[* 1]

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

RUNAKO ANDERSON,

Plaintiff,

- against -

VESTRY ACQUISITION, LLC, P. O'CONNOR & SONS, INC. and VANGUARD CONSTRUCTION AND DEVELOPMENT COMPANY, INC.,

Defendants.

Index No.: 17544/10

Motion Date: 5/3/12

Motion No.: 2

Motion Seq.: 4

- x

VESTRY ACQUISITION LLC,

Third-Party Plaintiff,

- against -

KENRY CONTRACTING, INC.,

Third-Party Defendant.

- x

The following papers numbered 1 to 43 read on this motion by the plaintiff for an award of partial summary judgment in his favor and against defendants Vestry Acquisition LLC. (Vestry) and Vanguard Construction and Development Company, Inc. (Vanguard) on his Labor Law section 240(1) and 241(6) claims; a separate motion by defendant P. O'Connor & Sons, Inc. (O'Connor & Sons)for an award of summary judgment dismissing the claims and cross claims asserted against it and in its favor on its first, second and third cross claims for indemnification asserted against defendant Vestry, defendant Vanguard and third-party defendant Kenry Contracting, Inc. (Kenry), respectively; and cross motion by defendant/third-party plaintiff Vestry and defendant Vanguard for an award of summary judgment (1) dismissing the plaintiff's negligence and Labor Law §200 claims and defendant O'Connor & Sons and third-party defendant Kenry's claim for indemnification (2)declaring that Vestry and Vanguard are additional insureds on the operative Kenry policy of insurance, and (3) finding a breach

of contract against O'Connor & Sons for its failure to secure general liability insurance naming Vanguard and Vestry as insureds.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....1-6;	22-26
Notice of Cross Motion - Affidavits - Exhibit...	29-31
Answering Affidavits - Exhibits.....7-18;	32-36
Reply Affidavits.....19-21;	27-28 37-43

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

The plaintiff commenced the main action to recover damages for personal injuries he allegedly sustained, on May 12, 2010, when he fell through a floor during the course of his work at a construction site located at 31-33 Vestry Street in Manhattan, New York and owned by defendant Vestry. Defendant Vanguard was the general contractor on the project and O'Connor & Sons was a subcontractor retained by it to perform carpentry work at the site. Vanguard also retained third-party defendant Kenry to perform concrete and superstructure work at the site. At the time of the accident, the plaintiff was employed as a laborer by nonparty Construction Force Services, an employment agency.

As a result of the accident, the plaintiff's verified amended complaint asserts two causes of action wherein he alleges claims for common law negligence and violations of Labor Law §§ 200, 240 and 241(6) and the Industrial Code against defendants Vestry, O'Connor & Sons and Vanguard. In turn, Vestry commenced a third-party action against its subcontractor Kenry, inter alia, for indemnification.

The Parties' Examination Before Trial Testimony

Upon examination before trial, the plaintiff testified that approximately two days before the incident his employer, nonparty Construction Force Services told him to report to work at the subject work site, and report to the foreman from third party defendant Kenry Contracting, Inc., whom the plaintiff believed was the "main masonry" contractor at that site. The following day, the plaintiff reported to work as instructed. He indicated that he was not provided with any safety devices by anyone at the job site. He was directed by the foreman of third-party

defendant Kenry to work with a group of other laborers to gather and clean up materials from the floor on which he was assigned to work, put them in a bucket and lower the materials down through a chute in the floor so they could be removed from the job site. According to the plaintiff, there was one laborer situated on each floor of the building to remove materials in the same manner. On the second day of work, which is when the accident occurred, the plaintiff was again assigned to move materials. That morning, he moved boards, clamps and other masonry materials from the third floor. After lunch, he was directed by the foreman for Kenry to work "on the floor just under the roof" and "clean up all the material on that floor", which he did. Right before the accident, the plaintiff was in the process of gathering materials he planned to send down the chute by walking around and picking up clamps and other small items. The plaintiff explained that as he was walking around that floor looking for materials to gather he "stepped up on a platform, what I thought was a platform, and it gave way and I went right through" an opening that it was covering. The plaintiff fell feet first through the opening, struck an upright ladder that was situated beneath his floor, and landed on his back on a concrete floor. When the platform broke, part of it fell with the plaintiff to the floor below the opening.

Mr. Terence Hughes was the construction superintendent and site safety coordinator for the general contractor, defendant Vanguard. Upon examination before trial, Mr. Hughes testified that Vanguard was retained by the site's owner, defendant/third-party plaintiff Vestry to serve as the general contractor for the construction of a nine-story mixed use commercial and residential building. Defendant Vanguard did not have any in-house contractors. All of the construction work was handled by subcontractors such as defendant O'Connor & Sons and third-party defendant Kerry. Mr. Hughes indicated that he, on behalf of defendant Vanguard, supervised the overall coordination of the work and safety at the site.

Mr. Hughes also indicated that third-party defendant Kenry was retained as a subcontractor to perform concrete and superstructure work at the site. Mr. Hughes was notified of the plaintiff's accident by Mr. Fintan Curly, Kenry's foreman at the site. Mr. Curly reportedly did not witness the accident, but two employees of defendant O'Connor & Son were reportedly on the roof when the accident occurred to begin life safety work around the perimeter of the structure. They reported that the plaintiff had fallen through a skylight opening that was protected by three-quarter inch plywood and two-by-fours around the perimeter of the opening. Mr. Hughes stated that the protective plywood had been

placed there by third-party defendant Kenry upon the completion of its portion of the work and that he had observed it. On the morning of the date of the accident, Mr. Hughes observed the subject opening and the plywood covering it. There were no cones or warning tape surrounding the opening but the word "hole" was spray painted on the plywood. While the Kenry foreman supervised the work of its individual workers, Mr. Hughes indicated that he was the person who supervised the safety protocol followed by Kenry on and before the date of the incident.

According to Mr. Hughes, defendant O'Connor & Sons was the life safety subcontractor at the work site. As the life safety subcontractor, it was responsible for installing guard rails, mesh netting related to the guardrails and perimeter guardrails. It implemented life safety features such as a toe kick, which prevented items on the floor from being kicked off the sides of the structure, and a guard rail system around the perimeter of the structure immediately following the accident in order to cure a Buildings Department violation. There were no violations issued in connection with the skylight opening and the accident. Mr. Hughes indicated that the instructions to third-party defendant Kenry to temporarily cover the subject opening with plywood came from him and was done to his specifications. He was aware of the materials used to make the cover and was satisfied that it was covered the way he instructed Kenry to cover it.

Mr. Hughes also testified that defendant O'Connor & Sons took its instructions from him. Defendant O'Connor & Sons was not slated to install life safety protection at the site until he instructed it do so, which they were in the process of preparing to do when the plaintiff's accident occurred. The procedure for installing guardrails is to first take care of the perimeter and then go back to handle any interior locations which were previously already protected by Kenry. Mr. Hughes stated that although defendant O'Connor & Sons was instructed to put a guardrail system around the subject skylight opening, their first responsibility was to install the perimeter guardrail, as he had instructed them to do. At the time of the accident, the perimeter guard rail system was not yet in place. Thus, the subject interior opening would not be addressed until such time as the perimeter rail system was completed. The plaintiff's accident occurred before defendant O'Connor and Sons had the opportunity to install safety protection around the subject opening.

Mr. Fintan Curley, who was the foreman of third-party defendant Kenry on the date of the accident, testified on its behalf. He stated that Kenry was retained as a subcontractor to perform concrete work to build a structure at the site. According

to Mr. Curly, the plaintiff and another laborer were sent to the work site at his request by nonparty Construction Force to move materials from the various floors of the structure. He indicated that he sent the plaintiff to the higher floors to remove materials but did not tell the plaintiff to the roof top area. Mr. Curly also indicated that he did not tell the plaintiff to not go on the roof. Mr. Curly stated that the opening through which the plaintiff had fallen was an opening for a skylight that Kenry had constructed in accordance with the specifications of his work. He further stated that, upon Mr. Hughes' request, three-quarter inch plywood was used by his employees to cover the subject opening with a temporary cover. Mr. Hughes saw the temporary plywood cover and it met with his approval.

Mr. Allen Curran testified upon examination before trial on behalf of defendant O'Connor & Sons. Mr. Curran was the foreman for O'Connor & Sons at the work site. On the date of the incident, Mr. Curran and a coworker were working together on the roof when he observed someone walking around the area from the corner of his eye. That person turned out to be the plaintiff. Mr. Curran was not watching the plaintiff and, thus, had no idea what the plaintiff was doing. After the plaintiff fell through the opening, Mr. Curran's coworker indicted that the plaintiff had fallen. Mr. Curran stated that he heard a loud noise contemporaneous to the fall but did not go to investigate what had occurred or go to the plaintiff's aid.

The Parties' Request For Relief

The plaintiff seeks an award of summary judgment in his favor and against defendant/third party plaintiff Vestry and defendant Vanguard on his Labor Law §§ 240 and 241 claims. To support his motion for summary judgment, in addition to copies of the transcripts of parties' examination before trial testimony summarized herein, the plaintiff submits an affidavit wherein he stated that he did not know there was an opening under the platform before he stepped on it. The platform did not have any writing or other markings on it to indicate that there was a hole beneath it. The plaintiff stated that if the word "hole" had been written on the platform, he would not have stepped onto it. Nor was there a barrier or netting around that platform to prevent anyone from stepping onto it. In opposition to summary judgment, Vestry and Vanguard argue that a question of fact exists as to whether the plaintiff was actually performing work when the accident occurred.

Labor Law section 240(1) provides, in relevant part, as

follows: "All contractors and owners and their agents who contract for but do not direct or control the work, in the erection,demolition, repairing, altering, painting, cleaning ... 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." It is well-settled that the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, "those best suited to bear that responsibility" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]) instead of on the workers, who are not in a position to protect themselves. (Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 [1985]). This provision imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury (see, Striegel v Hillcrest Heights Development Corp. 100 NY2d 974 [2004]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]; Keaney v City of New York, 24 AD3d 615 [2005]). The duty imposed by the statute is "nondelegable and ... an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [citations omitted]." (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993], quoting Rocovich v Consolidated Edison Co., 78 NY2d 509, supra; see also, Amato v State of New York, 241 AD2d 400, 401 [1997], lv denied 91 NY2d 805).

As a matter of law, the work that was being performed by the plaintiff at the time of the accident falls within the purview of Labor Law section 240(1), which applies to work performed at heights and where the work performed involves risks related to differences in elevation. (See, Groves v Land's End Hous. Co., 80 NY2d 978 [1992]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991], supra). The plaintiff has made a prima facie showing of entitlement to judgment as a matter of law against Vestry and Vanguard pursuant to Labor Law § 240(1) by demonstrating that he fell as a result of the absence of safety devices which would protect him from falling through the inadequately covered floor opening while engaged in a work-related activity involving an elevation-related risk at the subject premises (see generally, Hagins v State of New York, 81 NY2d 921, 922 [1993]; Crooks v E. Peters, LLC, 60_AD3d 717 {2009]; Lesisz v Salvation Army, 40 AD3d 1050 [2007]; Mariani v.New Style Waste Removal Corp., 269 AD2d 367 [2000]). In opposition, Vestry and Vanguard fail to raise a triable issue of fact (cf., Artoglou v Gene Scappy Realty

Realty Corp., 57 AD3d 460 [2008]).

Accordingly, the branch of the plaintiff's motion which seeks an award of partial summary judgment in his favor and against defendant/third-party plaintiff Vestry and defendant Vanguard on his Labor Law section 240(1) claim is granted. .

The plaintiff also seeks summary judgment in his favor and against defendant/third-party plaintiff Vestry and defendant Vanguard on his Labor Law §241(6) claim. Labor Law § 241(6) places a nondelegable duty on owners and contractors, without regard to direction and control, to keep work sites safe for those employed at such places (see Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 503, supra; Romero v J&S Simcha, Inc., 39 AD3d 838 [2007]; De Silva v. Jantron Indus., 155 AD2d 510 [1989]). In order to prevail under this section of the Labor Law, a plaintiff must establish that certain "concrete specifications" of the Industrial Code were violated. (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]; Ares v State of New York, 80 NY2d 959). In support of his Labor Law section 241(6) claim, the plaintiff's complaint and amended bill of particulars allege a violation of several provisions of the Industrial Code, including Industrial Code section 23-1.7(b)(1) which applies to hazardous openings. With the exception of Industrial Code section 23-1.7(b)(1), the plaintiff has failed to address the other alleged violations in his moving papers and, thus, those parts of the plaintiff's Labor Law 241(6) claim which are predicated on those violations not mentioned by the plaintiff in his moving papers are deemed abandoned (see, Genevoses v Gambino, 309 AD2d 832 [2003]). Nonetheless, the plaintiff has made a prima facie showing of entitlement to judgment on this motion by establishing that he fell through an opening that was not adequately protected and that Vestry and Vanguard violated this section of the Industrial Code by failing to ensure that the hazardous opening was "guarded by a substantial cover fastened in place or by a safety railing" in violation of Industrial Code section 23-1.7(b)(1) (see, Davidson v E.O.K. Green Acres, LP., 298 AD2d 546 [2002]). In opposition, Vestry and Vanguard fail to raise a triable issue of fact (Alvarez v Prospect Hospital, 68 NY2d 230[1986]).

Accordingly, the plaintiff is awarded summary judgment in his favor and against defendant Vestry and Vanguard on his Labor Law §241(6) claim.

Defendant O'Connor & Sons contends that it is entitled to summary judgment dismissing the plaintiff's causes of action for common law negligence and violations of Labor Law §200, 240(1)

and 241(6) as well as cross claims against for indemnification it because the alleged accident was not caused as a result of any acts or omissions on its part because (1)third party Kenry was responsible for and installed the protection over the opening through which the plaintiff fell, not O'Connor & Sons, and (2)it was neither the owner or general contractor at the site and had no control or supervisory authority over Kenry's means and methods of work. In opposition, the parties contend that a triable issue of fact exists with respect to Kenry's negligence.

Liability for negligence at a work site will attach pursuant to common law or under Labor Law §200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the dangerous condition (see, Pirotta v EklecCo, 292 AD2d 362 [2002]; Kobeszko v Lyden Realty Investors, 289 AD2d 535 [2001]; Giambalvo v Chemical Bank, 260 AD2d 432 [1999]). Based upon this standard and the evidence presented herein by defendant O'Connor & Sons, it has established its entitlement to summary judgment dismissing the plaintiff's claim against it that is predicated upon common law negligence. Review of the parties' deposition testimony submitted in support of its motion, demonstrates that there is no evidence that it exercised any supervisory control over the worked performed at the site or that it had notice of any dangerous condition. In opposition, the plaintiff has not raised a triable issue of fact (Alvarez v Prospect Hospital, 68 NY2d 230 [1986]).

The plaintiff's claim against defendant O'Connor & Sons for a violation of Labor Law § 200 must also be dismissed because an "implicit precondition" to the duty to provide construction-site workers with a safe place to work is that the party charged with such responsibility have the authority to control the activity bringing about the injury (see, Comes v New York State Elec. & Gas Corp., 82 NY2d 876). Here, it has been established and there is no question that defendant O'Connor & Sons did not exercise any degree of supervision and control over the injured plaintiff's work or the work performed by third-party defendant Kenry, the subcontractor who installed the plywood over the hole through which the plaintiff fell (see, Russin v. Louis N. Picciano & Son, 54 NY2d 311 [1981]).

Accordingly, defendant O'Connor & Sons request for summary judgment dismissing the plaintiff's common law negligence and Labor §200 claims against it is granted and the plaintiff's common law negligence and Labor Law §200 claims against it are

hereby dismissed.

Turning to the plaintiff's remaining claims against defendant O'Connor & Sons, "Labor Law § 240(1) imposes a non-delegable duty upon owners, general contractors, and their agents to provide proper protection to persons working upon elevated structures. A subcontractor can be deemed an "agent" under this statute, and be held liable, if to it is delegated the supervision and control either over the specific work area involved or the work which gives rise to the injury. Labor Law § 240(1) does not make each subcontractor liable for all injuries occurring on a job site in the absence of the subcontractor's ability to direct, supervise and control the work giving rise to the injury" (Headen v. Progressive Painting Corp., 160 AD2d 319 [1990]). The evidence submitted by defendant O'Connor & Son's unequivocally demonstrates that did not direct, supervise or control the work giving rise to the plaintiff's injury or have the authority to do so. As such, O'Connor & Sons have established that it is not liable under Labor Law §240. Nor may liability be imposed under these circumstances pursuant to Labor Law §241(6)(see, Russin v. Louis N. Picciano & Son, 54 NY2d 311 [1981]). In opposition, the plaintiff has failed to defeat summary judgment by raising a triable issue of fact as to this particular defendant's supervision and control of the activity which resulted in his injury.

Accordingly, defendant O'Connor & Son's request for summary judgment dismissing the plaintiff's Labor Law §§ 240 and 241 claims against it is granted and the Labor Law §§ 240 and 241 claims asserted against it are hereby dismissed.

Since defendant O'Connor & Sons did not perform any work on or involving the opening through which the plaintiff fell and was admittedly not obliged to do so by the owner or contractor prior to the happening of the accident, it established its entitlement to summary judgment by "demonstrating that the injured plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province" (Schultz v. Bridgeport & Port Jefferson Steamboat Co., 68 AD3d 970 [2009]). Accordingly, that branch of O'Connor & Sons' motion which seeks dismissal of the cross-claims against it for contribution and/or indemnification is granted and those cross-claims are hereby dismissed (see, Proulx v. Entergy Nuclear Indian Point 2, LLC --- N.Y.S.2d ----, 2012 WL 3104046 [2012])

The cross motion by Vestry and Vanguard for summary judgment dismissing the plaintiff's common law negligence and Labor Law § 200 claims against them is denied. They have failed to

demonstrate a prima facie entitlement to summary judgment on these claims since Mr. Hughes testimony on behalf defendant general contractor Vanguard essentially conceded liability when he testified, upon examination before trial, that he was responsible for supervising all aspects of safety at the site, directed Kenry to place a temporary plywood cover over the subject opening, and was aware of the subject dangerous condition at the site. (See, Ordonez v Brooklyn Tabernacle, 9 Misc.3d 1102 [2005]).

The cross-motion by Vestry and Vanguard for summary judgment on their claim for contractual indemnification against third-party defendant Kenry is denied since an issue of fact exists herein as to their own negligence (see, Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 NY2d 786, 795, rearg. denied 90 NY2d 1008 [1997]).

In light of the foregoing determination, the cross-motion by Vestry and Vanguard for summary judgment on their claim for indemnification against defendant O'Connor & Sons and is denied as moot and their remaining claims against it are denied as without merit.

The motions and cross-motion for summary judgment are in all other respects denied.

Dated: Long Island City, NY
August 27, 2012

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ROBERT J. McDONALD
J.S.C.