SHORT FORM ORDER

INDEX No. 03-11989
CAL. No. 08-00546-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-29-08
ADJ. DATE 5-29-08
Mot. Seq. # 002 - MD
003 - XMotD
004 - XMotD
005 - XMD

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ANTHONY M. SALVAGNO, JR.,

Plaintiff,

- against -

J.P. SPANO AND COMPANY, INC.,

Defendant.

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J.P. SPANO AND COMPANY, INC.,

Third-Party Plaintiff,

- against -

BRIAN FAY CONSTRUCTION, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 59 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motions and supporting papers 15 - 17; 18 - 36; 37 - 40; Answering Affidavits and supporting papers 41 - 42 ; 43 - 44 ; 45 - 46 ; 47 - 48 ; 49 - 51 ; Replying Affidavits and supporting papers 52 - 53 ; 54 - 55 ; 56 - 57 ; Other memorandum of law 58 - 59 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by third-party defendant Brian Fay Construction, Inc. for an order pursuant to CPLR 3212 granting defendant J. P. Spano and Company, Inc. summary judgment dismissing the plaintiff's Labor Law §§ 200, 240(1) and 241(6), and common-law negligence causes of action, is granted to the extent of dismissing the plaintiff's Labor Law § 200 and common-law negligence claims against J. P. Spano and Company, Inc., and is otherwise denied; and it is further

ORDERED that the cross motion (#003) by defendant J. P. Spano and Company, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and/or an order granting summary judgment on its third-party complaint against Brian Fay Construction, Inc., is granted to the extent of dismissing the plaintiff's Labor Law § 200 and common-law negligence causes of action against movant and granting summary judgment in its favor on its claim for contractual indemnification over and against Brian Fay Construction, Inc, and is otherwise denied; and it is further

ORDERED that the cross motion (#004) by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment as to the liability of defendants J.P. Spano and Company, Inc., John Davis, Edward S. Davis, III and David Stanton, is granted to the extent of granting the plaintiff summary judgment in his favor on his Labor Law § 240(1) claim against J.P. Spano and Company, Inc., and is otherwise denied, and it is further

ORDERED that the cross motion (#005) by defendants David Stanton, John M. Davis, and Edward M. Davis III, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against them is denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he suffered when a fellow employee, working with a circular saw on a ladder above him, fell, and he was cut by the saw. The plaintiff's employer, Brian Fay Construction, Inc. (Fay), was the framing and sheathing subcontractor hired by the general contractor, J. P. Spano and Company, Inc. (Spano), for the home under construction.

The plaintiff testified at his deposition that the front porch for the new home had been framed and that he was directed by his boss (Brian Fay or his brother) to install four-by-four boards underneath the porch. He worked in a crouched position, cutting and fitting the boards to extend from the footings to the porch frame. The rafters for the porch roof had already been installed and another Fay employee[1] was working directly above him, cutting the rafters, or headers, to their correct length. To reach the rafters, the coworker had placed a one-half sheet of plywood (about four feet by four feet) on top of the porch frame and then placed an unopened A frame ladder on top of the plywood. The coworker had leaned the unopened ladder against the porch post and was standing about half-way up the ladder, using a circular saw. As he leaned to reach a rafter, the plywood kicked out and the ladder and the coworker fell. The plaintiff testified that he heard his coworker yell as the ladder begin to fall and looked up to see the coworker and the saw falling towards him. The plaintiff put his hands up to protect himself and, as the worker fell, the saw was still operating and amputated two of the fingers on plaintiff's left hand.

Labor Law § 240(1) provides, in pertinent part, that owners, general contractors, and their agents must furnish "scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection" to a person employed in the erection of a building. It is well settled that the protection afforded by § 240(1) applies to both "falling worker" and "falling object" cases.

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[1] The plaintiff testified that he did not know his coworker's name, and the coworker was not deposed. However, the facts surrounding the plaintiff's accident are not in dispute.

In "falling object" cases, Labor Law § 240(1) applies where the object's fall is related to a significant risk inherent in the "difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). Further, in ***Outar v City of New York*** (5 NY3d 731, 799 NYS2d 770 [2005]), the Court of Appeals made it clear that "falling object" liability is not limited to cases in which the falling object is being actively hoisted or secured at the time it falls. In ***Outar***, Labor Law § 240(1) was found applicable when the plaintiff was injured by an unsecured dolly which fell from its "storage" place on a wall five feet above plaintiff. Clearly, the dolly did not fall during the course of being hoisted or secured.

The Appellate Division has also held that a plaintiff may recover as a matter of law where safety equipment falls or collapses on the plaintiff. In ***Thompson v St. Charles Condominiums*** (303 AD2d 152, 756 NYS2d 530, *lv dismissed* 100 NY2d 556, 763 NYS2d 814 [2003]), the plaintiff was placing cinder blocks and pans of mortar onto a four-foot-high sawhorse scaffold, on which a bricklayer would then stand in order to work. When the bricklayer climbed onto the scaffold, it collapsed, causing the cinder blocks and the bricklayer to fall on the plaintiff, injuring him. The Appellate Court found that where a safety device has been furnished, and it falls or collapses, a prima facie case of liability under Labor Law § 240 (1) is established. Further, liability is established whenever the employee is injured as a result of such a fall or collapse, "regardless of whether the employee was *on or under* the safety device when it collapsed" (*id.* at 154 [emphasis in original]; *see also*, ***Quattrocchi v F.J. Sciame Constr. Corp.***, 44 AD3d 377, 380-381, 843 NYS2d 564 [2007] [where inadequately secured planking fell onto the plaintiff];[2] ***Salinas v Barney Skanska Constr. Co.***, 2 AD3d 619, 769 NYS2d 559 [2003] [where plaintiff had to work underneath duct work he was removing]; ***Heidelmark v State of New York***, 1 AD3d 748, 766 NYS2d 742 [2003] [where the plaintiff was holding a ladder when his coworker on the ladder dropped a pipe on him]; ***Van Eken v Consolidated Edison Co.***, 294 AD2d 352, 742 NYS2d 94 [2002] [where the plaintiff was working in a trench when a sheet of plywood being lowered from the street slipped, the coworker next to the plaintiff in the trench let go of his jackhammer to grab the plywood, and the jackhammer hit and injured the plaintiff]). Here, the ladder used by the plaintiff's coworker was an enumerated safety device which failed to perform its function of safely supporting the coworker and his equipment (***Whalen v Exxonmobil Oil Corp.***, 50 AD3d 1553, 856 NYS2d 789 [2008]; ***Morin v Machnick Bldrs.***, 4 AD3d 668, 669-670, 772 NYS2d 388 [2004]). Therefore, the Court finds that the plaintiff established that the statute was violated and that the violation was a proximate cause of his injuries, and that the defendants did not refute this with admissible evidence to the contrary. Accordingly, the plaintiff is granted summary judgment as to his Labor Law § 240(1) claim against Spano, and so much of defendants' motions which seek to dismiss this claim is correspondingly denied.

Labor Law § 241(6) requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240(1), the duty

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[2] In ***Quattrocchi***, there was some question about the plaintiff's own action and, while the defendant's Labor Law § 240(1) liability was to be resolved at trial, it could not be excluded based upon the undisputed facts.

to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.***, 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that the defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]).

Here, the plaintiff has confined his argument to defendants' alleged violation of the Industrial Code found at 12 NYCRR § 23-1.21, entitled "Ladders and ladderways," at subsections (b) (4) (ii), and (e) (2) and (3). The plaintiff has not opposed dismissal of the other violations alleged in his bill of particulars and they do not appear to be applicable, and they are dismissed.

Section 23-1.21(b) (4) entitled "Installation and use," provides, in relevant part:

> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Section 23-1.21(e) (4) entitled "Stepladders," provides, in relevant part:

> (2) Bracing. Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder *shall be opened to its full position and the spreader shall be locked.* [emphasis added]
>
> (3) Stepladder footing. Standing stepladders shall be used only on firm, level footings. . . .

* * *

The thrust of the plaintiff's argument is that the ladder was placed on loose pieces of plywood on top of the porch studs, not on firm footings, and that the ladder was not fully opened and locked, in violation of these provisions. The Court finds that the provisions are at least arguably applicable to the accident and that defendants have not established that they are not applicable, as a matter of law. Further, a violation of the Industrial Code is only some evidence of negligence, it is for the jury to resolve the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (*see*, ***Rizzuto v L. A. Wenger Contr. Co.***, *supra*; ***Herman v St. John's Episcopal Hosp.***, 242 AD2d 316, 678 NYS2d 635 [1997]). Accordingly, summary judgment on this cause of action is denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercise control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Where,

as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the general contractor exercised no supervision or control over the subcontractor's work, no liability attaches under the common law or Labor Law § 200 (***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Accordingly, Spano has established its entitlement to summary judgment dismissing these causes of action, and the plaintiff has not offered any evidence to the contrary.

Spano also seeks summary judgment on its third-party claim for contractual indemnification over and against Fay. The contract between Spano and Fay provides, in relevant part, at paragraph number 11:

> **Indemnity** To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Contractor . . . for all claims for bodily injury and property damage that may arise from performance of Subcontract Work to the extent of the negligence attributed to such acts or omissions by Subcontractor, Subcontractor's subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

Therefore, Fay is obligated to indemnify Spano for any acts or omissions of its employees, the undisputed cause of plaintiff's accident (***Sullivan v G & L Bldg. Corp.***, 43 AD3d 401, 839 NYS2d 918 [2007]; ***Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.***, 10 AD3d 493, 495, 781 NYS2d 506 [2004]) and Spano's vicarious liability pursuant to Labor Law § 240(1) has been established (***Lesisz v Salvation Army***, 40 AD3d 1050, 837 NYS2d 238 [2007]; ***Boshnakov v Higgins-Kieffer, Inc.***, 255 AD2d 983, 680 NYS2d 337 [1998]). Accordingly, Spano is granted summary judgment on its claim for contractual indemnification over and against Fay.

The remaining motion by David Stanton, John M. Davis, and Edward M. Davis III, incorrectly labeled as a cross motion, is not properly before this court. Plaintiff commenced two separate actions relative to his accident, the instant action against Spano (Index No. 11989/03) and an action against David Stanton, John M. Davis, and Edward M. Davis III, the purported owners of the property (Index No. 6281/04). By order of this Court (Werner, J.), dated January 3, 2005, the two actions were joined for trial, but each action was to have a separate note of issue and certificate of readiness, and separate court fees. There was no consolidation and each action maintained its separate identity. Therefore, David Stanton, John M. Davis, and Edward M. Davis III, are not defendants in this action and the Court is unable to consider their motion; and the plaintiff's request for relief as against these defendants is correspondingly denied. Further, even if the Court were to deny the motion with leave to renew in the proper action, the motion is untimely and could not be considered. While the note of issue in the instant action was filed on March 7, 2008, the note of issue in the separate action against David Stanton, John M. Davis, and Edward M. Davis III, was filed on September 13, 2007. Accordingly, even if the motion had been brought in the correct action, it would be procedurally defective because it was not interposed within the time limitation prescribed by CPLR 3212(a) (***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]); ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Accordingly, the motion is denied.

In summary, the plaintiff's Labor Law § 200 and common-law negligence causes of action are dismissed and the plaintiff's Labor Law § 240(1) claim and his Labor Law § 241(6) claim based upon the alleged violations of the Industrial Code found at 12 NYCRR § 23-1.21 (b) (4) (ii), and (e) (2) and (3), are severed and shall continue (CPLR 3212 [e]). Upon service of a copy of this order with notice of entry the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part for the next available trial date.

Dated: July 16, 2008

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION