SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ **PART** 13
Justice

LUIS RAMIREZ,

Plaintiff,

-against-

A.W. & S. CONSTRUCTION CO., INC., EMPIRE STATE BUILDING COMPANY, L.L.C., EMPIRE STATE BUILDING ASSOCIATES, L.L.C. and W5 GROUP L.L.C. d/b/a WALDORF DEMOLITION,

Defendants.

INDEX NO. 154988/13
MOTION DATE 02-19-2014
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

A.W. & S. CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

W5 GROUP L.L.C. d/b/a WALDORF DEMOLITION,

Third-Party Defendant,

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

The following papers, numbered 1 to 16 were read on this motion to/for: Partial Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits _____cross motion _____	7 - 8, 9 - 12
Replying Affidavits _____	13-16

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant's Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. (hereinafter referred to collectively as the "Empire defendants") and defendant/third-party plaintiff, A.W. & S Construction Co., Inc. (hereinafter referred to as A.W. & S.) motion pursuant to CPLR §3212, for partial summary judgment dismissing the Labor Law § 200 claims asserted against them in the first and second causes of action of the amended complaint; granting summary judgment on their claims for contractual indemnification against co-defendant and third-party defendant, W5 Group L.L.C. d/b/a Waldorf Demolition (hereinafter referred to as "Waldorf"), dismissing all cross-claims and counterclaims asserted by Waldorf; and granting A.W. & S. summary judgment in the third-party action, is granted only as to dismissing plaintiff's Labor Law § 200 causes of action. The remainder of the relief sought in this motion, is denied.

Plaintiff brought this personal injury action asserting causes of action pursuant to Labor Law § 200, §240[1] and §241[6]. Plaintiff alleges that he was employed as a laborer for non-party Calvin Maintenance, Inc., a subcontractor of Waldorf, performing demolition as part of a gut renovation on the 73rd floor of the Empire State Building, located at 350 Fifth Avenue, New York, New York. Plaintiff alleges that on May 13, 2013, at 8:30p.m., as he was attempting to tear down a ceiling, a co-worker pre-maturely tore down the neighboring wall causing him to be struck in the head, neck,

back, right leg and right arm by falling sheetrock. The Empire defendants are the owner entities and A.W.& S. is the construction manager and general contractor for the job site.

The Empire defendants and A.W. & S., seek partial summary judgment dismissing the causes of action asserted against them pursuant to Labor Law §200 in the amended complaint, because they lacked actual or constructive notice of the alleged unsafe condition. They argue that there was no supervisory control, or duty to provide instruction and direction to plaintiff or his co-employees at the work area when the accident occurred. Empire Defendants and A.W. & S., claim that plaintiff's accident was subject to supervision by his foreman and arises from activity of a co-employee, all employed by non-party Calvin Maintenance, a subcontractor of Waldorf. It is their contention that the alleged injuries occurred in the manner the work was performed not because of a dangerous condition at the work site and they cannot be found liable under Labor Law §200.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

Plaintiff does not oppose the relief sought on Labor Law §200 claims asserted in the first and second causes of action of the amended complaint. Waldorf opposes the relief sought claiming that there is deposition testimony by Frank Leroy, project superintendent for A.W. & S., that he had authority to stop work and would walk through the job site and ensured safety equipment was worn, which establishes potential negligence on the part of his employer. Waldorf also claims that the "Empire State Building" had an employee present when plaintiff was injured, establishing supervision.

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site and requires satisfaction of common-law negligence standards. A plaintiff must show that the owner or general contractor either created the dangerous condition, or had actual or constructive notice sufficient for corrective action to be taken (Mitchell v. New York University, 12 A.D. 3d 200, 784 N.Y.S. 2d 104 [1st Dept., 2004]). A precondition is that the party charged must have authority or exercise supervisory control over the activity that resulted in the injury (McGarry v. CVP 1 LLC , 55 A.D. 3d 441, 866 N.Y.S. 2d 75 [1st Dept., 2008]). A plaintiff may recover against an owner or developer where it is shown that the party to be charged exercised "supervisory control" over the injury producing work. An owner is not liable for subcontractor employees over which there was no supervisory control (Cappabianca v. Skanska USA Bldg.,Inc., 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1st Dept., 2012]).

The Empire defendants have made a prima facie case establishing that they had no supervisory control of the work site. Waldorf does not raise issues of fact solely from the presence of an Empire defendants' employee after the accident. No proof was submitted that any Empire Defendants' employee was present and exercised any supervision, direction or control of the work site before or during the accident. Waldorf's speculative assertions about the Empire Defendants' employee that arrived after the accident does not raise issues of fact.

General duties to monitor safety at the worksite, regardless of whether the defendant had personnel on the site daily is insufficient for the imposition of liability.

Testimony that employees did not receive direction from the construction manager or its employees is sufficient to establish lack of liability (DaSilva v. Haks Engineers, Architects, and Land Surveyors, P.C., 125 A.D. 3d 480 [1st Dept., 2015] and In re 91st Street Crane Collapse Litigation, 133 A.D. 3d 478, 20 N.Y.S. 3d 24 [1st Dept. 2015]).

A.W. & S. has stated a prima facie case establishing lack of liability pursuant to Labor Law § 200. Waldorf has not raised issues of fact from the presence of Frank Leroy project superintendent for A.W. & S at the work site. Mr. Leroy's deposition transcript (Mot. Exh. DD) and the further clarification provided by his affidavit (Mot. Exh. LL), establish that his duties at the work site were to monitor site safety, and not supervise, direct, or control the work. Plaintiff's testimony that he and his co-worker were directed and supervised by Emilio Martinez of Calvin Maintenance Inc. and that complaints were made to the shop steward Ernesto Castillo a/k/a "Shoppy" (Mot Exh. Y pgs. 61-70 and Exh. AA, pgs. 104-118), further establish that A.W. & S., is not liable pursuant to Labor Law § 200.

The Empire defendants and A.W. & S. seek summary judgment pursuant to CPLR §3212 on their cross-claims sounding in contractual indemnification against Waldorf. A.W. & S. also seeks summary judgment on its third party-action against Waldorf. They argue that since there is no liability other than statutorily, they are entitled to summary judgment on the contractual indemnification claims.

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. The party seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident Mikelatos v. Theofilaktidis, 105 A.D.3d 822, 962 N.Y.S.2d 693 [1st. Dept. 2013]; Mak v. Silverstein Properties, Inc., 81 A.D.3d 520, 916 N.Y.S.2d 592 [1st. Dept. 2011]; DiFilipo v. Parkchester North Condominium, 65 A.D.3d 899, 885 N.Y.S.2d 81 [1st. Dept. 2009] ; Crespo v. City of New York, 303 A.D.2d 166, 756 N.Y.S.2d 183 [1st. Dept. 2003] denying summary judgment on contractual indemnification claims when there are issues of fact as to whose negligence caused the plaintiff's accident.

There remain issues of fact concerning Waldorf's liability for plaintiff's injury, the Empire defendants and A.W. & S. have only established that they are not negligent under Labor Law §200. They failed to prove a prima facie claim of negligence against both Waldorf and the non-party Calvin Maintenance, Inc..

An indemnification provision establishing liability must be strictly construed, it requires clear and unambiguous language to avoid the inference of a duty that was not intended by the parties (Cordeiro v. TS Midtown Holdings, LLC, 87 A.D. 3d 904, 931 N.Y.S. 2d 41 [1st Dept. 2011] and Martinez v. Benau, 103 A.D. 3d 545, 962 N..S. 2d 57 [1st Dept. 2013]).

Waldorf entered into a "Subcontractor Ageement" with "A.W. & S. Construction Co. Inc. by its Alexander Wolf & Son Division" (Contractor), for the period September 30, 2012 through September 30, 2015 (Mot. Exh. EE). Paragraph 4 titled, "Indemnification" states in relevant part:

> "To the fullest extent permitted by law, Subcontractor (*Waldorf*) agrees to indemnify, defend and hold harmless Contractor, Owner, the fee owner of the property and/or building where the project is located, leaseholder and any other person or entity whom Contractor is required to defend, indemnify and hold

harmless and/or for whom Contractor is performing Work,...from any and all claims, suits, damages liabilities, ... and losses of every kind (hereinafter "Claims"), including those brought by any employee of Contractor, Subcontractor, their subcontractors, suppliers and/or lower tier contractors and/or suppliers, arising from or related to death, bodily and personal injuries, damage to property (including loss of use thereof) and/or advertising injury brought against any of the indemnitees, arising from , in connection with, incidental to, or as a consequence of performance of Subcontractor's Work hereunder..."(Mot. Exh. EE).

Waldorf is listed as the "Vendor" on a Purchase Order with an entity which in large bold letters states, "Alexander Wolf & Son" followed in smaller type by the words, "A division of A.W. & S. Construction Co., Inc.." The Purchase Order does not specifically identify either entity as the "Purchaser." At paragraph 12, of the "Terms and Conditions" there is reference to indemnification of, "...Purchaser, Owner, and any other person or entity the Purchaser is required to defend, indemnify and hold harmless and/or for whom purchaser is performing work..." (Mot. Exh. FF").

At this juncture, summary judgment on the indemnification provision in either agreement, is premature. There remain issues of fact as to the parties intent and the relationship between A.W. & S. and "Alexander Wolf & Son."

Accordingly, it is ORDERED that defendants' Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. and defendant/third-party plaintiff, A.W. & S Construction Co., Inc. motion pursuant to CPLR §3212, for partial summary judgment dismissing the Labor Law § 200 causes of action asserted against them in the amended complaint, granting summary judgment on their claims for contractual indemnification against co-defendant and third-party defendant, W5 Group L.L.C. d/b/a Waldorf Demolition (hereinafter referred to as "Waldorf"), dismissing all cross-claims and counterclaims asserted by Waldorf, and granting A.W. & S. summary judgment in the third-party action, is granted only as to dismissing plaintiff's Labor Law § 200 causes of action asserted against them, and it is further,

ORDERED, that plaintiff's Labor Law § 200 claims asserted in the first and second causes of action in the amended complaint against defendants' Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. and A.W. & S. Construction Co., Inc., are severed and dismissed, and it is further,

ORDERED, that the remainder of the relief sought in defendants, Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. and A.W. & S. Construction Co., Inc.'s motion, is denied, and it is further,

ORDERED, that the counsel are directed to appear for a status conference in IAS Part 13, at 71 Thomas Street, Room 210 on March 30, 2016, at 9:30 a.m.

ENTER :

Dated: February 18, 2016

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE