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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. *Justice* PART 2

Thomas Rodgers

- v -

MTA

INDEX NO. 110460/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/17/13

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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THOMAS RODGERS,

Plaintiff,

INDEX NO.
110460/10

-against-

METROPOLITAN TRANSPORTATION AUTHORITY MTA CAPITAL CONSTRUCTION, and THE CITY OF NEW YORK,

Defendant.

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METROPOLITAN TRANSPORTATION AUTHORITY MTA CAPITAL CONSTRUCTION COMPANY, and THE CITY OF NEW YORK,

Third-Party Plaintiffs,

INDEX NO.
590643/11

-against-

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 15A-15D AND JAMES T. CALLAHAN, AS PRESIDENT AND BUSINESS MANAGER OF INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 15A-15D,

Third-Party Defendants.

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LOUIS B. YORK, J.:

Motions sequence nos. 002, 003 and 004 are consolidated herein for the purpose of disposition.

In motion seq. no. 002, plaintiff moves pursuant to CPLR 3025(b) to amend the complaint so as to add various entities as party defendants, and to amend the caption accordingly.

In motion seq. no. 003, defendants move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all claims against them.

In motion seq. no. 004, the third-party defendants move pursuant to CPLR 3212 to dismiss defendants' third-party complaint, and for sanctions and costs against defendants for bringing and maintaining a frivolous third-party action.

Plaintiff[1] brought this action to recover damages for personal injuries he allegedly sustained on December 16, 2009 at an MTA subterranean construction site located at 48th Street and Madison Avenue in Manhattan in the course of this employment as a sandhog for one of the contractors on the project, Dragados USA/Judlau Contracting ("Dragados"), when a valve in a piece of equipment known as an "air header" exploded in a tunnel and struck plaintiff in the abdomen and groin area. Defendants are being sued herein as owners of the project site.

MOTION SEQ. NO. 002

Plaintiff seeks to add seven new entities as defendants: Hatch Mott MacDonald NY Inc., Hatch Mott MacDonald, LLC (collectively, "Hatch"), URS Corporation - New York ("URS"), JCMS Inc. ("JCMS"), Integrated Strategic Resources LLC ("Integrated"), MCSS, Inc. ("MCSS"), and Jacobs/Edwards and Kelcey/Liro Joint Venture ("J/E & K/L"). This is plaintiff's second attempt to amend the complaint to add these additional party defendants.

Plaintiff's first motion to amend (seq. no. 001) was denied by this court because of the

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[1] Although nothing before the court suggests that plaintiff died of either his injuries or other causes, and no attempt has been made to substitute another party for plaintiff or convert this into a wrongful death suit, plaintiff's counsel often refers to plaintiff as "plaintiff's decedent" in his papers.

supporting papers' insufficiency. However, the court granted plaintiff leave to make the motion anew provided the moving papers "explain[ed] the reasons for the delay in adding all these parties and the bases for the claim that they may be liable to the plaintiff with respect to the causes of action asserted in this action" (see decision dated 5/23/12 at plaintiff's exhibit F).

Plaintiff's proposed amended complaint (plaintiff's exhibit G) states that at all relevant times the putative defendants were business corporations transacting business in New York which should have expected their acts to have consequences in New York (*id.*, ¶¶ 6-34), and which "operated," "maintained," "controlled" and "managed" the construction site (¶¶ 57-84). Counsel's supporting affirmation explains how the putative defendants were identified through discovery prior to plaintiff's initial motion to amend the complaint (without explicitly attributing the delay in moving to add them as parties to that process). He then cursorily states that the project's construction manager (Hatch), firms which listed safety engineers as working on the project (URS, JCMS, Integrated and MCSS) and those which provided construction management services (J/E & K/L) are necessary defendants in the action (see Boyle aff, ¶¶ 9-16). Counsel concludes that the purpose of amending the complaint is to "properly allege all of the necessary parties for a complete and proper claim on behalf of [p]laintiff" (*id.*, ¶ 21) and avoid a "multiplicity of litigation," thus "resulting in substantial economy of both time and money to the Court" and avoiding "a gross injustice to ... plaintiff" (*id.*, ¶ 21) without prejudicing the current defendants (*id.*, ¶ 24).

In opposition to plaintiff's motion, defendants make the following arguments: none of the theories of liability set forth in the causes of action asserted in plaintiff's proposed amended complaint (unchanged from those asserted in the complaint) "could ever possibly succeed against the proposed additional defendants"; adding seven new defendants at this juncture "is overly burdensome and will result in unnecessary defense expenditures, waste of judicial resources and inconvenience to all of the parties"; and, defendants, which are on the verge of resolving this litigation, should not be subjected to the delay caused by "the unnecessary depositions of seven

additional companies which could never be liable to plaintiff" (Noss aff., ¶¶ 2-3). Defendants' counsel concludes by positing that plaintiff's accident should properly give rise to a product liability action against Dragados, the manufacturer and installer of the defective air valve, but Dragados, as plaintiff's employer, is immune from such suit by plaintiff.

In reply, plaintiff argues that defendants' challenge to the merits of the proposed amendment is inappropriate in the context of a motion to amend the complaint, and that the proposed defendants should be added to this litigation because they had (unspecified) safety responsibilities at the project site. In his reply affirmation (dated and served on the same date the note of issue was served, along with a statement of readiness certifying that all pleadings had been served and the case was ready for trial), plaintiff's counsel contends that defendants will not be prejudiced since "the case is not yet on the trial calendar, let alone the eve of trial" (Boyle reply aff, ¶ 5). Finally, counsel reiterates that "[n]o previous application for the relief sought herein has ever been made to this or any other court" (*id.*, ¶ 18; see also Boyle's supporting aff, ¶ 23).

In denying plaintiff's previous application for the relief sought herein (mot seq no. 001), the court explicitly conditioned this second motion to amend on plaintiff's explaining the bases of the new defendants' liability under the causes of action asserted in the complaint. Plaintiff has offered no discussion of his causes of action or how the legal theories therein relate to the putative defendants, beyond a cursory attribution of vague "safety responsibility" to each of them.

Generally, leave to amend the complaint should be freely given where no prejudice ensues to defendant (see CPLR 3025[b]; *Edenwald Contracting Co. v City of New York*, 60 NY2d 957 [1983]). "The decision of whether to do so, however, is in the discretion of the trial court, and leave should not be granted where the proposed amendment is devoid of merit" (*Nasuf Construction Corp. v State of New York*, 185 AD2d 305, 306 [2d Dept 1992]; see also *Viacom International, Inc. v Midtown Realty Co.*, 193 AD2d 45, 52 [1st Dept 1993]). The court is not

required to "permit futile amendments which may lead to needless litigation" (*Saferstein v Mideast Systems, Ltd.*, 143 AD2d 82 [2d Dept 1988]), and should exercise its discretion to deny a motion to amend where, as here, "the proposed new allegations [are] conclusory, speculative and unsupported by any evidentiary showing establishing the merits of the proposed pleading" (*Mestel & Company, Inc. v Smythe, Masterson & Judd, Manda Weintraub*, 181 AD2d 501, 502 [1st Dept 1992]).

Based on the foregoing, the court finds that plaintiff's motion to amend the complaint should be denied.

MOTION SEQ. NO. 003

Plaintiff's complaint contains five causes of action, respectively (i) negligence, (ii) violations of Labor Law § 200, (iii) violations of Labor Law § 240(1), (iv) violations of Labor Law § 241(6), and (v) violations of the Industrial Code (12 NYCRR §§ 23-1.5, 23-1.7, 23-1.16 and 23-1.21).

At his June 11, 2010, 50-H hearing (see transcript at exhibit F to defendants' moving papers), plaintiff testified that the accident occurred while he was in the process of changing headers on the air and water line to a large drilling vehicle called "Jumbo." Plaintiff first shut off both the air and water at a valve about 20 feet from the header he was to remove. Then he let the water run out of the valve he was going to change. He then opened up the air line and since no air came out when it was in the open position, he assumed it was empty. Plaintiff held the air header, resting it on his knee at about waist level, to take the weight off and make it easier for one of his co-workers to remove the clamp from the pipe – the next step in the changing process. As his co-worker loosened the clamp bolts, the complete header suddenly exploded off the clamp, striking plaintiff. Plaintiff was blown back about 10 to 15 feet, he had a lot of "stuff" in his eyes despite the fact he was probably wearing safety glasses, his clothes and hardhat were blown off and he was lying on the tunnel floor. Plaintiff did not know what caused the accident,

but said two Dragados foremen told him the air header that exploded was defective because the bleeder valve was not drilled into the header (*id.* at 75). At his January 6, 2012 deposition (see transcript at exhibit G to defendants' moving papers), plaintiff testified that in the whole time he worked on the project he never worked with defendants' employees, and defendants did not tell him how to do his work or supervise him; he took orders only from his crew bosses. Plaintiff gave the same account of the accident that he had given at the 50-H hearing. He also testified after viewing a picture of the header that there was no opening by the wall of the air header cylinder and there should have been one to allow air to flow through the valve (*id.* at 82-83).

The testimony of MTA's deponent Mark Rhodes, the lead quality engineer on the project, employed by Hatch, confirms that the air header valve was defective because "it didn't have a hole for the air to feed the valve that was put on the side" (see Rhodes EBT at defendants' exhibit H, p 58, ll 12-13; see also p 81). Plaintiff's account of the accident and its cause being the defective air header valve are both basically undisputed. Defendants' contention that the defective air header valve was manufactured and fabricated by Dragados, which had exclusive control over it, is not disputed by plaintiff.

Defendants seek summary judgment dismissing all claims against them, arguing that they have affirmatively proven that they were not negligent and did not cause or contribute to plaintiff's accident, and that plaintiff's claims of vicarious liability cannot be sustained for the reasons set forth below.

Plaintiff's first two causes of action are common-law negligence and violation of Labor Law § 200, which is a codification of owners' and contractors' common-law duty to provide employees with a safe workplace (see *Houde v Barton*, 202 AD2d 890, 891 [3d Dept 1994], lv den 84 NY2d 977 [1994]). Defendants, relying on *Cappabianca v Skanska USA Building Inc.* (99 AD3d 139 [1st Dept 2012]), argue that they cannot be held liable for plaintiff's accident under these causes of action because they had no control over plaintiff's work or the defective header valve which caused the accident.

In opposition, plaintiff argues that defendants, which had safety inspectors who did regular walk-throughs of the project site and had the authority to stop the work if they saw hazardous conditions, are liable for his accident because they failed to prevent it. Plaintiff does not contend that defendants had the right – or reason – to examine the materials given to plaintiff by his employer. Nor does plaintiff attempt to specify exactly how defendants could have prevented the accident. Even if a safety inspector had been on site at the time of the accident or shortly before, he would not have seen anything amiss, since no one has even suggested that plaintiff did anything wrong or that there was a problem with the site itself which contributed to the accident.

The court finds that these two causes of action must be dismissed. Defendants have established that they "did not exercise any authority over the means and methods of plaintiff's work, ... [they were] not liable for the [dangerous] condition" and they did not "have actual or constructive notice of its existence prior to the accident in sufficient time to take corrective measures" (*Sosa v 46th Street Development LLC*, 101 AD3d 490, 493 [1st Dept 2012]). Under these circumstances, when a construction worker supervised solely by his employer is injured in an accident arising from the manner and means in which he performed his job with defective tools or materials furnished by his employer, the owners of the project site cannot be held liable (see *Cappabianca*, *supra*, 99 AD3d at 144).

Defendants argue that plaintiff's third cause of action, violation of Labor Law § 240(1), must also be dismissed because plaintiff's accident did not involve an elevation-related risk. Plaintiff counters that the accident was gravity-related because the "injury to plaintiff was every bit a direct consequence of [plaintiff's] effort to prevent the air header from falling to the ground by supporting its weight himself" (Boyle opposing aff, ¶ 57). In reply, defendants argue that plaintiff was injured by the sudden release of pressurized air at waist level, not by gravity. Defendants argue further that *Runner v NYSE*, 13 NY3d 599 (2009), the only case cited by plaintiff, has totally different facts. In *Runner*, a worker's hands were injured because an object

falling down the stairs pulled the rope the worker held in his hands, so gravity played a key role. Finally, defendants argue that none of the devices enumerated in Labor Law § 240 could have prevented plaintiff's accident.

The protection afforded by section 240(1) does "not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]). Even when "the injury is caused by the effects of gravity upon an object," Labor Law § 240(1) is not automatically implicated; the worker must have been laboring "under [the] unique gravity-related hazards" contemplated by the statute (*Melo v Consolidated Edison Company of New York*, 92 NY2d 909, 911 [1998]). To sustain a cause of action under Labor Law § 240(1), a plaintiff must prove that the statute was violated, that defendants failed to provide him with safety devices and that the specific violation was the proximate cause of his injuries (see *Zimmer v Chemung County Performing Arts,* 65 NY2d 513 [1985], rearg den 65 NY2d 1054 [1985]). "Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists" (*Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]). Here, plaintiff did not fall, nothing fell on him, and the fact that the header was at waist level instead of on the ground had nothing to do with the valve being defective. The court agrees with defendants that a waist-level explosion is not within the ambit of Labor Law § 240(1) (see *Toefer v Long Island Rail Road*, 4 NY3d 399 [2005]).

Finally, the complaint asserts claims that defendants violated Labor Law § 241(6) (fourth cause of action) and various sections of the Industrial Code (fifth cause of action).

Labor Law § 241(6) "creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where, and

only where, a 'specific positive command' ... or a 'concrete specification' ... of a regulation promulgated by the Commissioner pursuant to the statute has been violated" (*Toefer v LIRR, supra*, 4 NY3d at 409, citations omitted).

Plaintiff's complaint alleges that defendants violated four sections of the Industrial Code: 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.16 and 23-1.21 (¶ 60). In addition, plaintiff's verified bill of particulars (ex C to defendants' moving papers) alleges violations of 12 NYCRR §§ 23-1.8(c), 23-1.15, 23-1.21(B)(4)(l), 23-1.2(B)(4)(2)[*sic*] and 23-1.21(E)(3) (*id.*, ¶ 20).

In support of their motion, defendants painstakingly go through each Industrial Code section evoked by plaintiff and detail why each of those sections is either too broad to qualify as the predicate for a Labor Law § 241(6) violation or inapplicable to the facts of this case.

Defedants' analysis is apparently as persuasive to plaintiff as it is to the court. In opposition to defendants' motion to dismiss his § 241(6) claim, plaintiff abandons all the Industrial Code sections he previously relied on, and instead contends that defendants violated three other sections never previously mentioned: 12 NYCRR § 23-1.8(a) ("Personal protective equipment – Eye protection"), § 23-1.10(b) ("Hand tools – Electrical and pneumatic hand tools"), and § 23-4.2(k) ("Trench and area type excavations [– Falling material]"). Counsel then contends that because plaintiff has now asserted these "new allegations of industrial code violations, defendants' motion to dismiss Plaintiff's claims under Labor Law § 241(6) should be denied" (Boyle opposing aff, ¶ 82). Citing *Burton v CW Equities, LLC*, 92 AD3d 509 (1st Dept 2012), recalled and vacated 97 AD3d 462 (2012), *Sanders v St. Vincent Hospital*, 95 AD3d 1195 (2d Dept 2012), *Ortega v Everest Realty LLC*, 84 AD3d 542 (1st Dept 2011) and *Harris v City of New York*, 83 AD3d 104 (1st Dept 2011), counsel argues that the unusual move of asserting new Industrial Code violations for the first time in opposition to defendants' motion for summary judgment is permissible because it does not prejudice defendants and no new factual allegations or theories of liability are being presented.

The court disagrees. Since plaintiff has not served an amended bill of particulars, his

reliance on these new sections is tantamount to his amending the pleadings without leave of the court. Furthermore, the only one of the three sections that is not unrelated to the pleadings and the evidence heretofore adduced in this litigation is the requirement that plaintiff be provided with protective eyewear "while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes" (12 NYCRR § 23-1.8[a]). However, since plaintiff testified that he had protective eyewear and was in fact probably wearing protective glasses at the time of his accident (see defendants' exhibit F, pp 68-71 and exhibit G, pp 64, 81), he cannot show that he was not given protective eyewear while engaged in "an operation which may endanger the eyes" (the only enumerated activity which may arguably fit the facts of this case), assuming *arguendo* he could prove that eye injury was a reasonably foreseeable risk of changing headers on a line (see *Cappiello v Telehouse International Corporation of America, Inc.*, 193 AD2d 478 [1st Dept 1993]).

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]) The burden then shifts to the party opposing the motion to produce sufficient evidence of the existence of a material issue of fact requiring a trial of the action (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). "Rank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact" so as to defeat a motion for summary judgment (*Tungsupong v Bronx-Lebanon Hospital Center*, 213 AD2d 236, 237 [1st Dept 1995]). Summary judgment is "a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues.... But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated" (*Andre v Pomeroy*, 35 NY2d

361, 364 [1974]). Applying these principles, the court finds that defendants have made a showing of entitlement to judgment as a matter of law (see *Narciso v Ford Motor Co.*, 137 AD2d 508, 509 [2d Dept. 1988]), and that plaintiff has failed to raise a triable issue (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

MOTION SEQ. NO. 004

Defendants brought a third-party action against the closed union shop which allegedly manufactured and installed the offending valve. The third-party complaint contains six causes of action: (i) common law contribution; (ii) common law indemnification; (iii) strict tort liability; (iv) breach of implied warranty of merchantability; (v) breach of express warranty; and, (vi) breach of implied warranty of fitness.

The third-party defendants move for summary judgment dismissing the third-party complaint, and for sanctions against defendants/third-party plaintiffs for bringing a frivolous lawsuit.

Given that plaintiff's complaint against defendants is being dismissed herein, the third-party action has been rendered moot. Thus, without going into the merits of the action other than to ascertain that sanctions are not warranted, the third-party action will also be dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's motion (seq. no. 002) to amend the complaint is denied in its entirety; it is further

ORDERED that defendants' motion (seq. no. 003) for summary judgment dismissing the complaint is hereby granted; and, it is further

ORDERED that the third-party defendants' motion (seq. no. 004) for summary judgment and sanctions against defendants is granted only to the extent that the third-party action is hereby dismissed as moot, and is otherwise denied.

The Clerk is directed to enter judgment accordingly.

This decision constitutes the order of the court.

DATED: Oct. 15 , 2013

J.S.C.

LOUIS B. YORK
J.S.C.

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK