Miller v Webb of Buffalo, LLC
2013 NY Slip Op 33929(U)
October 2, 2013
Supreme Court, Erie County
Docket Number: 2009/3986
Judge: Patrick H. DeMoyer

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At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York, on the 2ND day of DECEMBER, 2013

STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

GREGORY MILLER.

Plaintiff,

v.

DECISION and ORDER

INDEX NO. 2009/3986

WEBB OF BUFFALO, LLC,
BURKE HOMES, LLC, and
TIME WARNER CABLE, INC.

Defendants.

APPEARANCES: BRIAN R. HOGAN, ESQ., for Plaintiff
JONATHAN S. HICKEY, ESQ., for Defendant Burke Homes, LLC
STUART B. SHAPIRO, ESQ., for Defendant Webb of Buffalo, LLC
AMANDA L. MACHACEK, ESQ., for Defendant Time Warner Cable, Inc.

PAPERS CONSIDERED: the NOTICE OF MOTION of Defendant Burke Homes, LLC and the ATTORNEY AFFIRMATION [of Jonathan S. Hickey, Esq.] IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, with annexed or referenced exhibits, including the MEMORANDUM OF LAW . . .;

the NOTICE OF CROSS MOTION of Defendant Time Warner Cable, Inc.;

the supporting ATTORNEY AFFIDAVIT of Amanda L. Machacek, Esq. with annexed exhibit;

the MEMORANDUM OF LAW IN SUPPORT OF TIME WARNER CABLE, INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT;

the NOTICE OF CROSS-MOTION of Defendant Webb of Buffalo, LLC and the supporting AFFIDAVIT of Stuart B. Shapiro, Esq., with annexed exhibits;

the opposing AFFIRMATION of Brian R. Hogan, Esq., with annexed exhibits;

the MEMORANDUM OF LAW of Plaintiff;

the ATTORNEY AFFIRMATION [of Jonathan S. Hickey, Esq.] IN OPPOSITION TO WEBB'S CROSS-MOTION AND IN FURTHER

SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST TIME WARNER SEEKING COMMON LAW INDEMNIFICATION; and

the REPLY ATTORNEY AFFIRMATION [of Jonathan S. Hickey, Esq.] IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

Plaintiff commenced this action to recover damages for personal injuries sustained on October 5, 2007 as a result of a fall at a construction site. The accident occurred during the course of plaintiff's work for Triple S Cable Services, Inc. (Triple S), a contractor of defendant Time Warner Cable, Inc. (Time Warner). On the day of the accident, plaintiff was installing a coaxial cable hookup for pay television at a building, known as the Webb Building, owned by defendant Webb of Buffalo, LLC (Webb). That work had been arranged between Webb and Time Warner, albeit in consultation with defendant Burke Homes, LLC (Burke). Burke was the construction contractor for the property, which was being converted or redeveloped into an apartment building with commercial space on the first floor. At the time of the accident, plaintiff had completed most of his work, which had involved anchoring/bolting a lockbox to the masonry exterior of the building and running cable to that lock box from the nearest "tap" (the interior of the building had already been wired for cable TV).. Nonetheless, it remained for plaintiff to run a ground wire from the spot where the cable lines left the building and the lockbox was installed to a cold water pipe located within the interior of the building (a grounding location allegedly jointly settled upon by Burke's electrician and plaintiff's superiors at Triple S).

For that purpose, it was necessary for plaintiff to enter the building for the purpose of grounding the wire, but in doing so plaintiff discovered that the interior room he needed to enter was locked. By his own account, plaintiff asked a particularly described but unidentified-by-

name representative of Burke for a key, but none could be found.[1] At that point, according to his own EBT testimony, plaintiff was directed by both his own supervisor, Triple S employee Doug Duzel, as well as the aforementioned representative of Burke[2] to check certain first floor windows at the rear of the building to see if they were unlocked and whether plaintiff could enter the interior space in question through one such window in order to finish installing the ground wire. Accordingly, using a 10-foot (at least) stepladder provided by his employer, plaintiff climbed up to and through a particular unlocked first floor (but high-off-the ground) window leading into the space in question, in which plaintiff completed his wire-grounding work.

It is at that point that the various accounts more meaningfully diverge. Plaintiff asserts that, in trying to leave the room after completing his work, he discovered that the interior doors to the room were locked and could not be opened from the inside. The various defendants, however, deny that, citing evidence tending to show that the locks that had been installed inside the building would not have prevented plaintiff from opening the interior door from the inside and thus exiting the space and the building that way.[3] Whatever the case, it is undisputed that plaintiff nonetheless returned to the window, intending to exit the space via the same ladder that he had used to climb up to and into that window. However, in looking out the window, plaintiff

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[1]Burke denies any such request or search for keys. Beyond that fact, the Court notes that the record, including the EBT testimony of the Burke and Webb representatives, is not free from contradiction concerning whether interior room keys were or would have been available on site, and whether the interior room or rooms in question had been locked because they had been officially occupied by tenants, or specifically in order to protect the completely renovated rooms from being entered and disturbed by workers prior to such occupancy.

[2]Again, the representative of Burke purportedly physically described by plaintiff, and for that matter the other representatives of Burke who might have been at the site, do not admit having had any such dealings or conversations with plaintiff regarding keys and locked doors on the date in question.

[3]Again, however, the testimony of defendants' representatives and witnesses is not unequivocal concerning what kind of interior door locks may have been installed on the date in question.

discovered that the ladder in question had been removed from beneath the window, by one of his co-workers. According to plaintiff's testimony, all of his co-workers, including the one who was now using the ladder not far away from the window in question, were within earshot of plaintiff. Upon asking for the return of the ladder, plaintiff was assured by one of the coworkers that the other co-worker who was then using the ladder would be done with it in a matter of minutes, whereupon the ladder would be put back into place below the window for plaintiff's use. According to his own testimony, plaintiff then sat on the windowsill, straddling it with one leg inside and one leg outside the building, fully intent on waiting for the return of the ladder before climbing down from the window. According to his own testimony, however, after sitting in that manner for minutes in continual communication with his co-workers, plaintiff leaned out of the window to better hear or say something, lost his balance, and fell 12 to 13 feet to the parking lot below. Defendants, for their part, point to evidence tending to show that plaintiff, disinclined to wait for the return of the ladder, deliberately jumped or dropped down from the windowsill to the parking lot, a distance that they characterize as being only 6½ to 7 feet. It appears to be undisputed that the jump or fall resulted in a fracture of plaintiff's right calcaneus.

The complaint alleges defendants' negligence and violations of Labor Law §§ 200, 240, and 241. By their separate answers, defendants deny liability, raise various affirmative defenses, and interpose cross claims against one another for contribution and indemnification.

Now before the Court are separate motions for summary judgment by all three defendants. By each such motion, each such defendant seeks summary judgment dismissing the complaint and any and all cross claims asserted against them, on various grounds. Thus, in so moving, defendant Burke asserts that plaintiff's own conduct was the sole proximate cause of his injuries, thus defeating his claims under Labor Law §§ 240 (1) and 241 (6); that plaintiff was not engaged in a statutorily protected activity, be it the "altering" of a building under section 240 (1) or merely building "construction" under section 241 (6); that Burke was not aware of

Triple S's work on the premises, thereby supposedly defeating section 240 (1) liability; that plaintiff was not exposed to an elevation-related risk, as required for recovery under section 240 (1); that plaintiff cannot demonstrate the violation of an applicable and concrete specification of the Industrial Code, thereby defeating liability under section 241 (6); that Burke did not exercise the requisite supervision and control over the method of plaintiff's work, thus defeating liability under section 200 and at common law; and that, assuming that Burke was at all negligent in this matter, there was no causal connection between such negligence and plaintiff's injury.

In likewise seeking summary judgment dismissing the complaint and any cross claims against them, defendants Webb and Time Warner, respectively, make many of the same arguments as made by defendant Burke. Plaintiff opposes all three of the foregoing motions.

Alternatively, and in the event that the Court denies their respective requests for summary judgment dismissing the complaint in any part, two of the moving defendants argue that they are each entitled to summary judgment on one or more of their claims over for indemnification. For example, Burke alternatively seeks summary judgment on its claim over against Time Warner for common-law indemnification, a motion opposed by Time Warner. Defendant Webb seeks summary judgment on its claim over for contractual indemnification against defendant Burke, as well as on its claim over for common-law indemnification against Time Warner, requests opposed by Burke and Time Warner, respectively..

Upon its consideration of the parties' respective submissions, this Court renders the following determinations on the following issues:

DEFENDANTS' ALLEGED LIABILITY UNDER LABOR LAW § 240 (1):

Labor Law § 240 (1) provides that "[a]ll contractors and owners and their agents . . . , 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 extraordinary protections of Labor Law § 240 (1) extend to the special hazards "inherent in a particular task because of the relative elevation at which the task must be performed" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]), including such "specific gravity-related [risks] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured"[4] (*Melber v 6333 Main Street*, 91 NY2d 759, 763 [1998], quoting *Ross v Curtis-Palmer Hyro-Elec. Co.*, 81 NY2d 494, 501 [1981]). In order to recover under the statute, an injured worker must prove both that the owner or responsible contractor or agent violated its nondelegable duty to ensure that a pertinent safety device was "so constructed, placed and operated as to give proper protection" to the worker (Labor Law § 240 [1]) and that such violation was a proximate cause of the worker's injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 959-960 [1988], *rearg denied* 92 NY2d 875 [1998]; *Felker v Corning Inc.*, 90 NY2d 219, 224 [1997]; *Zimmer v Chemung Co. Performing Arts*, 65 NY2d 513, 524 [1985], *rearg denied* 65 NY2d 1054 [1985]). Causation is established where the violation was a "substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]; see *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993]). On the other hand, the statutory requisites to liability "do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]). However, in order to demonstrate that a plaintiff's own conduct was the sole proximate

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[4]The Court of Appeals' decision in *Runner v New York Stock Exchange Inc.* (13 NY3d 599, 603-605 [2009]) makes clear, however, that those are not the only risks encompassed by the protections of the statute.

cause of the accident, a defendant must establish that "the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [that] plaintiff knew [that] he was expected to use them *but for no good reason chose not to do so,* causing an accident" (*Gallagher v New York Post,* 14 NY3d 83, 88 [2010] [emphasis and bracketed material supplied]; *see Kin v State of New York,* 101 AD3d 1606, 1607 [4th Dept 2012]; *Ganger v Anthony Cimato/ACP Partnership,* 53 AD3d 1051, 1052 [4th Dept 2008]). In that event, the "plaintiff's actions [will be deemed to be] the sole proximate cause of his injuries, and consequently . . . liability under Labor Law § 240 (1) [will] not attach" (*Weininger,* 91 NY2d at 960 [bracketed material supplied]; *see Gallagher,* 14 NY3d at 88-89; *Robinson,* 6 NY3d at 554; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 45, 40 [2004]; *Blake*, 1 NY3d at 289-292; *Arnold v Barry S. Barone Const. Corp.,* 46 AD3d 1390, 1390-1391 [4th Dept 2007], *lv denied* 10 NY3d 707 [2008]). Absent such a complete severing of the causal relationship between the alleged statutory violation and the injury, however, the plaintiff's comparative fault is immaterial to the defense of an action under section 240 (1) (*see Bland v Manocherian,* 66 NY2d 452, 459-461 [1985]; *Zimmer,* 65 NY2d at 521).

Rejecting the arguments of defendants Burke and Webb, the Court concludes that plaintiff was on the date of the accident engaged in a protected activity under section 240 (1), namely, the "altering . . . of a building or structure" (*see Kochman v City of New York,* 110 AD3d 477, 478 [1st Dept 2013]; *Schick v 200 Blydenburgh, LLC,* 88 AD3d 684, 685-687 [2d Dept 2011], *lv dismissed* 19 NY3d 876 [2012]; *Randall v Time Warner Cable, Inc.*, 81 AD3d 1150, 1150-1151 [3d Dept 2011]; *Bedassee v 3500 Snyder Ave. Owners Corp.*, 266 AD2d 250, 250-251 [2d Dept 1999]; *see also Weininger,* 91 NY2d at 959-960; *see generally Joblon v Solow*, 91 NY2d 457, 465-466 [1998]). The record establishes that plaintiff's task at the building, which was undergoing extensive renovation, involved running cable to and installing a

lock box on the exterior of the building and running a ground wire through the exterior wall of the building into an interior space, where the ground wire was affixed to a cold water pipe. As a matter of law, that work meets the definition of "altering" within the meaning of the statute, i.e., "making a *significant* physical change to the figuration or composition of the building or structure" (*Joblon*, 91 NY2d at 465 [emphasis in original]).

Addressing the arguments of all three movants, the Court concludes that defendants failed to sustain their respective burdens of demonstrating, as a matter of law, that plaintiff's conduct was the sole proximate cause of his injuries, to the exclusion of any unavailability or non- or misplacement of a statutorily enumerated safety device, i.e., a ladder. The Court would of course be more receptive to defendants' argument on sole proximate causation if the evidence adduced on this record, including by the movants themselves, was unequivocally to the effect that plaintiff deliberately jumped or dropped down from the windowsill without waiting for the missing ladder to be put back into place (*see e.g. Montgomery,* 4 NY3d at 806). However, that is far from the exclusive thrust of the evidence adduced on the respective motions. Rather, each defendant has adduced plaintiff's EBT testimony to the effect that plaintiff was intent on waiting for the ladder to be replaced below the window when he accidentally fell from the windowsill to the parking lot below. Again, the governing principle of law seems to be that a worker's conduct will be deemed to have been the sole proximate cause of his fall and injuries only where the "plaintiff knew [that] he was expected to use [an available safety device] but for *no good reason chose not to do so*" (*Gallagher,* 14 NY3d at 88 [emphasis and bracketed material supplied]). In light of such testimony and such controlling rule of law, the Court concludes that there remains a prominent triable question of fact with regard to what exactly transpired at the worksite on the date in question, a discrepancy in accounts that by itself militates against the granting of summary judgment to defendants. In any event, there remains an issue – one that can be resolved only by the trier of fact – with regard to whether

plaintiff's self-described conduct in straddling the windowsill was (irrespective of whether he subsequently jumped or fell) the sole proximate cause of his injuries (*see Baun v Project Orange Assocs., L.P.*, 26 AD3d 831, 834-835 [4th Dept 2006]; *Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077 [4th Dept 2007]; *see generally John v Klewin Bldg. Co., Inc.*, 94 AD3d 1502, 1503-1504 [4th Dept 2012]; *Harris v Hueber Breuer Const. Co., Inc.*, 67 AD3d 1351, 1352-1353 [4th Dept 2009]; *Lovall v Graves Bros., Inc.*, 63 AD3d 1528, 1529 [4th Dept 2009]), or merely one of several contributing causes of such injuries. At least one such alleged alternative or contributing cause may have been plaintiff's co-workers' undisputed removal of the ladder from beneath the window, and another might well have been the building owner's, or the construction contractor's, or the cable company's alleged negligent failure to provide plaintiff with safer ingress to and egress from the building (*see infra*). In that latter connection, the Court notes that it is the testimony of plaintiff,[5] at least, that he attempted to leave the room in question via its interior doors, but found such doors locked and unable to be unlocked from the inside. Although defendants seek to refute that testimony, the record evinces a triable issue of fact as to the existence or non-existence of that potentially contributing cause of plaintiff's injury.

Addressing an argument made by defendant Burke alone, the Court concludes that it cannot by any means accept Burke's assertion that, because Burke was unaware that plaintiff or his co-workers were to be performing any work at the site that day, no liability may be imposed upon Burke under section 240 (1), in accordance with the principle articulated in *Abbatiello v Lancaster Studio Assocs.* (3 NY3d 46 [2004]). *Abbatiello* merely holds that a

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[5]Again, plaintiff's EBT testimony is fully adduced by defendants on their respective motions. Thus, this is a case in which defendants' own submissions "raised triable issues of fact [concerning] whether safe alternative means of descending from [the window] were available to plaintiff and whether his failure to use those alternative means was the sole proximate cause of his injury" (*Harris,* 67 AD3d at 1352-1353; *see Lovall,* 63 AD3d at 1529).

building *owner* is not liable under section 240 (1) for injuries sustained by a cable technician called to the building *by a tenant* without the knowledge or consent of the owner, which by statute (Public Service Law § 228) has no right to exclude the cable technician from the property (*id.* at 51-53). *Abbatiello,* which is clearly an outlier among the cases arising under section 240 (1), is easily distinguished from this case. *Abbatiello* is easily seen to be an outlier in the case law because, as a clear and general rule, there is no requirement of such knowledge or consent before section 240 (1) liability may be imposed upon a responsible owner or contractor (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 335, 340 [2008], citing *Celestine v City of New York,* 59 NY2d 938 [1983], *affg for reasons stated below* 86 AD2d 592 [2nd Dept 1982]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]; *Coleman v City of New York,* 91 NY2d 821, 823 [1997]). *Abbatiello* is clearly distinguishable from this case because, here, plaintiff was at the property not at the behest of a tenant and unbeknownst to an owner, but rather at the specific arrangement of defendant Webb as the building owner and defendant Time Warner as the cable company, which had contracted directly with plaintiff's employer.

Even more to the point raised by Burke, the Court in any event is not persuaded, certainly not as a matter of law, that Burke had no knowledge of the work being done at the premises by plaintiff and his co-workers on the date of the accident. The record establishes that representatives of Burke as the renovation contractor were present daily at the work site, in that capacity had been in contact with representatives of Time Warner, and had specifically acceded to Time Warner's request for permission to mount the cable lockbox at a particular location on the exterior of the building. Moreover, it is the testimony of plaintiff, at least, that in seeking to enter the building in order to ground the cable wire, and upon finding that the interior space in question was locked up, plaintiff conversed with a certain (as yet unidentified) representative of Burke, who first allegedly attempted unsuccessfully to find a key for plaintiff,

and then allegedly directed or at least invited plaintiff to enter the interior space in question via a ladder and an open window. In sum, the Court simply finds no legal or factual support for Burke's effort to evade statutory liability on the ground that it lacked knowledge of the presence of plaintiff and his co-workers on the premises on the date in question.

Finally, the Court rejects out of hand Burke's and Time Warner's argument that plaintiff cannot recover under the statute because he was not exposed to an elevation-related risk. At the time of his mishap, plaintiff was working at a height and hence subjected to a fall hazard, which is a " 'risk of the kind that the safety devices listed in section 240 (1) protect against' (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007])" (*Salazar v Novalux Contr. Corp.*, 18 NY3d 134, 139 [2011]). The argument to the contrary simply cannot be reconciled with defendants' position that plaintiff should have waited for and used an available ladder in order to climb down from the window.

DEFENDANTS' ALLEGED LIABILITY UNDER LABOR LAW SECTION 241 (6):

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> 6. 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Addressing arguments advanced by defendants Burke and Webb, the Court rejects the notion that plaintiff cannot recover under the statute because he was not engaged in the requisite "construction" work (Labor Law § 241 [6]). The Court rejects that contention for the reasons articulated *supra* with reference to whether plaintiff's work constituted the "altering" of a

building (*see Schick,* 88 AD3d at 687; *Becker v ADN Design Corp.,* 51 AD3d 834, 837 [2d Dept 2008]). In that connection, the Court notes that the regulations promulgated under section 241 (6), more particularly at 12 NYCRR 23-1.4 (b)(13), define "construction" work within the meaning of the statute to include "work of the types performed in the construction, erection, *alteration*, repair, maintenance, painting or moving of buildings or other structures" (*see generally Joblon*, 91 NY2d at 466).

Moreover, addressing arguments made by all three moving defendants, and likewise for the reasons stated *supra*, the Court concludes that it remains a triable issue of fact whether plaintiff's conduct was the sole proximate cause of his injuries, to the exclusion of any alleged violation of section 241 (6) (*see Gurung v Arnav Retirement Trust,* 79 AD3d 969, 970 [2d Dept 2010]; *see generally Arnold,* 46 AD3d at 1390-1391).

Finally, addressing an argument raised by defendants Burke and Time Warner, the Court concludes that the movants have not borne their burden on their respective motions of demonstrating that there was no violation of an applicable and concrete specification of the Industrial Code, as necessary to support the imposition of liability under the statute (*see Morris v Pavarini Constr.,* 9 NY3d 47, 50-51 [2007]; *Ross,* 81 NY2d at 502-504). In that regard, the Court notes that, although he has particularized multiple such violations, plaintiff in opposition to the motion argues the violation of only a single regulation, namely, 12 NYCRR 23-1.7 (f). That regulation, entitled "Vertical passage", provides:

> "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

That regulation has been held to be sufficiently specific to ground liability under section 241 (6) (*see e.g. Baker v City of Buffalo*, 90 AD3d 1684, 1685 [4th Dept 2011], citing *Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323 [3d Dept 2009]). (Defendants do not argue

otherwise.) Beyond that, the Court cannot conclude, certainly not as a matter of law, that the regulation is inapplicable to the alleged fall of plaintiff from a window through which he allegedly was compelled by his work and other circumstances to enter and exit the building, a fall that allegedly occurred while plaintiff allegedly awaited the (re-)placement of a ladder that might have enabled him to descend safely from the window. Nor can the Court conclude as a matter of law that the regulation was not violated and/or that any such regulatory violation played no causal role here, despite the undisputed removal of the ladder from beneath the window, merely on account of the ladder's being present at a nearby location upon the worksite and being imminently available to plaintiff (*see generally Harris,* 67 AD3d at 1353; *McGovern v Gleason Builders, Inc.,* 41 AD3d 1295, 1296 [4th Dept 2007]).

DEFENDANTS' ALLEGED LIABILITY UNDER LABOR LAW § 200 AND PRINCIPLES OF COMMON-LAW NEGLIGENCE:

Labor Law § 200, entitled "General Duty to Protect the Health and Safety of Employees; Enforcement," provides in subdivision (1) that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein who are lawfully frequenting such places." Section 200 merely codifies the common-law duty imposed upon a landowner or general contractor to provide construction workers with a safe place to work (*see Russin v Picciano & Son*, 54 NY2d 311, 316-317 [1981]; *see also Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Allen v Cloutier Constr. Corp.*, 44 NY 280, 299 [1978], *rearg denied* 45 NY2d 776 [1978]; *Adamczyk v Hillview Estates Dev Co.*, 226 AD2d 1049, 1050 [4th Dept 1996]). Thus, a cause of action alleging a violation of Labor Law § 200 is equivalent to one sounding in negligence (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]), meaning that two causes of action stand or fall together.

All three defendants argue that they bear no liability for plaintiff's injury under section

200 or on a theory of common-law negligence inasmuch as none of the defendants had or exercised the authority to direct, supervise, or control plaintiff's work (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross*, 81 NY2d at 506; *Waszak v State of New York*, 275 AD2d 916, 917 [4th Dept 2000]). At the outset, the Court must reject that contention with respect to defendant Time Warner, which appears to have actually directed and controlled plaintiff's work to the extent of contracting with his employer the performance of work to be carried out at a time and place of Time Warner's choosing and pursuant to Time Warner's specifications for the proper performance of the work. Especially on this record, which includes testimony concerning Time Warner's provision of materials, classroom instruction, and "how-to" and safety manuals to Triple S employees, the notion that Time Warner lacked even the authority to direct and control the work of its cable installation subcontractor's employees seems fatuous. The Court's conclusions in that regard are not altered by the fact that Time Warner communicated the requirements of this particular job only to plaintiff's superiors, and not to plaintiff himself, or by the fact that Time Warner had no physical presence on the job site on the date in question.

Concerning the other movants, the Court's analysis differs. The Court agrees that defendant Webb, as owner of the premises, did not have even a general authority to direct or control the manner in which plaintiff carried out his work (*see Comes,* 82 NY2d at 877). The Court is less sure about the actual exercise of authority by defendant Burke, as the renovation contractor and possibly as the owner's construction agent, given plaintiff's EBT testimony that an as-yet-unidentified representative of Burke directed plaintiff to enter the building through a window in order that he might complete his work. There is also some evidence that Burke's electrician told Triple S where it might run the ground wire for the TV cable.

Nonetheless, it is an alternative basis for those movants' liability under section 200 and

principles of common-law negligence that the movants were allegedly responsible for a defective or dangerous condition at the premises that caused or contributed to the worker's injury (*see Ozimek v Holiday Valley, Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; *Chowdhury v Rodrigues,* 57 AD3d 121, 128-130 [2nd Dept 2008]; *Riordan v BOCES of Rochester*, 4 AD3d 869, 870 [4th Dept 2004]; *Hennard v Boyce*, 6 AD3d 1132, 1133 [4th Dept 2004]). (We are, after all, talking about an owner and contractor's duty to provide a worker such as plaintiff with a safe place to work.) Here, plaintiff alleges and adduces evidence tending to prove[6] that a dangerous situation or condition existed at the premises insofar as he could not, by conventional means, get into an interior space to which he needed access for the proper completion of his work, and that plaintiff as a result was directed and compelled to enter the space via a ladder and window. Plaintiff also alleges and adduces some proof that such inaccessibility and necessity were conditions created by defendants or were situations of which they had actual or constructive notice (*see Ozimek,* 83 AD3d at 1417; *see generally Bateman v Walbridge Aldinger Co.,* 299 AD2d 834, 835 [4th Dept 2002], *lv denied* 100 NY2d 502 [2003]). Plaintiff further alleges and demonstrates that, as a result of the dangerous condition or situation, he eventually was compelled to climb out of a window that was about 12 feet off the ground, according to plaintiff. Finally, according to plaintiff, that dangerous situation resulted in plaintiff's fall and injuries. Although defendants deny all of that, the Court again must conclude that, with respect to what exactly preceded the fall, the case presents multiple and basic triable issues of fact that can be resolved only by a jury. It will also be for that jury to say whether the alleged existence of the locked interior doors and of the absence or non-provision of keys (for whatever reasons) amounted to actionable negligence on the part of the owner and renovation contractor and whether such negligence was a proximate cause of plaintiff's fall and injury.

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[6]And, again, the evidence invoked by plaintiff was first adduced by one or more of the defendants on their respective motions.

DEFANDANTS' ALLEGED LIABILITY FOR CONTRIBUTION OR INDEMNIFICATION:

Based on the determined existence of triable questions of fact with regard to the alleged negligence and/or the alleged actual supervision, direction, or control of plaintiff on the part of all three moving defendants as would-be indemnitors (*see generally McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]; *Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]), the Court makes clear that it is denying the requests of each such movant for summary judgment dismissing any and all cross claims of other defendants seeking contribution and common-law indemnification from such movant.

As its alternative request for relief, Burke seeks summary judgment on it claim over against Time Warner for common-law indemnification. The Court concludes that, inasmuch as there exist triable issues of fact with regard to Burke's own alleged negligence, Burke has failed to demonstrate its entitlement to judgment on its claim over against Time Warner for common-law indemnification (*see Scally v Regional Indus. Partnership*, 9 AD3d 865, 868 [4th Dept 2004]; *Niagara Frontier Transp. Auth. v City of Buffalo Sewer Auth.*, 1 AD3d 893, 895-896 [4th Dept 2003]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

On the same basis, the Court reaches the same conclusion concerning Webb's cross claim and summary judgment motion seeking common-law indemnification from Time Warner.

Concerning Webb's alternative request for summary judgment on its claim over against Burke for contractual indemnification, the Court concludes that Webb did not sustain its burden on the motion of demonstrating its entitlement to contractual indemnification pursuant to section 3.18 of the AIA Document A201 that Webb asserts was part of its contract with Burke.[7] In any event, the Court concludes that Burke, in opposition to the motion, raised a triable issue of fact.

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[7]Webb has, on the other hand, demonstrated the potential viability of its claim over for contractual indemnification, thus defeating Burke's request for summary judgment dismissing such claim.

Quite simply (and unusually), that triable issue consists foremost of whether the AIA document in question in fact governed the relationship between Webb and Burke, as asserted by Webb, or is completely extraneous to those parties' contractual relationship, as asserted by Burke. Obviously, to the extent that the parties to the contract themselves cannot agree on which documents actually comprised the contract, and cannot even agree that the actual contract set forth an indemnification obligation running from Burke to Webb, the Court is in no position to find Burke liable for contractual indemnification as a matter of law. Beyond that, as noted *supra,* there remain triable questions of fact with regard to the indemnitor's and indemnitee's alleged negligence, issues material under the law of contractual indemnification (*see* General Obligations Law § 5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794-795 [1997]; *see Brown v Two Exch. Plaza Partners,* 76 NY2d 172, 179-180 [1990]) and/or under the contractual clause invoked by Webb (*see Hunt v Ciminelli-Cowper Co., Inc.,* 66 AD3d 1506, 1510 [4th Dept 2009]; *Sheridan v Albion Cent. School Dist.,* 41 AD3d 1277, 1279 [4th Dept 2007]; *Malecki v Wal-Mart Stores, Inc.,* 222 AD2d 1010, 1011 [4th Dept 1995]; *Gillmore v Duke/Fluor Daniel,* 221 AD2d 938, 939 [4th Dept 1995]; *Baskewicz v Rochester Gas & Elec. Corp.,* 217 AD2d 922 [4th Dept 1995]).

Accordingly, the motion of defendant Burke is DENIED in its entirety.

The motion of defendant Webb is likewise DENIED in its entirety.

The motion of defendant Time Warner is likewise DENIED in its entirety.

All counsel are to report for a status conference to be held on January 28, 2014, at 1:45 p.m., in Part 34, at 50 Delaware Avenue.

SO ORDERED:

HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

DEC 02 2013

BY

KEVIN J. O'CONNOR
COURT CLERK