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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY **PART** 8

Justice

Index Number : 100963/2010
PENARANDA, BRAULIO MILTON
vs.
4933 REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 100963/10
MOTION DATE 6/5/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 29 **, were read on this motion to/for** summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1-14

Answering Affidavits — Exhibits _____ **No(s).** 15-27

Replying Affidavits _____ **No(s).** 28-29

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/11/12

JOAN M. KENNEY, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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BRAULIO MILTON PENARANDA,

Plaintiff,

Decision & Order
Index No.: 100963/10

-against-

4933 REALTY, LLC,

Defendant.

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4933 REALTY, LLC,

Third-Party Plaintiff,

-against-

NY CONSTRUCTION WORK, INC, d/b/a K&S CONSTRUCTION,

Third-Party Defendant.

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JOAN M. KENNEY, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Defendant, 4933 Realty, LLC (4933) seeks an Order, pursuant to CPLR 3212, dismissing plaintiff's claims based on violations of Labor Law §§ 200, 240 (1) and 241 (6), and for summary judgment on its third-party claims (motion sequence 001).

Third-party defendant NY Construction Work, Inc. d/b/a K&S Construction (NY Construction) seeks an Order, pursuant to CPLR 3212, dismissing the third-party complaint (motion sequence 002).

FACTUAL BACKGROUND

This action arises out of an accident that occurred on November 24, 2009, when plaintiff injured his left wrist, neck and back when he fell off a "Bobcat" machine while working at 129-09 26th Avenue, Flushing, New York. At the time of the accident,

plaintiff was employed by third-party defendant, NY Construction, and was in the process of carrying plywood on the Bobcat machine.

According to the complaint, 4933 is the owner of the property where the accident took place, and NY Construction was engaged by 4933 to perform construction at the premises and leased the premises where the accident occurred from 4933. Motion 001, Ex. B. The complaint alleges causes of action against 4933 for common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). In his bill of particulars, plaintiff asserts violations of the following sections of the Industrial Code: 23-6.1 (c) (1) and (2); 23-6.3 (k); 23-9.2 (b) (1) and (2) (c) (1); 23-9.4 (f), (g) and (h) (4); and 23-9.7 (c) and (e). Motion 001, Ex. A.

At his examination before trial (EBT), plaintiff testified that he was employed to clean up trash and move plywood at the project and, at the time of the occurrence, he was standing on the Bobcat machine, approximately three feet off the ground, when he was thrown to the ground. Plaintiff EBT, at 40, 45-46, 48. Plaintiff said that, at the time that he got onto the machine it was stopped, but that, while he was holding on to it, the driver of the Bobcat started moving the machine, causing him to be thrown to the ground. *Id.* at 48. Plaintiff testified that the driver of the Bobcat told him to hold on to the machine and to act as a counterweight to balance the Bobcat because of the plywood in the front. *Id.* at 49-50. Plaintiff was not on a seat on the Bobcat

when the accident took place. *Id.* At a second EBT, plaintiff averred that he was instructed to move the plywood by his NY Construction boss. Plaintiff's 2d EBT, at 44, 54. Plaintiff confirmed that the plywood that he was moving was not used to frame the concrete in order to erect the curbs. *Id.* at 54.

Hyuk K. Hwang (Hwang), the president of NY Construction, was also deposed in this matter and testified that NY Construction leased the warehouse at the location where the accident took place. Hwang EBT, at 9-11. Hwang stated that NY Construction was contracted by 4933 to erect a concrete curb around the parking lot located at 129-09 26th Avenue. *Id.* at 13-14. According to Hwang, he was unaware of any accident occurring at the project, and he never took any NY Construction employee to the hospital during the three-day project. *Id.* at 37. Hwang said that the accident occurred within the warehouse that NY Construction leased from 4933, and that plaintiff did not work at the curb construction project, but rather worked inside the warehouse, organizing the warehouse space. *Id.* at 40-42, 70, 80-81. In addition, Hwang averred that he was responsible for directing the work of NY Construction's employees and that no one from 4933 directed or controlled the work of NY Construction employees. *Id.* at 34-35.

Andy Kim (Kim), the property manager for 4933, was deposed in this matter and stated that NY Construction leased the warehouse where the accident occurred from 4933, and that 4933 did not

provide any equipment, tools, materials or supervision to or for NY Construction workers. Kim EBT, at 32-33. Further, Kim said that 4933 was not in charge of safety at the project. *Id.* at 32.

Pursuant to the terms of the lease agreement entered into between NY Construction and 4933 for the warehouse space,

> "[the Tenant will] forever indemnify and save harmless the Landlord for and against all liability, penalties, damages, expenses, and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns, or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises ... ."

Motion 001, Ex. H.

In addition to the lease agreement, NY Construction and 4933 also entered into a liability agreement, which states, in pertinent part:

> "The Contractor [NY Construction] hereby indemnifies and holds harmless the Company [4933], its subsidiaries, and affiliates, and their officers and employees, from any damages, claims, liabilities, and costs, including reasonable attorney's fees, or losses of any kind or nature whatsoever which may in any way arise from the services performed by the Contractor hereunder, the work of employees of the Contractor while performing the services of the Contractor hereunder, or any breach or alleged breach by Contractor of this Agreement, including the warranties set forth herein. The Company shall have the right to retain control over the defense of, and any resolution or settlement relating to, such loss.
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> . . .
>
> Each Party hereto had the opportunity to have this Agreement reviewed by competent counsel; therefore, this Agreement shall constitute a product of arms-length negotiations and be interpreted as mutually drafted by the parties herein."

Motion 001, Ex. I.

Kim testified that he does not read English and did not recall reviewing the liability agreement, but did acknowledge his signature on the document. Kim EBT, at 19.

The main thrust of 4933's argument is that, based on the above-quoted provisions of the lease and liability agreements, it is entitled to complete contractual indemnification from NY Construction, and that, even though liability has yet to be established, it is entitled to an order of conditional liability.

As a secondary argument, 4933 contends that, if the court is unwilling to grant its request for contractual indemnification from NY Construction, plaintiff's Labor Law claims must, nevertheless, be dismissed, because, at the time of the occurrence, plaintiff was not involved in any aspect of the construction project that forms the basis of his lawsuit. 4933 maintains that all of the deposition testimony confirms that plaintiff's job was to organize the warehouse and that he was not involved in the actual erection of the concrete curb. Moreover, 4933 asserts that, in order to prevail on a Labor Law § 240 (1) cause of action, the injury must have been caused by an elevation risk, which was not the case in the instant matter. Further, 4933 argues that to hold an owner liable for a claim pursuant to Labor Law § 200, a worker must prove that the owner either created or had notice of a dangerous condition, with sufficient time to remedy it, whereas in the case

at bar, plaintiff's accident occurred because a co-worker started moving the Bobcat machine while plaintiff was still standing on it. Lastly, 4933 claims that the nature of plaintiff's work indicates that he was not "employed" at the construction site, thereby negating plaintiff's Labor Law § 241 (6) cause of action.

In opposition to motion sequence number 001, plaintiff states that he withdraws his causes of action based on common-law negligence and Labor Law § 200. Plaintiff contends that, in its third-party bill of particulars, 4933 admits that plaintiff was not provided with adequate safety equipment; however, in the third-party bill of particulars 4933 says that NY Construction failed to provide the requisite safety measures. Plaintiff's Op., Ex. 6. Moreover, plaintiff maintains that the work in which he was engaged was incidental and necessary to the construction project. In sum and substance, plaintiff argues that triable issues of material fact exist with respect to his Labor Law §§ 240 (1) and 241 (6) causes of action which preclude granting 4933 summary judgment dismissing the complaint.

NY Construction has opposed that portion of 4933's motion seeking contractual indemnification from it based on the lease agreement, because that agreement was not part of the third-party complaint. In addition, NY Construction agrees that, at the time of the occurrence, plaintiff was not working on the construction project, the erection of a concrete curb, but was organizing the

warehouse, thereby barring him from asserting any cause of action under the Labor Laws.

The third-party complaint asserts four causes of action against NY Construction: (1) common-law indemnification; (2) common-law contribution; (3) contractual indemnification; and (4) breach of contract in not procuring insurance.

In motion sequence number 002, NY Construction avers that 4933 is not entitled to indemnification because plaintiff, its employee, did not suffer a grave injury and because the lease agreement was not part of the third-party complaint. In addition, NY Construction contends that the fourth cause of action must be dismissed because the contract does not require that NY Construction obtain insurance. The court notes that the liability agreement states that NY Construction is required to obtain Worker's Compensation insurance but, in the event that it is excused from obtaining Worker's Compensation insurance, it then must obtain general commercial liability insurance.

NY Construction maintains that the liability agreement is unenforceable because it is undated, it does not indicate that it pertains to the contract for the erection of the concrete curb, and the accident does not arise from services performed by NY Construction. Further, NY Construction contends that the work that plaintiff was performing did not arise out of or was incidental to the contractual work of erecting a concrete curb.

In opposition to motion sequence 002, 4933 argues that the liability agreement is valid and enforceable because: (1) Kim acknowledged signing it; (2) it indicates the party to be indemnified; (3) it was executed in conjunction with the work agreement; and (4) it confirmed the type of work and location where the work was to be performed; hence, the lack of a date on the agreement is irrelevant.

4933 also maintains that, if the court concludes that plaintiff was performing the contracted for work at the time of the occurrence, it is also entitled to contractual indemnification based on the lease, since the third-party complaint asserts a contractual indemnification claim, the lease is a contract executed by the parties, and NY Construction cannot argue, in good faith, that the lease should be disregarded since it was in possession of the lease when the third-party action was instituted.

In reply, NY Construction reiterates its argument that plaintiff cannot maintain his suit against 4933.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present

evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of 4933's motion (motion sequence number 001) seeking to dismiss plaintiff's complaint is granted.

Since plaintiff has withdrawn his causes of action based on common-law negligence and violations of Labor Law § 200, the only causes of action remaining for the court's consideration are those based on violations of Labor Law §§ 240 (1) and 241 (6).

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "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, 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."

As stated by the Court of Appeals in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability*

> for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that 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 [internal quotation marks and citations omitted]."

Labor Law § 240 (1) was designed to protect workers against elevation-related risks, including instances wherein a worker falls from a height or is struck by a falling object (*Narducci v Manhasset Bay Associates*, 96 NY2d 259 [2001]). "In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of his injuries" (*Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 [2d Dept 1998]). A worker's negligence is irrelevant to the absolute liability of the owner and general contractor (*Cosban v New York City Transit Authority*, 227 AD2d 160 [1st Dept 1996]). However, not all gravity-related injuries are encompassed by this section of the Labor Law, and the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 (2009).

In the case at bar, plaintiff fell off the back of a Bobcat machine when the driver of the machine moved it while plaintiff was

hanging on to the back, at the direction of the driver, plaintiff's co-worker and fellow employee of NY Construction. Plaintiff fell approximately three feet.

As the Court said in *Toefer v Long Island Railroad* (4 NY3d 399, 408 [2005]), a case in which that plaintiff fell three feet off the back of a pick-up truck on which he was riding, this is "not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law § 240 (1) [internal quotation marks and citation omitted]." Simply stated, plaintiff's injuries arose from the realities of the workplace and do not implicate the protections of Labor Law § 240 (1). *DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 653-654 (1st Dept 2012).

The court finds that the case relied upon by plaintiff, *Ortiz v Varsity Holdings, LLC* (18 NY3d 335 [2011]), is distinguishable from the facts of the instant case.

In *Ortiz*, the worker was injured while he was standing on top of a dumpster loading and arranging debris therein. The *Ortiz* Court said that the particular task that Ortiz was performing required him to stand on the top of the dumpster, which might require the use of the type of safety equipment enumerated in Labor Law § 240 (1). In the case at bar, plaintiff was not required to ride on the back of the Bobcat to perform his work.

Therefore, based on the foregoing, plaintiff's cause of action based on a violation of Labor Law § 240 (1) is dismissed. In

addition, for the reasons stated below, plaintiff's claim based on a violation of Labor Law § 240 (1) would also be dismissed because, at the time of the occurrence, plaintiff was not engaged in the type of activity for which the Labor Laws provide protections.

Labor Law § 241 states:

> "Construction, excavation and demolition work. 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
>
> 6. All 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241 (6), such proof does not establish liability, and is merely evidence of negligence (*Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]). In addition, an owner or general contractor may raise any valid defense to the imposition of the

vicarious liability imposed under section 241 (6) of the Labor Law, including contributory and comparative negligence. *Rizzuto v L.A. Wenger Contracting Co., Inc.,* 91 NY2d at 350, *supra.*

Of all of the Industrial Code provisions alleged to have been violated by plaintiff, the only one that is possibly applicable to the facts of the case is section 23-9.7 (e), dealing with motor trucks, which states:

> "Riding. No person shall be suffered or permitted to ride on running boards, fenders or elsewhere on a truck or similar vehicle except where a properly constructed and installed seat or platform is provided."

12 NYCRR 23-9.7 (e).

This section of the Industrial Code has been found sufficient to sustain a cause of action based on a violation of Labor Law § 241 (6). *See Clause v E.I. du Pont de Nemours & Co.,* 284 AD2d 966 (4th Dept 2001).

The thrust of 4933 and NY Construction's arguments is that, at the time of the accident, plaintiff was not engaged in construction, excavation or demolition work, thereby rendering any cause of action based on a violation of Labor Law § 241 (6) inapplicable. The court agrees.

All of the evidence presented indicates that, whereas the construction work for which NY Construction was hired consisted of erecting concrete curbs around the premises, plaintiff's job consisted exclusively of cleaning up trash and moving plywood inside the warehouse facility leased from 4933 by NY Construction.

Further, plaintiff confirmed that the plywood that he was moving was not used for framing the concrete for the curbs. Plaintiff never alleges that he was engaged in the actual construction of the concrete curbs, which were being erected outside of the warehouse on the street.

In order to sustain a Labor Law § 241 (6) claim, a plaintiff must establish that the accident arose from construction, excavation or demolition work. *See Esposito v New York City Industrial Development Agency,* 1 NY3d 526 (2003); *see also Sotomayer v Metropolitan Transportation Authority,* 92 AD3d 862 (2d Dept 2012); *Panico v Avanstar Communications, Inc.,* 92 Ad3d 656 (2d Dept 2012).

> "Plaintiff's work ... did not 'affect the structural integrity of the building or structure or [constitute] an integral part of the construction [or demolition] of a building or structure.' Rather, his work was unrelated to any broader renovation or construction project, and was limited to removing [and moving plywood and organizing the warehouse]. Inasmuch as [such work] had no physical impact upon the [contracted for work], plaintiff's Labor Law § 241 (6) claim should [be] dismissed [internal citations omitted]."

Lavigne v Glens Falls Cement Company, Inc., 92 AD3d 1182, 1183 (3d Dept 2012).

The cases cited by plaintiff in opposition to the instant motion (motion sequence number 001) are all distinguishable, in that the injured workers in those cases were all actually involved in the construction work of the project itself, unlike plaintiff in

the case at bar. *See Linkowski v City of New York,* 33 AD3d 971 (2d Dept 2006); *Whalen v City of New York,* 270 AD2d 340 (2d Dept 2000); *Higgins v E.I. du Pont de Nemours & Company,* 186 AD2d 1011 (4th Dept 1992); *Rivera v Squibb Corp.,* 184 AD2d 239 (1st Dept 1992).

Moreover, in order to avoid dismissal of a Labor Law § 241 (6) cause of action, a plaintiff must be able to establish that the Industrial Code violation upon which that claim is based was the proximate cause of his injuries. *Treu v Cappelletti,* 71 AD3d 994 (2d Dept 2010); *Abreo v URS Greiner Woodward Clyde,* 60 AD3d 878 (2d Dept 2009).

In the case at bar, plaintiff fell off the Bobcat when he was holding on to the back of the machine while the machine was in motion. Not only was plaintiff not supposed to place himself in that position, but what he was doing, acting as a counterweight, was not part of his job. Further, there was a seat on the Bobcat, which the driver was using, and the driver was the only person who should have been on the machine while it was moving. Therefore, since there was a seat on the Bobcat, in accordance with Industrial Code 23-9.7 (e), it cannot be said that a violation of that provision was the proximate cause of plaintiff's injuries.

As a consequence of the foregoing, plaintiff's cause of action based on a violation of Labor Law § 241 (6) is dismissed, and the portion of 4933's motion seeking summary judgment on its third-party claim is rendered moot.

Since, by this decision, plaintiff's complaint is dismissed, third-party NY Construction's motion for summary judgment dismissing the third-party complaint is granted.

Based on the foregoing, it is hereby

ORDERED that the branch of defendant's motion (motion sequence number 001) seeking to dismiss the complaint is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of defendant's motion (motion sequence number 001) is denied as moot; and it is further

ORDERED that third-party defendant's motion (motion sequence number 002) seeking to dismiss the third-party complaint is granted and the third-party complaint is dismissed, with costs and disbursements to third-party defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs.

Dated: September 11, 2012

Joan M. Kenney, J.S.C.