Sumpter v Plaza Constr. Corp.
2017 NY Slip Op 31524(U)
July 18, 2017
Supreme Court, Kings County
Docket Number: 503363/13
Judge: Larry D. Martin

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of June, 2017.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

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RONALD SUMPTER,

Plaintiff,

- against - Index No. 503363/13

PLAZA CONSTRUCTION CORP., LAQUILA GROUP, INC., AND 150 CHARLES STREET HOLDINGS LLC.,

Defendants.

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THE LAQUILA GROUP, INC.,

Third-Party Plaintiff,

- against - Discontinued

NAVILLUS CONTRACTING,

Third-Party Defendant.

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PLAZA CONSTRUCTION CORP. AND 150 CHARLES STREET HOLDINGS LLC.,

Second Third-Party Plaintiffs,

- against -

NAVILLUS TILE, INC., D/B/A NAVILLUS CONTRACTING,

Second Third-Party Defendant.

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The following papers numbered 1 to 11 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5
Opposing Affidavits (Affirmations)	6, 8-9
Reply Affidavits (Affirmations)	7, 10, 11

Upon the foregoing papers, defendants/second-third-party plaintiffs Plaza Construction Corp., (Plaza) and 150 Charles Street Holdings LLC, (150 Charles) (collectively, the moving defendants) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff Ronald Sumpter's Labor Law §§ 240 (1), 241 (6), 200 and/or common-law negligence claims as asserted against the moving defendants. The moving defendants also seek summary judgment in their favor on their cross claims for contractual indemnification as against co-defendant Laquila Group, Inc., (Laquila) and third-party defendant Navillus Tile Inc. d/b/a Navillus Contracting (Navillus). Plaintiff cross-moves for an order, pursuant to CPLR 3025, granting him leave to amend his bill of particulars to add additional Industrial Code violations. Plaintiffs also cross-moves for an order, pursuant to CPLR 3212, seeking summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims.

Background Facts and Procedural History

This is an action to recover monetary damages for personal injuries sustained by the plaintiff on April 3, 2013, while working at a job site located at 150 Charles Street in Manhattan. At the time of the accident, the site was owned by defendant 150 Charles, which entered into a written agreement with Plaza, whereby Plaza acted as construction manager for the construction of new condominium units at that location. Plaza subcontracted with Laquila to perform excavation and foundation work at the site. Laquila retained plaintiff's employer, Navillus to provide and install reinforcing steel, or steel rebar, in connection with the concrete foundation scope of the project.

On April 3, 2013, Laquila was utilizing a concrete pump truck to pour concrete at the location. The truck was located at street level and had a long, rigid boom that extended from the truck approximately 30 feet down into the site. A flexible hose was then connected to

the rigid boom at this point via a mechanical coupling device. The flexible hose dropped down from this attachment into the subcellar level. There, Laquila employees used the flexible hose to direct the flow of concrete that was to be poured to form the foundation of the new construction. Plaintiff was a concrete laborer employed by Navillus. On this date he was instructed to locate pieces of steel rebar and was carrying about 70-80 pounds of it while walking on top of the rebar mat in the subcellar. At the same time, workers from Laquila were starting the process of pouring concrete into the rebar mat at a location approximately 40 to 60 feet away from where plaintiff was carrying his rebar pieces. At some point, the flexible hose became detached from the rigid boom causing a spray of liquid material, known as slurry,[1] to release and spray several of the workers at the site including plaintiff.

As plaintiff attempted to run from the spray, he tripped and fell over a bundle of steel that Navillus workers had placed on the rebar mat as part of their work. His supervisor, Steve Spielman, testified that he, and other Navillus employees were also sprayed and that he had instructed his employees to immediately clean off the liquid. Supervisor Spielman further testified that plaintiff also scraped a knee as a result of his fall and that he had it cleaned and bandaged. As a result of this incident, plaintiff's hard hat cracked and he was given a new one.

Plaintiff's Cross Motion To Amend His Bill Of Particulars

Before the court addresses the motion and cross motion for summary judgment, it must decide the portion of plaintiff's cross motion seeking leave to amend his bill of particulars. Plaintiff cross-moves for an order, pursuant to CPLR 3025, granting him leave

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[1]The slurry was liquid priming material placed in the hose to prime the pump prior to the pumping of the concrete.

to amend his bill of particulars to add Industrial Code violations. Plaintiff argues that leave to amend should be freely given as he is not raising any new theories of liability. Here, plaintiff seeks to add alleged violations of Industrial Code 12 NYCRR 23-1.7, 9.2 (b) (1) and 9.2 (d) to support his Labor Law § 241 (6) claim, as such a claim requires that "plaintiff must allege a violation of a specific and applicable provision of the Industrial Code" (*D'Elia v City of New York*, 81 AD3d 682, 684 [2011]).

In opposition, the moving defendants argue that leave to amend should be denied as it would prejudice them and deprive them of their right to conduct discovery related to these newly raised theories of liability. Moreover, they argue leave to amend should be denied because the Industrial Code provisions plaintiff is seeking to add are either not specific enough to support a Labor Law § 241 (6) claim or are not applicable to the facts of the instant case.

Discussion

"Leave to amend the pleadings to identify a specific, applicable Industrial Code provision 'may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant'" (*D'Elia*, 81 AD3d at 684 quoting *Galarraga v City of New York*, 54 AD3d 308, 310 [2008]; *see Dowd v City of New York*, 40 AD3d 908, 911 [2007]; *Kelleir v Supreme Indus. Park*, 293 AD2d 513, 514 [2002]).

Plaintiff argues that section 23-1.7 relates to overhead hazards, and defendants are well aware that he is claiming that his accident occurred due to an overhead hazard; thus, there are no new factual allegation in this regard. Moreover, he argues that the other two Industrial Code provisions relate to power-operated equipment and notes that he has always

claimed that here, the equipment was not operated in a safe manner. Consequently, he maintains that there are no new allegations or theory of liability that would now prejudice the moving defendants.

Initially, the court notes that 12 NYCRR 23-9.2 (b) (1) is merely a general safety standard that does not give rise to a nondelegable duty under Labor Law § 241(6) (see *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2016]; *Abelleira v City of New York*, 120 AD3d 1163, 1165 [2014]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 958 [2013]; *Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [2012]; *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2009]; *Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1285 [2007], *affd* 10 NY3d 902 [2008]). Accordingly, this is not a sufficient section to support a Labor Law § 241 (6) violation

Turning to Industrial Code 12 NYCRR 23-9.2 (d), this section relates to the protection of moving parts and provides that "[g]ears, belts, sprockets, drums, sheaves and any points of contact between moving parts of power-operated equipment or machines when not guarded by location shall be guarded in compliance with this Part (rule) and with Industrial Code Part (rule) 19." In support of his cross motion seeking to amend to include this Industrial Code provision, plaintiff merely asserts that it was violated.

In opposition, the moving defendants argue that this Industrial Code provision is not applicable to the facts of this case as the hose and boom arm were connected with a metal coupling device and that neither the boom arm, nor the hose, were a "moving part" within the meaning of this Industrial Code section. The moving defendants further argue that this regulation requires guarding to protect a worker's appendages from becoming trapped by a gear or belt or other moving part. Here, they contend the apparatus at issue did not have a moving part that required guarding.

In reply, plaintiff argues that there was a pipe with attachments that moved around and above the site, which was controlled by the concrete truck operator; thus he maintains there is at least a question of fact regarding whether a moving part was involved in the happening of the accident.

The court notes that there have been few cases discussing this Industrial Code provision (*see Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138 [2004]; *Hassett v Celtic Holdings*, LLC, 7 AD3d 364, 365 [2004]). However, *Shields v First Ave. Bldrs. LLC*, (39 Misc 3d 1223[A], 2013 NY Slip Op 50505(U), *8-*9 [Sup Ct, NY County 2013], *affd* 118 AD3d 588 [2014]) involved a plaintiff who was cleaning a portion of a concrete pump known as a swing-tube and the pumping mechanism re-engaged trapping his hand resulting in the amputation of four of his fingers. The *Shield* court held that:

> "[e]ven under the liberal principles for applying the Industrial Code, the court finds that section 23-9.2(d) does not apply here since it cannot be said that the interior moving parts at issue in this action are 'not guarded by location.' This conclusion is supported by section 23-1.12, entitled 'guarding of power driven machinery,' which does not include any interior moving parts similar to those at issue and applies only to the machines or their parts which are not otherwise 'protected by their location or design.'"

The court noted, at footnote 6, that:

> "The section [23-1.12] requires that the following machines or their parts be guarded: 'keys, set screws, bolts and similar projections[']' on revolving parts of machines 'that are not protected by location,' power driven saws, circular table saws, 'sprockets or gears not protected by location or design from accidental contact by persons,' 'belts, pulleys and flywheels ... not protected by location from accidental contact by persons,' 'friction-disc drives ... not protected by location from accidental contact by persons,' and 'nip points between ... wire rope."

Similarly, here the court finds that the apparatus at issue did not involve moving parts as referenced in the Industrial Code and thus this section is not applicable to the facts of the instant case.

Finally, plaintiff seeks to assert a violation of Industrial Code 23-1.7 (a) which deals with overhead hazards and provides that:

> "(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.
>
> "(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

12 NYCRR 23-1.7 (a) has been determined to be sufficiently specific to support a Labor Law § 241 (6) claim (*see Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2013]). Initially, the court notes that 23-1.7 (a) (2) is not applicable to the facts of the case as plaintiff was in fact required to work in the area where the incident occurred.

The moving defendants oppose the amendment of plaintiff's bill of particulars to assert a violation of this code provision and argue that the rebar mat where plaintiff was working when he was injured was not an area that was normally exposed to falling material. They point to plaintiff's own testimony that the spray occurred at most three times and only on the date of plaintiff's incident. Importantly, they note that plaintiff was working in an area that was actually 40 to 60 feet away from where the concrete was being poured. Moreover, they contend that this regulation, which requires measures such as placing a

wooden planked structure to protect workers from loads of 100 pounds per foot, is not feasible given the work being performed. Finally, they point to Spielman's testimony that there had been no prior instances with the concrete pump breaking and material being spewed out of it.

Here, the court finds that plaintiff has failed to demonstrate that 12 NYCRR 23-1.7 (a) (1) is applicable to the facts of this case and that the area where plaintiff sustained his injuries was normally exposed to falling material or objects (see *Moncayo,* 106 AD3d at 965; *Fried v Always Green, LLC*, 77 AD3d 788, 790 [2010]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2009]; *cf. Roosa v Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1354 [2007], *rearg denied* 45 AD3d1423 [2007]).

Based upon the foregoing, the court finds that the moving defendants, in opposition to plaintiff's cross motion to amend his bill of particulars to add additional Industrial Code provisions to support his Labor Law § 241 (6) claim, have established that the proposed Industrial Code sections are either too general to support a Labor Law§ 241 (6) violation or are inapplicable to the facts of the instant case, thus this branch of plaintiff's cross motion seeking leave to amend his bill of particulars to assert these Industrial Code violations is denied.

Plaza And 150 Charles' Motion

Plaza and 150 Charles move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 240 (1), 241 (6), 200 and/or common-law negligence. The moving defendants also seek summary judgment on their cross claims for contractual indemnification as against co-defendant Laquila and third-party defendant Navillus.

The moving defendants argue that plaintiff's Labor Law § 240 (1) claim should be dismissed as the incident alleged by plaintiff was not gravity related. They contend that plaintiff was between 40 to 60 feet away from the hose and was not underneath it. Rather, the concrete shot out or blasted out of the hose, and thus the incident was not due to the application of the force of gravity onto an object or person.

In opposition and in support of his cross motion, plaintiff argues that gravity played a role in the fall of the boom and hose as well as causing plaintiff to be struck by the slurry mixture. Moreover, he contends that the concrete mix that fell, as well as the boom and the hose, required securing for the purposes of the undertaking. Plaintiff points to Spielman's testimony that the hose actually crashed to the ground after the elbow or connection between the boom and the hose broke and that the slurry mix was spraying out from both the falling hose and from the boom pump above.

In opposition to plaintiff's motion and in further support of their own motion, the moving defendants argue that the branch of plaintiff's cross motion seeking summary judgment in his favor on his Labor Law § 240 (1) claim should be denied as plaintiff was not involved in a "gravity-related" accident. In support of this position, the moving defendants point to *Joseph v City of New York* (143 AD3d 489, 490 [2016]) involving a plaintiff "struck by a pipe while it was being flushed clean with a highly pressurized mixture of air, water, and a rubber "rabbit" device." The *Joseph* court held that plaintiff's injury did not fall within the ambit of section 240 (1) because "[t]he mixture in the pipe did not move through the exercise of the force of gravity, but was rather intentionally propelled through the pipe through the use of high pressure." It did not involve "the direct consequence of the application of the force of gravity to an object" (quoting *Gasques v State of New York*, 15 NY3d 869, 870 [2010]). The *Joseph* court also cited to *Medina v City of New York*, 87 AD3d 907, 909 [2011] which also dismissed a plaintiff's Labor Law § 240 (1) claim holding that the subway rail

that struck and hit the plaintiff "was propelled by the kinetic energy of the sudden release of tensile stress . . . not the result of the effects of gravity"])

Here, the moving defendants point to plaintiff's own testimony regarding the incident:

> "Q. So you were a very good distance away, 40 to 60 feet [from the hose], not underneath it, correct?
> A. Absolutely.
> Q. So based on that, is it your understanding that at the moment your incident happened, the concrete struck you after pressure had built up and it was sent as a projectile against your head?
> A. Yes.
> Q. It didn't fall onto your head from above, correct?
> A. No. It shot out, blasted. It blasted, and just like a baseball bat, struck me in my head.

In further support, the moving defendants point to Spielman's testimony that the slurry came out of the boom for a few seconds until the shut-off switch was hit which stopped the pump truck from operating and caused the slurry to cease spewing out. Additionally, the moving defendants contend that plaintiff's argument that Labor Law § 240 (1) should apply because the flexible hose and coupling device both fell from the boom arm onto the rebar mat is of no merit inasmuch as plaintiff was not struck by these devices but, rather, was merely sprayed with the liquid material that was propelled through the boom arm due to the force of pressure and not as a result of gravity.

Discussion

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."

Elevation risks covered by the statute are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). 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], *rearg denied* 65 NY2d 1054 [1985]). 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 Performing Arts*, 65 NY2d 513, 520 [1985]). "[T]he 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). Additionally, the absolute liability imposed by Labor Law § 240 (1) means that a plaintiff's contributory or comparative negligence is wholly irrelevant in determining liability and does not bar recovery or serve to offset liability (*Stolt v General Foods Corporation*, 81 NY2d 918, 920 [1993]; *Bland v Manocherian*, 66 NY2d 452, 460-461 [1985]).

Here, the moving defendants have established that the incident in which plaintiff sustained his injuries was not the result of a Labor Law § 240 (1) violation inasmuch as plaintiff was not struck by a falling object nor were his injuries sustained as result of the application of the force of gravity to an object or person. In opposition, plaintiff has failed to raise a triable issue of fact in this regard. Based upon the foregoing, that branch of the

moving defendants' motion seeking summary judgment dismissing plaintiff's claim as based upon a violation of Labor Law § 240 (1) is granted.

Labor Law § 241 (6)

The court now turns to that branch of the moving defendants' motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim. Labor Law § 241 (6) provides, in pertinent part, that:

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross,* 81 NY2d at 501-502]). Accordingly, "the cause of action must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]). Here, plaintiff has alleged a violation of Industrial Code 23-9.2 (a)[2]

§ 23-9.2 provides as follows:

> All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing

[2] As discussed above, that branch of plaintiff's cross motion seeking to amend his bill of particulars to assert the violation of additional Industrial Code provisions is denied.

> and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.

This Industrial Code provision was discussed at length by the Court of Appeals in *Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009]). The *Misicki* court held that while the first two sentences of section 23-9.2 (a) "are not specific enough to permit recovery under section 241 (6) against a nonsupervising owner or general contractor". . . the third sentence . . . "imposes an affirmative duty on employers to 'correct[] by necessary repairs or replacement' 'any structural defect or unsafe condition' in equipment or machinery "[u]pon discovery" or actual notice of the structural defect or unsafe condition . . . [Thus an] employee who claims to have suffered injuries proximately caused by a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery has stated a cause of action under Labor Law § 241 (6) based on an alleged violation of 12 NYCRR 23-9.2 (a)."

The moving defendants argue that the record establishes that they did not have prior actual notice of any defects in Laquila's concrete pumping equipment. In support of this position, they point to the deposition testimony of Robert Marrone, a General Superintendent for Plaza. Mr. Marrone testified that he was not aware of any prior incidents with the pump or with the hardware on the pump prior to the accident and that he did not personally observe any hazardous conditions around the pump prior to the accident (Marrone tr at 76, lines 19-22; at 80 lines 7-10). They also point to the affidavit submitted by Craig Murphy, Executive Vice President of the Witkoff Group, LLC, a property management and development corporation, in support of the motion. Mr. Murphy affirms that he is not aware of any verbal or written complaints to 150 Charles regarding the concrete pumping operations or equipment and that he never observed any defects or unsafe conditions related to the

equipment. Further, he affirms that he is unaware of any incidents involving this equipment prior to the incident involved in the instant case. Finally, they point to the deposition testimony of Jeff Glennon, the Superintendent for Construction for Laquila. Mr. Glennon testified that this was the first instance where a hose had decoupled during the operation of the pump truck (Glennon tr at 30, lines 13-17). Therefore, based upon the foregoing, the moving defendants have established that they lacked prior actual knowledge of a defect with the concrete pumping equipment. Thus, the burden shifts to plaintiff to establish a question of fact in this regard.

In opposition and in support of his cross motion, plaintiff argues that Industrial Code 23-9.2 (a) is specific and applicable. He argues that his testimony that the exact problem had occurred before establishes that the moving defendants had actual notice of the incident condition, or at least establishes a question of fact.

In reply, the moving defendants point to Mr. Glennon's deposition testimony indicating that he, along with the operator of the pump, would perform a pre-placement inspection of the equipment. Moreover, he further testified that he performed an inspection of the equipment involved immediately upon learning of the incident.

Here, the court finds that plaintiff has failed to raise a triable issue of fact regarding whether there was a violation of this Industrial Code provision. Thus, that branch of the moving defendants' motion seeking dismissal of plaintiff's Labor Law §241 (6) claim is granted.

The court now turns to that branch of the moving defendants' motion seeking summary judgment dismissing plaintiff's clam as based upon a violation of Labor Law § 200 and common-law negligence.

Labor Law § 200/Common-Law Negligence

Section 200 of the Labor Law statute 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, 877 [1993]; *Haider v Davis*, 35 AD3d 363, 364 [2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition or had actual or constructive notice of its existence (*see Koffour v Whitestone Constr. Corp.*, 94 AD3d 706, 707-708 [2012]; *Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007], *lv denied* 10 NY3d 706 [2008]). By contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work or the provision of the alleged defective equipment (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965], *rearg denied* 16 NY2d 883 [1965]).

Here, the record demonstrates that the accident was not caused by a defective property condition, but rather by the use of alleged defective equipment. The moving defendants argue that it is undisputed that they did not provide any tools or equipment to plaintiff and did not supervise or control his work activities. In support of this, they point to plaintiff's testimony that he received all of his supervision and direction from Navillus (Sumpter tr at

57, lines 3-12; at 57-58, lines 22-8). They also point to Mr. Marrone's testimony that he was the only Plaza employee on site at the time of the incident and that Plaza was not in control of the ongoing work. Specifically, he testified that he did not direct Laquila employees in terms of the work they were performing, but merely could direct them to stop if he observed them engaging in an unsafe activity (Marrone tr at 41, lines 9-21). The moving defendants note that the incident arose from a defect in the subcontractor's tools, specifically the equipment utilized by Laquila, and that there was no act or omission on the part of the moving defendants that caused or contributed to the alleged incident.

In opposition, plaintiff argues that Labor Law § 200 liability should be imposed upon the moving defendants because they had the authority to remove any employee engaging in unsafe work practices. He also contends that the contract between Plaza and Laquila specifies that Laquila worked under the direction and supervision of the moving defendants. In addition, he points to the testimony of Laquila representative Jeff Glennon that the owner came up with the plan regarding where to place the cement truck, the hose and the boom.

In reply, the moving defendants reiterate that there was no active negligence on their part and that their general supervisory authority is not sufficient to impose Labor Law § 200 and or common-law negligence liability. Moreover, they point out that the contract between Plaza and Laquila actually specifically provided that Laquila would employ its own means and methods in performing its work and was responsible for ensuring the safety of its employees and other individuals that could be affected by its work.

" [T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2016] quoting *Austin v*

Consolidated Edison, Inc., 79 AD3d 682, 684 [2010], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009], *affd* 15 NY3d 869 [2010]; *see Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2013]; *Harrison v State of New York*, 88 AD3d 951, 954 [2011]). As stated by the Court of Appeals, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" *(Persichilli,* 16 NY2d at 145 [1965]; *see also Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196,1197 [2012]).

Here, the moving defendants have demonstrated their prima facie entitlement to summary judgment dismissing plaintiff's claims based upon Labor Law § 200 and common-law negligence by showing that they did not have the authority to supervise or control plaintiff's work, nor did they provide the equipment that is alleged to have been defective that caused plaintiff's injuries, and plaintiff has failed to raise an issue of fact in this regard (*see Dasilva v Nussdorf*, 146 AD3d 859, 860-861 [2017]; *Konaz v St. John's Preparatory Sch.,* 105 AD3d 91L2, 914 [2013]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1223 [2011]; *LaGuidice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]; *Bishop v Marsh*, 59 AD3d 483, 483 [2009]). Accordingly, that branch of the moving defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claim as asserted against the moving defendants is granted.

In light of the foregoing, that branch of the moving defendants' motion seeking summary judgment in their favor on their cross claims for contractual indemnification against Laquila and on their second-third-party claim for contractual indemnification against Navillus is moot.

Plaintiff's Cross Motion

Plaintiff cross-moves for an order, pursuant to CPLR 3212, seeking summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims. As discussed above in relation to the motion by Plaza and 150 Charles, the moving defendants have established their prima facie entitlement to summary judgment dismissing plaintiff's claims as asserted against these defendants. Accordingly, that branch of plaintiff's cross motion seeking summary judgment in his favor on his claims as against the moving defendants is denied in its entirety for the reasons stated above.

Navillus and Laquila (the subcontractor defendants) oppose plaintiff's cross motion for summary judgment, as it relates to the subcontractor Laquila, arguing that it is untimely. They point out that the deadline for moving for summary judgment in this case was September 26, 2016, pursuant to this court's order dated May 26, 2016. However, on or about October 13, 2016, plaintiff filed his cross motion seeking to amend his bill of particulars and for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims. Moreover, they point out that plaintiff's cross motion is not supported by the pleadings as required.

It is true, as the subcontractor defendants point out, that plaintiffs' cross motion is untimely inasmuch as it was made after the deadline set forth in this court's May 26, 2016 order. Furthermore, courts are generally precluded from considering untimely summary judgment motions irrespective of the merits of the motions (*Brill v City of New York*, 2 NY3d 648 [2004]). However, a well-established exception to this rule exists when the untimely cross motion is "nearly identical" to a timely summary judgment motion already before the court (*Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d 737, 738-739 [2011]; *Whitehead v City of New York*, 79 AD3d 858, 860 [2010]). The rationale for this

exception stems from the court's statutory authority under CPLR 3212 (b) to award summary judgment to a non-moving party in the course of deciding a timely summary judgment motion.

Here, plaintiffs' cross motion for summary judgment under Labor Law § 240 (1) and 241 (6) was nearly identical to that branch of the moving defendants' timely motion seeking summary judgment dismissing plaintiff's complaint in its entirety, which is why the court elected to decide plaintiff's cross motion as it related to the moving defendants. However, "[a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Mango v Long Island Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [1986]; *see*, CPLR 2215; *see also Asiedu v Lieberman*, 142 AD3d 858, 858 [2016]; *Kershaw v Hospital for Special Surgery,* 114 AD3d 75, 88 [2013]; *Terio v Spodek*, 25 AD3d 781, 785 [2006]). Accordingly, that branch of plaintiff's cross motion seeking summary judgment in his favor as against Laquila is denied.

Finally, the subcontractor defendants ask the court to search the record and dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as asserted against Laquila. They argue that these statutes are inapplicable to the facts of the instant case. The subcontractor defendants are correct in their assertion that the court has the authority to search the record and award summary judgment to a nonmoving party with respect to issues that were the subject of the motion before the Supreme Court (*see* CPLR 3212 [b]; *Kweku v Thomas*, 144 AD3d 1109, 1111-1112 [2016]; *Arista Real Estate Holdings, Inc. v Kemalettin*, 133 AD3d 696, 697-698 [2015]). Accordingly, upon searching the record the court finds that the subcontractor defendants are entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as asserted against Laquila.

Conclusion

The moving defendants' (150 Charles and Plaza) motion for summary judgment dismissing plaintiff's claims as based upon a violation of Labor Law §§ 240 (1), 241 (6) and 200 is granted and said claims are hereby dismissed as against these defendants. That branch of the motion seeking contractual indemnification as against the subcontractor defendants (LaQuila and Navillus) is denied as moot. Likewise, the second third-party action against Navillus is dismissed as moot. Plaintiff's cross motion is denied in its entirety. Upon searching the record the court grants summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against Laquila, and said claims are hereby dismissed.

The foregoing constitutes the decision and order of the court.

E N T E R,

JUN 30 2017

J. S. C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

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