Godlewski v Williamsburg Terrace, LLC
2014 NY Slip Op 30209(U)
January 21, 2014
Sup Ct, New York County
Docket Number: 106822/10
Judge: Doris Ling-Cohan
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SCANNED ON 1/27/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C.
Justice

PART 36

Index Number : 106822/2010
GODLEWSKI, MIECZYSLAW
vs.
WILLIAMSBURG TERRACE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to 12, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1, 2

Answering Affidavits — Exhibits | No(s). 5, 6, 7, 8, 9

Replying Affidavits | No(s). 10, 11, 12

Cross-motion etc | 3, 4

Upon the foregoing papers, it is ordered that this motion for summary judgment by third-party defendant Janbar Inc is decided in accordance with the attached memorandum decision; Tri-Rail's cross-motion is decided in accordance with the attached memorandum decision. (consolidated for disposition with motion sequence number 002 + 003)

FILED
JAN 27 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/23/14

______, J.S.C.
DORIS LING-COHAN
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: IAS PART 36

---X

MIECZYSLAW GODLEWSKI,

Plaintiff,

Index No.: 106822/10
DECISION/ORDER

-against-

Motion Seq. No.: 001, 002 & 003

WILLIAMSBURG TERRACE, LLC and BOARD OF MANAGERS OF WILLIAMSBURG TERRACE CONDOMINIUM,

Defendants.

---X

WILLIAMSBURG TERRACE, LLC and BOARD OF MANAGERS OF WILLIAMSBURG TERRACE CONDOMINIUM,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590244/11

TRI-RAIL CONSTRUCTION, INC., individually and as a joint venture with JANBAR, INC., JANBAR, INC., Individually and as a joint venture with TRI-RAIL CONSTRUCTION, INC. and WILLIAMSBURG/TRI-RAIL/JANBAR I, LLC,

Third-Party Defendants.

---X

FILED
JAN 27 2014
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN, J.S.C.:

Before this court, in this negligence/Labor Law action and subsequent third-party indemnity action, are three motions and two cross-motions for summary judgment(motion sequence numbers 001, 002 and 003). The motions are consolidated for disposition, as follows.

BACKGROUND

On May 10, 2010, plaintiff Mieczyslaw Godlewski (Godlewski) suffered injuries to his legs and back when he fell from a ladder during the course of his employment as a construction

worker, employed by third-party defendant Janbar, Inc. (Janbar), at a building located at 195 Berry Street in the County of Kings, City and State of New York (the building). *See* Notice of Motion (motion sequence number 001), White Affirmation, ¶ 4. Defendants Williamsburg Terrace, LLC (Williamsburg) and the Board of Managers of Williamsburg Terrace Condominium (the Board) are, respectively, the building's owner and management company (the Williamsburg defendants). *Id.*

On January 26, 2009, the Williamsburg defendants contracted with Janbar and third-party defendant Tri-Rail Construction, Inc. (Tri-Rail), who were operating as a joint venture, to perform certain construction and renovation work at the building, pursuant to a written agreement (the prime contract). *See* Notice of Motion (motion sequence number 003), Poritz Affirmation, ¶ 11; Exhibit D. Thereafter, Janbar and Tri-Rail orally assigned the prime contract to third-party defendant Williamsburg/Tri- Rail/Janbar I, LLC (WTJ), a limited liability corporation that they had formed to receive payment for their work at the building. *Id.*, ¶ 12; Exhibit H, at 21-22. On February 27, 2009, Tri-Rail sent a written request to the Williamsburg defendants to make all payments due under the prime contract to WTJ. *Id.*; Exhibit I. Subsequently, WTJ evidently executed several subcontracting agreements (both written and oral), with Janbar, Tri-Rail and other entities for individual items of work. As an example, of an alleged written agreement, WTJ presents a copy of an unsigned agreement with Janbar, dated September 30, 2009 (the unsigned Janbar/WTJ contract). *Id.*, ¶ 13; Exhibit E. According to WTJ, the original of the Janbar/WTJ contract was in fact signed by WTJ and Janbar, on September 30, 2009, however, the original signed contract was stolen from Janbar's temporary offices. As detailed below, whether the Janbar/WTJ contract was ever signed is disputed by the

parties.

At his deposition, Godlewski stated that, on the day of his accident, he had been engaged in cutting rebar on a work site located on top of the building's elevator room, which was a 14-foot high raised structure sitting on top of the roof deck, in the rear of the building on the fifth floor. *See* Notice of Motion (motion sequence number 001), Exhibit M, at 50-53, 57-58, 65. He further stated that he reached this work site by climbing a metal extension ladder that stood on an insulation panel, had rubber feet on its bottom, and was secured at its top to the elevator room's roof platform, by a length of electrical cable that had been looped around the top of the ladder and through a hole in metal stud that had been set into the edge of the roof platform. *Id.* at 65-67, 69-72, 82. Godlewski also stated that he had been engaged in doing this job for four or five days, and that, at the beginning, there had been scaffolding erected around the elevator room, but that he and his Janbar co-workers had removed the scaffolding prior to his accident. *Id.* at 56-64. Godlewski recounted that he was descending the ladder when its bottom slid away from the elevator room's outside wall and he fell straight down approximately 10 feet, landing sharply on his feet and injuring his legs and back. *Id.* at 73-80. Godlewski noted that the insulation panel had slid away from the elevator room's outside wall, and that the top of the ladder did not stay attached to the elevator room's roof, although he was unsure as to how the electrical cable had broken or come loose. *Id.* at 75, 84-86.

The Williamsburg defendants were deposed, by one of their agents, real estate developer and manager Abraham Bennun (Bennun), who acknowledged having executed the prime contract with Tri-Rail and Janbar, and explained that it was necessary for the two entities to operate as a joint venture because only when they combined their resources, did they have enough manpower,

and access to finances, to function as the general contractor/construction manager for the work at the building. *See* Notice of Motion (motion sequence number 001), Exhibit N, at 12-17, 19-20, 22-24. Bennun also acknowledged that Tri-Rail and Janbar had formed WTJ, several months after they executed the prime contract, and that the Williamsburg defendants had thereafter made all payments to WTJ, which thereafter made payments to Tri-Rail and Janbar individually. *Id.* at 42-45, 54-55. Bennun stated that the Williamsburg defendants did not directly hire any of the subcontractors for the work at the building, and that, consequently, he was unfamiliar with the unsigned Janbar/WTJ contract (between Janbar and WTJ). *Id.* at 24-25, 68-70. Bennun further stated that WTJ, Tri-Rail and Janbar eventually abandoned the project, by defaulting on their obligations under the prime contract. *Id.* at 26-29. Although he was unable to specify an exact breach, or an exact default date, Bennun stated that the third-party defendants ended their relationship with the Williamsburg defendants sometime after Godlewski's accident. *Id.* at 28. Finally, Bennun stated that Tri-Rail and Janbar were responsible for site safety at the building, but acknowledged that the Williamsburg defendants also had employees there every day while the work was ongoing, and that some of them had the authority to stop the work of both the contractors and the subcontractors. *Id.* at 57-58.

The relevant portions of the prime contract provide as follows:

> Article 8 Insurance and Bonds
>
> § 8.1 Insurance Required of the Construction Manager
> During both phases of the Project, the Construction Manager [i.e., originally Tri-Rail and Janbar; later WTJ] shall purchase and maintain insurance as set forth in Section 11.1 of A201-1997.
>
> ***
>
> Article 11 Other Conditions and Services

[Tri-Rail] and [Janbar] hereby agree that, irrespective of any amendment hererto, they are each jointly and severally liable under this Contract and, whether they may form or have formed any formal joint venture corporate entity or partnership organization (and even if this Contract be assigned to such entity or partnership), they shall remain jointly and severally liable for all obligations hereunder.

***

AIA Document A201-1997 - General Conditions for the Contract for Construction

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Article 11 Insurance and Bonds

§ 11.1 Contractor's Liability Insurance
§ 11.1.1 The Contractor [i.e., originally Tri-Rail and Janbar; later WTJ] shall purchase ... and maintain ... such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, ...:

1. Claims under worker's compensation ...;
2. Claims for damages because of bodily injury ... of the Contractor's employees;
3. Claims for damages because of bodily injury ... of any person other than the Contractor's employees;

***

§ 11.1.3 The foregoing insurances shall include at the minimum the following coverages and limits:

> Workers' Compensation insurance consistent with the statutory requirements, Comprehensive General Liability coverage of $5 million per occurrence ... .

See Notice of Motion (motion sequence number 001), Exhibit S, at 16, 19, 33.

Tri-Rail was deposed by its president, Charles Ventimiglia (Ventimiglia), who also acknowledged having executed the prime contract with the Williamsburg defendants, and having subsequently formed WTJ with Janbar several months later. *See* Notice of Motion (motion sequence number 001), Exhibit O, at 10, 12, 19-25. Ventimiglia reviewed the unsigned

Janbar/WTJ subcontract and noted that it was unsigned. *Id.* at 32-33. Ventimiglia stated, however, that the unsigned Janbar/WTJ contract was a "CM [i.e., construction manager] contract," which the parties never executed, but that WTJ had executed a separate subcontracting agreement with Janbar for roofing work, for which he could not recall if there was a separate contract. *Id.* at 29-33.

Janbar was deposed by its president, Janusz Bartnicki (Bartnicki), who also acknowledged having executed the prime contract with the Williamsburg defendants, and having subsequently formed WTJ with Tri-Rail several months later. *See* Notice of Motion (motion sequence number 001), Exhibit Q, at 13-23. Bartnicki also acknowledged that Janbar subsequently entered into several subcontracting agreements with WTJ, for various items of work, since the Williamsburg defendants had communicated to the principals of WTJ (Ventimiglia and himself), their reluctance to approve a comprehensive agreement with Janbar, on the ground that it would be too expensive. *Id.* at 29-35. Bartnicki further stated that he had signed some of the subcontracting agreements and had orally agreed to others; but that, in each instance, he had intended Janbar to be bound by all of the terms of said subcontracting agreements. *Id.* Bartnicki noted that all of WTJ's subcontracting agreements were standard form documents that contained the same terms. *Id.* at 35-40. Bartnicki also stated that WTJ, and not Janbar, was responsible for maintaining insurance for the work at the building. *Id.* at 36, 40-41. Finally, Bartnicki stated that he believed that the contracts that he had executed, on behalf of Janbar, with Ventimiglia, on behalf of WTJ, were among a number of items that had been stolen from the temporary office that Janbar maintained at the building, sometime during the performance of the work. *Id.* at 69-70.

[* 8]

The relevant portions of the unsigned Janbar/WTJ contract provide as follows:

Article 4 Subcontractor

***

§ 4.6 Indemnification

§ 4.6.1 To the fullest extent permitted by law, the Subcontractor [i.e., Janbar] shall indemnify and hold harmless the Owner [i.e., the Williamsburg defendants], Contractor [i.e., WTJ], Architect, Architect's consultants, and agents and employees of any of them 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, provided that any such claim, damage, loss or expense is attributable to bodily injury ... , but only to the extent caused by the negligent acts or omissions of the Subcontractor ... any one directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations to indemnity which would otherwise exist as to a party or person described in this Section 4.6.

Article 13 Insurance and Bonds

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract:
Type of insurance of bond [blank]
Limit of liability or bond amount [blank]

***

§ 13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: 1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and 2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.

See Notice of Motion (motion sequence number 001), Exhibit R at 7, 13, 14.

Janbar was deposed a second time by its office manager, Sebastian Gawel (Gawel), who acknowledged the execution of the prime contract with the Williamsburg defendants and the

formation of WTJ with Tri-Rail several months later. *See* Notice of Motion (motion sequence number 001), Exhibit P, at 12, 14-20. Gawel (Janbar's office manager), also acknowledged that Bartnicki (Janbar's president) had executed a subcontract for Janbar to perform roofing work with Ventimiglia (on behalf of WTJ), but stated that he could not locate a signed copy of that subcontract. *Id.* at 40-41.

Godlewski commenced this action, by filing a summons and complaint that sets forth one cause of action for common-law negligence, and one cause of action for violation of Labor Law §§ 200, 240 (1), 241 (6) and 241-a. *See* Notice of Motion (motion sequence number 001), Exhibit A, at 4, 5. The Williamsburg defendants filed a verified answer to the complaint and, thereafter, the Williamsburg defendants initially commenced a third-party action naming only Janbar and Tri-Rail as defendants, and then they filed an amended third-party summons and complaint that also names WTJ, as third-party defendant. The causes of action asserted in the Williamsburg defendants' amended third-party complaint are: 1) contributory negligence; 2) the doctrine of primary negligence; 3) contractual indemnity; 4) statutory negligence; and 5) breach of contract. *Id.*; Exhibit F. WTJ, Tri-Rail and Janbar each filed answers that include cross-claims for contributory negligence and common-law and/or contractual indemnity. *Id.*

Now before the court are: (1) Janbar's motion for summary judgment of dismissal of the third-party complaint as against it and for summary judgment of dismissal of the cross-claims asserted against it, and Tri-Rail's cross motion for the same relief (motion sequence number 001); (2) the Williamsburg defendants' motion for summary judgment to dismiss the complaint and all cross claims asserted against it and Godlewski's cross motion for partial liability on his Labor Law § 240 (1) claim (motion sequence number 002); and (3) WTJ's motion for summary

judgment on its cross claims against Janbar, and to dismiss all cross claims asserted against it (motion sequence number 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Questions of credibility should not be resolved by the court on a motion for summary judgment, based on affidavits or deposition testimony, but, rather, are best reserved for the trier of fact. S*ee S.J. Capelin Assoc., Inc. v. Globe Manufacturing Corp.*, 34 NY2d 338 (1974); *Curtis Properties Corp. v. Greif Companies*, 212 AD2d 259 (1st Dept 1995); *First New York Rlty. v. DeSetto*, 237 AD2d 219 (1st Dept 1997).

Janbar's Motion for Summary Judgment

Janbar seeks summary judgment to dismiss the third-party complaint as against it and to dismiss all cross-claims asserted against it, in the third-party action. Janbar first argues that "[a]ll common-law claims ... asserted as against Janbar in the third-party complaint and action should be dismissed as a matter of law, because the evidence shows that plaintiff did not sustain a 'grave

injury' as defined under Workers' Compensation Law § 11." *See* Notice of Motion (motion sequence number 001), White Affirmation, ¶ 29. The "common law claims" referred to appear to include the Williamsburg defendants' third-party causes of action for contributory negligence, primary negligence and statutory negligence. *Id.*; Exhibit F. In their opposition papers, the Williamsburg defendants agree with this argument, stating that they concede that there is no 'grave injury' in this case (Feehan Affirmation in Opposition, ¶ 5), and consent to the dismissal of their first, second and fourth third-party causes of action. Thus, that portion of Janbar's motion which seeks dismissal of the Williamsburg defendants' third-party causes of action asserted against Janbar for contributory negligence, primary negligence and statutory negligence is granted.

Janbar next argues that all of the contractual claims asserted against it in the third-party action should be dismissed as a matter of law because of the absence of a written contract, with terms requiring Janbar to indemnify the Williamsburg defendants or WTJ, as required under Workers' Compensation Law § 11, since Janbar was plaintiff's employer. *See* Notice of Motion (motion sequence number 001), White Affirmation, ¶ 29. The contractual claims appear to include the Williamsburg defendants' third and fifth third-party causes of action against Janbar, for contractual indemnification and breach of contract for failure to obtain insurance. *Id.*; Exhibit F. Janbar bases its argument that there was no written contract requiring Janbar to indemnify the Williamsburg defendants or WTJ, on the deposition testimony of: (1) Bennun (the Williamsburg defendants' manager), that he "did not remember being aware" of the existence of the unsigned Janbar/WTJ contract; (2) Ventimiglia (Tri-Rails president and a member of WTJ), that he "could not recall" whether there was a contract between WTJ and Janbar; (3) Gawel (Janbar's office

manager), that the copy of the roofing subcontract that he examined was not signed; and (4) Bartnicki (Janbar's president), that Janbar did not execute a general subcontracting agreement with WTJ because it "was too much money." *See* Notice of Motion (motion sequence number 001), White Affirmation, ¶¶ 22-28. Significantly, however, the only contract (other than the prime contract) that the parties have produced to date, is the unsigned Janbar/WTJ contract, because of allegations that the original signed Janbar/WTJ contract was stolen. Nevertheless, for the reasons discussed later in this decision, there are issues of fact as to whether the Janbar/WTJ contract was ever signed and whether the unsigned "A201-1997" contract form may be sufficient evidence of the existence of a written contractual relationship between WTJ and Janbar, and the terms of such written contract. Thus, that portion of Janbar's motion which seeks summary judgment of dismissal of the contractual claims asserted in the third party action is denied.

Tri-Rail's Cross-Motion for Summary Judgment

Tri-Rail has cross moved for summary judgment of dismissal of the third-party complaint as against it. As was also previously mentioned, the Williamsburg defendants have already consented to the dismissal of their first, second and fourth third-party causes of action for contributory negligence, primary negligence and statutory negligence. Therefore, the court grants so much of Tri-Rail's cross motion that seeks summary judgment to dismiss the Williamsburg defendants first, second and fourth causes of action, asserted in the third-party complaint.

With respect to the Williamsburg defendants' two remaining causes of action in the third-party action, against Tri-Rail for contractual indemnity and breach of contract for failure to obtain insurance, Tri-Rail first argues that the claim for breach of contract for failure to obtain

insurance should be dismissed because "no evidence has been produced ... that [the Williamsburg defendants have] incurred an increase in [their] insurance premiums directly attributable to the institution of the instant claim against [them]." *See* Notice of Cross Motion (motion sequence number 001), Bailey Affirmation, ¶ 84. However, before any determination can be made as to what financial injury the Williamsburg defendants may have suffered as a result of Tri-Rail's purported failure to obtain insurance, it must first be determined whether Tri-Rail did, in fact, obtain such insurance. However, Tri-Rail has failed to satisfy its initial burden of establishing that it has in fact obtained insurance; thus, that portion of Tri-Rail's motion which seeks to dismiss the Williamsburg defendants' third-party cause of action for breach of contract for failure to obtain insurance is denied.

Tri-Rail next argues that the Williamsburg defendants' third-party claim for contractual indemnity be dismissed, on the ground that "Tri-Rail performed certain below ground-level masonry work ... [but] did not perform any sort of work on the roof or in the area of plaintiff's accident." *See* Notice of Cross Motion (motion sequence number 001), Bailey Affirmation, ¶ 93. The Williamsburg defendants respond that this argument must fail because "Tri-Rail agreed to be jointly and severally liable ... under the [prime] contract." *See* Feehan Affirmation in Opposition, ¶ 5. The Williamsburg defendants are correct. Article 11 of the prime contract plainly imposes joint and several liability on Tri-Rail and Janbar in their capacity as joint venturers. Although the parties all agree that Tri-Rail and Janbar eventually assigned the prime contract to WTJ, Article 11 of the prime contract specifically provides that Tri-Rail agrees to be jointly and severally liable with Janbar to the Williamsburg defendants, even in the event of an assignment, so the issue is moot. Under these circumstances, the argument that Tri-Rail did not perform any of the

work that might have led to Godlewski's injuries is irrelevant, and the court therefore rejects it. Accordingly, the court denies the portion of Tri-Rail's cross motion that seeks summary judgment to dismiss the Williamsburg defendants' third-party claim for contractual indemnity.

Williamsburg Defendants Motion/Plaintiff's Cross-Motion for Partial Summary Judgment

The court notes that plaintiff has consented to the dismissal of the portion of his claim which is based on Labor Law §§ 200 and 241-a, and to the dismissal of the entire complaint as to the Board, but not as to Williamsburg. *See* MacDonnell Affirmation in Opposition (motion sequence number 002), ¶ 5. The court also notes that the Williamsburg defendants' motion does not raise any argument as to summary judgment of dismissal of the portion of Godlewski's claim that is based on the Williamsburg defendants' alleged violation of Labor Law § 240 (1). Accordingly, the court grants the Williamsburg defendants' motion solely to the extent of dismissing Godlewski's Labor Law §§ 200 and 241-a claims, and turns its attention to the balance of the Williamsburg defendants' motion for summary judgment of dismissal of Godlewski's claim that the Williamsburg defendants violated Labor Law § 241 (6) claim.

Labor Law § 241 (6) imposes a non-delegable duty on "owners and contractors 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-Electric Co.*, 81 NY2d 494, 501-502 (1993). In order to prevail on a claim under Labor Law § 241 (6), it is incumbent on a plaintiff to demonstrate that the defendant violated a regulation containing "concrete specifications" applicable to the facts of the case. *Id.* at 505. Here, the Williamsburg defendants simply argue that "[p]laintiff has cited to

25 separate sections of the Industrial Code which have purportedly been violated ... [but] ... [n]one of these sections are applicable." *See* Notice of Motion (motion sequence number 002), Feehan Affirmation, ¶ 33. Godlewski responds that this argument does not set forth any specific objections, and refers to 12 NYCRR 23-1.21 as a basis for his Labor Law § 241 (6) claim. *See* MacDonnell Affirmation in Opposition (motion sequence number 002), ¶¶ 6-8. The relevant portions of that Industrial Code provision state as follows:

> 23-1.21 Ladders and ladderways.
>
> ***
>
> (b) General requirements for ladders.
>
> ***
>
> (4) Installation and use.
>
> (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.
>
> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
>
> (iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.
>
> (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.
>
> (v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.

This Industrial Code provision has been held to be sufficiently specific to support plaintiff's Labor Law § 241 (6) claim. *See e.g. Hart v Turner Constr. Co.*, 30 AD3d 213 (1st Dept 2006) (12 NYCRR 23-1.21 (b) (4) (ii) is sufficiently specific to support a Labor Law § 241 (6) claim). The court also agrees that Godlewski's allegation that the ladder that he fell from was improperly placed on top of an unsecured insulation panel is sufficient to bring his claim within the ambit of 12 NYCRR 23-1.21. *Id.* In any case, the Williamsburg defendants do not raise any counter argument in their reply papers and appear to have conceded such point. Therefore, the portion of the Williamsburg defendants' motion that seeks summary judgment dismissing Godlewski's claim that is based on an alleged violation of Labor Law § 241 (6) is denied.

As was previously mentioned, the final portion of Godlewski's claim alleges a violation of Labor Law § 240 (1). Although the Williamsburg defendants' motion does not address this allegation, in his cross motion, Godlewski seeks partial summary judgment on this portion of his claim. The statute provides, in pertinent part, that:

> 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 the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 (1991). The Court

also notes that this statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers." *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 342 (2008). Finally, the Court requires a "plaintiff to show that the statute was violated and that the violation proximately caused his injury." *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 (2004). Here, Godlewski argues that he has demonstrated that he is entitled to summary judgment on the issue of liability on his Labor Law § 240 (1) claim because his uncontroverted deposition testimony indicates that he fell from the subject ladder, when the unsecured insulation panel that it was standing on top of, slid backwards, and that this exact scenario has been held to present a prima facie case of liability under the statute. *See* Notice of Cross Motion (motion sequence number 002), MacDonnell Affirmation, ¶¶ 8-9. In this, Godlewski appears to be correct. *See e.g. Chlap v 43rd Street-Second Ave. Corp.*, 18 AD3d 598 (2d Dept 2005). Nevertheless, the Williamsburg defendants and WTJ both oppose Godlewski's motion on the ground that he was the "sole proximate cause" of his own injuries.

The Williamsburg defendants advance the argument that there is an issue of fact presented by Gawel's deposition testimony that he had been informed by unidentified co-workers of Godlewski that Godlewski had actually gotten his foot tangled in a rope, while he was descending the ladder, and thereby caused himself to fall. *See* Feehan Affirmation in Opposition, ¶ 6. However, as Godlewski correctly points out, Gawel's own deposition testimony was that he did *not* witness the accident, and his statements regarding other people's observations are inadmissible hearsay. *See* Breen Reply Affirmation, ¶ 4. Additionally, affidavits from the purported eye witnesses, or other proof, has not been supplied. Thus, the court agrees that the

Williamsburg defendants have failed to raise an issue of fact with regard to the circumstances of Godlewski's accident, and rejects their argument as speculative and unfounded.

WTJ argues that "[t]he ladder used by the plaintiff ... was not defective, ... there is no evidence or claim of a defect," and that "the evidence demonstrates that the plaintiff improperly used the ladder." *See* Poritz Affirmation in Opposition, ¶ 11. However, this argument amounts to an allegation of contributory negligence on Godlewski's part, and New York State law does not recognize such allegations, as a legitimate defense to claims under Labor Law § 240 (1). *See e.g. Hernandez v 151 Sullivan Tenant Corp.*, 307 AD2d 207 (1st Dept 2003), citing *Rocovich v Consolidated Edison Co.*, 78 NY2d at 513; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 (1985). Therefore, the court also rejects this argument. Accordingly, as Godlewski has demonstrated a *prima facie* claim pursuant to Labor Law § 240 (1), and factual issues have not been raised, plaintiff's cross-motion for partial summary judgment is granted against the Williamsburg defendants as to the issue of liability on plaintiff's Labor Law §240(1) claim, with the issue of damages to be determined at trial.

WTJ's Motion for Summary Judgment

The final motion before the court is third-party defendant WTJ's request for summary judgment on its contractual indemnity cross claim against third-party defendant Janbar, based upon the allegedly stolen subcontract between WTJ and Janbar (motion sequence number 003).[1] Janbar objects arguing that, it never executed the unsigned Janbar/WTJ contract, and, therefore, is

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[1] WTJ does not raise a claim against Janbar for breach of contract by failure to procure insurance, as the Williamsburg defendants did.

not bound by its terms. *See* Alter Reply Affirmation (motion sequence number 003), ¶¶ 7-12. As the court indicated above, there are issues of fact as to whether the Janbar/WTJ contract was ever signed and whether the unsigned "A201-1997" contract form may be sufficient evidence of the existence of a written contractual relationship between WTJ and Janbar, regarding the roofing work at issue and the terms of such written contract.

WTJ argues that, because Bartnicki (Janbar's president) testified that the original contract between Janbar and WTJ was among the items stolen from Janbar's temporary offices at the building, it is entitled to produce secondary evidence to prove its contents, as a matter of law, on this summary judgment motion. While New York State law permits an exception to the "best evidence rule", under which WTJ may offer the unsigned Janbar contract as "secondary evidence", to establish the terms of its contractual relationship with Janbar, which, it asserts, includes the indemnity clause set forth in all "A201-1997" contract forms, the burden to use secondary evidence is high. *See* Notice of Motion (motion sequence number 003). Poritz Affirmation, ¶¶ 21-28. In *Schozer v William Penn Life Ins. Co. of N.Y.* (84 NY2d 639 [1994]), the Court of Appeals, in discussing the use of secondary evidence, held that:

> No categorical limitations are placed on the types of secondary evidence that are admissible. Nonetheless, the proponent of such derivative proof has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and "correctly reflects the contents of the original" before ruling on its admissibility. For example, when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, from personal knowledge, "substantially and with reasonable accuracy" all of its contents. Once a sufficient foundation for admission is presented, the secondary evidence is "subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with [the] final determination left to the trier of fact."

> Placement of this heavy foundational burden on the proponent of secondary evidence to prove its accuracy as a derivative source of proof serves to reduce the dangers of fraud and prejudice ... [internal citations omitted].

84 NY2d at 645-646. Here, however, the threshold issue, disputed by the parties, is whether Janbar and WTJ actually signed a written contract, which must be resolved at trial, prior to the use of secondary evidence, to prove the contents of the allegedly lost/stolen contract. If in fact there is determination that a contract was signed by Janbar and WTJ, and that such contract was lost or stolen, its contents may then be proved by secondary evidence at trial, at which testimony and evidence may be considered. In any event, WTJ has not met the "heavy foundational burden" on the record on this summary judgment motion. *See Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d at 646. Thus, WTJ may not use the unsigned Janbar/WTJ contract, as secondary evidence of Janbar's contractual obligation, *at this juncture*, to seek indemnification from Janbar, as to any claims arising out of the roofing work that Janbar had subcontracted to perform.

Furthermore, as to the substance of WTJ's indemnification claim, in order to sustain a claim for contractual indemnification, the proponent must prove some quantum of negligence on the defendant's part. *See e.g. Knight v City of New York*, 225 AD2d 355 (1st Dept 1996). Regarding this burden, the Appellate Division, First Department, has articulated the general rule as follows:

> It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred. The plaintiff need not exclude every other possible cause of the accident, but must offer proof that causes other than defendant's negligence are sufficiently "remote" or "technical" to allow a jury to base its verdict on logical inferences to be drawn from the evidence, rather than speculation [internal citations

omitted].

Feder v Tower Air, Inc., 12 AD3d 190, 191 (1st Dept 2004). Here, there has been no determination that Janbar, or any other party was negligent. Therefore, it would be premature to grant WTJ's request for summary judgment on its contractual indemnity claim. This does not end the inquiry, however. As the Court of Appeals observed in *Seaboard Sur. Co. v Gillette Co.* (64 NY2d 304, 310-311 [1984]):

> Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify. The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased. Though policy coverage is often denominated as "liability insurance", where the insurer has made promises to defend "it is clear that [the coverage] is, in fact, 'litigation insurance' as well." As such, "[s]o long as the claims [asserted against the insured] may rationally be said to fall within policy coverage, whatever may later prove to be the limits of the insurer's responsibility to pay, there is no doubt that it is obligated to defend [internal citations omitted]."

Here, however, the indemnity clause of the unsigned Janbar/WTJ contract does not even set forth a duty to defend. *See* Notice of Motion (motion sequence number 001), Exhibit R, at 4. Further, while that obligation might reasonably be read into the insurance clause of that contract, the court has already determined that such clause is unenforceable at this juncture, since it has not been determined that there was in fact a signed contract between Janbar and WTJ. Further, the portion that specified Janbar's insurance obligations was left blank, and none of the parties have provided sufficient testimony or other evidence for the court to determine what those obligations were.

Therefore, WTJ's motion for summary judgment on its contractual indemnity cross claim against Janbar is denied.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Janbar, Inc. (motion sequence number 001) is granted solely to the extent that the first, second and fourth causes of action (for contributory negligence, primary negligence and statutory negligence) in the third-party complaint are severed and dismissed as against third-party defendant Janbar, but is otherwise denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of third-party defendant Tri-Rail Construction, Inc. (motion sequence number 001) is granted solely to the extent that the first, second and fourth causes of action (for contributory negligence, primary negligence and statutory negligence) in the third-party complaint are severed and dismissed as against third-party defendant Tri-Rail, but is otherwise denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants/third-party plaintiffs Williamsburg Terrace, LLC and the Board of Managers of Williamsburg Terrace Condominium (motion sequence number 002) is granted to the extent that this action is severed and dismissed as to defendant Board of Managers of Williamsburg Terrace Condominium, but is otherwise denied; and it is further

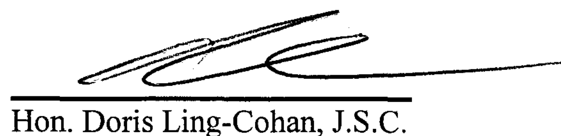
ORDERED that the cross motion, pursuant to CPLR 3212, of plaintiff Mieczyslaw Godlewski (motion sequence number 002) is granted solely to the extent of granting partial

summary judgment in favor of plaintiff and against defendant Williamsburg Terrace, LLC on the issue of liability under Labor Law § 240 (1), with the issue of damages, to be determined at the trial of this action; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of third-party defendant Williamsburg/Tri-Rail/Janbar I, LLC (motion sequence number 003) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy, upon all parties, with notice of entry.

Dated: New York, New York
January 21, 2014



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\godlewskivwilliamsburgterrece

FILED
JAN 27 2014
NEW YORK
COUNTY CLERK'S OFFICE