (*Brooks v Judlau Contracting, Inc.*, 11 NY3d 204 [2008]). Since the contract was entered into prior to the accident, and the indemnification is limited both to injuries caused by Central's own action and only to the fullest extent permitted by law, the owner defendants may be entitled to contractual indemnification if Central is found totally or partially responsible for plaintiff's injuries *(Rodrigues v. N & S Building Contractors, Inc.,* 5 NY3d 427 (2005).

The branch of the cross motion for summary judgment on their claims for contribution and indemnification from Everest is denied. There is no basis upon which to hold Everest liable. Everest erected a sidewalk bridge along the building's service entrance. This bridge ended a few feet away from the building's corner wall.. Defendants argue that because the bridge was shorter in length than the hanging scaffold used by Central during this project, that Everest created a defective condition. To support this argument, defendants rely solely on Everest's contract with AWR which states that "All work shall be completed in a

workmanlike manner according to standard practices, New York City Building Code and OSHA requirements". However, defendants do not point to any specific code or regulation that Everest is alleged to have violated. Indeed there is no requirement in the New York City Building Code or the New York Administrative Code which requires that sidewalk bridge be placed directly against the building's facade, or requires that the sidewalk bridge meet or exceed the length of the hanging facade [see New York City Building Code §§ 27-1011(b), 27-594, 27-591, 27-1015, 27-1042(b)(1), 27-1042(b)(3), 27-1021(b)(1), 26-204.1, 27-1042(a)(4), 27-1042(g); OSHA §§ 1926.452(d), 1926.451(c)(1), 1926.451(c)(3), and 1926.451(c)(4)]

Furthermore, even if the distance between the bridge and the wall was considered a "hazardous opening" under 12 NYCRR 23-1.7(b)(1)(I) , safety railings were in place and therefore, Everest was in compliance with the regulation. Everest also erected a four-foot parapet wall along the portion of the bridge abutting the gap between the bridge and the building's wall. Plaintiff, Jimmy Downes (Everest's president), and Dinko Orlic (AWR's project manager) all testified that Everest properly erected a protective four-foot wall along the side of the sidewalk bridge. Jay Petrie, director of safety for AWR also inspected the sidewalk bridge the day after the subject accident and stated in his report that "I examined the scaffold and the sidewalk bridge on 9/23/08 and found everything to be set up correctly and according to Code".

Finally, it is noted that Everest erected the bridge at the site before the work on the building facade had commenced and, accordingly, before the hanging scaffold had been built. This hanging scaffold was set up by plaintiff and other Central employees. It would have been difficult (if not impossible) for Everest to have anticipated the various types of hanging scaffolds that Central was going to use on the project.

Accordingly, the motion by Everest for summary judgment in its favor dismissing all claims and cross claims against it is granted. The branch of the motion by plaintiff for summary judgment on his claim pursuant to Labor Law §240 (1), is granted as against defendants Viewest, and AWR.. The branch of plaintiff's motion for summary judgment on his claim pursuant to Labor Law §241 (6), is denied. On the cross motion by Viewest, Orsid and AWR, plaintiff's complaint is dismissed only as against defendant Orsid. The branch of the cross motion seeking to dismiss plaintiff's Labor Law §200 claim is granted on the merits, without opposition, as against defendants Viewest and AWR . The branch of the cross motion which seeks to dismiss plaintiff's Labor Law §240(1) claim is denied. The branch of the cross motion which seeks to dismiss plaintiff's Labor Law §241(6) claim is granted, as the Industrial Code sections allegedly violated are either inapplicable or not sufficiently specific. The branch of the cross motion for indemnification from Central is

granted. Finally, the branch of the cross motion by the for summary judgment on claims for contribution and indemnification from Everest is denied.

This constitutes the order of the court.

Dated: June 15, 2012

James J. Golia, J.S.C.