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SHORT FORM ORDER

INDEX No. 06-7683

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 7-16-09 (#006)
MOTION DATE 7-27-09 (#007 & #008)
MOTION DATE 9-24-09 (#009)
ADJ. DATE 10-29-09
Mot. Seq. # 006 - MotD
Mot. Seq. # 007 - MotD
Mot. Seq. # 008 - XMotD
Mot. Seq. # 009 - XMD

JOHN POSA and CAROLINE POSA,

Plaintiffs,

- against -

COPIAGUE PUBLIC SCHOOL DISTRICT, HEALTH AND EDUCATION EQUIPMENT CORP., IRWIN CONTRACTING OF LONG ISLAND, INC., THE AMERISC CORP., TKO CONTRACTING CORP., and SCHOOL CONSTRUCTION CONSULTANTS, INC.,

Defendants.

COPIAGUE PUBLIC SCHOOL DISTRICT and IRWIN CONTRACTING OF LONG ISLAND, INC.,

Third-Party Plaintiff,

- against -

HEALTH AND EDUCATION EQUIPMENT CORP.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 86 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 28 ; Notice of Cross Motion and supporting papers 29 - 46 ; 47 - 53 ; Answering Affidavits and supporting papers 54 - 59 ; 60 - 61 ; 62 - 63 ; 64 - 69 ; 70 - 71 ; 72 - 73 ; Replying Affidavits and supporting papers 74 - 75 ; 76 - 77 ; 78 - 80 ; 81 - 82 ; 83 - 84 ; Other memorandum of law 85 - 86 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#006) by defendant/third-party defendant Health and Educational Equipment Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and the third-party complaint, as well as any cross claims asserted against it, and for summary judgment on its cross claim over and against defendant TKO Contracting Corp. for common-law indemnification, is granted to the extent that the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed, and is otherwise denied; and it is further

ORDERED that the motion (#007) by defendant TKO Contracting Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, as well as any cross claims asserted against it, is granted to the extent that the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#008) by defendants/third-party plaintiffs Copiague Public School District and Irwin Contracting of Long Island, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, as well as any cross claims asserted against them, and for summary judgment in their favor on their claims for contractual indemnification over and against defendants Health and Educational Equipment Corp. and School Construction Consultants, Inc., is granted to the extent that the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed and they are entitled to contractual indemnification over and against Health and Educational Equipment Corp., and is otherwise denied; and it is further

ORDERED that the cross motion (#009) by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment as to the defendants' liability pursuant to Labor Law § 240 (1) is denied.

The injured plaintiff, John Posa, commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered when tabletops being stored in a hallway fell over onto his foot. His wife sues derivatively. The defendant Copiague Public School District (School District) contracted with several prime contractors to make certain alterations and additions to its schools. It appears that defendant Irwin Contracting of Long Island, Inc. (Irwin) was the prime construction contractor, and that its contract included renovation of science labs. Irwin subcontracted the cabinets, tables, and tabletops for the science labs to defendant Health and Education Equipment Corp. (H & E). H & E, in turn, sub-subcontracted the installation of these fixtures to TKO Contracting Corp. (TKO). Defendant School Construction Consultants, Inc. (SCC) was a prime contractor hired to act as the construction manager.

The plaintiff testified at his deposition that he was employed by a nonparty and that, on the day of his accident, he was installing partitions in a third-floor bathroom. Other contractors, including electricians and carpenters, were also working at the site on the day of his accident. He was utilizing an A-frame cart to carry his tools and materials and he testified that, as he exited the elevator to third floor, he pushed the cart in front of him. When he was approximately three feet into the hall, tabletops which had been leaning against the wall in the hallway fell over onto his foot, inflicting the injuries alleged herein. The tabletops were epoxy resin and weighed 180 pounds each. The plaintiff did not see the tabletops before they fell over.

Labor Law § 240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either actually exercised supervision or control over the work (*see*, ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240 (1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). However, the "special hazards" contemplated by § 240 (1) "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*; ***Rodriguez v Margaret Tietz Ctr. for Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994]) and "not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1)" (***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS2d 2d 37 [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 (***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]).

In actions premised on falling objects, an essential component of an injured worker's ability to recover is that he "must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (***Narducci v Manhasset Bay Assoc.***, *supra*; *also*, ***Roberts v General Elec. Co.***, 97 NY2d 737, 742 NYS2d 188 [2002]). Here, the tabletops which fell over were neither in the process of being hoisted nor a load that required securing by an enumerated device (***Narducci v Manhasset Bay Assoc.***, *supra* at 268; ***Misseritti v Mark IV Constr.***, 86 NY2d 487, 490-491, 634 NYS2d 35 [1995]; ***Mikcova v Alps Mech.***, 34 AD3d 769, 82 NYS2d 130 [2006]). Further, the tabletops were at the same level as the plaintiff and therefore were not falling objects for the purposes of the absolute liability imposed by Labor Law § 240 (1) (*compare*, ***Outar v City of New York***, 5 NY3d 731, 799 NYS2d 770 [2005] [where the object, although not being hoisted, was at a higher level than the plaintiff's work]; *see also*, ***Desharnais v Jefferson Concrete Co.***, 35 AD3d 1059, 827 NYS2d 312 [2006]; ***Peay v New York City School Constr. Auth.***, 35 AD3d 566, 568, 827 NYS2d 189 [2006]; *lv denied* 8 NY2d 807, 833 NYS2d 426 [2007]; ***Mikcova v Alps Mech.***, *supra*; ***Zirkel v Frontier Communications of Am.***, 29 AD3d 1188, 815 NYS2d 324 [2006]; ***Atkinson v State of New York***, 20 AD3d 739, 740, 789 NYS2d 230 [2005]). Accordingly, Labor Law § 240 (1) is inapplicable to the plaintiff's accident, summary judgment dismissing this claim is granted to the defendants, and the plaintiff's motion for summary judgment in his favor on this claim is correspondingly denied.

To establish liability under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a specific Industrial Code regulation that is applicable to the circumstances of his accident (*see*, ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*). Here, the plaintiff's complaint and bill of particulars are devoid of any reference to a specific regulation. The failure to identify a violation of any specific provision of the Industrial Code precludes liability under Labor Law § 241 (6) (***Owen v Commercial Sites***, 284 AD2d 315, 725 NYS2d 574 [2001]). Accordingly, summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim is granted to the defendants.

As to the remaining claims, Tom DiBenedetto, the owner of TKO, testified at his deposition that his workers off-loaded the tabletops when they were delivered to the site, that he asked the general contractor (Irwin) where to store them and was told to consult the School District's custodian, that the custodian told him to place them in the hallway near the elevator because the floors in the classrooms were being refinished, and that it was his own decision to lean them upright. This decision was based upon the fact that the tabletops were to be installed in just a few weeks and the space in the hallway was limited. If the date for installation was further off, the tabletops would have been stored flat because they could warp. Moving them from a flat position was more difficult because of their weight, and leaning them upright made them easier to handle. DiBenedetto also testified that he complained to the "safety manager" or "safety inspector" at the site that the storage areas were located too far from where the material was to be installed. He recalled that this safety person checked to make sure that TKO had proper hard hats and shoes and took the personnel count, although he did not recall his name or for whom he worked. He testified that it was this safety person who directed him to the custodian.

Jeffrey Engelhardt, the School District's head custodian testified at his deposition that he recalled seeing smaller tabletops leaning against the wall by the third-floor elevator, but not the large ones that the plaintiff alleges fell on him, and that he made no complaints about them to SCC. He did not direct where the contractors would store their supplies and, if a contractor had sought such direction, he would have referred them to SCC. The floors were not refinished until after all construction had been completed.

Victor Naujokas, SCC's construction project manager, testified at his deposition that he was present at the site daily but did not direct how or where construction material was stored. Although he had contact with Mr. Engelhardt, Mr. Engelhardt did not direct or control where materials were stored, each contractor was responsible for its own material. He was unaware of a specific person responsible for safety at the site, he had no authority to stop or redirect work he felt was unsafe, and he did not see the tabletops until they were installed on the tables. He testified that he observed floors being refinished during the project.

John Irwin, the owner of Irwin, testified at his deposition that he subcontracted the lab fixtures to H & E, that he never discussed or controlled where or how to store the tabletops with H & E, and that he was unaware that H & E had sub-subcontracted their installation to TKO. The first time he saw the tabletops, they were already installed on the tables.

Steven Myers, H & E's vice president, testified at his deposition that H & E subcontracted the installation of the lab fixtures to TKO, and that TKO off-loaded the tabletops at the site, stored them at

the site, and installed them. TKO's work was supervised at the site by H & E's project manager, Frank Rossi. H & E did not supervise how TKO was to do its work and was not present at the site on the day of the plaintiff's accident.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]; ***Mordkofsky v V.C.V. Dev. Corp.***, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, *supra*) who exercise control or supervision over the work, or either created the 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 the plaintiff alleges that a proximate cause of his injuries can be attributed to an allegedly dangerous condition at the work site, a defendant may be liable under Labor Law § 200 and for common-law negligence if it had control over the place where the injury occurred and had actual or constructive notice of the dangerous condition (***Nasuro v PI Assoc.***, *supra*; ***Payne v 100 Motor Parkway Assoc.***, 45 AD3d 550, 846 NYS2d 211 [2007]; ***Gadani v Dormitory Auth. of State of N.Y.***, 43 AD3d 1218, 841 NYS2d 709 [2007]). Further, a subcontractor may be held liable for negligence where its work created the condition that caused the plaintiff's injury, even if it did not possess any authority to supervise and control the plaintiff's work or work area (*see*, ***Tabickman v Batchelder St. Condominiums By the Bay***, 52 AD3d 593, 859 NYS2d 721 [2008]; ***Kelarakos v Massapequa Water Dist.***, 38 AD3d 717, 832 NYS2d 625 [2007]; ***Mendez v Union Theol. Seminary in City of N.Y.***, 17 AD3d 271, 793 NYS2d 420 [2005]). While the plaintiff must establish at trial that the defendant created or had actual or constructive notice of the alleged dangerous condition and that this was a proximate cause of his accident (*see*, ***Wolfe v KLR Mech.***, 35 AD3d 916, 918, 826 NYS2d 458 [2006]; ***Jurgens v Whiteface Resort on Lake Placid***, 293 AD2d 924, 742 NYS2d 142 [2002]; ***Johnson v Packaging Corp. of Am.***, 274 AD2d 627, 629, 710 NYS2d 699 [2000]), for the purpose of the defendants' motions for summary judgment dismissing the Labor Law § 200 and negligence claims, each defendant had the initial burden to establish, *prima facie*, that it did not create nor have actual or constructive notice of the alleged dangerous condition (*see*, ***Wolfe v KLR Mech.***, *supra* at 919; ***Bell v Bengomo Realty***, 36 AD3d 479, 829 NYS2d 42 [2007]; ***Bonse v Katrine Apt. Assoc.***, 28 AD3d 990, 991, 813 NYS2d 578 [2006]). Here, the deposition transcripts directly contradict one another as to who had control or notice of the placement of tabletops in the hallway. Accordingly, summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims is denied to all defendants.

The School District and Irwin also seek summary judgment on their claim for contractual indemnification over and against H & E. It is well settled that the right to contractual indemnification depends upon the specific language of the contract (***Bellefleur v Newark Beth Israel Md. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2009]; ***Moss v McDonald's Corp.***, 34 AD3d 656, 825 NYS2d 497 [2006]; ***Kader v City of N. Y. Hous. Preserv. & Dev.***, 16 AD3d 461, 463, 791 NYS2d 634 [2005]; ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [1995]). Here, the contract between Irwin and H & E provides, in relevant part, at section 4.6, that H & E would indemnify and hold the owner and contractor (Irwin) harmless against any claims, damages, losses and expenses by reason of any liability "arising out of or resulting from" the performance of its work, "but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Sub-Contractor's Sub-subcontractors," * * * "regardless of whether such claim" is "caused in part by a party indemnified hereunder."

While the School District and Irwin could not be indemnified if they were found to be solely at fault (General Obligations Law § 5-322.1 [1]; ***Brooks v Judlau Contr.***, 11 NY3d 204, 869 NYS2d 366 [2008]; ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 786, 658 NYS2d 903 [1997]), here there is no dispute that it was the decision of H & E's sub-subcontractor, TKO, to store the tabletops by leaning them against the wall. Therefore, regardless of whether it is established at trial that the School District or Irwin had some control of the placement of the tabletops in the hall, they cannot be found to be solely at fault. Since the contract contemplates indemnification even where the owner and contractor are found to be partially at fault, and TKO's actions caused or contributed to the happening of the accident, the request by the School District and Irwin for summary judgment on their claim for contractual indemnification over and against H & E is granted.

The remaining relief sought by the School District and Irwin is summary judgment on their claim for contractual indemnification over and against SCC. The contract between the School District and SCC provides, in relevant part, at article 9, section 4, that SCC would indemnify and hold harmless the owner and its consultants and agents and employees from and against all claims "arising out of or resulting from any omission, fault, or neglect" on its part, but excluding those arising from the Owner's own gross negligence. SCC argues that its contract with the School District also provides, at article 7, section 8, that it "shall not have control over or charge of the work" and "shall not be responsible for construction means, methods, techniques . . . or for safety precautions and programs in connection with the work of each of the Prime Contractors or Trade Contractors, since these are solely the Contractor's and Trade Contractor's responsibility." Section 8 also states that SCC "shall not have control over or charge of acts or omissions of the Prime Contractors, Trade Contractors, subcontractors, or their agents or employees . . . not directly employed by" it. Therefore, SCC argues that it had no responsibility for where or how the sub-subcontractor stored its material and has no duty to indemnify.

The School District and Irwin argue that the contract also provides at article 2, section 4 (c), subsection 8, that SCC "shall arrange . . . or secure services necessary for the delivery and storage, protection and security for . . . materials, systems and equipment which are part of the Project," and at article 2, section 4 (d), subsection 9, that SCC "shall enforce the requirement that all Contractors maintain in an unobstructed condition all entrances and/or exits from present buildings" and that in the event that a contractor fails to maintain such unobstructed condition, SCC "shall immediately notify" such contractor or "arrange for removal of the obstruction." Therefore, while it is clear the SCC had no control of the methods or means employed by the various contractors to perform their work, there is, at minimum, a question as to whether SCC had an ability and a duty as to the storage of materials at the site and as to notifying a contractor or arranging for maintenance of unobstructed passages. Accordingly, summary judgment on this claim is denied to the School District and Irwin.

Lastly, H & E seeks summary judgment on its claim for common-law indemnification over and against TKO. However, an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties (*see*, ***Mendelshohn v Goodman***, __ AD3d __ , 2009 NY Slip Op 8193,[2009]; ***Tama v Gargiulo Bros.***, 61 AD3d 958, 878 NYS2d 128 [2009]; ***Kwang Ho Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 620, 852 NYS2d 138 [2008]; ***Coque v Wildflower Estates Devs.***, 31 AD3d 484, 818 NYS2d 546 [2006]). Here, H & E did not establish as a matter of law that its project manager lacked authority over,

or notice of. the alleged storage hazard. Accordingly, summary judgment on this claim is denied.

The plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, dismissed herein, are severed and the remaining claims shall continue.

Dated: January 7, 2010
Riverhead, New York

EMILY PINES
J. S. C.