VanNostrand v Race & Rally Constr. Co., Inc.

2012 NY Slip Op 30076(U)

January 3, 2012

Sup Ct, Suffolk County

Docket Number: 06-14470

Judge: Emily Pines

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SHORT FORM ORDER

INDEX No. 06-14470

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 46 - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 4-21-11 (#006)
MOTION DATE 5-26-11 (#007)
MOTION DATE 6-15-11 (#008)
MOTION DATE 6-23-11 (#009)
MOTION DATE 7-28-11 (#010)
ADJ. DATE 9-15-11
Mot. Seq. # 006 - MotD # 009 - XMD
007 - XMotD # 010 - MotD
008 - MotD

---X

ROBERT VAN NOSTRAND,

Plaintiff,

- against -

RACE & RALLY CONSTRUCTION CO., INC., CARRIER NORTHEAST and PENSKE LOGISTICS, INC. and MCN DISTRIBUTORS, INC.,

Defendants.

---X

RACE & RALLY CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

- against -

MASTER MECHANICAL CORP.,

Third-Party Defendant.

---X

Action No. 1
Index No. 06-14470

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[* 2]

ROBERT VAN NOSTRAND, Plaintiff, - against - "JOHN DOE", now known as MCN DISTRIBUTORS, INC., Defendant.	*Action No. 2* Index No. 08-2239

Upon the following papers numbered 1 to 128 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; 61-74; 109 - 122; Notice of Cross Motion and supporting papers 21 - 51; 98 - 102 ; Answering Affidavits and supporting papers 15 - 16; 17 - 18; 52 - 53; 54 - 55; 75 - 76; 77 - 78; 83 - 95; 96 - 97; 103 - 104; 123 - 124 ; Replying Affidavits and supporting papers 19-20; 56 - 57; 58 - 59;79 - 80; 81 - 82; 105 - 106; 107 - 108; 125 - 126; 127 - 128 ; Other __________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendant MCN Distributors, Inc., defendant Penske Logistics LLC s/h/a Penske Logistics, Inc., and defendant/third-party plaintiff Race & Rally Construction Co., Inc. for summary judgment are consolidated for the purposes of this determination and are decided together with the cross motions by defendants Carrier Sales and Distribution, LLC i/s/h/a Carrier Northeast and third-party defendant Master Mechanical Corporation; and it is further

ORDERED that the motion (#006) by defendant MCN Distributors, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint as against it is determined herein; and it is further

ORDERED that the cross motion (#007) by defendant Carrier Sales and Distribution, LLC i/s/h/a Carrier Northeast for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is determined herein; and it is further

ORDERED that the motion (#008) by defendant Penske Logistics LLC s/h/a Penske Logistics, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is determined herein; and it is further

ORDERED that the cross motion (#009) by third-party defendant Master Mechanical Corporation for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the third-party complaint and all cross claims as against it is denied; and it is further

ORDERED that the motion (#010) by defendant/third-party plaintiff Race & Rally Construction Co., Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims and counterclaims as against it; and granting it summary judgment on its contractual and/or common law defense and indemnity claims against third-party defendant Master Mechanical Corporation, or in the alternative, granting a conditional order is determined herein.

Plaintiff, a lead mechanic for Master Mechanical Corp. (Master Mechanical), a mechanical contracting corporation for air conditioning and heating equipment, was allegedly injured during the

course of his employment on January 28, 2005 at approximately 10 a.m. when he fell off of the rear of a flatbed delivery truck at a construction site located at 242 Maple Avenue, Westbury, Nassau County, New York. A boom truck had been lifting pallets of air conditioning and heating equipment, that were strapped and hooked to its crane, from the surface of the flatbed delivery truck onto the roof of the six-story, 92-unit, residential condominium building under construction at the site. Plaintiff had been directed by a Master Mechanical supervisor, Bill Walters, who was on the roof with other Master Mechanical workers, to stand at ground level near the delivery truck and to notify him by radio of the size of the air conditioner condensing units being lifted by the boom truck. After two pallets had been lifted to the roof without incident, the third pallet had allegedly become stuck under the delivery truck's side railing. The truck driver had allegedly complained that it was the wrong truck for this work. Thereafter, the delivery truck driver and/or the operator of the boom truck had allegedly requested plaintiff's assistance in freeing the stuck pallet, and plaintiff had obtained permission to provide such assistance from Bill Walters.

Just prior to his fall, plaintiff had been standing on the surface of the truck's flatbed, near its tail end, approximately five feet above the ground. Plaintiff had been wearing steel-toed work boots, a hard hat, safety glasses and cotton gloves with plastic palms, and had not been offered any additional safety equipment or clothing. He had been holding a device with a long bar and wheels, which he called a "pallet jack," that had allegedly been provided by the truck driver to lift and move the pallet out from under the side railing. The truck driver had allegedly been standing on the ground next to the truck using a bar to lift the side railing, and the crane operator had allegedly been putting tension on the cable attached to the stuck pallet. Plaintiff did not recall actually falling or being hit by anything. He only recalled the truck driver signaling to the crane operator to lift, then the swift approach in plaintiff's direction of the pallet and the device that he was holding, and then lying on his back in the snow behind the delivery truck. Plaintiff received Workers' Compensation Benefits as a result of this incident.

The owner of the project site, non-party West Maple LLC, had hired Race & Rally Construction Co., Inc. (Race & Rally) as the general contractor for the construction of the building. Race & Rally had then hired plaintiff's employer, Master Mechanical, as a subcontractor pursuant to a written agreement. Master Mechanical had thereafter ordered air conditioning and heating equipment from Carrier Sales and Distribution, LLC i/s/h/a Carrier Northeast (Carrier) in Farmingdale, New York for delivery to the construction site. Carrier had a written agreement with Penske Logistics LLC s/h/a Penske Logistics, Inc. (Penske) for the delivery of its products from its Farmingdale warehouse. Master Mechanical had also hired MCN Distributors, Inc. (MCN), an air conditioner rigging company, to lift the Carrier air conditioning and heating equipment from the delivery truck to the roof of the building with a boom truck.

Plaintiff commenced actions[1] against Race & Rally, MCN, Carrier, and Penske alleging violations of Labor Law §§ 200, 240 (1) and 241(6) and common-law negligence. In its answer, Race & Rally asserted cross claims against Carrier for common-law indemnification, contribution, contractual indemnification, and breach of contractual obligation to procure liability insurance. Carrier cross-claimed against Race & Rally in its answer seeking contribution and common-law indemnification.

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[1] Action No. 1 with Index number 14470/2006 and Action No. 2 with Index number 2239/2008 were subsequently joined for trial pursuant to a so-ordered stipulation dated May 28, 2009.

Penske asserted cross claims against Race & Rally and Carrier for contractual indemnification and breach of contractual obligation to procure liability insurance. Race & Rally subsequently commenced a third-party action against plaintiff's employer, Master Mechanical, for common-law indemnification and contribution, and contractual indemnification, including costs and expenses incurred in the defense of the action, pursuant to the indemnification clause and breach of the obligation to obtain liability insurance. In its third-party answer, Master Mechanical asserted a cross-claim against Carrier for common law and contractual indemnification and asserted a counterclaim against Race & Rally for indemnity and contribution.

At their depositions, the Penske truck driver, Gerard N. Budd, and the MCN crane operator, George Romare, testified that no one fell during the unloading of the truck, no pallets got stuck, and they did not request or direct plaintiff to unload the delivery truck. Plaintiff's employer, Joseph Bonifazio, testified at his deposition that plaintiff came to see him a few days after the incident and merely said that he jumped up onto the delivery truck to help because things were moving slowly, and that while he was standing at the back of the truck, he took a step back, there was no more truck, and he fell off onto his back.

Josh Vega, operations manager for Carrier, testified at his deposition that based on an agreement with Penske, Carrier's warehouse personnel loaded the goods onto the Penske trucks, with no involvement from the Penske driver, and the Penske driver was responsible for the unloading of the goods with occasional assistance from the ordering entity. The MCN crane operator testified that he gave the nylon slings from his boom truck to two men he believed to be Master Mechanical employees, instructed them on how to attach the slings to the loads, and taught them the twirl signal to give when they were ready for him to lift a pallet. According to the MCN crane operator, the two men performed this work on the flatbed truck without incident. No one told him that Penske was responsible for slinging and hooking the load to the cable. The Penske truck driver denied at his deposition that he provided plaintiff with any device or complained about his truck, particularly since there was only one flatbed delivery truck. He emphasized that he did not get involved in rigging, and indicated that the side rails are flush with the flatbed surface so that a pallet could not get stuck. The Penske truck driver and the Carrier operations manager testified that a pallet jack could not have been used on the type of pallet on which the condensers were delivered. Joel Brooks, general counsel to Race & Rally, testified at his deposition that Race & Rally had a job superintendent, Laszlo Loki, who was responsible for coordination and general oversight. Joel Brooks testified that he did not have personal knowledge as to whether Laszlo Loki or any contractors were at the site on the date of the incident.

MCN, Carrier, Penske and Race & Rally now seek summary judgment dismissing the complaint as against them on grounds including that a fall from a flatbed truck is not the type of elevation-related risk which calls for any of the protective devices listed in Labor Law § 240 (1), that the alleged Industrial Code violations supporting plaintiff's Labor Law § 241(6) claims do not apply to the facts of this case, and that they did not direct, supervise or control plaintiff's work. Their submissions include the amended summons and complaint, their answers, plaintiff's bill of particulars, and the deposition transcripts of plaintiff, George Romare on behalf of MCN, Josh Vega on behalf of Carrier, Joel Brooks

on behalf of Race & Rally, Joseph Bonifazio on behalf of Master Mechanical, Gerard N. Budd on behalf of Penske Logistics, and non-party witness Eric Clark[2].

Carrier and Penske assert that they were merely a supplier and deliverer of goods, respectively, and did not own or lease the project site, were not agents of the owner or general contractor, did not maintain or hire contractors to perform work at the site, and did not direct or control any work performed at the site. MCN emphasizes that it was on the job site for the limited purpose of moving the air conditioning and heating equipment from the delivery truck to the roof by crane. Carrier asserts that its personnel were never at the site, it did not enter into any construction related contracts, that its sole involvement was filling an order placed by Master Mechanical to supply certain air conditioning units, and that its warehouse personnel loaded the Penske flatbed truck in the presence of the Penske truck driver. Carrier provides a copy of the Transportation Agreement dated January 17, 2000 and its addendum dated October 31, 2004 between Carrier and Penske. Penske emphasizes that it merely delivered packaged air conditioning condensers pursuant to its contract with Carrier and that its driver did not participate in or control the unloading. Race & Rally asserts that it did not direct, supervise or control plaintiff's work the day of the incident and provides a copy of its "Standard Form of Agreement Between Contractor and Subcontractor" dated March 8, 2004 executed by Joseph Bonifazio on behalf of Master Mechanical.

Plaintiff contends in opposition that summary judgment cannot be granted to any of the defendants where, as here, there is conflicting deposition testimony as to what happened at the site. In addition, plaintiff contends that MCN and Race & Rally owed a duty of care to plaintiff during the process of hoisting condensers from the back of the flatbed truck up onto the roof and that they are liable under Labor Law § 241 (6) based on violations of sections of the Industrial Code including, 12 NYCRR § 23-8.1 (f) (2) (i), (ii), § 23-8.1 (f) (5), and § 23-8.1 (f) (1) (iv). Plaintiff's submissions in support of his opposition include the affidavit dated August 18, 2011 of his certified site safety manager expert, Kathleen Hopkins, the affidavit dated August 21, 2011 of his shipping industry expert, John Nielsen, a Carrier invoice to Master Mechanical for January 28, 2005, and a Carrier bill of lading for January 28, 2005.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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 Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

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[2] The deposition testimony of the non-party witness Eric Clark was not considered by the Court as the submitted transcript was neither signed nor certified (*see* CPLR 3116).

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law §§ 200 [1], 240 [1], 241). A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; ***Damiani v Federated Dept. Stores, Inc.***, 23 AD3d 329, 331-332, 804 NYS2d 103 [2d Dept 2005]). The determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right" (***Williams v Dover Home Improvement***, 276 AD2d 626, 626, 714 NYS2d 318 [2d Dept 2000]; *see* ***Bakhtadze v Riddle***, 56 AD3d 589, 590, 868 NYS2d 684 [2d Dept 2008]).

Carrier and Penske met their initial burden of establishing that they were not an owner, contractor, or agent covered under the provisions of Labor Law §§ 200, 240 (1), or § 241 (6) (*see* ***Sakai-Figurny v Irastan***, LLC, 67 AD3d 985, 888 NYS2d 753 [2d Dept 2009]; ***Umanzor v Charles Hofer Painting & Wallpapering, Inc.***, 48 AD3d 553, 849 NYS2d 889 [2d Dept 2008], *lv denied* 10 NY3d 714, 861 NYS2d 275 [2008]). There is no evidence that the supplier Carrier or deliverer Penske exercised any authority or control over the work site or the particular work, the attempt to free a stuck pallet in the process of being lifted to the roof by the boom truck, which allegedly gave rise to plaintiff's injuries (*see* ***Ficano v Franklin Stucco Supply, Inc.***, 72 AD3d 1018, 898 NYS2d 882 [2d Dept 2010]; ***Brooks v Harris Structural Steel***, 242 AD2d 653, 662 NYS2d 781 [2d Dept 1997]). Plaintiff failed to raise a triable issue of fact. Penske demonstrated that it had no contractual relationship with any entity at the work site and that although its driver was responsible for the Carrier goods being undamaged during delivery, its driver was not responsible for the rigging of goods to the roof. The mere fact that the truck was owned by Penske, its driver watched the lifting of the goods to make sure that they were not damaged, and its driver may have requested plaintiff's assistance in moving a stuck pallet or even provided a device, did not endow Penske with the authority to supervise and control plaintiff's actions. Therefore, Carrier and Penske are granted partial summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims as against them.

Where the owner or general contractor delegates the duty to conform to the principles of the Labor Law to a third party, that third party becomes the statutory agent of the owner or general contractor (*see* ***Walls v Turner Constr. Co.***, *supra* at 864, 798 NYS2d 351 [2005]; *see* ***Bakhtadze v Riddle***, *supra*; ***Lodato v Greyhawk North America, LLC***, 39 AD3d 491, 493, 834 NYS2d 242 [2d Dept 2007]). To hold a subcontractor or statutory agent of the owner or general contractor absolutely liable under Labor Law §§ 240 or 241, "there must be a showing that the subcontractor had the authority to supervise and control the work giving rise to these duties" (***Kehoe v Segal***, 272 AD2d 583, 584, 709 NYS2d 817 [2d Dept 2000]). "The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed" (*id.* at 584, 709 NYS2d 817; *see* ***Grochowski v Ben Rubins, LLC***, 81 AD3d 589, 916 NYS2d 171 [2d Dept 2011]; ***Temperino v DRA, Inc.***, 75 AD3d 543, 545, 904 NYS2d 767 [2d Dept 2010]; ***Everitt v Nozkowski***, 285 AD2d 442, 443, 728 NYS2d 58 [2d Dept 2001]).

Here, the proffered proof established that MCN was not a general contractor or a statutory agent for purposes of liability under Labor Law § 240 (1) and § 241(6) inasmuch as it did not select and coordinate the contractors, schedule and monitor the work, and ensure that safety guidelines were followed (*see* ***Temperino v DRA, Inc.***, *supra*). Plaintiff failed to show the existence of a triable issue of fact. Therefore, MCN is entitled to partial summary judgment dismissing the Labor Law § 240 (1) and § 241(6) claims asserted against it (*see id.*).

Inasmuch as Race & Rally was the general contractor at the site, it is subject to the Labor Law statutes.

Labor Law § 240 (1) requires that building owners and contractors: "in the erection, demolition, repairing, altering, painting, cleaning or pointing 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." The statute imposes absolute liability on building owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker (*see* ***Wilinski v 334 East 92nd Housing Development Fund Corp.***, 2011 WL 5040902, 2011 NY LEXIS 3181, 2011 NY Slip Op 07477 [NY Oct 25, 2011]; ***Misseritti v Mark IV Const. Co., Inc.***, 86 NY2d 487, 490, 634 NYS2d 35 [1995]; ***Henry v Eleventh Ave., L.P.***, 87 AD3d 523, 524, 928 NYS2d 72 [2d Dept 2011]). The type of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Runner v New York Stock Exch., Inc.***, 13 NY3d 599, 603, 895 NYS2d 279 [2009], quoting ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993] [emphasis removed]; *see* ***Salazar v Novalex Contracting Corp.***, 2011 WL 5827987, 2011 N.Y. Slip Op. 08446 [NY Nov 21, 2011]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)" (***Treu v Cappelletti***, 71 AD3d 994, 997, 897 NYS2d 199 [2d Dept 2010]; *see* ***Poracki v St. Mary's Roman Catholic Church***, 82 AD3d 1192, 1194, 920 NYS2d 233 [2d Dept 2011]).

A four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers coverage under Labor Law § 240 (1) (*see* ***Toefer v Long Is. R.R.***, 4 NY3d 399, 795 NYS2d 511 [2005]). In addition, plaintiff's work did not call for the use of a device like those listed in Labor Law § 240 (1) to prevent him from falling (*see id.*). Thus, Labor Law § 240 (1) is inapplicable to the circumstances of this action. Plaintiff concedes in his amended affirmation in opposition that he cannot sustain his Labor Law § 240 (1) claims against defendants. Therefore, Race & Rally is granted partial summary judgment dismissing plaintiff's Labor Law § 240 (1) claims as against it, and plaintiff's Labor Law § 240 (1) claims are dismissed in their entirety.

Labor Law § 241 (6) provides: "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 the persons employed therein or lawfully frequenting such places." Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed

in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see* ***Wilinski v 334 East 92nd Housing Development Fund Corp.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 530, 601 NYS2d 49; ***Jara v New York Racing Assn., Inc.***, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; ***D'Elia v City of New York***, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]). The interpretation of an Industrial Code regulation and the determination as to whether a particular condition comes within the scope of the regulation generally present questions of law for the court (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Messina v City of New York***, 300 AD2d 121, 752 NYS2d 608 [1st Dept 2002]; ***Penta v Related Cos.***, 286 AD2d 674, 730 NYS2d 140 [2d Dept 2001]).

Plaintiff alleges in his bill of particulars violations by defendants of the following sections of the Industrial Code: 12 NYCRR § 23-1.5 (General Responsibility of Employers), § 23-1.7 (Protection from General Hazards), § 23-1.16 (Safety Belts, Harnesses, Tail Lines and Life Lines), § 23-2.1 (Maintenance and Housekeeping), § 23-6.1 (Material Hoisting, General Requirements), § 23-6.3 (Material Platform or Bucket Hoists), § 23-8.1 (Mobile Cranes, Tower Cranes and Derricks, General Provisions), § 23-8.2 (Special Provisions for Mobile Cranes), and § 23-8.5 (Special Provisions for Crane Operators)[3]. Plaintiff also alleges that defendants violated the Federal Occupational Safety and Health Act (OSHA).

Initially the Court notes that plaintiff's reliance on alleged violations of OSHA regulations is misplaced as it is well settled that said regulations do not provide a basis for liability under Labor Law § 241 (6) (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 351, 670 NYS2d 816; ***Shaw v RPA Assoc.***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

With respect to the alleged Industrial Code sections, 12 NYCRR 23-1.5 is not a regulation sufficiently specific to support a cause of action under Labor Law § 241 (6), but merely establishes a general safety standard (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, *supra; see also* ***Ulrich v Motor Parkway Properties, LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Pereira v Quogue Field Club of Quogue, Long Is.***, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]). In addition, 12 NYCRR 23-1.7 (a) is inapplicable as there is no evidence that plaintiff's work site was "normally exposed" to "falling material or objects" (*see* ***Marin v AP-Amsterdam 1661 Park LLC***, 60 AD3d 824, 875 NYS2d 242 [2d Dept 2009]). 12 NYCRR 23-1.16, which sets standards for safety belts, is not applicable because it is undisputed that plaintiff was not provided with any safety belts (*see* ***Forschner v Jucca Co.***, 63 AD3d 996, 998-999, 883 NYS2d 63 [2d Dept 2009]; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 868, 870 NYS2d 111 [2d Dept 2008]; ***Smith v Cari, LLC***, 50 AD3d 879, 881, 855 NYS2d 245 [2d Dept 2008]; *see also* ***Clavijo v Universal Baptist Church***, 76 AD3d 990, 991, 907 NYS2d 515 [2d Dept 2010]). 12 NYCRR 23-2.1 is also inapplicable because the material that allegedly caused plaintiff's injuries "was not being 'stored' but was in use" at the time of the accident (*see* ***Zamajtys v Cholewa***, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]). Moreover, 12 NYCRR 23-2.1 (a) is not

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[3] This section was repealed, effective October 20, 2010.

applicable, as plaintiff's injury did not occur as a result of improperly stored building material or equipment and the injury did not occur in a "passageway, walkway, stairway or other thoroughfare" (*see* 12 NYCRR 23-2.1 [a] [1]; 12 NYCRR 23-2.1[a] [2]; ***Moisa v Atlantic Collaborative Constr. Co., Inc.***, 83 AD3d 675, 922 NYS2d 405 [2d Dept 2011]). Furthermore, 12 NYCRR 23-6.1 (a) indicates that this section does not apply to cranes or derricks and is thus inapplicable to this action (*see* 12 NYCRR 23-6.1), 12 NYCRR 23-6.3 concerning material platform or bucket hoists is inapplicable to this action (*see* 12 NYCRR 23-6.3), and 12 NYCRR 23-8.5 has been repealed. Plaintiff has failed to raise a triable issue of fact with respect to said Industrial Code sections. Therefore, Race & Rally is granted summary judgment dismissing so much of plaintiff's Labor Law § 241 (6) claim as is predicated on 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.16, 23-2.1 23-6.1, 23-6.3, 23-8.1 (a), (b), (c), (d), (e), and 23-8.2 (a), (b), (f), (g), and 23-8.5.

However, the request by Race & Rally for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated upon violations of Industrial Code §§ 23-8.1 (f) (Hoisting the load), and 23-8.2 (c) (Hoisting the load) is denied (*see* 12 NYCRR §§ 23-8.1, 23-8.2; ***Ali v Richmond Indus. Corp.***, 59 AD3d 469, 873 NYS2d 207 [2d Dept 2009]). Race & Rally failed to submit evidence establishing that said provisions are inapplicable based on plaintiff's version of events, and that they did not violate the subject Industrial Code provisions (*see id.*).

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 the injury allegedly arises from the means and methods of the work performed, rather than a dangerous condition on the premises, an implicit precondition to this duty is that the party charged with that responsibility have the authority to supervise or control the activity bringing about the injury (*see* ***Hart v Commack Hotel, LLC***, 85 AD3d 1117, 1118, 927 NYS2d 111 [2d Dept 2011]; ***Ferrero v Best Modular Homes, Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally* ***Aranda v Park E. Constr.***, 4 AD3d 315, 316, 772 NYS2d 70 [2d Dept 2004]; *see also* ***Rodriguez v JMB Architecture, LLC***, *supra*; ***Armentano v Broadway Mall Props., Inc.***, 30 AD3d 450, 817 NYS2d 132; ***Loiacono v Lehrer McGovern Bovis***, 270 AD2d 464, 704 NYS2d 658). General supervisory authority at the work site for the purpose of overseeing the progress of the work and inspecting the work product in insufficient to impose liability under the statute (*see* ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Orellana v Dutcher Ave. Bldrs.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specification, and to stop work for observed safety violations is also insufficient to impose liability (*see* ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; ***McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.***, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; *compare* ***Mancuso v MTA New York City Tr.***, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]).

Plaintiff's negligence claims include failing to have the delivery vehicle properly and safely loaded so that it could be safely unloaded with the available equipment, failing to provide an

appropriate delivery vehicle, and failing to provide or erect such hoists, lifts, hangers, blocks, pulleys or other equipment for the safe unloading of the air conditioning equipment.

Initially, the Court notes that the proffered deposition testimony raises conflicting versions of events, that plaintiff did not fall off of the delivery truck at all, or that plaintiff merely stepped back and fell off the flatbed surface (*see* ***Santoro v New York City Tr. Auth.***, 302 AD2d 581, 755 NYS2d 425 [2d Dept 2003]), or that plaintiff was knocked off of the flatbed surface by a pallet or the crane (*see* ***Kobetitsch v P.M. Maintenance***, 308 AD2d 510, 764 NYS2d 856 [2d Dept 2003]). These conflicting versions of events raise credibility issues that cannot be resolved on a motion for summary judgment (*see generally* ***S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]).

In addition, there is no evidence from someone with personal knowledge that Race & Rally's representative Laszlo Loki was not present at the construction site the time of the accident, and did not have the authority to supervise and control plaintiff's work. The testimony of Race & Rally's general counsel is insufficient for Race & Rally to make a prima facie showing (*see* ***Kartiganer Assocs., P.C. v. Town of New Windsor***, 132 AD2d 527, 517 NYS2d 266 [2d Dept 1987], *lv denied* 70 NY2d 612, 523 NYS2d 496 [1987]). Without said evidence there remain issues of fact as to Race & Rally's presence, and level of supervision and control at the work site (*compare* ***Kajo v E. W. Howell Co., Inc.***, 52 AD3d 659, 861 NYS2d 105 [2d Dept 2008]; ***Gonzalez v Turner Constr. Co.***, 21 AD3d 832, 801 NYS2d 310 [1st Dept 2005]; ***De La Rosa v Philip Morris Mgt. Corp.***, 303 AD2d 190, 192, 757 NYS2d 527 [1st Dept 2003]). Therefore, the request by Race & Rally for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

A subcontractor may be held liable for common-law negligence "where the work it performed 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" (***Poracki v St. Mary's R.C. Church***, *supra* at 1195, 920 NYS2d 233 [internal quotation marks omitted]; *see* ***Erickson v Cross Ready Mix, Inc.***, 75 AD3d 519, 523, 906 NYS2d 284 [2d Dept 2010]). An award of summary judgment in favor of a subcontractor on a negligence claim is improper "where the 'evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries' " (***Erickson v Cross Ready Mix, Inc.***, *supra* at 523, 906 NYS2d 284, quoting ***Marano v Commander Elec., Inc.***, 12 AD3d 571, 572-573, 785 NYS2d 109 [2d Dept 2004]; *see* ***Ortiz v I.B.K. Enterprises, Inc.***, 85 AD3d 1139, 1140,927 NYS2d 114 [2d Dept 2011]).

Plaintiff's allegations raise issues of fact as to whether the negligent lifting of the stuck pallet by the MCN crane operator created the condition that caused the plaintiff's injury. Therefore, the request by MCN for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it are denied.

A finding of negligence must be based on the breach of a duty, and a threshold question is whether the alleged tortfeasor owed a duty of care to the injured party (*see* ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 138, 746 NYS2d 120 [2002]; ***Pulka v Edelman***, 40 NY2d 781, 782, 390 NYS2d 393 [1976]).

Penske established that it owed no duty to plaintiff on the basis of its contractual relationship with Carrier (*see* ***Mougiannis v Dermody***, 87 AD3d 993, 929 NYS2d 323 [2d Dept 2011]). However, there are issues of fact as to whether Penske "launched a force or instrument of harm" while its truck driver was allegedly using a bar to lift the truck's side railing, and created or exacerbated a dangerous condition (*see* ***Espinal v Melville Snow Contractors, Inc.***, *supra* at 141-142, 746 NYS2d 120). Therefore, its request for summary judgment dismissing plaintiff's common-law negligence claims as against it is denied. Plaintiff's allegations also raise issues of fact as to whether the improper loading of the delivery truck by Carrier warehouse personnel created the condition that caused the plaintiff's injury. It so follows that the request by Carrier for summary judgment dismissing plaintiff's common-law negligence claims as against it is denied.

Carrier and Race & Rally seek dismissal of the cross-claims asserted against them. Race & Rally also seeks summary judgment on its contractual and/or common law defense and indemnity claims against third-party defendant Master Mechanical, or in the alternative, a conditional order. Master Mechanical seeks summary judgment dismissing the third-party complaint and all cross claims as against it on the ground that Race & Rally cannot be held liable for any of plaintiff's claims. Its submissions include the pleadings of the third-party action.

"[A] party cannot obtain common-law indemnification unless it has been held vicariously liable without proof of any negligence or actual supervision on its own part" (***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]). "[I]f a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone (*id.* at 378, 929 NYS2d 556).

Inasmuch as there remain issues of fact concerning the negligence of Race & Rally and Carrier, and Race & Rally's authority to supervise and actual level of supervision and control, the requests by Race & Rally and Carrier for dismissal of the cross claims against them for contribution and common-law indemnification are denied (*see* ***Poracki v St. Mary's Roman Catholic Church***, *supra* at 1196, 920 NYS2d 233). In addition, Race & Rally is not entitled to summary judgment on its common-law indemnification claims against Master Mechanical at this juncture inasmuch as there remain issues of fact regarding its negligence, its authority to supervise since the contractual rights and responsibilities concerning its authority to supervise are not delineated in the agreement between Race & Rally and Master Mechanical, and its actual level of supervision and control (*see id.*).

"[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; *see* ***McAllister v Constr. Consultants L.I., Inc.***, 83 AD3d 1013, 1014, 921 NYS2d 556 [2d Dept 2011]; ***Reynolds v County of Westchester***, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]).

Inasmuch as there is no evidence of a written agreement between Carrier and Race & Rally or Penske and Race & Rally, the cross claims of Race & Rally against Carrier for contractual indemnification and breach of contractual obligation to procure liability insurance are dismissed and the

cross claims of Penske against Race & Rally for contractual indemnification, and breach of contractual obligation to procure liability insurance are dismissed.

"Where the plaintiff has not sustained a 'grave injury,' section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant" (***Tonking v Port Auth. of N.Y. & N.J.***, 3 NY3d 486, 490, 787 NYS2d 708 [2004]; *see* ***Ascencio v Briarcrest at Macy Manor, LLC***, 60 AD3d 606, 607-608, 874 NYS2d 562 [2d Dept 2009]).

Paragraph 4.6 of the agreement between Race & Rally and Master Mechanical provides: "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, ... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

Although plaintiff's employer, Master Mechanical, expressly agreed to provide indemnification pursuant to the agreement, Race & Rally is not entitled at this juncture to summary judgment or even conditional summary judgment on its third-party cause of action for contractual indemnification against Master Mechanical inasmuch as there are issues of fact as to whose negligence, if any, caused plaintiff's accident (*see* ***McAllister v Construction Consultants L.I., Inc.***, *supra*; *see also* ***Dalvano v Racanelli Constr. Co., Inc.***, 86 AD3d 550, 926 NYS2d 658 [2d Dept 2011]). Since Race & Rally is not entitled to indemnification at this juncture, it is not entitled to a defense provided by Master Mechanical (*see* ***Terrell v City of New York***, 74 AD3d 787, 901 NYS2d 709 [2d Dept 2010]). In addition, Master Mechanical is not entitled to summary judgment dismissing the third-party action based on the freedom from liability of Race & Rally. Master Mechanical also failed to establish, as a matter of law, that any alleged negligence on its part did not contribute to plaintiff's alleged accident (*see* ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]; ***Poracki v St. Mary's R.C. Church***, *supra* at 1196, 920 NYS2d 233).

Dated: 1|3|12

Emily Pines
J.S.C.
HON. EMILY PINES