

Mulhall v Archdiocese of N.Y.
2015 NY Slip Op 31378(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 151656/12
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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ROBERT A. MULHALL as administrator
of the estate of JANUSZ ZDYBEL (A/K/A
JANUSZ WOJCIECH ZDYBEL) Deceased
October 13, 2011 on behalf of /for the
benefit of SYLWIA MOSKAL ZDYBEL,
the Widow and surviving spouse of
JANUSZ ZDYBEL and their infant
daughter, IZABELLA ZDYBEL, born
on November 19, 2011,

Index No.: 151656/12
Motion Seq. Nos. 003 and
004

DECISION AND ORDER

Plaintiffs,

-against-

ARCHDIOCESE OF NEW YORK,
ARCHDIOCESAN BUILDING COMMISSION,
OLD STRUCTURES ENGINEERING, PC,
CHURCH OF ST. PAUL THE APOSTLE and ST.
PAUL THE APOSTLE CHURCH FINANCE
COUNCIL,

Defendants.

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ARCHDIOCESE OF NEW YORK,
ARCHDIOCESAN BUILDING COMMISSION,
and CHURCH OF ST. PAUL THE APOSTLE,

Third-Party Plaintiffs,

-against-

WEST NEW YORK RESTORATION OF CT, INC.,

Third-Party Defendant.

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OLD STRUCTURES ENGINEERING, PC

Second Third-Party Plaintiff,

-against-

WEST NEW YORK RESTORATION OF CT, INC.

Second Third-Party Defendant.

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ELLEN M. COIN, J:

In an action that involves the death of a worker during a roof renovation, defendant/second third-party plaintiff Old Structures Engineering, PC (Old Structures) moves pursuant to CPLR 3212 for summary judgment dismissing all claims as against it (motion seq. No. 003). Several other parties move jointly for summary judgment: (1) defendants/third-party plaintiffs Archdiocese of New York (the Archdiocese) and the Archdiocesan Building Commission (ABC), as well as defendant St. Paul the Apostle Church Finance Council (Finance Council) seek summary judgment dismissing all claims and cross claims as against them; (2) defendant/third-party plaintiff Church of St. Paul the Apostle (the Church) seeks summary judgment dismissing several claims as against it: (i) the first cause of action under Labor Law sections 200, 240 (1), and 241, (ii) the second cause of action for common-law negligence, (iii) the fifth cause of action alleging breach of warranty, (iv) the sixth cause of action seeking punitive damages for spoliation; (3) defendants/third-party plaintiffs the Church, the Archdiocese and ABC seek summary judgment as to liability against West New York Restoration of CT, Inc. (West NY) on their claims for common law indemnity, contractual indemnification and breach of

contract for failure to procure insurance (motion Seq. No. 004) (the Church defendants' motion). The motions are consolidated for disposition.

BACKGROUND

On October 13, 2011, Janusz Wojciech Zdybel (Zdybel) died while working for third-party defendant West NY in a church on the upper west side. Along with his colleague, Ruslan Brianyk (Brianyk), Zdybel was working from a ladder placed on a catwalk in the attic of the church. Brianyk and Zdybel were installing safety equipment for a renovation job on the church's roof. More specifically, they each held one end of a bracket that they were trying to drive through the roof (Brianyk dep at 115-118). A metallic sheathed electrical cable leaned against the ladder as they worked (*id.* at 122, George Grenier aff, ¶ 17). While Brianyk held onto a beam next to the ladder with one hand and the bracket with the other, Zdybel held the bracket with one hand and in the other he held a pipe that he used to hammer the bracket into place (Brianyk dep. at 118). When Zdybel's end of the bracket suddenly shifted into place, both men received an electric shock (*id.* at 119). While Brianyk remained on the ladder, Zdybel was convulsed, let go of everything, and fell to the floor 150 feet below (*id.* at 119 – 120, 142; Complaint ¶3 at 2).

The roof renovation project that led to Zdybel's death arose from an agreement between the Church and West NY entitled "The Church of Saint Paul the Apostle Church Building, Phase 2, Roof Areas Restoration Project" (Ex W to the Affirmation of Cruz M. Williams dated Nov. 3, 2014). The Church owns the subject property. The Archdiocese, ABC, and the Finance Council are affiliated with the Church. Old Structures provided structural engineering services to the Church for exterior renovation.

In April 2012, plaintiff commenced this action by filing a summons and complaint. The first cause of action alleges that the Church, ABC, the Finance Council and defendant Vertical Access, LLC (Vertical) are liable to plaintiff's estate under Labor Law § § 200, 240 (1), 241 and 241 (6). The second cause of action alleges that all defendants (but with specific reference only to Belmont Electrical, Inc.) are liable for negligence and gross negligence, while the third alleges professional negligence against Old Structures, and the fourth alleges professional negligence against Vertical. The fifth cause of action alleges breach of warranty against all defendants. Finally, the sixth cause of action alleges spoliation of evidence against the Archdiocese, the Church, and the Finance Council.

DISCUSSION

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

I. Old Structures' Motion for Summary Judgment

a. Professional Negligence

Old Structures provided structural engineering services which did not involve the iron bracket installation work Zdybel was performing at the time of the accident. It argues that it cannot be held liable for negligence because it had no duty to Zdybel, as it did not control the

means and method of his work. Old Structures submits the depositions of West NY employees Brianyk, Tomacz Mikucki (Mikucki), and Gregory Kendzior (Kendzior), which, taken together, show that Old Structures did not control the means or methods of Zdybel's work.

Old Structures also argues that it is not liable in negligence because it did not proximately cause Zdybel's death, as the design work it did for the Church did not involve the attic area where Zdybel was working when he fell. Moreover, Old Structures argues that plaintiff cannot establish negligence because it has not hired an expert.

In opposition, plaintiff argues that Old Structures had a duty under 1 RCNY § 21-01(b), which is a codification of the requirements of the permit Old Structures received from the NYC Department of Buildings (DOB) regarding its work on the Church, and which provides, in relevant part:

(5) That the architect or engineer of record and associate architects or engineers, if any, shall comply with the provisions of the Zoning Resolution, the Building Code and other applicable laws and regulations or shall resolve any non-compliance as provided in paragraph 6, below.

(6) That, prior to the limited supervisory check and/or professional certification, any non-compliance shall be resolved by reconsideration or otherwise. Such reconsideration or other resolution shall be in writing and shall be submitted with the application that qualifies for limited supervisory check and/or professional certification.

(1 RCNY § 21-01 [b] [5-6]).

Plaintiff argues that Old Structures knew about electrical problems within the church. Plaintiff submits emails to church officials from William Stivale (Stivale), who worked as an independent consultant for the Church, and who is the husband of Marie Ennis, one of Old

Structure's engineers. The first email, which Stivale sent on April 19, 2011, outlines his concerns about the electrical system:

Please know I am by no means an electrician (nor am I an expert in the field) – but I immediately became very concerned when I brushed against an old light socket – and the bulb actually flickered on and off. Meaning – there is obviously some level of live electricity still running through these vault areas. If you look at the remaining attached photos of some typical wiring/connection conditions – I believe you will see why I am concerned. Again, this is by no means my area of expertise or work – but may I humbly suggest that you cut off all electrical power leading to these vault areas immediately (in both the North and South aisle areas) until you can get a qualified expert to review the electrical conditions

(Stivale April 19, 2011 email to Gilbert Martinez, Wally Sandoval, and George Grenier, Exhibit 6 to the Affirmation of Robert Schacht, dated January 8, 2015).

Plaintiff argues not only that Old Structures had a duty to also inform the DOB of the electrical problems that Stivale witnessed, but also that Old Structures voluntarily assumed a duty to Zdybel through Stivale's email. In support, plaintiff cites to *Fermin v City of New York*, 28 Misc 3d 1235(A), * 6 [Sup Ct, Kings County 2010]), which held that the defendant's calls to 311 "fail to constitute assumption of a voluntary duty."

Here, Old Structures is not liable to plaintiff because it had no duty toward Zdybel. A party that enters into a contract to provide services typically does not have a duty to third parties (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). None of the *Espinal* exceptions are present here. As to the argument regarding 1 RCNY § 21-01, even if Old Structures had violated this regulation, it would not establish a duty to Zdybel. Moreover, it is clear that Old Structures did not voluntarily assume a duty to Zdybel through Stivale's expression of concern regarding the electrical system.

b. **Breach of Warranty**

Old Structures argues that it is not liable for breach of either implied or express warranty, as it made no express or implied warranties regarding the electrical system. Plaintiff does not respond to defendant's arguments. As such, plaintiff has abandoned the breach of warranty claim against Old Structures (*see generally Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]). Accordingly, Old Structures' motion is granted and all claims against it are dismissed.

II. **ABC, the Finance Council, and the Archdiocese's Motion For Summary Judgment Dismissing All Claim's Against Them**

The Church defendants argue that ABC, the Finance Council and Archdiocese are all improper defendants.

a. **ABC**

ABC argues that it is an improper defendant because it is not an entity that can be sued. ABC submits the affidavit of George Grenier (Grenier), the project manager for this project. Grenier states that ABC exists only as "a division of Central Services, Archdiocese of New York" (Grenier aff, ¶ 1). Grenier also alleges that he added boilerplate terms to the contract with West NY (*id.*, ¶ 5) and that while he served as a project manager of the roof renovation, neither ABC nor the Archdiocese controlled or supervised the means or methods of West NY's work. (*id.*, ¶¶ 1, 18). In opposition, plaintiff never addresses the issue of ABC's liability. Plaintiff has abandoned his claims against ABC as a separate entity (*see Gary v Flair Beverage Corp.*, 60 AD3d at 413).

b. The Finance Council

Similarly, the Finance Council argues that it is not a legal entity subject to suit. Father Gilbert Martinez (Martinez), the Church's pastor, alleges that the Finance Council is merely a group of volunteer parishioners who advise the Church on financial matters (Martinez aff at ¶ 4). In response, plaintiff fails to address Martinez' contention, much less to rebut it. Thus, the court grants the motion of the Finance Council for summary judgment dismissing all claims and cross-claims against it.

c. The Archdiocese

The Archdiocese argues that it is not liable because it does not own the subject property or perform work on it. In opposition, plaintiff argues that the Archdiocese had control over the roof renovation project and that therefore liability under the Labor Law is appropriate.

Plaintiff cites Martinez's deposition testimony in which he states that Grenier worked on the project as a representative of ABC (Martinez Dep. p. 38, lines 19-23; Ex 4 to the Schacht Aff. dated Jan. 8, 2015). Plaintiff also refers to the deposition testimony of Tomasz Mikucki (Mikucki), West NY's project manager, who testified that he had regular meetings with Grenier and that he saw him "quite a few times" during the project (Mikucki dep at 30-31; Ex 12 to the Schacht Aff.). Mikucki also testified that Grenier "was from the Archdiocese" (*id.* at 30). Plaintiff also relies on Stivale's deposition testimony (Ex 5 to the Schacht Aff.). Stivale, who worked for the Church as a conservation consultant, stated that Grenier "was a project manager for the diocesan" (Stivale dep at 119) and that, approximately two months before Zdybel's accident, Grenier hired a nonparty to do plaster work in the attic (*id.* at 119-120). Moreover,

Stivale testified that “there was talk of” West NY giving Grenier price quotes for running safety lines for work on the ceiling (*id.* at 130).

In reply, the Archdiocese argues that Grenier worked for ABC, a division of Central Services, Archdioceses of New York, rather than the Archdiocese.

A party is an agent of an owner or general contractor under the Labor Law when it has “been given the authority to supervise and control the work giving rise to plaintiff’s injuries” (*Ramade v C.B. Contr. Corp.*, 127 AD3d 596, 597 [1st Dept 2015]).

Plaintiff has failed to raise an issue of fact as to whether the Archdiocese had the authority to supervise and control Zdybel’s work. As was established above in reference to Old Structures’ motion, West NY controlled the means and methods of Zdybel’s work. Moreover, even if plaintiff could prove that Grenier had unexercised authority to supervise and control Zdybel’s work, the Church defendants have made an unrebutted showing that Grenier did not work for the Archdiocese, even if it was commonly assumed at the project that he did. Thus, the Archdiocese was not a statutory agent of the Church. As such, all claims and cross-claims as against it are dismissed.

d. Labor Law § 200 and Common-law Negligence

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at

the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where, as here, the defect arises from a dangerous condition at the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor “is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]).

Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition. A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell

(*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]).

Here, Zdybel’s accident arose from the Church’s faulty electrical system. The Church argues for a narrow view of the defect; specifically, it contends that Zdybel’s accident arose from a defective light junction box that electrified a cable leaning against Zdybel’s ladder.

If the defect is viewed broadly as the Church’s faulty electrical system, there is at least a question of fact as to whether the Church had actual notice. In response to Stivale’s April 19, 2011 email expressing concerns about electrical problems in “vault areas” of the church, Martinez, the pastor, referred to his own concern relating to the electrical system as a whole: “Thank you for your comments about the electrical system. We have been aware of this problem

for some time . . . A review of our electrical system is a very high priority for us in coming months” (Ex 2 to the Schacht Aff.).

If the defect is viewed narrowly, as a defective light junction box, then the Church fails to make a prima facie showing that it did not have constructive notice of the defect. The Church fails to provide any evidence that it inspected the attic area where Zdybel was working and that, upon inspection, the defective light box was not apparent. Indeed, the Church fails to provide any evidence that it upheld its duty to inspect (*see McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1093 [2d Dept 2012] [“The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections, and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact”] [internal quotation marks and citation omitted]; *see also Urban*, 62 AD3d at 55 [holding that a property owner’s duty to provide a safe workplace “encompasses the duty to make reasonable inspections to detect unsafe conditions”]).

In light of the failure of the Church defendants to make a prima facie showing of entitlement to judgment on this issue, the branch of their motion seeking dismissal of plaintiff’s Labor Law § 200 and common-law negligence claims as against the Church is denied.

e. Labor Law § 241

The Church defendants argue that Labor Law § 241 (1) through Labor Law § 241 (5) are inapplicable to Zdybel’s accident, and plaintiff concedes this point. However, the parties disagree as to the applicability of Labor Law § 241 (6), which provides, in relevant part:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated

and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

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

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

The Church defendants concede that there are at least questions of fact as to 12 NYCRR 23-1.13, “Electrical hazards,” and 12 NYCRR 23-1.21 (b) (7)¹, which provides that “[m]etal ladders shall not be used or placed in any location where they may come into contact with any energized electric power line, power facility or any exposed electrical parts of apparatus or equipment.”

¹ Both the Church defendants and plaintiff mistakenly refer to 12 NYCRR 1.2 (b) (7), which does not exist, instead of 12 NYCRR 23-1.21 (b) (7), to which they both clearly intend to refer, as they use the title of 12 NYCRR § 23-1.21, “Ladders and ladderways.”

Nevertheless, the Church defendants seek dismissal of various provisions of the Industrial Code listed in the complaint. Plaintiff abandons reliance on all provisions except: 12 NYCRR § 23-1.13, 12 NYCRR § 23-1.21 (b), and 12 NYCRR §23-1.10. The Church defendants are correct that 12 NYCRR §23-1.10 (b), entitled “Hand Tools, Electric and pneumatic hand tools,” is inapplicable, as Zdybel was not holding an electric or pneumatic hand tool at the time of his accident.

Plaintiff argues that the court, under CPLR 3212 (b), should grant it summary judgment as to liability under Labor Law § 241 (6) based on the violation of 12 NYCRR § 23-1.13 and 12 NYCRR § 23-1.21 (b) (7). Here, the applicability and violation of 12 NYCRR § 23-1.13 is so clear as to warrant use of the court’s power under CPLR 3212 (b). 12 NYCRR § 23-1.13 (b) (4), “Electrical hazards, Protection of Employees,” provides, in a relevant part, that:

No employer shall or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.

12 NYCRR § 23-1.13 (b) (4) is sufficiently specific to serve as a predicate for liability under Labor Law § 241 (6) (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 516 [1st Dept 2013]). Moreover, it is plain that the Church violated this provision by failing to protect Zdybel from an electrical power circuit. While the Church defendants suggest that there may be an issue of fact as to comparative negligence, nothing in the record suggests that Zdybel was negligent. As such, plaintiff is entitled to summary judgment as to liability on his Labor Law § 241 (6) claim against the Church.

f. Gross Negligence and Punitive Damages

“[G]ross negligence contemplates conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing” (*Obremski v The Image Bank, Inc.*, 30 AD3d 1141, 1142 [1st Dept 2006] [internal quotation marks and citation omitted]). The Church defendants are correct that gross negligence and punitive damages are inapplicable to this action, as there is no evidence that the Church exhibited any intentional wrongdoing, or a reckless disregard of the rights of others. Thus, the branch of the Church defendants’ motion seeking dismissal of plaintiff’s claim seeking punitive damages for gross negligence is granted.

g. Breach of Warranty

Plaintiff has not opposed the branch of the Church defendants’ motion that seeks dismissal of plaintiff’s breach of warranty claims. Thus, plaintiff has abandoned the warranty claims and those claims are dismissed.

h. Spoliation

Similarly, plaintiff has provided no opposition to dismissal of its sixth cause of action or spoliation against the Church defendants. This claim is also dismissed.

i. Claims Against West NY

Indemnification

The Church defendants argue that West NY owes both contractual and common-law indemnification to the Church, the Archdiocese, and ABC. This motion is moot as to ABC and the Archdiocese, as all claims are dismissed against them, and West NY’s insurer has already provided a defense to them. In relevant part, the indemnification provision in the contract between the Church and West NY provides:

To the fullest extent provided by law, the contractor shall indemnify and hold harmless the owner and its officers, employees and agents . . . (including, but not limited to, judgments, attorneys' fees, court costs and the costs of appellate proceedings) arising out of the work by the contractor, any subcontractor, material supplier or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including, but not limited to, any such claims, suits, damages, losses and expenses attributable to the injury to or destruction of property, including the loss of use resulting there from; regardless of whether or not it is caused in part by a party indemnified hereunder

(West NY/the Church agreement, § 3.18.1).

The Church defendants argue that they need not prove negligence against West NY in order to trigger this provision. The Church defendants also argue that West NY owes common-law indemnification to the Church, the Archdiocese and ABC.

The Church defendants fail to make a prima facie showing of the Church's entitlement to summary judgment for contractual indemnification against West NY, as there is still a question of fact as to whether the accident was caused by the Church's own negligence (*see Kelly v Glass House Dev., LLC*, 114 AD3d 623 [1st Dept 2014]). While the indemnification provision states that it is applicable even when the indemnities are partially negligent, it cannot be applied if the Church's negligence is wholly responsible for the accident (*see General Obligations Law § 5-322.1 [1]; Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]). As that remains a question of fact, the Church's application for summary judgment as to contractual indemnification is premature.

The question of fact as to the Church's negligence is also sufficient to preclude summary judgment as to common law indemnification (*see generally McCarthy v Turner*

Constr., Inc., 17 NY3d 369, 375 [2011]). Thus, so much of the Church defendants' motion as seeks indemnification is denied.

Breach of Contract For Failure to Procure Insurance

The contract between the Church and West NY provided that West NY was to procure primary insurance with a \$2 million limit and excess insurance with a \$5 million limit. Under the contract, the Church, the Archdiocese, and ABC were to be named as additional insureds. West NY procured a primary policy with RLI Insurance (RLI) with a \$1 million limit on which the Church, the Archdiocese and ABC were named as additional insureds. It also procured an excess policy with Everest National Insurance Company (Everest) with a limit of \$10 million, but Everest has not acknowledged that the Church, the Archdiocese, and ABC are additional insureds under that policy. Thus, the Church defendants argue that West NY has breached the agreement by failing to procure a \$2 million primary policy and by failing to name the Church, the Archdiocese and ABC as additional insureds under the excess policy.

The Church defendants have brought a declaratory judgment action against Everest to determine the rights of the Church, ABC, and the Archdiocese under the Everest policy. While it is clear that West NY breached the agreement with the Church by procuring a primary policy in half the amount required under the contract, the full extent of West NY's breach will not be clear until the declaratory judgment action is resolved. At that time, the Court will be better able to evaluate the Church defendants' breach of contract claims against West NY. Thus, the branch of the Church defendants' motion that seeks summary judgment on the breach of contract claim is denied as

premature.

Finally, although not raised or addressed on these motions for summary judgment, the court notes that the complaint does not contain discrete survival and wrongful death causes of action. Instead, it pleads only the underlying theories of liability. In view of the facts that (1) the administrator of decedent's estate commenced this action, and (2) plaintiffs' bill of particulars contains allegations of facts and description of damages indicative of claims ordinarily brought on behalf of the estate and distributees, defendants were sufficiently apprised that this action is asserted under Estates, Powers and Trusts Law (EPTL) §§ 11-3.1 *et seq.* and 5-4.1 *et seq.* Therefore, plaintiffs shall have leave to amend the complaint accordingly within 30 days from the date of this order.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant/second third-party plaintiff Old Structures Engineering, PC for summary judgment dismissing all claims against it (motion Seq. No. 003) is granted; and it is further

ORDERED that the motion for summary judgment of defendant/third-party plaintiff Archdiocese of New York, defendant/third-party plaintiff Archdiocesan Building Commission, defendant Church of St. Paul the Apostle Church Finance Council, and defendant/third-party plaintiff Church of St. Paul the Apostle (motion seq. No. 004) is resolved as follows:

- All claims and cross-claims are dismissed as against defendant/third-party plaintiff Archdiocese of New York, defendant/third-party plaintiff Archdiocesan Building Commission, and defendant Church of St. Paul the Apostle Church Finance Council;
- Plaintiff's claims under Labor Law §§ 241 (1) through (5) are dismissed;
- The branch of the motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claims against defendant/third-party plaintiff Church of St. Paul the Apostle is denied;
- The branch of the motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim as against defendant/third-party plaintiff Church of St. Paul the Apostle is denied;
- The branch of the motion seeking dismissal of plaintiff's claims for gross negligence, punitive damages, breach of warranties, and spoliation as against defendant/third-party plaintiff Church of St. Paul the Apostle is granted;
- The branch of the motion seeking summary judgment as to the indemnity and breach of contract claims of the Church of St. Paul the Apostle against third-party defendant West New York Restoration of Ct, Inc. is denied without prejudice; and it is further

ORDERED that the Clerk of Court shall sever and dismiss the above-captioned matter, together with all counterclaims, cross-claims and third-party claims, if any, by and against defendants Old Structures Engineering, PC., Archdiocese of New York,

Archdiocesan Building Commission and St. Paul the Apostle Church Finance Council,
with costs and disbursements to said defendants as taxed by the Clerk of the Court, and
the remainder of the action shall continue, and the Clerk of Court shall amend the caption
accordingly; and it is further

ORDERED that plaintiff is granted summary judgment as to liability under Labor
Law § 241 (6) against defendant/third-party plaintiff Church of St. Paul the Apostle.

Dated: July 24, 2015

ENTER:

EM

Hon. Ellen M. Coin, A.J.S.C.