SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 100886/2008
SACTA, JULIO
vs
CLAREMONT OWNER LLC
Sequence Number : 007
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4.30.13

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequences 007, 008, 009 and 010 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants/third-party plaintiffs Claremont Owner LLC and Dominion Management Company's joint motion for summary judgment (motion seq. No. 007) is resolved as follows:

• leave to amend its cross claim herein is granted, and the amended cross claim in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof;

• dismissal of plaintiff's Julio Sacta's complaint as against defendant/third-party plaintiff Dominion Management Company is granted with costs and disbursements to said defendant/third-party plaintiff as taxed by the Clerk upon the submission of an appropriate bill of costs;

• the remainder of the motion is denied;

and it is further

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

JULIO SACTA,

Plaintiff,

-against-

CLAREMONT OWNER LLC, CHARLES CORTES, INC., WS GROUP LLC d/b/a WALDORF DENMOLITION and DOMINION MANAGEMENT COMPANY,

Defendants.

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CLAREMONT OWNER LLC, and DOMINION MANAGEMENT COMPANY,

Third-party Plaintiffs,

-against-

CALVIN MAINTENANCE, INC.,

Third-party Defendant.

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Index №.: 100886/08
Motion Seq. Nos.
007, 008, 009, 010

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In an action involving a demolition worker's fall from the second floor of a building to a scaffold on the first floor, defendants/third-party plaintiffs Claremont Owner LLC (Claremont Owner) and Dominion Management Company (Dominion Management) move jointly, pursuant to CPLR 3212, for summary judgment (1) dismissing plaintiff Julio Sacta's (plaintiff, or Sacta) claims against Dominion Management; (2) dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Claremont Owner; (3) dismissing any claims for past or future earnings; and (4) granting Claremont Owner and Dominion Management judgment on their breach of contract and contractual indemnification claims against defendants Charles Cortes, Inc.

(Cortes) and WS Group, LLC d/b/a Waldorf Demolition[1] (Waldorf Demolition) (motion seq. No. 007). Moreover, Claremont Owner seeks leave to amend its cross claim against Cortes and Waldorf Demolition. Cortes, meanwhile, also moves for summary judgment (1) dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it; (2) dismissing plaintiff's claims for past or future earnings; (3) granting Cortes conditional judgment on its cross claims for contractual and common-law indemnification claims against Waldorf Demolition; and (4) granting Cortes judgment on its cross claim against Waldorf Demolition for breach of contract (motion seq. No. 008). Waldorf Demolition and third-party defendant Calvin Maintenance, Inc. (Calvin Maintenance) also move, jointly, for summary judgment. They seek dismissal of all claims and cross claims as against Waldorf Demolition, dismissal of the third-party complaint against Calvin Demolition, and dismissal of any claims for lost earnings (motion seq. No. 009). Finally, plaintiff moves for summary judgment as to liability against Claremont Owner and Cortes on his Labor Law §§ 200, 240 (1) and 241 (6). The motions are consolidated for disposition.

Finally, Claremont Owner and Dominion Management seek, by way of amended notice of motion, and supplemental affirmation in support, to replace their proposed amended cross claim with another proposed amended cross claim that also adds claims, on behalf of both of them, against Calvin Maintenance, Inc.

BACKGROUND

On December 6, 2007 plaintiff was working for Calvin Demolition, as a demolition

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[1] Waldorf Demolition notes that while it was sued herein as WS Group LLC d/b/a Waldorf Demolition, its name is actually W5 Group LLC.

laborer at a construction project located at 175 West 89th Street in Manhattan (Sacta aff, ¶ 3). The project involved two buildings, one five stories and the other two stories, and, on the day of his accident, plaintiff was working on the second floor of the two-story building (Sacta deposition, 128). Plaintiff testified that his work involved dropping debris, such as wood, metal, sheetrock, insulation, and sundry refuse, from a hole in the second floor made for that purpose (*id.* at 104-105, 110). While other jobs plaintiff had worked on contained safety railings and toe railings protecting similar holes, there were none at the project on 175 West 89th Street, and plaintiff was not provided with a safety harness (*id.* at 145). Plaintiff testified that, while he and his coworkers did their demolition work, the floor and the wall shook, and that while he complained to his foreman, he was told to continue working (*id.* at 153-154).

As he approached the hole, to check if anyone was below on the first floor before he threw down debris, the plywood plaintiff was standing on dipped and broke, and plaintiff fell forward, arresting his fall by grabbing onto some bricks protruding from the wall, before falling a distance greater than his own height onto a scaffold on the first floor (id. at 188-199; Sacta aff, ¶¶ 9-10). Plaintiff injured his shoulder in the fall.

Claremont Owner owned the 175 West 89th Street at the time of the accident, while Cortes was the general contractor on the demolition and renovation project there. Cortes contracted with Waldorf Demolition to do demolition for the project, Waldorf Demolition enlisted Calvin Maintenance, an entity related to Waldorf Demolition, for assistance with that work. Plaintiff filed a summons and complaint on January 22, 2008, and an amended complaint on August 28, 2008. The amended complaint alleges that defendants are liable under common-law negligence, as well as Labor Law §§ 200, 240 (1), and 241 (6).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Plaintiff, in response to the applications for summary judgment by Dominion Management and Waldorf Demolition, has expressed a willingness abandon his claims against these parties. As such, the complaint is dismissed as against Dominion Management and Waldorf Demolition (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]).

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "All 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 Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to

provide a worker engaged in § 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

Plaintiff argues that he is entitled to summary judgment as to liability against Claremont Owner and Cortes because their failure to provide protection against a fall from an elevated height was a proximate cause of his accident. Specifically, plaintiff notes that there was no gate, cover, safety railing, or guardrail around the hole through which he fell.

Cortes argues that summary judgment should be denied, as questions of fact exist as to how plaintiff's accident occurred and whether plaintiff was the sole proximate cause of his own accident. Similarly, Claremont Owner argues that plaintiff has failed to make a *prima facie* showing that his accident was foreseeable, and that there are questions of fact as to whether plaintiff was the sole proximate cause of his own accident.

As to the question of how the accident happened, Cortes notes that while plaintiff testified that he fell through the refuse hole on the second floor, the testimony of Carlos Buestan (Buestan) creates a question of fact as to whether the accident occurred, instead, because the carriage house collapsed. Buestan, who has worked for both Waldorf Demolition and Calvin Maintenance, testified that he could not remember which he worked for on the day of plaintiff's accident, nor could he remember where he worked in December 2007, whether he ever worked at 175 West 89th Street, or if he knew plaintiff, or witnessed plaintiff's accident (Buestan

deposition, at 12-13). After conferencing with his attorney outside the deposition room, Buestan testified that he had witnessed plaintiff's accident (*id.* at 14). After having his memory refreshed by his attorney, this is how Buestan described plaintiff's accident:

> Q: Do you remember how it happened?
> A: Not very much.
> Q: Not very much, okay. Do you remember if there was an opening in the floor at the place where you were working that day?
> A: There wasn't a hole, there was a floor.
> Q: And how did the accident happen?
> A: The wood was poor.
> Q: Okay, and what happened because the wood was poor?
> A: He walked on top of it and fell through

(*id.* at 15-16).

Further on in the deposition, Buestan again put his own recollection of the accident in question:

> Q: Were you looking at the plaintiff as he fell through the floor?
> A: I don't remember.
> Q: Were there any walls nearby the area where he fell through the second floor?
> A: I don't remember.

(*id.* at 37-38).

Also, while Buestan initially testified that no wood fell through to the first floor, next he speculated that it might have, before finally acknowledging that he did not know:

> Q: Did any wood break off and fall to the floor below?
> A: No.
> Q: Do you know what happened to the wood that broke off from the second floor during this accident?
> A: It may have fell through because of the weight.
> Q: Do you know that or are you just assuming?
> A: I didn't see it.

(*id.* at 35).

The question of whether plaintiff fell through a hole or through a collapsing floor is a crucial one because of an oddity of Labor Law § 240 (1) jurisprudence. That is, "there is no requirement that plaintiff offer expert testimony on the foreseeability of the accident to prevail on a Labor Law § 240 (1) claim outside the permanent structure context" (*Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]). The Court in *Ortega* reasoned that "the question of circumstantial reasonableness is irrelevant when safety devices are required pursuant to Labor Law § 240 (1), and an owner or contractor is absolutely liable in damages for injuries sustained by a covered worker" (*id.*). While the Court in *Ortega*, thus, appears to disagree, as a matter of statutory interpretation, with the limited exception for permanent structures, it accommodates the Court's previous holdings requiring a showing of foreseeability when permanent structures collapsed (*see Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008] [involving a demolition worker's fall after a second-story floor collapsed]; *Espinosa v Azure Holdings II, LP*, 58 AD3d 287 [1st Dept 2008] [demolition worker on a gut rehabilitation project fell through a sidewalk after the cellar vault it rested on collapsed]). *Ortega*, then, seems to provide an answer to the question of what is the role of foreseeability in making out a Labor Law § 240 (1) claim after *Runner*, which appeared to streamline analysis of the statute.

Waldorf Demolition and Calvin Maintenance also put in an opposition arguing that summary judgment should be denied as there is a question of fact as to how the accident happened. Similar to Cortes, Claremont Owner argues that plaintiff fell through the second-floor, rather than falling through a refuse hole on the second floor. Instead of maintaining that a question fact exists as to how plaintiff's accident occurred, Claremont Owner contends that since plaintiff's testified that the floor boards cracked, sending him into the refuse-hole, his case is

better classified as a floor-collapse, rather than a floor-opening case.

Plaintiff argues in reply that Buestan's testimony is speculative and incredible, as he acknowledged not remembering or seeing plaintiff's accident. As to Buestan's testimony that no hole existed at the time of plaintiff's accident, plaintiff notes that Cortes's own opposition states that Calvin Maintenance's general superintendent, Diego Tantillo (Tantillo), "confirmed that Calvin created the subject floor opening that plaintiff testified he fell through by removal of duct work" (Meyerson April 22, 2013 affirmation, ¶ 9, citing to Tantillo deposition, at 100). Plaintiff also argues that a floor-board failure was predictable since the boards were visibly rotten.

As to sole proximate causation, Cortes and Claremont Owner argue that Tantillo's testimony creates an issue fact on this issue. At Tantillo's deposition, the subject of safety devices came up in the context of discussions at toolbox meetings:

Q: Was there any discussion about safety at these meetings?
A: Of course.
Q: Was there any discussions about holes in the flooring?
A: Yes.
Q: And what was discussed about holes in the flooring?
A: Depending on where the holes were, it's about being tied off. When we're done with the hole just to caution tape it because the GC would do their barricades.
Q: . . . what do you mean by tied off?
A: A guy would know to tie off, if you're going near a hole, you have to tie off, put your safety line, the whole bit.
Q: . . . did Waldorf provide the safety workers (sic.) with harnesses?
A: Yes.
Q: Did they provide them with tie lines?
A: Yes.
Q: Where would the tie lines be located?
A: Usually they would be above tied to some sort of structure. Tied to a beam.
Q: Were workers directed to put on the harnesses as soon as they entered the premises?
A: Usually, depending on the task. If you were by a hole, if you were

working by there that would be the reason for you to put it on, the harness.
Q: Where were these harnesses and safety lines?
A: In our toolbox.
Q: Where was the toolbox kept?
A: Somewhere on the jobsite, whether it be the first floor or the second floor, depending where we were working.
Q: Did you have enough harnesses for all the men?
A: Yes.

(Tantillo deposition, at 24-26).

Later in the deposition, Tantillo reiterated that workers were to wear safety harnesses when they worked in the vicinity of holes or by the elevator shaft (*id.* at 52). Tantillo also testified as to the level of direction workers received with regard to safety devices:

Q: Were they told in the morning when they came in to put them on?
A: Absolutely.
Q: Who would tell them?
A: That would be the foreman or myself, depending who was there first.

(*id.* at 52-53).

In reply, plaintiff argues, citing to Buestan's testimony, that none of the workers were wearing harnesses at the time of the accident:

Q: At the time of the accident, was anyone at Calvin wearing any safety harnesses?
A: Not yet. Because we were about to begin work.
Q: And was it your understanding that you were going to put safety harnesses on at some point that day?
A: Yes.
Q: And why were you going to put safety harnesses on?
A: It's regulations.
Q: What were you going to do that required the use of a safety harness?
A: Because we were going to create this hole through which to put the garbage.

(Buestan deposition, at 35-36).

Here, plaintiff is in the uncomfortable position of relying on Buestan's testimony to

eliminate any question of fact as to sole proximate causation, on one hand, and on the other, characterizing Buestan's testimony as inherently incredible to eliminate any issue of fact as to whether fell through a hole, or through a collapsing floor.

First, it is clear that if Buestan' s testimony is credited, it is clear that there would be a question of fact precluding summary judgment. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441 [1st Dept 2012]).

Here, Buestan testified that the accident happened because the second floor of the building collapsed. If his version of the facts were accepted, then plaintiff would, in order to make a *prima facie* case, have to make a showing of foreseeability (*see Ortega*, 95 AD3d at 128; *Jones*, 57 at 75 [holding that, in order make out a prima facie case under the statute, "a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged"]). "Questions of foreseeability are for the court to determine as a matter of law when there is only a single inference that can be drawn from the undisputed facts" (*Pinero v Rite Aid of N.Y.*, 294 AD2d 251, 252 [1st Dept 2002]; *see also Mei Cai Chen v Everprime 84 Corp.*, 34 AD3d 321 [1st Dept 2006]).

Here, as is generally the case, foreseeability is a question for the jury because plaintiff has not demonstrated that there is only one inference one could draw with regard to the foreseeability of a collapse of the floorboards on the second floor. Moreover, while plaintiff tries to characterize the second floor of the building as a functional scaffold, it is more clearly a

permanent structure than the one that "served, conceptually and functionally, as an elevated platform or scaffold" in *Berrios v 735 Ave. of the Ams., LLC* (82 AD3d 552, 552 [1st Dept 2011] [internal quotation marks and citation omitted]), which consisted of "I-beams, ribs, and plywood," that is, the shell of an unfinished building along with makeshift platforms.

The court must give every inference to Cortes and Claremont Owner. However, a self-serving statement is not enough to raise an issue fact defeating a motion for summary judgment where the statements create "no more than a feigned issue of fact tailored to avoid the consequences of the earlier contrary testimony" (*Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 414 [1st Dept 2009]). Buestan, an employee of defendant Waldorf Demolition, offers testimony that comes close to the self-serving statements discarded in *Kiss Constr.*, but here the self-serving nature of his testimony is less obvious than the affidavit in *Kiss Constr.*, especially where plaintiff also relies on Buestan deposition testimony as to whether the other workers present at the time of plaintiff's accident were wearing safety harnesses.

Thus, plaintiff is not entitled to summary judgment against Cortes and Claremont Owner, as the court has been offered differing versions of the accident, one version of which constitutes a violation of Labor Law § 240 (1), and another version where a violation cannot be determined as a matter of law. Accordingly, the branch of plaintiff's motion seeking summary judgment under Labor Law § 240 (1) is denied. As such, the court need not reach the question of whether a question of fact exists as to sole proximate causation.

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

"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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416).

Plaintiff alleges that Cortes and Claremont Owner violated the following Industrial Code provisions: 12 NYCRR 23-1.7 (b) (1) (i), 12 NYCRR 23-1.7 (b) (1) (ii), 12 NYCRR 23-3.3 (j) (2) (i).

12 NYCRR 23-1.7 (b) (1) is entitled "Falling hazards, hazardous openings" and its first subsection provides: "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." Its second subdivision provides:

> "Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit."

12 NYCRR 23-3.3 (j) (2) is entitled "Demolition by hand, Floor openings, Required protection." Its first subdivision provides:

> "Every opening used for the removal of debris or materials on every floor not closed to access, except the top working floor, shall be provided with an enclosure from floor to ceiling equivalent to that afforded by planking not less than two inches thick full size. Such enclosure shall be solid except for portions openable for loosening blocked debris. Alternatively, the opening shall be fenced off by a substantial safety railing constructed and installed in compliance with this Part (rule) and placed not less than 20 feet from the perimeter of such opening. Every opening not used for the removal of debris or other materials in any floor to which access is permitted shall be protected by a solid enclosure as described above, by a substantial safety railing constructed and installed at least two feet from the perimeter of the opening and otherwise in compliance with this Part (rule) or such opening shall be solidly planked over with planks not less than two inches thick full size"

These regulations are sufficiently specific to serve as predicates under the statute, but defendants raise a question of fact as to their applicability through the testimony of Buestan. As all of these regulations depend on the existence of a hole, and Buestan denied there was a hole in the second floor before plaintiff's accident, there is a question of fact with regard to the applicability of all three. As such, plaintiff's motion for summary judgment as to liability under Labor Law § 241 (6) is denied.

III. Labor Law § 200 and Common-Law Negligence

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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall

into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, plaintiff's accident arose from a dangerous condition under both his own and Buestan's versions of the fall. Plaintiff moves for summary judgment against Cortes and Claremont Owner as to liability on his Labor Law § 200 claim, but he does not even allege in his

moving papers that either defendant had notice of the dangerous condition. Thus, plaintiff fails to make a *prima facie* showing of entitlement to judgment and the branch of his motion seeking summary judgment as to liability under Labor Law § 200 must be denied.

Claremont Owner argues that it should be granted summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as it did not have supervisory control over plaintiff's work. However, as plaintiff's accident arose from a dangerous condition, Claremont Owner misconstrues its burden, and fails to allege that it did not have notice of the dangerous condition on the second floor of the building on its property. Thus, it fails to make a *prima facie* showing of entitlement to judgment, and the branch of its motion seeking dismissal of plaintiff's claims under Labor Law § 200 and common-law negligence must be denied.

Cortes also moves for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, alleging that there is no evidence in the record that it had actual or constructive notice of the dangerous condition, which in this context Cortes characterizes, as a debris-hole, rather than a collapsing floor, as it did in the Labor Law § 240 (1) and 241 (6) contexts. In opposition, plaintiff refers, among other things, to the deposition testimony of Gino Capolino (Capolino), the principal of Cortes, which Cortes submitted along with its motion. Capolino acknowledged that he had been to the second floor of the subject building before plaintiff's accident (Capolino deposition, 38-39). Capolino also testified, more generally, that it was Cortes's general practice to inspect the site, including the flooring, before work commenced on a project (*id.* at 43-44).

"Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and

remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Given the open, easily observable quality of the dangerous condition described by plaintiff, the combination of the rotted, unsteady floors abutting an open hole, Campolino's testimony, at the very least, raises a question of fact as to constructive notice. As such, the branch of Cortes's motion that seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is denied.

IV. Lost Earnings

Defendants argue that plaintiff's lost earnings claim must be dismissed because he procured his employment through use of a fake social security number, referring to the following portion of his deposition testimony:

> "Q: When you were filling out your documents as part of your employment for Allstate prior to joining the union, what social security number did you give?
> . . .
> A: [plaintiff gives number]
> Q: Where did you obtain that number from?
> A: I bought on Roosevelt"

(Sacta deposition, at 40-41).

Waldorf Demolition and Calvin Maintenance submit an affidavit from Joseph Marone (Marone), part-owner of both Waldorf Demolition and Calvin Maintenance, as well as president of the latter. In pertinent part, Marone states:

> "As plaintiff, Julio Sacta, testified that he was in the United States illegally, does not have [a] valid green card and purchased a social security number/card [disclosing number] on Roosevelt Avenue, in Queens, New York, it is clear that he submitted these false documents in order to obtain the job with defendants, [Waldorf Demolition and Calvin Maintenance]. These false documents [] were relied upon by defendants . . . in order to hire plaintiff. Plaintiff would not have been hired by defendants . . . if we were aware that they were false documents and if we were aware of his illegal resident status"

(Marone affidavit, ¶ 6).

The Appellate Division has held that:

> "a worker's submission of false documentation is sufficient to bar recovery of damages for lost wages only where that conduct actually induces the employer to hire the worker, and that this circumstance is not present where the employer knew or should have known of the worker's undocumented status or failed to verify the worker's eligibility for employment as required by federal legislation"

(*Coque v Wildflower Estates Devs., Inc.*, 58 AD3d 44, 46 [2d Dept 2008]).

Coque was interpreting *Balbuena v IDR Realty* (6 NY3d 338 [2006]), in which the Court of Appeals held that federal law did not preempt lost wages awarded to plaintiffs with "illegal resident status," to use Marone's phrase, under the Labor Law in the circumstances presented by the *Balbuena* plaintiffs (*id.* at 363). In *Balbuena,* plaintiffs had not "tendered false work authorization documents to obtain employment" (*id.*). It was left to the Appellate Division to interpret what the result is when plaintiffs do tender false documents to obtain work. The First Department, in *Macedo v J.D. Posillico, Inc.* (68 AD3d 508 [1st Dept 2009]) adopted *Coque's* holding and fleshed out when an employer should know that her worker is undocumented. While the plaintiff in *Macedo* admitted he had a false social security number, the Court held that plaintiff "did not forfeit his right to recover lost wages since the evidence did not show that [defendant] was induced to hire him because he produced false documentation" (68 AD3d at 511). More specifically, while defendant's chief operating officer claimed that defendant relied on the false social security card number, the Court reasoned that:

> "it is undisputed that [defendant] did not complete or have plaintiff sign an I-9 Form until months after the accident took place. Accordingly, even assuming that plaintiff had submitted his social security card at the time of his hire, it is clear that [defendant] failed to comply with its employment verification obligations in good faith. Thus, it cannot be concluded that plaintiff induced [defendant] to hire him based on his social security card"

(*id.*).

Here, as in *Macedo*, defendants fail to produce an I-9, Employment Eligibility Verification. Thus, it would appear that Waldorf Demolition and Calvin Maintenance failed to verify plaintiff's eligibility for employment as required by federal legislation. This failure not only prevents Waldorf Demolition and Calvin Maintenance from precluding plaintiff's lost wages claim, but it also precludes the other defendants (*see Coque*, at 58 AD3d at 53 n1[2]). As such, the branches of defendants' motions that seek summary judgment dismissing plaintiff's claim for lost wages is denied.

V. Leave to Amend

Claremont Owner and Dominion Management seek leave to serve an amended cross claim adding various contribution, indemnification, and breach of the duty to procure insurance claims against Cortes, Waldorf Demolition, and Calvin Maintenance.

Leave to amend a pleading pursuant to CPLR 3025 (b) is freely granted, "absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]). However, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted," and "[w]here a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009] [internal quotation marks and citation omitted]).

Here, the long delay involved, as well as the apparent mootness of Dominion

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[2] "the same principles apply regardless of the identity of the defendant, since precluding recovery of damages for lost wages in Labor Law cases would provide a windfall to defendants and, more importantly, would reduce their incentive to comply with the requirements of the Labor Law and provide employees with a safe place to work."

Management's new cross claims, now that the complaint is dismissed as against it, tempt a line item veto approach to this motion. Ultimately, however, no prejudice falls on the non-moving parties, as all of these claims are typically concomitant to the experience of being a Labor Law defendant, and thus cannot come as a surprise. Moreover, since these claims drag behind the primary case, and are generally resolved more easily once those primary Labor Law claims are determined, it does not strain judicial resources to allow them, despite their faults. Thus, the branch of Claremont Owner and Dominion Management's amended motion that seeks leave to amend their cross claim is granted.

VI. Indemnification and Breach of Contract

A. Indemnification

Cortes seeks conditional summary judgment as to its cross claims against Waldorf Demolition for contractual and common-law indemnification. Cortes and Waldorf Demolition entered into contract, on October 10, 2007, for Waldorf Demolition to perform demolition on the subject project. Cortes submits the agreement's indemnification provision, which states, in relevant part:

> "To the fullest extreme permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor . . . 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 . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damages, loss or expense is caused in part by a party indemnified hereunder . . ."

(Cortes/Waldorf Demolition agreement, § 4.6).

Cortes also submits a November 20, 2007 indemnity and insurance agreement between

Cortes and Waldorf Demolition. The agreement provides, in relevant part:

> "To the fullest extent permitted by law Contractor agree to indemnify and hold harmless Charles Cortes Inc., Owner's Managing Agent and their respective Affiliates, Officers, Partners, Agents, Employees, Servants and Assignees, all to be referenced as 'CHARLES CORTES INC.' from and against all liability, claims and demands on account of injuries to persons . . . arising out of the performance, or lack of performance, of the Agreement by Sub-Contractor, Sub-Sub-Contractor's, all to be referenced as 'CONTRACTORS' " . . . Contractor shall also indemnify "CHARLES CORTES INC." from any damages, loss, claim, expense, liability, or fine incurred or arising by reason of contractors breach of this Agreement and for any loss of funds due to such acts.

Here, the second indemnification provision does not preclude Cortes's recovery for its own negligence, and there remains an issue of fact as to whether Cortes was negligent. As such, Cortes is not entitled to summary judgment as to contractual indemnification (*see Bell v City of New York*, 104 AD3d 484, 486 [1st Dept 2013]). In this circumstance, where a question of fact remains as to Cortes's negligence, it is not entitled to summary judgment on its common-law indemnification claim (*see generally McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). As such, the branch of Cortes's motion seeking conditional summary judgment on its indemnification claims is denied.

Similarly, there is still a question of fact as to Claremont Owner's negligence, so it is not entitled to conditional judgment on its claims for either contractual or common-law indemnification.

B. Breach of Contract

Cortes seeks summary judgment on its claim for breach of contract for failure to procure insurance against Waldorf Demolition. It submits proof that Waldorf Demolition was obliged to procure insurance, but fails to allege that Waldorf Demolition failed to procure it. As such, Cortes does not make a prima facie showing of entitlement to judgment and the branch of its

motion seeking summary judgment on its breach of contract claims against Waldorf Demolition is denied.

As to Claremont Owner and Dominion Management, they failed to show that any party owed them a duty to procure insurance. Thus, the branch of their joint motion that seeks summary judgment against Cortes and Waldorf Demolition on its breach of contract claims for failure to procure insurance is denied.

VII. Remainder of Waldorf Demolition and Calvin Maintenance's Claim

While the court is dismissing plaintiff's complaint as against Waldorf Demolition, Waldorf Demolition and Calvin Maintenance have provided no basis for the court dismiss the cross claims against Waldorf Demolition or the third-party complaint against Calvin, except for the second cause of action in the third-party action, which is dependant on a finding that plaintiff received a grave injury as defined by Workers' Compensation Law § 11. As the record makes clear that plaintiff's shoulder injury is not grave, the second cause of action in Claremont Owner and Dominion's Management's third-party complaint is dismissed.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants/third-party plaintiffs Claremont Owner LLC and Dominion Management Company's joint motion for summary judgment (motion seq. No. 007) is resolved as follows:

• leave to amend its cross claim herein is granted, and the amended cross claim in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof;

• dismissal of plaintiff's Julio Sacta's complaint as against defendant/third-party plaintiff Dominion Management Company is granted with costs and disbursements to said defendant/third-party plaintiff as taxed by the Clerk upon the submission of an appropriate bill of costs;

• the remainder of the motion is denied;

and it is further

ORDERED that defendant Charles Cortes Inc.'s motion for summary judgment (motion seq. No. 008) is denied; and it is further

ORDERED that defendant WS Group LLC d/b/a Waldorf Demolition and third-party defendant Calvin Maintenance, Inc.'s joint motion for summary judgment (motion seq. No. 009) is resolved as follows:

• dismissal of plaintiff's Julio Sacta's complaint as against defendant WS Group LLC d/b/a Waldorf Demolition is granted with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs

• dismissal of the second cause action in the third-party complaint is granted;

and it is further

ORDERED that plaintiff Julio Sacta's motion for summary judgment (mot. seq. No. 010 is denied.

Dated: July 15, 2013

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD