Lanza v MCP 56, LLC
2013 NY Slip Op 32079(U)
August 29, 2013
Supreme Court, New York County
Docket Number: 105704/08
Judge: Jeffrey Oing

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48

Justice

Index Number : 105704/2008
LANZA, WILLIAM M.
vs.
MCP 56
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 8/29/13

JEFFREY K. OING 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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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WILLIAM M. LANZA,

Plaintiff,

-against-

MCP 56, LLC, MCP SO STRATEGIC 56, L.P., HIGHRISE HOISTING AND SCAFFOLDING INC., SLCE ARCHITECTS, LLP, and KENSICO CONSTRUCTION COMPANY INC.,

Defendants.

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Index No.: 105704/08

Mtn Seq. No. 003, 004 & 005

DECISION AND ORDER

MCP 56, LLC and MCP SO STRATEGIC 56, L.P.,

Third-Party Plaintiffs,

-against-

KREISLER BORG FLORMAN GENERAL CONSTRUCTION COMPANY INC. and KENSICO CONSTRUCTION COMPANY, INC.,

Third-Party Defendants.

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JEFFREY K. OING, J.:

In motion sequence no. 003, defendants MCP 56, LLC, MCP SO Strategic 56, L.P. (collectively "MCP"), and Kensico Construction Company Inc. ("Kensico"), move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint against them and any and all cross-claims and counterclaims, and for judgment against defendant Highrise Hoisting and Scaffolding Inc. ("Highrise"), for defense and indemnification.

In motion sequence no. 004, defendant Highrise moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and all cross-claims against it.

In motion sequence no. 005, defendant SLCE Architects, LLP ("SLCE"), moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and all cross-claims against it.

Background

MCP is the owner of a 17-story Manhattan residential apartment building at 33 West 56th Street (the "building"). Third-party defendant Kreisler Borg Florman General Construction Company Inc. ("KBF") was the construction manager for the building's construction project (the "project"). Defendant Highrise was the subcontractor who constructed the temporary ramp (the "ramp") at issue in this action. Defendant MCP retained defendant SLCE as the project's executive architect.

Plaintiff worked as a laborer shop steward at the project for approximately three months before his accident occurred. The ramp located on the roof of the building led from a hoist to the roof of the building. The hoist that led to the roof opened onto a platform that was connected to the ramp at issue. The platform was approximately six feet long and constructed of plank wood, and the ramp was approximately 30 to 35 feet long.

On the morning of Monday, February 25, 2008, after snow had fallen on Saturday, Frank, plaintiff's foreman, directed plaintiff to clean snow off the ramp and platform. Plaintiff

testified that he had cleared the platform, and about three-quarters of the ramp before he slipped and fell (Lanza EBT Tr. at pp. 71-81). Plaintiff alleges that as a consequence of his fall he tore the tendon of his left quadriceps, which required surgery (Moving Papers, Ex. L, Verified Bill of Particulars, ¶ 14).

Plaintiff testified that he began work at the site approximately in late November of 2007, and claimed that he reported his concerns about the ramp within about one month of when he started the job (Lanza EBT Tr. at pp. 18-22). Specifically, he testified that he made a complaint to the hoist operator and his foreman, Frank, because the angle of the ramp "was too much" (Id. at pp. 17, 19, 22). In that regard, plaintiff had to first report any safety concerns to his foreman, and then it was the foreman's job to report the concern to the project superintendent (Id. at 17). Plaintiff believed that the superintendent worked for KBF, and was named Steve Williams (Id. at 23). When plaintiff told his foreman, Frank, about his concerns, Frank told plaintiff that he was going to bring the issue up with Williams, the superintendent (Id. at 22). From the time plaintiff made the complaint to Frank, until the time of his accident, he never saw anyone do anything to the ramp to address his concerns (Id. at 25). Frank told plaintiff that the superintendent pushed the issue "under the rug" (Id.).

Plaintiff commenced this action alleging claims under Labor Law §§ 200, 240(1), 241(6), and 12 NYCRR §§ 23-1.7, 23-1.7(e)(2),

23-1.11, 23-1.16, and 23-1.22, New York City Administrative Code § 27-377, and 29 CFR 1924.451(e)(5)(iii).

Discussion

Experts' Affidavits

Regarding the ramp, plaintiff and defendant MCP each proffer an expert affidavit. MCP's expert, Thomas R. Turkel, A.I.A, states in his affidavit the following:

> From my examination and analysis of the photographic evidence of the subject site and known dimensions, I was able to reasonably determine those ramp measurements that were necessary to evaluate its code compliance. I did not directly measure the size of the subject ramp. Known dimensions were determined from: the temporary hoist system, and the height of the parapet wall above roof level (3'). A temporary wood platform, constructed from the roof elevator on the roof side (i.e., interior) of the building's parapet wall, was approximately 4'-4" (i.e., 52") above the roof level. The subject temporary wood ramp was constructed from the floor surface of that platform down to the roof level. Both the platform and the ramp were provided with handrails, guardrails and toe boards. The length of the subject ramp was calculated to be 35'. Therefore, the slope or pitch of the ramp was 1:8, or 12.5% (4.3' or 52" rise ÷ 35' run).

(Turkel Aff., ¶ 7). Based on his examination and analysis, Turkel opined that the subject ramp met all the requirements of NYC Building Code § 27-1051 (Id., ¶ 8).

In opposition, plaintiff argues that Turkel's finding that the subject ramp had a slope or pitch of 1:8 (0.125) is predicated on erroneous assumptions of the height of the platform leading to the ramp, particularly given that Turkel admittedly was never at the site and never took actual measurements. Plaintiff contends that while Turkel assumed that the platform was approximately 52" above the roof level, it was actually 66".

To support this claimed measurement, plaintiff proffers the affidavit of his expert, Dr. Anthony Storace, P.E.

Dr. Storace states in his affidavit that the subject ramp was 55" wide, 34'4 in length, and 66" high (Storace Aff., ¶ 7). Dr. Storace bases these measurements on his inspection of the accident site (Id., ¶¶ 4, 8). Dr. Storace claims that the ramp had a slope with a vertical to horizontal of 0.162 (Id. at ¶ 8). The NYC Building Code requires that ramps shall not have a slope greater than 1 in 8 which corresponds to a vertical to horizontal ration of 0.125 and cleats are required on ramps having a vertical to horizontal ratio in excess of 0.125 (Id. at ¶¶ 10-11). The subject ramp had no cleats, but was 29% steeper than the maximum allowed by the NYC Building Code for ramps without cleats (Id. at ¶ 11). Thus, Dr. Storace concludes that the subject ramp was defective and violated the NYC Building Code (Id. at ¶ 14).

Clearly, under these circumstances, plaintiff's and defendant's experts have differing opinions with regard to the construction of the ramp.

Defendants argue that this Court should disregard Dr. Storace's affidavit for the following reason. The note of issue and certificate of readiness was filed on November 14, 2011. MCP states that it filed, and served the instant motion for summary judgment on December 23, 2011, and that it was not until MCP's motion that plaintiff served his expert witness response on December 29, 2011. MCP rejected plaintiff's expert response as

untimely, and incomplete because plaintiff neglected to attach a copy of Dr. Storace's report upon which his response was based. Plaintiff again attempted to serve his expert response, this time including his expert witness report. The report was dated April 13, 2009, and it indicated that Dr. Storace conducted an inspection of the ramp on May 5, 2008. MCP again rejected the response as being untimely and not in conformity with defendants' expert demand, dated August 18, 2008. The record demonstrates that plaintiff had this report for two years and eight months before he exchanged it with defendants and he only did so in opposition to defendants' summary judgment motions. Defendants point out that plaintiff fails to proffer an excuse for not exchanging the report before the filing of the note of issue and certificate of readiness. Defendants also argue that they have been prejudiced because during the course of this action the subject ramp was no longer in existence, and defendants would have been entitled to the specific measurements, photographs, notes, and information that plaintiff's expert relied on to arrive at his conclusions.

To begin, this Court will not consider plaintiff's expert affidavit because it lacks a certificate of conformity given it was notarized in Florida (CPLR 2309[c]; Scott v Westmore Fuel Company, Inc., 96 AD3d 520 [1st Dept 2012]). Although the record demonstrates that plaintiff failed to comply with discovery demands regarding his expert, whether such evidence should be

precluded at trial is not before this Court given the absence of an application for a preclusion order.

Labor Law § 240[1]

The law is well settled that section 240[1] imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (McCarthy v Turner Construction Inc., 17 NY3d 369 [2011]). The section applies to "falling worker" and "falling object" cases (Narducci v Manhasset Bay Associates, 96 NY2d 259 [2001]).

Here, defendants MCP and Kensico argue that section 240[1] is inapplicable because plaintiff at no time fell off the ramp, nor was he struck by a falling object. Defendants argue that it was the snow that plaintiff was clearing that caused his accident.

Plaintiff argues that simply because he did not fall off the ramp does not preclude a claim under section 240[1]. In fact, section 240[1] applies to injuries sustained while a plaintiff is seeking to protect against falling from an elevated surface (see Reavely v Yonkers Raceway Programs, Inc., 88 AD3d 561 [1st Dept 2011]). Plaintiff also argues that there is a factual issue as to whether appropriate safety devices such as tread protection, cleats, or appropriately placed handrails would have prevented his fall.

Section 240[1] claims against defendants Highrise, SLCE, and Kenisco are dismissed. Highrise, as the subcontractor that

constructed the hoist and ramp, and SLCE, as the architect on the project, are neither the owner of the building nor the general contractor of the project. As for defendant Kensico, while the parties dispute whether plaintiff was employed by Kensico or KBF, like Highrise and SLCE, Kensico was not an owner or general contractor. More importantly, plaintiff offers no details as to Kensico's role in relation to the project or how Kensico is liable for plaintiff's injury.

In addition, and more importantly, the record demonstrates that defendants Highrise, SLCE, and Kensico did not exercise any supervisory control or authority over the work being conducted, or the work performed by plaintiff when he sustained his injury. As such, there exists no statutory agency so as to impose liability on these defendants under section 240[1] (Walls v Turner Construction Company, 4 NY3d 861 [2005]; Parra v Allright Parking Management, Inc., 59 AD3d 346 [1st Dept 2009]; Mahoney v Turner Construction Co., 37 AD3d 377 [1st Dept 2007]).

Next, plaintiff's argument that section 240[1] applies to injuries sustained when a plaintiff is seeking to protect against a fall is unavailing. Here, plaintiff was injured when he slipped on the ramp, and there is no evidence in this record that he injured himself while trying to prevent his fall. Having said that, while MCP argues that it was the snow plaintiff was clearing that caused his accident, the fact remains that the ramp was the sole means of access from the hoist platform to the top of the roof. Thus, the ramp was a device used to protect against

an elevation-related risk within the meaning of section 240[1] (Arrasti v HRH Construction LLC, 60 AD3d 582 [1st Dept 2009]; Conklin v Triborough Bridge and Tunnel Authority, 49 AD3d 320 [1st Dept 2008]). As such, a factual issue exists as to whether the ramp was adequately equipped with safety devices, such as tread or cleats, and whether the lack of any required safety device was a proximate cause of plaintiff's injury (Id.).

Accordingly, that branch of MCP's motion for summary judgment dismissing the Labor Law § 240[1] claim against it is denied.

Labor Law § 241[6]

Section 241[6] imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to workers employed in all areas in which construction work is being performed (Capuano v Tishman Construction Corp., 98 AD3d 848 [1st Dept 2012]). To establish a section 241[6] claim, plaintiff must show that defendants violated a specific, applicable Industrial Code regulation and that the violation caused his injury (Id.).

A section 241[6] claim cannot be asserted against Highrise, SLCE, or Kensico for the same reasons set forth in the section 240[1] analysis, supra (Nascimento v Bridgehampton Construction Corp., 86 AD3d 189 [1st Dept 2011] [subcontractor "may be held liable for plaintiff's injuries under Labor Law §§ 240[1] and 241[6] only if it had the authority to supervise and control the work giving rise to the obligations imposed by these statues,

which would render it the general contractor's agent"]; Walker v Metro-North Commuter Railroad, 11 AD3d 339 [1st Dept 2004] [Labor Law § 241[6] may not "serve as a basis for imposing liability against a project architect as an 'agent' of the owner unless the project architect controls and supervises the work or has the authority to direct the construction procedures or safety measures employed at the site"]).

In the supplemental verified bill of particulars, plaintiff alleges violations of the following Industrial Code and statutory provisions: 12 NYCRR §§ 23-1.7, 23-1.7(e)(2), 23-1.11, 23-1.16, and 23-1.22, NYC Administrative Code § 27-377, and 29 CFR 1924.451(e)[5](iii).

As for 12 NYCRR § 23-1.7, entitled "Protection from general hazards," defendants correctly argue that plaintiff cannot simply cite this entire Industrial Code section without referring to a violation of a specific section. Plaintiff does go on to claim a violation of 12 NYCRR § 23-1.7(e)(2), entitled "Tripping and other hazards." This section, however, does not apply to the facts of this case. Plaintiff did not trip on an accumulation of dirt and debris, or scattered tools and materials or sharp projections (Purcell v Metlife Inc., 2013 NY Slip Op 4999 [1st Dept 2013]; Cooper v State of New York, 72 AD3d 633 [2nd Dept 2010]; Fura v Adam's Rib Ranch Corp., 15 AD3d 948 [4th Dept 2005]).

In his opposition to defendants' motions, plaintiff also refers to 12 NYCRR §§ 23-1.7(b)(1)(iii)(c) ("Falling hazards ...

Hazardous openings") and 23-1.7(d) ("Slipping hazards"). Plaintiff failed to cite to these provisions in the complaint or the supplemental bill of particulars and does not now move to amend the supplemental bill of particulars. In any event, neither provision applies to this case. Plaintiff was not exposed to a hazardous opening under § 23-1.7(b)(1)(iii)(c). Section 23-1.7(d) ("Slipping hazards") does not apply because the snow on which plaintiff allegedly slipped was the very condition he was charged with removing (Gaisor v Gregory Madison Avenue, LLC, 13 AD3d 58 [1st Dept 2004]).

Section 23-1.11 ("Lumber and nail fastenings") is inapplicable because plaintiff does not claim that his accident was caused by defects in the lumber and nail fastenings used to construct the ramp (Purcell v Metlife Inc., 2013 NY Slip Op 4999, supra).

As for section 23-1.16 ("Safety belts, harnesses, tail lines and lifelines"), this section is inapplicable to this case because plaintiff was not provided with any of the enumerated safety devices in this provision (Fernandez v Stockbridge Homes, LLC, 99 AD3d 550 [1st Dept 2012]).

Finally, as for plaintiff's section 23-1.22 claim ("Structural runways, ramps and platforms"), again, plaintiff fails to specify which provision of this section he is claiming was violated, and how any such violation was the proximate cause of his accident. For example, plaintiff does not specify whether the ramp at issue in this case was "constructed for the use of

persons only" (12 NYCRR § 23-1.22(b)[2]), or "constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks" (12 NYCRR § 23-1.22(b)[3]). In any event, plaintiff does not allege how a violation of either provision was a proximate cause of his accident (cf. Arrasti v HRH Construction LLC, 60 AD3d 582, supra).

NYC Administrative Code § 27-377 applies to interior or exterior ramps "used as exits". The definition of "Exit" found in NYC Administrative Code § 27-232 is "a means of egress from the interior of a building to an open exterior space." The meaning of "Open Exterior Space" is "[a] street or other public space; or a yard, court, or plaza open on one or more sides and unroofed or open on all sides, which provides egress to a street or public space." The ramp at issue in this case does not fall within the definition of an exit, thus New York City Administrative Code § 27-377 is inapplicable.

Plaintiff also refers to 29 CFR § 1924.451(e)[5](iii) in his supplemental bill of particulars. That federal regulation, however, does not exist. Assuming this is a typographical error, and the correct citation is 29 CFR § 1926.451(e)(5)(iii), defendants argue that it does not apply to this case because that provision deals with "scaffold access for all employees." In his opposition to defendants' motions, plaintiff does not address these claimed deficiencies.

Under these circumstances, plaintiff has failed to raise a triable issue of fact on his claims pursuant to Labor Law § 241[6] that would preclude summary judgment in defendants' favor.

Accordingly, defendants' motion for summary judgment dismissing the section 241[6] is granted, and it is hereby dismissed.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide a safe workplace (Rizzuto v LA Wenger Construction Co., 91 NY2d 343 [1998]). Where the accident arises not from the methods or manner of the work, but from a dangerous or defective condition on the premises, the owner or general contractor is liable under Labor Law § 200 when it created, or had actual or constructive notice of the defective condition that caused the injury (Mendoza v Highpoint Associates, IX, LLC, 83 AD3d 1 [1st Dept 2011]). Here, plaintiff claims that his accident occurred because the ramp was defective and dangerous in that it was too steep and not properly constructed.

Kensico

Plaintiff fails raise any factual issues as to Kensico's liability under Labor Law § 200 and common-law negligence. Accordingly, these claims are dismiss against Kensico.

SLCE

Any Labor Law § 200 or common-law negligence claims asserted against SLCE are hereby dismissed. SLCE, as the project's architect, was neither an owner nor a general contractor (see

Urban v No. 5 Times Square Development, LLC, 62 AD3d 553 [1st Dept 2009]). Nothing in this record indicates that SLCE created the alleged dangerous condition or had actual or constructive notice of such. According to the EBT transcript of Milo DeLeon, SLCE's witness, an employee of SLCE would only visit the project at the request of either the construction manager or owner (DeLeon EBT Tr. at pp. 21-22). DeLeon testified that SLCE did not design the ramp, was not asked by anyone to look at the ramp, was never asked to check the dimensions, nor did it check the dimensions, of the ramp (Id. at pp. 32-34). When shown a photograph of the ramp, DeLeon testified that he had never seen the ramp before that moment (Id. at pp. 35-36). Further, neither DeLeon nor any other employee of SLCE was ever on the roof of the building prior to, and including, February 28, 2008 (Id. at pp. 39-40).

Plaintiff argues that SLCE is subject to liability because it was the project's architect, and pursuant to its contract with MCP, was the owner's representative. The argument is unavailing. Section 2.6.5 of the contract between SLCE and MCP clearly provides that SLCE:

> shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

(Wedinger Affirm., Ex. D, p. 7).

Highrise

Highrise, like SLCE, was not an owner or general contractor, thus liability does not attach pursuant to Labor Law § 200 (see Urban v No. 5 Times Square Development, LLC, 62 AD3d 553 [1st Dept 2009]). Highrise did, however, construct the ramp. Thus, there is a factual issue as to whether Highrise created a dangerous condition, and, as such, whether it is liable under plaintiff's common-law negligence claim.

Accordingly, that branch of Highrise's motion for summary judgment to dismiss the Labor Law § 200 claim is granted, and that branch to dismiss the common-law negligence claim is denied.

MCP

Plaintiff claims that he complained to his foreman, Frank, that the angle of the ramp "was too much," who then was supposed to relay plaintiff's concern to the project's superintendent, Steve Williams (Lanza EBT Tr. at pp. 16-19, 22-23). Plaintiff testified that he never saw anyone correct the alleged problem with the ramp (Id. at p. 25).

MCP's representative on the project, Armen Boyajian, testified at his EBT that in February 2008, KBF, the construction manager, was responsible for supervising and directing the workers, and the work being performed at the project (Boyajian EBT Tr. at pp. 23-24). Luc Haines, was KBF's project manager, and Steven Williams, was KBF's project superintendent, both of whom supervised and directed the work being done at the project in February 2008 (Id. at p. 24). Boyajian testified that no one

ever complained about the steepness or traction of the ramp prior to plaintiff's accident on February 25, 2008 (Id. at p. 41). In addition, Williams, the superintendent never told him that anyone had complained to him regarding the ramp (Id. at p. 71). Boyajian also testified that as the main MCP representative on the project he would visit the project approximately a couple of times a week (Id. at pp. 22, 29). The principals of MCP, Roy Stillman and Robby Antonio, would also visit the project site, but not as often as Boyajian, and would not provide any supervision or direction to workers (Id. at p. 22). Nor would Boyajian provide any supervision or direction to the workers (Id. at p. 23). Back in February of 2008, Williams was the person responsible for supervising the workers and the work that needed to be done (Id. at p. 24).

Absent from this record is any evidence that MCP had actual notice of the alleged defect with the ramp. Nonetheless, there is a factual issue as to whether MCP had constructive notice of the ramp's alleged dangerous condition. Indeed, the absence of an EBT of Williams and plaintiff's foreman, Frank, further supports the finding that a factual issue exists concerning MCP's constructive notice. Without such testimony, Boyajian's EBT testimony is self-serving.

In addition, that branch of MCP's motion to dismiss the common-law negligence claim against it is denied (Urban v No. 5 Times Square Development, LLC, 62 AD3d at 555, supra [finding that an owner has a duty to furnish a safe workplace including a

duty to make reasonable inspections to detect unsafe conditions and that whether an alleged danger should have been apparent upon visual inspection is a question of fact]).

Defense and Indemnification

MCP moves for summary judgment against Highrise for defense and indemnification in this action. The indemnification provision found in paragraph 12.10 of the construction contract between the construction manager, KBF, and Highrise provides as follows:

> To the fullest extent permitted by law, Contractor shall indemnify, defend and hold harmless Owner, Construction Manager, Lender, Additional Insureds and anyone for whose acts they may be liable ... from and against all losses, claims ... causes of action, lawsuits, costs, damages, and expenses ... arising out of or in connection with: (i) any personal or bodily injury, sickness, disease, or death, or damage or injury to, or loss or destruction of, property (including tools, equipment, plant and the buildings at the Project Site and adjacent locations, but excluding the Work itself), including the loss of use resulting therefrom sustained or purported to have been sustained as a result of the performance of the Work; (ii) any negligent or wrongful act or omission of Contractor, its employees, subcontractors, representatives or other persons for whom Contractor legally is liable ....

(Moving Papers, Ex. S).

MCP also points out that MCP SO Strategic 56, LP, and MCP 56, LLC are listed as additional insureds (Moving Papers, Ex. S-C). MCP claims that based on this provision it is entitled to a full defense and indemnification, and that its attorney's fees should be reimbursed. In addition, MCP also asserts that pursuant to the insurance provision of Article 12 of KBF's construction contract with Highrise, Highrise was to provide MCP with

insurance. MCP claims that to date Highrise has failed, neglected, and refused to provide MCP with insurance, a defense to this matter, or contractual indemnification.

The issue of whether Highrise procured insurance is moot considering the letter MCP received from Liberty International Underwriters, Inc. ("Liberty"), Highrise's insurance carrier, wherein Liberty represented that MCP is a named insured in Highrise's insurance policy (Pusateri Affirm., 3/21/12, Ex. I). Further, Liberty's letter indicates that it intends to defend MCP in this action. Given, however, that there are factual issues as to whether MCP had constructive notice of the ramp's alleged defect, and whether MCP is directly, and not merely vicariously liable, and whether Highrise was negligent, summary judgment on MCP's claim for indemnification from Highrise is premature at this time (Urban v No. 5 Times Square Development, LLC, 62 AD3d 553, 557, supra).

Accordingly, it is

ORDERED that branch of MCP's and Kensico's motion to dismiss the complaint against Kensico is granted, and it is dismissed against Kensico; and it is further

ORDERED that branch of MCP's motion to dismiss plaintiff's labor law claims against it is granted with respect to Labor Law § 241[6], and denied with respect to Labor Law §§ 240[1] and 200, and the common-law negligence claim; and it is further

ORDERED that branch of MCP's motion for summary judgment on the claim for indemnification is denied; and it is further

ORDERED that branch of Highrise's motion for summary judgment to dismiss the complaint against it is granted with respect to the Labor Law §§ 240[1], 241[6], and 200 claims, and denied with respect to common-law negligence claim and all cross-claims; and it is further

ORDERED that SLCE's motion for summary judgment to dismiss the complaint and all cross-claims against it is granted, and they are hereby dismissed; and it is further

ORDERED, that counsel shall appear for a pre-trial conference in Part 48 on October 30, 2013 at 10 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/29/13

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.