SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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THOMAS D. WALTERS and JAIMELYNN NOTO WALTERS

Plaintiffs,

-against-

JOSEPH E. MARX COMPANY, INC., NEW 545 MADISON AVENUE LLC, BOVIS LEND LEASE HOLDINGS, INC., NELSON AIR DEVICE CORPORATION and CONSTRUCTION REALTY SAFETY GROUP, INC.,

Defendants.

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JOSEPH E. MARX COMPANY, INC., NEW 545 MADISON AVENUE LLC, BOVIS LEND LEASE HOLDINGS, INC.,

Third-Party Plaintiffs,

-against-

METROPOLIS SHEETMETAL CONTRACTORS, INC.,

Third-Party Defendant.

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NELSON AIR DEVICE CORPORATION,

Second Third-Party Plaintiff,

-against-

METROPOLIS SHEETMETAL CONTRACTORS, INC.,

Second Third-Party Defendant.

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JOSEPH E. MARX COMPANY, INC., NEW 545 MADISON AVENUE LLC, BOVIS LEND LEASE HOLDINGS, INC.,

Third Third-Party Plaintiffs,

DCM PART 4

Present:

HON. JOHN A. FUSCO

DECISION AND ORDER

Index No.101359/09

Motion Nos: 3266-004
3414-005
3517-006

Third-Party Index No. A101359/09

Second Third-Party Index No. B101359/09

Third Third-Party Index No. C101359/09

WALTERS v. JOSEPH E. MARX COMPANY, INC., et. al.,

-against-

CONSTRUCTION REALTY SAFETY GROUP, INC.,

Third Third-Party Defendant.

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The following papers numbered 1 to 15 were fully submitted on the 1st day of March, 2013:

Papers Numbered

Notice of Motion for Summary Judgment of Defendants/Third-Party and Third Third-Party Plaintiffs Joseph E. Marx Company, Inc., New 545 Madison Avenue LLC, Bovis Lend Lease Holdings, Inc., and Nelson Air Device Corporation, with Affirmation in Support (Dated October 26, 2012).....1

Plaintiffs' Notice of Motion for Summary Judgment, with Affirmation and Memorandum of Law in Support (Dated November 21, 2012).....2

Notice of Motion for Summary Judgment of Defendant and Third Third-Party Defendant Construction Realty Safety Group, Inc., with Affirmation in Support (Dated November 21, 2012).....3

Affirmation in Opposition of Third-Party Defendant and Second Third-Party Defendant Metropolis Sheetmetal Contractors, Inc. to the Motion for Summary Judgment by Defendants Marx/Madison/Bovis and Nelson (Dated November 28, 2012).....4

Affirmation in Opposition of Construction Realty to Plaintiffs' Motion for Summary Judgment (Dated December 7, 2012).....5

Reply Affirmation of Defendants Marx/Madison/Bovis and Nelson (Dated December 17, 2012).....6

Affirmation in Opposition of Defendants Marx/Madison/Bovis and Nelson to Construction Realty's Motion for Summary Judgment (Dated December 18, 2012).....7

Affirmation in Opposition of Defendants Marx/Madison/Bovis and Nelson to Plaintiffs' Motion for Summary Judgment (Dated December 18, 2012).....8

Affirmation in Opposition of First and Third Third-Party Defendant Metropolis

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Upon the foregoing papers, the motions for summary judgment (Nos. 3266-004, 3414-005 and 3517-006) are decided as follows.

This matter arises out of a construction site accident which occurred on May 3, 2008, at 545 Madison Avenue, New York, New York. To the extent relevant, plaintiff Thomas D. Walters (hereinafter, plaintiff), a sheet metal foreman employed by third-party and second third-party defendant Sheetmetal Contractors Inc. (hereinafter "Metropolis") claims to have sustained extensive personal injuries when a parapet wall located on the 20th floor rooftop collapsed, spraying plaintiff with falling debris as he worked two floors below. At the time of the accident, plaintiff and his co-workers were in the process of utilizing the parapet (to which a chain block and armature were attached) in order to hoist duct work from the 18th to 20th floors. Plaintiff's May 3, 2008 written description of the accident reads as follows: "Performed work on roof. Had to rig up ductwork [sic] off of parapit [sic] wall. Parapit [sic] wall came down and crushed duct work. Bricks hit my leg &

shoulder. I have [right] shoulder & [right] knee pain due to this accident" (*see* Marx/Madison/Bovis and Nelson's Exhibit Q). It is conceded that Metropolis owned and fashioned the armature and chain block hoisting device which was attached to the parapet wall.

During the relevant time period, the subject premises were owned by defendants/third-party plaintiffs and third third-party plaintiffs Joseph E. Marx Company, Inc. and New 545 Madison Avenue LLC. The general contractor on the project was defendant/third-party plaintiff and third third-party plaintiff Bovis Lend Lease Holdings, Inc., which had hired defendant/second third-party plaintiff Nelson Air Device Corporation as the heating, ventilation and air conditioning contractor.[1] Plaintiff's employer, Metropolis, was the duct work subcontractor hired by Nelson pursuant to a May 3, 2007 Purchase Order/Contract (*see* Marx/Madison/Bovis and Nelson's Exhibit R). Also hired by Marx/Madison/Bovis as safety consultant for the project was defendant/third third-party defendant Construction Realty Safety Group, Inc. (hereinafter "CRSG").

MOTION NO. 3266-004

In moving for summary judgment against Metropolis on their third-party claims for indemnification, attorneys' fees and expenses, Marx/Madison/Bovis and Nelson rely on the terms of the May 3, 2007 Purchase Order, which provides, in pertinent part:

> "[Metropolis]...hereby agrees to indemnify, protect and hold harmless Nelson Air, the General Contractors, the Owners...(hereinafter collectively referred to as the 'Indemnified Parties') from and against any and all liabilities...including...reasonable attorney's fees and expenses...imposed upon... any of the Indemnified Parties directly or indirectly arising out of...(i)

[1] The foregoing entities being jointly represented on these motions, they will be collectively referred to hereinafter as "Marx/Madison/Bovis and Nelson".

> the Work; (ii) [its] breach of or failure to perform any provision of the Purchase Order...(iii) [its] breach of any provision of, or the breach or inaccuracy of any representation or warranty...or (iv) bodily injury, death or damage to property caused in whole or in party by the acts or omissions of [Metropolis]" (*see* Marx/Madison/Bovis and Nelson Exhibit R).

In support, the movants argue, *inter alia*, that since (1) the intention to indemnify is clear from the language and purpose of the foregoing agreement, and (2) plaintiff's accident arose solely out of the work that Metropolis was performing at the site (*i.e*., the installation of duct work), they are entitled to be indemnified by Metropolis as a matter of law.

In opposition, Metropolis and plaintiffs contend that the movants cannot establish their freedom from negligence as a matter of law due, in part, to the parties' contradictory deposition testimony, from which a trier of fact might conclude that Marx/Madison/Bovis and Nelson had the authority to address site safety but failed to do so in this particular case, and/or actively controlled the construction site and/or plaintiff's work at the site. In support, Metropolis has submitted copies of the deposition testimony of four witnesses sufficient, at least, to raise an issue of fact regarding movants' concern about the structural integrity of the parapet wall at a time when they were authorized but failed to halt the unsafe work practices which resulted in plaintiff's injury.[2]

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[2] More particularly, **Jonathan Grasso,** assistant superintendent from Marx/Madison/Bovis, testified that he actively conducted inspections of the subcontractors' work, and if unsafe conditions were found, he would address them with the subcontractor, or with his boss, Bovis superintendent Mike Vidal, or with CRSG's representative, Anthony Toscano (*see* Marx/Madison/Bovis and Nelson's Exhibit O, pp 80-83). Moreover, he said he was present when **Mike Vidal** told Metropolis workers that use of the armature and chain block on the parapet wall was "not a good idea" (*id*. at 153-155). **Plaintiff** testified that Bovis itself created an opening in the wall immediately below the parapet(which, allegedly, weakened the structure) in order to accommodate the size of the air conditioning units being installed by Metropolis (*see* Marx/Madison/Bovis and Nelson's Exhibit L, pp 135-139). For his part, **Mike Doff**, Nelson's Chief Operating Officer, testified that Nelson had the authority to stop Metropolis for safety reasons if necessary, and/or

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It is well settled that "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" (Hirsch v. Blake Hous., LLC, 65 AD3d 570, 571 [*internal quotation marks omitted*]; *cf.* Giangarra v. Pav-Lak Contr., Inc., 55 AD3d 869, 870-871). Inasmuch as a factual question has been raised as to whether the prospective indemnitees themselves acted negligently in, *e.g.*, failing to halt the hoisting technique employed by Metropolis, resolution of a contractual indemnification issue at this juncture would be premature (*see* Manicone v. City of New York, 75 AD3d 535, 537-538; Erickson v. Cross Ready Mix, Inc., 75 AD3d 519, 524; Tulovic v. Chase Manhattan Bank, 309 AD2d 923, 925-926). Accordingly, the motion for summary judgment on the cause(s) of action for contractual indemnification by defendants Marx/Madison/Bovis and Nelson as against third-party and second third-party defendant Metropolis is denied.

MOTION NO. 3414-005

In support of the motion for summary judgment against each of the named defendants for violations of Labor Law §§240(1) and 241(6), plaintiff argues that no question of fact exists as to (1) defendants' failure to provide him with proper safety gear (*i.e.*, netting/mesh or catchall) under Labor Law §240(1) in this "falling objects" case, and (2) relative to his claim under Labor Law §241(6), their violation of Rule 23 of the Industrial Code insofar as it relates to overhead protection and worker safety. In particular, plaintiff cites Industrial Code §§23-1.7(a) (12 NYCRR 23-1.7[a],

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change the work performed by Metropolis (*see* Marx/Madison/Bovis and Nelson's Exhibit M, pp 70-71). Finally**, Angelo Toscano**, site safety manager of CRSG, testified that the parapet wall was considered to be an "ongoing issue" which posed a "threat to the public" of which Bovis was aware (*see* Exhibit A of Metropolis' Affirmation in Opposition to Motion for Indemnification, p 90).

entitled "Overhead hazards,"[3] and 23-8.1(f)(1)(iv) (12 NYCRR 23-8.1[f][1][iv]), entitled "Hoisting the load", which requires that a load must be well secured and properly balanced before being lifted more than a few inches in a sling or other lifting device. According to plaintiff, since the deposition testimony establishes that defendants' representatives were present every day, *inter alia*, inspecting his employer's work, and no alternative means of hoisting the duct work was made available for use by Metropolis at the site, plaintiff is entitled to partial summary judgment on the issue of liability under both sections of the Labor Law.

In opposition, defendants Marx/Madison/Bovis and Nelson assert that the "scaffold law" *i.e.*, Labor Law §240(1), does not apply in this case since plaintiff's accident resulted from the "ordinary dangers of a construction site" rather than a "special hazard" involving gravity (*citing* Runner v. New York Stock Exch Inc., 13 NY3d 599). Moreover, as to plaintiff's claim under Labor Law §241(6), these same defendants argue that they functioned only in a general supervisory capacity at the work site, and had no input into the specific methods and means developed by Metropolis to lift the duct work. Accordingly, they urge that a question of fact exists as to whether any or all of them supervised, directed and/or controlled the manner of hoisting, thereby precluding an award of partial summary judgment under Labor Law §241(6).

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[3] This section requires, *inter alia*, that persons who are required to work in an area normally exposed to falling materials or objects shall be provided with overhead protection consisting of tightly laid sound planks "at least two inches thick full size" or other material of equivalent strength with a supporting structure capable of supporting a load of 100 pounds per square foot.

For its part, CRSG opposes plaintiff's motion on the grounds that it owed no duty to plaintiff in its capacity as safety inspector hired by Marx/Madison/Bovis. According to CRSG, it did not actively work at the site, nor did it supervise, direct or control plaintiff's work.

Finally, plaintiff's employer (third-party and second third-party defendant Metropolis) opposes his motion on the grounds that plaintiff's own conduct may be found to constitute the sole proximate cause of the accident, and plaintiff himself may be found to have been a "recalcitrant worker". In this regard, Metropolis asserts that a question exists as to whether plaintiff, as the foreman directing his fellow employees, continued to use the chain block and parapet wall for hoisting the duct work notwithstanding alleged warnings against their use. Additionally, Metropolis argues that Labor Law §241(6) is inapplicable since the Industrial Code provisions allegedly violated are non-specific and/or inapplicable herein. Alternatively, it is argued that plaintiff's own comparative negligence is an affirmative defense requiring assessment by the finder of fact.

It is well settled that "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1)" (Blake v. Neighborhood Hous. Servs of NY City, 1 NY3d 280, 288[*internal quotation marks omitted*]). Put differently, "an accident alone does not establish [either] a Labor Law §240(1) violation or causation" (*id.* at 289). Accordingly, a plaintiff's decision, *e.g.*, to use an inappropriate device to move material between heights, if determined to be the sole proximate cause of the injury, will preclude him or her from a recovery under Labor Law §240(1) (*see* Montgomery v. Federal Express Corp., 4 NY3d 805, 806; Blake v. Neighborhood Hous. Services of New York City, 1 NY3d at 290). As a consequence, the Court in each instance must consider the factual circumstances of every claim

brought under Labor Law §240(1) in order to assess the viability of the assertion (if any) of a "recalcitrant worker" and/or "sole proximate cause" defense. As for a cause of action predicated on the alleged violation of Labor Law §241(6), a plaintiff seeking partial summary judgment on the issue of liability bears the burden of demonstrating prima facie that each of the defendants moved against has violated a rule or regulation promulgated by the Commissioner of Labor setting forth a specific standard of care, and that such violation constituted causally related negligence (*see* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502; Copp v. City of Elmira, 31 AD3d 899).

Here, assuming *arguendo*, that either section was shown to have been violated as a matter of law, an issue of fact has been demonstrated to exist as to whether plaintiff's own acts or omissions may have contributed to his injury or been the sole proximate cause of the wall's collapse. Thus, it remains to be determined whether, *e.g.*, plaintiff was specifically cautioned or told not to use the parapet wall to hoist duct work onto the 20th floor[4]. Accordingly, plaintiffs' motion for summary judgment on the issue of liability under Labor Law §§240(1) and 241(6) must be denied.

MOTION NO: 3517-006

[4]See, *e.g.*, the deposition testimony of Nelson Air's Michael Doff: "I received a call from [Bovis] demanding that I remove Metropolis from the project because...they went contrary to [Bovis'] super's telling them that they couldn't use the parapet wall to support their scaffold and based on that he had no confidence of them following directions going forward and he wanted them off the job" (*see* Marx/Madison/Bovis and Nelson's Exhibit M, pp 53-55) as well as the deposition testimony of Bovis' Jonathan Grasso: "There was a time when I was with Mike Vidal and we noticed the guys from Metropolis using a parapet clamp, hanging on the parapet, to hoist equipment...but Mike had told them that it's not a good idea, and they shouldn't do that, and they should find another way" (*see* Marx/Madison/Bovis and Nelson's Exhibit O, pp 150-151).

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In its motion for summary judgment dismissing the complaint, third-party complaint, and all cross claims against it, defendant/third third-party defendant CRSG argues that it owed no duty to plaintiffs as a matter of law, nor did it owe any duty of care to its co-defendants and third third-party plaintiffs where it had no knowledge of the means and methods of the work being performed by plaintiff on the day in question. In support, CRSG cites, *inter alia,* the deposition testimony of its witness Angelo Toscano, who denied seeing or being informed in advance by Bovis of the installation of duct work on the roof of the building under construction, and denied ever seeing anything being hoisted from the parapet wall situated above the 20th floor set back. In opposition, it is argued, in relevant part, that CRSG was hired specifically to conduct inspections at the job site as required by the New York City Building Code, the City's Site Safety Manager's Handbook and the site-specific Safety Plan.

Notwithstanding the above-cited testimony, CRSG's Toscano also testified that he was present at the work site on a daily basis, conducted safety inspections and walked around the building several times each day, and that he had the authority, if necessary, to stop the work of anyone at the site. Accordingly, rather than supporting summary judgment, the testimony of this witness is alone sufficient to raise a triable issue of fact as to CRSG's prospective liability to, *e.g.*, indemnify its contract vendees, defendants/third third-party plaintiffs Marx/Madison/Bovis, in the event that they are held liable for plaintiff's injuries (*see generally* Alvarez v. Prospect Hosp., 68 NY2d 320, 324; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853). However, in the absence of evidence sufficient to raise a triable issue on the question of CRSG's lack of duty to plaintiff (*see* Espinal v.

Melville Snow Contrs., 98 NY2d 136), the complaint as against defendant CRSG must be severed and dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant/third third-party defendant Construction Realty Safety Group, Inc. is granted to the extent that the complaint as against said defendant is hereby severed and dismissed; and it is further

ORDERED that in all other respects, the motions for summary judgment are denied.

E N T E R,

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JOHN A. FUSCO, J.S.C.

Dated: May 20, 2013
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