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SHORT FORM ORDER

INDEX No. 11-4772
CAL. No. 14-01339OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

MOTION DATE 11-19-14 (#003)
MOTION DATE 1-7-15 (#004)
MOTION DATE 2-25-15 (#005)
ADJ. DATE 3-11-15
Mot. Seq. # 003 - MotD
004 - MotD
005 - XMotD

JOSE CARLOS CARDENAS,

Plaintiff,

- against -

BEN KRUPINSKI GENERAL CONTRACTOR, INC., and BONNIE KRUPINSKI,

Defendants.

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New York, New York 10004

BEN KRUPINSKI GENERAL CONTRACTOR, INC.,

Third-Party Plaintiff,

- against -

HAMPTON CONTRACTING, INC.,

Third-Party Defendant.

CUOMO, LLC
Attorney for Defendant Bonnie Krupinski
9 East 38th Street
New York, New York 10016

CARROLL, MCNULTY & KULL, LLC
Attorney for Third-Party Defendant Hampton Contracting
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New York, New York 10022

Upon the following papers numbered 1 to 51 read on these motions for leave to amend the pleadings and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16, 17 - 30 ; Notice of Cross Motion and supporting papers 31 - 35 ; Answering Affidavits and supporting papers 36 -38; 39 - 43; 44 - 45 ; Replying Affidavits and supporting papers 46 - 47; 48 - 49; 50 - 51; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of plaintiff's motion for an order amending the caption to reflect his correct name, Juan Carlos Cardenas, is granted; and it is

ORDERED that the amended pleadings shall be deemed served upon service of a copy of this order with notice of its entry on defendants; and it is

ORDERED that the branch of plaintiff's motion for partial summary judgment in his favor on his Labor Law §240(1) claim is denied; and it is

ORDERED that the motion by defendant/third-party plaintiff Ben Krupinski General Contractor, Inc. for, inter alia, summary judgment dismissing plaintiff's common law and Labor Law §§241(6) and 200 claims is granted to extent indicated herein, and is otherwise denied; and it is

ORDERED that the cross motion by third-party defendant Hampton Contractor, Inc. for summary judgment dismissing the third-party complaint against it is granted to extent indicated herein, and is otherwise denied.

Plaintiff Juan Cardenas commenced this action to recover damages for personal injuries he allegedly sustained on February 8, 2011 while working on the construction of a home owned by defendant Bonnie Krupinski. Plaintiff allegedly was injured when a scaffold on which he was standing collapsed, causing him to fall to the ground. At the time of the accident, plaintiff was an employee of third-party defendant Hampton Contractor, Inc. (hereinafter "HCI"), a subcontractor hired to perform framing services. Defendant/third-party plaintiff Ben Krupinski General Contractor, Inc. ("KGC"), was the general contractor for the construction project. By his complaint, plaintiff alleges causes of action based upon the common law and Labor Law §§ 200, 240 (1), and 241(6). Defendants joined issue, asserting general denials and cross claims for breach of contract, contribution and indemnification. Thereafter, KGC commenced a third-party action against HCI. HCI joined the third-party action and asserted counterclaims against KGC. On July 28, 2014, the parties executed a stipulation discontinuing the action against Bonnie Krupinski. The action was continued against KGC, and the note of issue was filed on August 11, 2014.

Plaintiff now moves, pursuant to CPLR 3025, for an order permitting the amendment of the caption to reflect his correct name, Juan Carlos Cardenas. Plaintiff asserts that the inclusion of the incorrect name in the summons and complaint was a ministerial error, and requests, should the motion be granted, that the amended caption be deemed served on all parties. Plaintiff also moves for partial summary judgment on his Labor Law §240(1) claim, arguing, among other things, that the collapse of the subject scaffold is prima facie proof of KGC's liability under the statute. KGC opposes the motion on the basis a triable issue exists as to whether plaintiff's refusal to follow his employer's instruction that he utilize available pipe scaffolding while working on the project was the proximate cause of his injuries. By way of a separate motion, KGC moves for summary judgment dismissing plaintiff's claims under the common law and Labor Law §§241(6) and 200. KGC also seeks conditional summary judgment on its third-party claims over and against HCI for breach of contract and contractual indemnification. KGC argues that the subcontractor agreement entered into by the parties during 2009 applied to all framing jobs HCI performed on KGC's projects, that the agreement required HCI to indemnify and insure KGC against all claims arising from work performed during such projects, and that the indemnification requirement was not contingent upon a showing that the HCI was at fault for the happening of the accident.

Plaintiff only opposes the branch of KGC's motion seeking dismissal of the Labor Law §241(6) claim, asserting his complaint has alleged specific and applicable violations of the industrial code. HCI opposes KGC's motion and cross-moves for summary judgment dismissing the third-party complaint on the ground the contribution and common law indemnification claims against it are barred by section 11 of the Workers' Compensation Law. HCI also argues that the proposal by which it agreed to perform work on the project in question did not require it to either indemnify or insure KGC, and that the general subcontractor agreement it previously entered with KGC expired approximately five months prior to plaintiff's accident.

KGC concedes that its third-party claims for common law indemnification and contribution are inactionable, where, as here, plaintiff did not suffer a grave injury. However, KGC opposes the branch of the cross motion seeking dismissal of the contractual indemnification claim on the basis the subcontractor agreement entered by the parties during 2009 applied to all framing jobs HCI performed on KGC's projects, that the agreement did not have an expiry date, and that it unambiguously required HCI to indemnify and insure KGC against any claims for damages, expenses, or legal fees arising out of the performance of the work. KGC also opposes the branch of the cross motion for dismissal of the breach of contract claim, asserting that a triable issue exists as to whether HCI, whose insurer denied KGC's tender for additional insured coverage, failed to add KGC as an additional insured under its insurance policy.

Initially, the Court grants the unopposed branch of plaintiffs' motion seeking an order permitting the amendment of the caption to reflect his correct name and deem the corrected caption served on all defendants. Generally, leave to amend pleadings should be freely granted absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]; ***Aurora Loan Servs., LLC v Thomas***, 70 AD3d 986, 897 NYS2d 140 [2d Dept 2010]).

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 497 NYS2d 557, 404 NE2d 718 [1980]).

Labor Law §240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work performed (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240(1) requires that

safety devices, such as scaffolds, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Blake v Neighborhood Hous. Serv. of N.Y. City***, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]).

Nevertheless, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon . . . the failure to use, or the inadequacy of, a safety device of the kind enumerated [in the statute]" (***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). And while contributory negligence on the part of the worker is not a defense to a Labor Law §240(1) claim where none or inadequate safety devices are provided (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*), liability does not attach where a plaintiff's conduct is the sole proximate cause of his or her own injuries, such as where adequate safety devices are available at the worksite, but the worker for no good reason either does not use or misuses them (*see* ***Gallagher v New York Post***, 14 NY3d 83, 896 NYS2d 732 [2010]; ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; ***Montgomery v Fed. Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]).

Here, plaintiff failed to establish his prima facie entitlement to summary judgment on his Labor Law §240 (1) claim by eliminating triable issues from case (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Although plaintiff testified that the scaffold in question failed to fulfill its safety function when it unexpectedly collapsed, his own submissions, namely the deposition transcript of HCI's president, Thomas Simone, raise a significant triable issue as to whether plaintiff refused to utilize available pipe scaffolding, and instead improvised by erecting the makeshift wooden scaffold on which he was working at the time of the accident (*see* ***Silvia v Bow Tie Partners, LLC***, 77 AD3d 1143, 909 NYS2d 202 [2d Dept 2010]; ***Cantineri v Carrere***, 60 AD3d 1331, 875 NYS2d 417 [4th Dept 2009]; *see also* ***Bascombe v West 44th St. Hotel, LLC***, 124 AD3d 812, 2 NYS3d 569 [2d Dept 2015]). Significantly, Simone testified that he personally instructed all of HCI's employees, including plaintiff, that they were expected to utilize the pipe scaffolding provided by KGC on the worksite, and that he specifically instructed them to ensure that the scaffold was "solid and level" before any work was performed on top of them. Simone further testified that the pipe scaffolding was readily available on the day of the accident, and that he observed HCI's employees using pipe scaffolds prior to the date of the accident. Simone testified that when he inspected the area where the accident occurred, he observed the poorly made wooden scaffold that had collapsed, and that his foreman informed him that plaintiff chose to build the wooden scaffold because he was too lazy to use the pipe scaffolding.

Turning to the motion by KGC for, inter alia, dismissal of plaintiff's claims under Labor Law §§241(6) and 200, the unopposed branch of KGC's motion seeking dismissal of the Labor law §200 claim is granted, as it is undisputed that KGC never possessed the authority to control or supervise the method or

manner of plaintiff's work and never provided him the alleged defective equipment (*see* ***Bennett v Hucke***, 131 AD3d 993, 16 NYS3d 261 [2d Dept 2015]; ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The court also grants the branch of KGC's motion seeking dismissal of plaintiff's claims under Labor Law §241(6). To recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]), and the rule or regulation alleged to have been breached must be specific and applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*). Here, the violations alleged by plaintiff are predicated on either inactionable general safety standards or inapplicable sections of the industrial code. In particular, 12 NYCRR 23-1.5 (setting forth an employer's general responsibilities) and 12 NYCRR 23.5.1(f) (setting forth the general requirement that scaffolds be kept in good repair) merely set forth general safety standards, which are inactionable (*see* ***Mahoney v Madeira Assoc.***, 32 AD3d 1303, 822 NYS2d 190 [4th Dept 2006]; ***Moutray v Baron***, 244 AD2d 618, 663 NYS2d 926 [3d Dept 1997]). 12 NYCRR 23-1.7(g) and 12 NYCRR 23.1.16, which regulate, respectively, contaminated or oxygen deprived areas of the worksite and the condition of available safety belts and lifelines, are inapplicable to the facts of this case (*see* ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Dzieran v 1800 Boston Rd., LLC***, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]; ***Osorio v Kenart Realty, Inc.***, 35 AD3d 561, 826 NYS2d 645 [2d Dept 2006]). 12 NYCRR 23-1.11 also is inapplicable, as plaintiff's own testimony indicates that he did not observe any defects in the lumber and nail fastening used in the construction of the subject scaffold (*see* ***Purcell v Metlife Inc.***, 108 AD3d 431, 969 NYS2d 43 [1st Dept 2013]).

As to the branch of KGC's motion for summary judgment on its third-party claims against HCI for breach of contract and contractual indemnification, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 491, 549 NYS2d 365 [1989]). Moreover, where, as here, the existence and the terms of the parties' agreement are disputed, "it is necessary to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (***Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.***, 41 NY2d 397, 393 NYS2d 350 [1977]; *see also* ***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 367, 795 NYS2d 491 [2005]). While it is the responsibility of the court to interpret written instruments, where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises (***Flores v Lower E. Side Serv. Ctr., Inc.***, *supra*; ***Murphy v Eagle Scaffolding, Inc.***, 129 AD3d 799, 11 NYS3d 218 [2d Dept 2015]; ***Tullino v Pyramid Cos.***, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; ***Auchampaugh v Syracuse Univ.***, 67 AD3d 1164, 889 NYS2d 706 [3d Dept 2009]).

The parties, which have worked on multiple projects together, dispute whether the terms of an allegedly expired general subcontractor agreement or a proposal estimate submitted by the subcontractor governs HCI's duties to either insure or indemnify KGC. The general subcontractor agreement, which is dated September 24, 2009, contain provisions which require HCI to provide KGC with additional insured coverage and indemnify it against any "claims, damages . . .[or] legal expenses, arising out of or resulting from performance of sub-contracted work to the extent caused in whole or in part by the contractor or anyone directly or indirectly employed by [it]." However, the agreement, which permits either party to

terminate upon 30 days notice, also contains a provision that states it "will be renewed and updated on a yearly basis." The proposal estimate HCI provided to KGC is dated January 3, 2011. It sets forth an estimate and what appears to be an acknowledgment of a partial payment for services already rendered. The proposal does not, however, contain any other term or language requiring indemnification, additional insured coverage, or seeking to incorporate the 2009 general subcontractor agreement.

In support of its contention that the 2009 subcontractor agreement was applicable to HCI's work on the subject premises, KGC submitted the deposition transcript of its president who testified that, consistent with the parties course of dealings, the 2009 "master" agreement related to any and all projects HCI performed on behalf of KGC, including the project in question. In contrast, HCI's president testified that the proposal estimate was the only agreement which covered its work on the subject premises, and that he believed that the terms of the 2009 agreement expired one year from the date it was executed. HCI's president further testified that he did not know whether the terms of the 2009 agreement was incorporated into the proposal estimate, and that at no time after 2009 did KGC notify HCI that it was renewing the terms of the 2009 agreement.

Here, given the existence of the parties' dispute regarding the applicability of the 2009 general subcontractor agreement, any finding as to whether HCI is contractually required to insure or indemnify KGC should be left to the trier of fact (*see* ***Flores v Lower E. Side Serv. Ctr., Inc.***, *supra*; ***Murphy v Eagle Scaffolding, Inc.***, *supra*; ***Tullino v Pyramid Cos.***, *supra*; ***Auchampaugh v Syracuse Univ.***, *supra*). Accordingly, the branch of KGC's motion for conditional summary judgment on its third-party claims for breach of contract and indemnification over and against HCI is denied.

Based on the foregoing, the branch of HCI's cross motion for summary judgment dismissing KGC's third-party claims for breach on contract and contractual indemnification against it is denied. However, as KGC concedes that plaintiff did not suffer a grave injury and its third-party claims for common law indemnification and contribution are inactionable, the court grants the unopposed branch of HCI's motion seeking dismissal of those claims (*see* ***Masiello v 21 E. 79th St. Corp.***, 126 AD3d 596, 7 NYS3d 35 [1st Dept 2015]; ***Lue v Finkelstein & Partners, LLP***, 94 AD3d 1386, 943 NYS2d 636 [3d Dept 2012]).

Dated: NOVEMBER 9, 2015

A.J.S.C.
JOHN H. ROUSE

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION