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SHORT FORM ORDER

INDEX No. 09-47489
CAL No. 11-01075OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-11-13
ADJ. DATE
Mot. Seq. # 007 - MD

MAREK CHILINSKI, Plaintiff, - against - LMJ CONTRACTING INC., UNITED BAKING CO., INC., d/b/a UNCLE WALLY'S, DUNBAR SYSTEMS, INC., and C&C MILLWRIGHT MAINTENANCE CO., Defendants.	KENNETH A. WILHELM, ESQ. Attorney for Plaintiff 445 Park Avenue, 9th Floor New York, New York 10022 TORINO & BERNSTEIN, P.C. Attorney for LMJ Contracting, Inc. 200 Old Country Road, Suite 220 Mineola, New York 11501 TROMELLO McDONNEL & KEHOE Attorney for United Baking Co., Inc. P.O. Box 9038 Melville, New York 11747
UNITED BAKING CO., INC., Third-Party Plaintiff, - against - C&C MILLWRIGHT MAINTENANCE CO. and DUNBAR SYSTEMS, INC., Third-Party Defendants.	WHITE, FLEISCHNER, FINO Attorney for C&C Millwright Maintenance Co. 61 Broadway, 18th Floor New York, New York 10006 CHRISTOPHER P. DI GIULIO, ESQ. Attorney for United Baking Co., Inc. 111 John Street, Suite 10038 New York, New York 10038 CHURBUCK CALABRIA JONES & MATERAZO Attorney for Dunbar Systems, Inc. 43a East Barclay Street Hicksville, New York 11801

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 19; Replying Affidavits and supporting papers 20 - 21; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

9-16-13

ORDERED that this motion by defendant/third-party plaintiff United Baking Co., Inc. for an order pursuant to CPLR 3212 (e) for partial summary judgment dismissing plaintiff's claims sounding in common-law negligence and Labor Law § 200 as against it, and conditional summary judgment on its cross claims and third-party claims for full common-law indemnity as against defendants/third-party defendants C & C Millwright Maintenance Co. and Dunbar Systems, Inc. is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on September 3, 2009 when a plywood covering on which he stood broke and he fell through an opening in a platform that was under construction as part of the installation of a new industrial oven. At the time of the accident, plaintiff was employed by a contractor hired to perform welding on said platform. The accident occurred at a commercial bakery plant located at 41 Natcon Drive, Shirley, New York. Defendant/third-party plaintiff United Baking Co., Inc. (defendant United) operated said plant. Defendant United contracted with defendant/third-party defendant Dunbar Systems, Inc. (defendant Dunbar) for the purchase and installation of the industrial oven and its appurtenances, which included the platform. Defendant Dunbar subcontracted with defendant/third-party defendant C & C Millwright Maintenance Co. (defendant C & C) to perform the installation work.

By his complaint, plaintiff alleges a first cause of action alleging negligence, a second cause of action alleging violation of Labor Law § 200, a third cause of action alleging violation of Labor Law 240 (1), and a fourth cause of action alleging violation of Labor Law § 241 (6). By its answer, defendant United asserts general denials except for admitting that work related to the installation of certain equipment was being performed at the subject premises on said date. Defendant United also asserts affirmative defenses as well as cross claims against its co-defendants for common-law indemnity or contribution, contractual indemnity, and breach of contract for failure to name it as an additional insured on an insurance policy.

Defendant United now moves for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims on the grounds that the employees of the subcontractor C & C solely decided to install, then designed, constructed and installed, the temporary plywood cover without any involvement by United; that defendant United did not exercise any supervision or control over means or methods of the work of defendant C & C nor over plaintiff's work at the time of the accident; and that defendant United did not create nor did it have actual or constructive notice that the temporary plywood cover was insufficient to prevent someone from falling through the hole in the platform flooring. In addition, defendant United asserts that in the event that it is found liable to plaintiff under Labor Law §§ 240 and/or 241 (6), it is entitled, based on vicarious liability, to conditional summary judgment on its common-law indemnity claims as against defendant C & C, whose negligence created the condition that caused the accident, and defendant Dunbar, based on its breach of its contractual duty to install equipment in a workmanlike manner and in compliance with applicable law and regulations. Defendant United's submissions include the pleadings, the deposition transcripts of plaintiff, defendant C& C by James Cansler, Roger Hatfield, Bert Cansler, defendant C & C by Roy R. Greene, defendant United by John Avignone, and the contract between defendants United and Dunbar.

Plaintiff submits an affirmation in partial opposition opposing that portion of the motion that seeks dismissal of his common-law negligence and Labor Law § 200 claims. He contends that the dangerous condition was the opening approximately 20 feet above ground that was not adequately guarded or

secured and not merely the plywood cover. In addition, plaintiff contends that defendant United through its representative John Avignone had both actual and constructive notice of the dangerous condition during the two weeks that the cover was over the hole prior to plaintiff's accident. Plaintiff also submits a copy of the incident report prepared by and testified to by John Avignone at his deposition as well as a copy of construction plans depicting the subject platform and hole that was identified by John Avignone at his deposition.

In reply, defendant United argues that it is an owner that did not perform any of the work that gave rise to plaintiff's accident, did not exercise any supervision or control over any of the means or methods of any of the work that gave rise to the accident, and did not create nor have actual or constructive notice of any insufficiency or defect in the temporary plywood cover safety device. Defendant United further argues that the hole itself was not a defect in that it was "purpose-built" to accommodate the oven equipment and that plaintiff's argument that defendant is liable merely because it had notice of the existence of the condition that required the safety device and on which a safety device was installed to guard against its danger lacks merit.

Plaintiff's deposition testimony reveals that on the date of the accident he was employed by non-party Felber Metal as a welder, that it was the first time that he was at the subject location, and that upon arriving at the work site, he, his boss and his co-workers climbed stairs to a platform 12 feet above the first floor of the newly constructed building. He described the platform as being 20 feet by 15 feet with the stairs located at the shorter end. Plaintiff testified that prior thereto, at Felber's shop, he and his co-workers had prepared pre-cut sheets of metal that comprised said platform and had cut a hole in the metal with an inch-and-a half metal lip on its edges. In addition, he testified that the metal sheets had been brought by someone other than himself to the platform, that the metal sheets on the platform did not move, that there was no opening in the platform, and that there was a four feet by five feet piece of wood on the platform located approximately five to six feet from the top step of the staircase. Plaintiff explained that prior to his accident he had guessed that the wood was covering the hole in the platform because when the metal sheets were being prefabricated in the shop he knew that there would be an opening or hole in the platform. Plaintiff also testified that he began working at 8:50 a.m. on top of the platform welding the metal sheets together while on his knees then standing up and stepping backwards and that after repeating this two or three times, he stepped backwards and his right foot stepped on the piece of wood, it did not move, but there was a cracking sound and plaintiff fell to the floor below.

James Cansler testified at his deposition on behalf of defendant C& C that he is employed by defendant C & C as a lead man who assists the foreman, and that he is a carpenter, welder and fabricator. In addition, he testified that he was present at the subject facility in September 2009, that his boss was the foreman Roger Hatfield, and that defendant Dunbar had retained defendant C & C to perform work there. He explained that defendant C & C installed the Auto-Bake system, that it involved the fabrication by employees of defendant C & C during the first week of September 2009 of a galvanized steel platform called a "mezzanine" resting on steel columns above the baking equipment, and that defendant C & C's work was completed at the end of September 2009. Mr. James Cansler also explained that the top decking of the mezzanine consisted of a stainless steel deck consisting of 100-pound stainless steel plates which defendant C & C's employees drilled onto the frame. He further explained that there was an opening of 40 inches by 24 inches created by the placement of the stainless steel plates by defendant C & C's employees and that one day after the opening was created he decided on his own to cover it to prevent

someone from falling through. Mr. James Cansler also testified that he went outside and got a large piece of exterior plywood three quarters of an inch thick and weighing 25 to 30 pounds and put it over the hole so that it extended approximately six inches beyond the opening on all sides and then he got two-by-fours and cut them to length and stacked them around the outside perimeters of the plywood to prevent the plywood from lifting up if someone stepped on it. The two-by-fours were not secured to the plywood cover or to the decking. After placing the plywood cover, he tested it by stepping onto it and bouncing on it two or three times and the cover sprang down a little but did not move to the right or left or forward or backwards, he believed that the cover was secure and could not break, and he had no discussions with anyone from defendant C & C or defendant United regarding said plywood cover. Mr. James Cansler stated that while working in September 2009 he was not supervised by and did not take directions from anyone from defendant United. Plaintiff's accident occurred one day after Mr. James Cansler placed the plywood cover. Mr. James Cansler was working at the facility that morning but he and the employees of defendant C & C had gone on break and left the facility at 9 a.m. so he did not witness the accident.

Roger Hatfield testified at his deposition that at the time of the accident he was a foreman for defendant C & C, that C & C erected the platform, and that it was apparent from the blueprints that there would be an opening in the platform for a chute for mixing ingredients to travel through. He stated that no one from defendant United was involved in setting up the steel platform or in directing what tools were to be used, how they were to be used, or the number of men to do the work or in providing instructions about the opening. In addition, Mr. Hatfield testified that the platform was approximately 12 to 14 feet above the ground. He also testified that he was informed by his employees Greg Cansler and Bert Cansler that they were covering the opening with plywood and two by fours, that they did so to prevent C & C employees from falling into the hole, and that he believed it was a great idea. Mr. Hatfield stated that he inspected the covering and that he and Greg Cansler stood on it together to make sure that it was sturdy.

At his deposition, Bert Cansler testified that he was employed by defendant C & C at the time of the subject accident, at said project his supervisors were Dale Patterson and Roger Hatfield, and that the hole in the platform was covered by C & C employees the morning of the accident. In addition, he testified that he and his cousin and co-employee Greg Cansler covered the hole with plywood and slid two-by-fours under it to keep the plywood from rocking. Mr. Bert Cansler also testified that he and Greg tested the cover by attempting to rock it and that he did not believe that the two-by-fours were fastened to the platform. He stated that he was on break when plaintiff's accident occurred.

Roy R. Greene testified at his deposition that he was employed by defendant C & C as a welder at the time of the subject accident, that he, Greg Cansler and Bert Cansler placed the plywood cover over the hole, and that he bounced up and down on it to make sure that it was safe. He stated that he was not fully satisfied that the plywood cover was safe because it could have been easily kicked or slid off. According to Mr. Greene, the plywood cover was then secured by putting four-by-four blocks along the edge of the hole, where there was a lip to prevent water from running into the hole, which blocks were screwed to the plywood down to the floor. He explained that to move the cover would require that it be picked straight up. Mr. Greene stated that he and his co-workers placed the plywood cover over the hole as the welders were heading up the platform bringing their equipment and that the welders should have seen the cover being placed over the hole. He was out taking a break when plaintiff's accident occurred.

John Avignone testified on behalf of defendant United stating that he was a logistics manager and project coordinator for defendant United, that it was his duty "to walk the job," that defendant United hired plaintiff's employer Felber, that prior to the accident he ascended the platform with Walter Felber and his employees, and that Walter Felber told him that they were going to do a test weld. According to Mr. Avignone, each time that he went onto the mixing platform he observed plywood covering the subject hole which he described as the mixing hole and there was two-by-four cribbing under the plywood to keep it from sliding. He stated that the platform was approximately 20 feet above the ground. He also stated that there was no one from United specifically designated as a safety manager. According to Mr. Avignone, the plywood had been covering the hole for two weeks prior to plaintiff's accident, he never asked anyone to remove it and did not know of anyone from defendant United asking for its removal but that he or anyone from United had the authority to tell C & C or Dunbar or Felber to remove the plywood. Mr. Avignone further testified that he did not witness plaintiff's accident, he was outside at the time.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). "The statute applies, inter alia, to owners and contractors who either created a dangerous condition or had actual or constructive notice of it" (***Wein v Amato Props., LLC***, 30 AD3d 506, 507, 816 NYS2d 370 [2d Dept 2006]). "[P]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (***Cupo v Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]; *see* ***Zastenchik v Knollwood Country Club***, 101 AD3d 861, 863, 955 NYS2d 640 [2d Dept 2012]). Liability pursuant to Labor Law § 200 may fall into two broad categories: workers "injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***McLean v 405 Webster Ave. Assoc.***, 98 AD3d 1090, 951 NYS2d 185 [2d Dept 2012]; ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]). Where, as here, a "premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or

constructive notice of the dangerous condition that caused the accident" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323; *see* ***Ramirez v Metropolitan Transp. Auth.***, 106 AD3d 799, 965 NYS2d 156 [2d Dept 2013]; ***Aguilera v Pistilli Constr. & Dev. Corp.***, 63 AD3d 763, 764, 882 NYS2d 148 [2d Dept 2009]). "The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections" (***Kennedy v McKay***, 86 AD2d 597, 598, 446 NYS2d 124 [1982]; *see* ***Colon v Bet Torah, Inc.***, 66 AD3d 731, 732, 887 NYS2d 611 [2d Dept 2009]; ***Wynne v State of New York***, 53 AD3d 656, 658, 863 NYS2d 222 [2d Dept 2008]), and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact (*see* ***Urban v No. 5 Times Sq. Dev., LLC***, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009]; *see also* ***McLean v 405 Webster Ave. Assoc.***, 98 AD3d 1090, 951 NYS2d 185). This duty extends to general contractors with control over the work site (*see id.*). A party may be liable under Labor Law § 200 and the common law where it has the authority to supervise or control the performance of the work, even where the party does not actually exercise this authority (*see* ***Ortega v Puccia***, 57 AD3d 54, 62 n. 2, 866 NYS2d 323; *see also* ***Clavijo v Universal Baptist Church***, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]).

Here, the adduced evidence demonstrates that the employees of defendant C & C created the plywood covering over the subject hole and that defendant United, the owner, through its logistics manager and project coordinator John Avignone had actual notice of the existence of the plywood covering the hole and had the authority to direct its removal. Contrary to defendant United's assertions, plaintiff's injuries did not arise from the means or methods of the work being performed by the employees of defendant C & C or Felber but rather from a condition on the premises in the form of a plywood-covered "purpose-built" hole in a permanent platform constructed within the bakery plant. However, the deposition testimony of the parties is either conflicting or unclear as to whether the cover was actually secured to the platform so that it could not be pushed off or could not slide off of the hole, whether it appeared sturdy enough for a worker to safely stand on it, and concerning how long a period of time the cover was in place prior to plaintiff's accident. There is no evidence that Mr. Avignone actually inspected the plywood cover to determine its safety prior to plaintiff's accident. Thus, defendant United failed to establish its entitlement to judgment as a matter of law on the causes of action alleging common-law negligence and violation of Labor Law § 200 inasmuch as it failed to produce competent evidence establishing that the subject plywood cover over the hole was safe, that defendant United lacked control over the work site or that it lacked actual or constructive notice of the allegedly dangerous condition which caused plaintiff's injuries (*see* ***Bruno v Board of Educ. of Cent. School Dist. #5***, 74 AD3d 1114, 907 NYS2d 23 [2d Dept 2010]; ***Godoy v Baisley Lumber Corp.***, 40 AD3d 920, 837 NYS2d 682 [2d Dept 2007]; *see also* ***Coleman v Crumb Rubber Mfrs.***, 92 AD3d 1128, 940 NYS2d 170 [3d Dept 2012]; ***Clavijo v Universal Baptist Church***, 76 AD3d 990, 907 NYS2d 515; ***Gallagher v Levien & Co.***, 72 AD3d 407, 898 NYS2d 35 [1st Dept 2010]).

A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part (***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]). Moreover "[i]n order to establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor ... was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (***Hart v Commack Hotel, LLC***, 85 AD3d 1117, 1118-1119, 927 NYS2d 111 [2d Dept 2011] [internal quotation marks omitted]; *see* ***Wahab v Agris & Brenner, LLC***, 102 AD3d 672, 674, 958 NYS2d 401 [2d Dept

2013]). Inasmuch as defendant United failed to demonstrate that it was not negligent as a matter of law, an award of summary judgment is premature as to its cross claim for common-law indemnification asserted against defendants C & C and Dunbar (*see* ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]; *see also* ***Fritz v Sports Auth.***, 91 AD3d 712, 936 NYS2d 310 [2d Dept 2012]).

Accordingly, the instant motion is denied.

Dated: Sept. 12, 2013

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION