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SHORT FORM ORDER

INDEX No. 10-5114
CAL No. 12-00700OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 6-26-12 (#003)
MOTION DATE 7-31-12 (#004)
ADJ. DATE 9-4-12
Mot. Seq. # 003 - MD
004 - MotD

CORY DREYFUS and LAURA DREYFUS,

Plaintiffs,

- against -

MPCC CORP.

Defendant.

SACKS & SACKS
Attorney for Plaintiffs
150 Broadway
New York, New York 10038

CATALANO GALLARDO & PETROPOULOS
Attorney for Defendant
100 Jericho Quadrangle Suite 214
Jericho, New York 11753

MPCC CORP.,

Third-Party Plaintiff,

- against -

CANATAL INDUSTRIES, INC.,

Third-Party Defendant.

BRAFF, HARRIS & SUKONECK
Attorney for Third-Party Defendant Canatal
305 Broadway, 7th Floor
New York, New York 10028

CANATAL INDUSTRIES, INC.,

Second Third-Party Plaintiff,

- against -

B & K IRON WORKS, INC.,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 55 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 30 ; Answering Affidavits and supporting papers 31 -32; 33 - 40; 41 -44; 45 - 46 ; Replying Affidavits and supporting papers 47 - 48; 49 - 50; 51 - 53; 54 - 55 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by third-party defendant Canatal Industries, Inc. for, inter alia, summary judgment dismissing the third-party complaint against it is granted to the extent indicated herein, and is otherwise denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff MPCC Corp. for summary judgment dismissing the complaint and all cross claims against it is denied.

Plaintiff Cory Dreyfus commenced this action to recover damages for personal injuries he allegedly sustained on January 7, 2010, when he slipped on ice and injured his back while working at the construction site of the Academic Building of the Old Westbury College. Plaintiff allegedly slipped on ice that formed in the ruts and ridges of the uneven surface of the ground at the construction site. Old Westbury College is owned by the State University of New York ("SUNY"), which hired defendant MPCC Corp. as the general contractor for the construction project. MPCC was responsible for hiring various subcontractors to complete the project, including Canatal Industries, Inc. ("Canatal"), the steel fabricator for the project. At the time of the alleged accident, plaintiff was an employee of B&K Iron Works, Inc. ("B&K"), a sub-subcontractor hired by Canatal to perform various structural steel work on the new building. Plaintiff alleges causes of action against MPCC for common law negligence and for violation of Labor Law §§ 200, 240 (1), and 241(6). The complaint also asserts a claim by plaintiff's wife, Laura Dreyfus, for loss of services and reimbursement of medical expenses.

Following the commencement of plaintiff's action, MPCC brought a third-party action against Canatal for common law and contractual indemnification, contribution, and breach of contract based upon Canatal's alleged failure to obtain liability insurance naming MPCC as an additional insured. Subsequently, Canatal commenced a second third-party action against B&K alleging identical causes of action. Shortly thereafter, MPCC served a notice asserting similar cross claims against B&K. On April 12, 2011, SUNY commenced a separate action under Index No. 12282/11 against MPCC, Canatal and B&K for indemnification, contribution, and breach of contract. By order of this Court dated October 12, 2011, the actions were joined for the purposes of discovery and trial only. The Court further granted separate motions by SUNY and Canatal for entry of a judgment of default against B&K who failed to appear in either action.

Canatal now moves for summary judgment dismissing the first-party and third-party claims asserted against it by SUNY and MPCC. Canatal argues that it cannot be held liable to either party for contribution or indemnification, as it was not an owner, general contractor or statutory agent, and did not control or supervise the injured plaintiff's work or the safety procedures of his employer at the time of the alleged accident. Canatal also argues that any claims against it premised on its alleged failure to procure liability insurance on behalf of MPCC and SUNY must be dismissed, since it fulfilled its contractual obligation to procure insurance naming both parties as additional insureds. MPCC opposes the motion and cross-moves for summary judgment in its favor on the third-party complaint, arguing that

Canatal was contractually required to indemnify it for any and all claims arising out of, or in connection with its work at the construction site. MPCC also seeks summary judgment dismissing the Dreyfus complaint on the grounds it fails to state viable causes of action under the common law or sections 200, 240(1) and 241(6) of the Labor Law.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Uni. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the Court notes that Labor Law §240 (1) is inapplicable under the circumstances of this case, as it is undisputed that the subject accident, which occurred as a result of a ground level slipping hazard, is not among the type of perils Labor Law §240 (1) was designed to prevent (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Favreau v Barnett & Barnett, LLC***, 47 AD3d 996, 849 NYS2d 691 [3d Dept 2008]). Therefore, the branch of MPCC's motion seeking summary judgment dismissing plaintiffs' claim under Labor Law §240(1) is granted.

MPCC failed, however, to establish its entitlement to summary judgment dismissing plaintiffs' claim under Labor Law §241(6). Plaintiffs' initial failure to identify the violation of a particular code provision in his complaint or original bill of particulars need not be fatal to his claim, as plaintiffs now submit an amended bill of particulars specifying the alleged violation of 12 NYCRR § 23-1.7(b) (*see eg* ***Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.***, 271 AD2d 231, 705 NYS2d 577 [3d Dept 2000]). Further, inasmuch as 12 NYCRR § 23-1.7(b) proscribes slipping hazards by requiring the removal of, among other things, snow and ice from walkways or passageways utilized at construction sites, plaintiffs' submission of evidence that the "open area" where plaintiff fell was routinely traversed by B&G's employees as they walked from their work area to the shed where their tools and equipment were stored, raises a triable issue as to whether the area constituted a walkway, and if so, whether the failure to remove snow and ice from the area was a violation of the code (*see* ***Sullivan v RGS Energy Group, Inc.***, 78 AD3d 1503, 1503, 910 NYS2d 776 [2010]; ***Smith v Hines GS Props., Inc.***, 29 AD3d 433, 815 NYS2d 82 [1st Dept 2006]; *compare* ***Bauer v Niagra Mohawk Power Corp.***, 249 AD2d 948, 672 NYS2d 567 [4th Dept 1998]).

MPCC similarly failed to establish, as a matter of law, its entitlement to summary judgment dismissing plaintiffs' claim under section 200 of the Labor Law. Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers

with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner or contractor may be held liable in common-law negligence and under Labor Law §200 if they had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Russin v Louis N. Piccado & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]).

Here, viewing the evidence in the light most favorable to plaintiffs, triable issues exist as to whether MPCC created or had actual or constructive notice of the alleged dangerous condition that caused plaintiff's accident (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Andre v Pomeroy***, *supra*). Significantly, MPCC does not dispute that its was responsible for the removal of snow or ice from the worksite, and that its heavy equipment created ruts when it was used to transport building materials to different parts of the unfinished building. Moreover, plaintiffs submitted evidence that plaintiff and non-party witness Pat Ging repeatedly made complaints to MPCC's representatives regarding the treacherous conditions caused by the presence of ruts and the accumulation of snow and ice at the worksite. MPCC also failed to submit any evidence that the accumulation of ice and snow occurred so close in time to the accident that it could not reasonably have been expected to notice and remedy the condition (*see* ***Sullivan v RGS Energy Group, Inc.***, *supra*; ***Bannister v LPCiminelli, Inc.***, 93 AD3d 1294, 940 NYS2d 749 [4th Dept 2012]). Therefore, the branch of the motion by MPCC for summary judgment dismissing plaintiffs' claim under Labor Law §200 is denied.

With regard to the branch of MPCC's motion for judgment in its favor over and against Canatal on its third-party claims for contractual or common law indemnification, the existence of triable issues as to whether MPCC's negligence, if any, caused or created the alleged dangerous condition precludes any judgment in its favor on those claims at this juncture (*see* ***McAllister v Construction Consultants L.I. Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]; ***Erickson v Cross Ready Mix, Inc.***, 75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1).

As for Canatal's motion for summary judgment dismissing the third-party complaint, the indemnification clause contained in Canatal's contract with MPCC, requiring, among other things, that Canatal indemnify MPCC for "any and all liability . . . arising out of or in connection with the work . . .whether such liability be the result of the alleged active or passive negligence of the Owner or Contractor," is void and unenforceable under General Obligations Law § 5-322.1 (*see* ***Kinney v Lisk Co.***, 76 NY2d 215, 557 NYS2d 283 [1990]; ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.***, 89

NY2d 786, 658 NYS2d 903 [1997]; ***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, *supra*; ***Reynolds v County of Westchester***, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]). Thus, MPCC's third-party claim for contractual indemnification against Canatal fails as a matter of law, and is dismissed.

Canatal also established, prima facie, its entitlement to summary judgment dismissing the third-party claim against it for breach of contract based upon its alleged failure to procure insurance naming MPCC as an additional insured by submitting a copy of the insurance certificate which names MPCC as an additional insured (*see* ***Vick v American Re-Fuel Co. of Niagara***, 283 AD2d 915 , 723 NYS2d 781 [4th Dept 2001]; ***Martinez v Tishman Constr. Corp.***, 227 AD2d 298, 642 NYS2d 675 [1st Dept 1996]; ***Garcia v Great Atl. & Pac. Tea Co.***, 231 AD2d 401, 647 NYS2d 2 [1st Dept 1996]). MPCC, which did not address this branch of Canatal's motion, failed to raise a triable issue in opposition. Therefore, the branch of Canatal's motion for summary judgment dismissing the third-party claim against it for breach of contract is granted.

Canatal further established its entitlement to summary judgment dismissing the third-party claims against it for contribution and/or common law indemnification by demonstrating that it was not actively negligent in causing the accident, since it did not have control over the worksite, and did not create or have actual or constructive notice of the alleged defective condition (*see* ***Guinter v I. Park Success, LLC***, 67 AD3d 406, 886 NYS2d 880 [1st Dept 2009];***Yondt v Blvd. Mall Co.***, 306 AD2d 882, 760 NYS2d 914 [4th Dept 2003]; ***Martinez v Tishman Constr. Corp.***, *supra*; *see also* ***DiMarco v New York City Health & Hosps. Corp.***, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]). The adduced evidence indicates that Canatal did not have control over the worksite, and was not responsible for the removal or snow or ice, or the general maintenance of the grounds. Canatal also submitted evidence that none of its representatives were present at the worksite on the day of the accident, and that it did not exercise any actual control over plaintiff's work or receive any complaints regarding the presence of unsafe ruts and the accumulation of snow or ice therein. In opposition, MPCC's mere assertion that Canatal's representative was dispatched to monitor the progress of the work, and that its dissatisfaction with B&G's performance caused it to terminate B&G's services, is insufficient for the purposes of establishing Canatal's liability under the common law or Labor Law §§200 and 241(6) (*see* ***Perri v Gilbert Johnson Enters. Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; ***Dos Santos v STV Engrs., Inc.***, 8 AD3d 223, 778 NYS2d 48 [2d Dept 2004]). Accordingly, the branch of Canatal's motion for summary judgment dismissing the third-party complaint against it is granted.

However, the branch of Canatal's motion for summary judgment dismissing SUNY's complaint and related cross claims against it is denied. Inasmuch as the actions by SUNY and the Dreyfus' have been joined for discovery and trial only, Canatal's application has been inappropriately made under the incorrect index number.

Dated: DECEMBER 28, 2012.

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION