Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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JOHN SULLIVAN,
Plaintiff(s),

- against -

NEW YORK ATHLETIC CLUB OF THE CITY OF NEW YORK and TALISEN CONSTRUCTION CORPORATION,
Defendants.
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NEW YORK ATHLETIC CLUB OF THE CITY OF NEW YORK,
Third-Party Plaintiff(s),

- against -

PREMIER WOODCRAFT, LTD.,

Third-Party Defendants.
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Index No.: 702984/12
Motion Date: 9/10/15
Motion Cal. No.: 154
Motion Seq. No: 4

The following papers numbered 1 - 27 read on this motion by third-party defendant, Premier Woodcraft, Ltd. ("Premier"), and cross-motions by defendant, Talisen Construction Corporation ("Talisen"), and by plaintiff, all seeking summary judgment, pursuant to CPLR § 3212.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Service.....	5 - 6
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Notice of Cross-Motion-Affirmation-Service.....	10 - 12
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Upon the foregoing papers, it is **ORDERED** that the motion and cross-motions are determined as follows:

Plaintiff, employed by third-party defendant, Premier, allegedly

sustained serious personal injuries while working as a carpenter at a renovation project in the lobby bathroom of the New York Athletic Club on July 11, 2012. Defendant, New York Athletic Club of the City of New York ("NYAC"), was the owner of the property, and Talisen was the general contractor, which hired Premier, a subcontractor. Plaintiff and another worker were carrying a steel beam, which plaintiff claimed weighed approximately three hundred pounds, down a six-step, interior stairway, when he "felt (his) knee pop" and fell to the ground. Plaintiff does not allege that the condition of the stairs caused him to fall.

Plaintiff's complaint claims violations of Labor Law §§ 240, 241, 200 and common law negligence. Premier moves for summary judgment dismissing the Labor Law §§ 240 and 241 claims in plaintiff's complaint against the direct defendants, and dismissing the contribution, contractual indemnity, common law indemnity and failure to procure insurance claims in the third-party complaint, pursuant to CPLR § 3212. Talisen cross-moves for summary judgment against Premier on its contractual indemnification cross-claims. Plaintiff seeks summary judgment against the direct defendants solely on his Labor Law § 240(1) cause of action. In his cross-motion, plaintiff consents to the dismissal of his cause of action brought under Labor Law § 241(6).

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Stukas v Streiter*, 83 AD3d 18 [2011]; *Dykeman v Heht*, 52 AD3d 767 [2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014], citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; *Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a *prima facie* demonstration 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 (*Zuckerman v City of*

New York, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

Labor Law § 240 (1) provides, in pertinent part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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" (*see Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]). It protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" *(Ross v Curtis Palmer Hydro-Electric Company,* 81 NY2d 494, 501 [1993]).

This statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658 [2014]; *Misseritti v Mark IV Construction Co, Inc.*, 86 NY2d 487 [1995]; *Zamora v 42 Carmine St. Associates, LLC,* 131 AD3d 531 [2015]), and the duty imposed upon contractors and owners pursuant to it is non-delegable (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). Liability under the statute is imposed where there is a failure to utilize a safety device enumerated in the statute, and "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential " (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]).

In the case at bar, plaintiff and Premier have each failed to establish *prima facie* entitlement to summary judgment based upon Labor Law § 240 (1). Plaintiff contends that the origin of his accident was elevation-related; that the height differential of the stairs was not *de minimis*; and that one or more of the statute's enumerated safety devices would have prevented his injuries, but has failed to manifest the absence of any material issues of fact with respect to these assertions. Despite Premier's declaration that the inner staircase where the subject accident occurred "was a normal appurtenance to the building and was not designated as a safety device to protect ... plaintiff from elevation-related risks" (*Pope v Safety & Quality Plus,*

Inc., 74 AD3d 1040, 1041 [2010]), and plaintiff's concession that the condition of the stairs was not a cause of his accident, defendant has failed to demonstrate conclusively that "plaintiff's injuries did not result from the type of elevation related hazard to which the statute applies" (*Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2012]), or that plaintiff's accident did not result from a failure to implement one of the safety devices listed in the statute.

Based upon the evidence presented, genuine issues of material fact exist with regard to whether an elevation-related risk or hazard was present at the accident site; whether plaintiff's injuries resulted "from harm directly flowing from the application of the force of gravity" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604); and whether there was a causal nexus between plaintiff's injury and a lack of a safety device prescribed by Labor Law § 240 (1) (*see Wilinski v 334 East 92nd Housing Development Fund*, 18 NY3d 1; *Cardenas v BBM Const. Corp.*, 133 AD3d 626 [2015]). The disparities in the opinion evidence presented by the parties' experts present triable issues of fact and credibility as to whether or not this statute applies (*see Hernandez v Ten Ten Co.* 31 AD3d 333 [1 Dept. 2006]), and are not so minor or immaterial as to warrant the granting of summary judgment, on this ground, to either movant herein (*see Figueroa v Mishko*, 242 AD2d 521 [1997]).

The branch of Premier's motion seeking dismissal of the third-party claims for common law indemnity and contribution is granted. Workers Compensation Law (WCL) § 11 prohibits third-party common law indemnification or contribution claims against employers, unless the employee has sustained a "grave injury" or the claim is based upon a written contract provision, entered into prior to the accident, by which the employer had expressly consented to contribution to, or indemnification of, the claimant (*see American Ins. Co. v Schnall*, 2015 N.Y. Slip Op.09058 [2015]; *Henderson v Gyrodyne Co, of Am., Inc.*, 123 AD3d 1091 [2014]). Plaintiff has failed to establish that he sustained a "grave injury," as defined in the statute.

Premier further moves for summary judgment dismissing the third-party claims for contractual indemnification and for failure to procure insurance. Talisen cross moves for summary judgment on its contractual indemnification claim against Premier. "The right to contractual indemnification depends upon the specific language of the contract" (*Dos Santos v Power Auth. of State of N. Y.*, 85 AD3d 718, 722 [2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Alayev v Juster Assoc., LLC*, 122 AD3d 886, 887 [2014]; *see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]; *Lawson v R & L Carriers, Inc.*, 126 AD3d 944 [2015]).

To determine whether the written contract in the case at bar

satisfies the requirements of WCL 11, it must first be determined that the parties entered into a written contract containing an indemnity provision which applied to the site or job where the subject accident occurred and which was in effect prior to the accident date, and, second, a determination must be made as to whether such provision was sufficiently particular to satisfy WCL 11 (*see Rodriguez v N & S Bldg. Contrs., Inc.*, 5 NY3d 427 [2005]; *Tullino v Pyramid Companies*, 78 AD3d 1041 [2010]). The agreement herein satisfied the statute's requirement of a "written contract," as it was entered into prior to the accident and was sufficiently particular as it encompassed "an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered" (*Rodriguez v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433).

Premier's contention that the indemnity agreement violated General Obligations Law (GOL) §5-322.1 is without merit. The initial seven words of said agreement, *i.e.*, "To the fullest extent permitted by law", removes this matter from a violation of GOL 5-322.1, in that it does not require the subcontractor to fully indemnify the general contractor for the general contractor's own negligence, but creates a partial indemnification obligation on behalf of the subcontractor (see *Brooks v Judlau Contr. Inc.*, 11 NY3d 204 [2008]; *Guryev v Tomchinsky*, 114 AD3d 723 [2014]). Further, the agreement's express language, "except those claims ... caused by the sole negligence of any indemnified party," disproves Premier's contention that GOL 5-322.1 has been violated. Consequently, the subject indemnification agreement herein is enforceable.

The party seeking contractual indemnification "must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Mohan v Atlantic Court, LLC*, 2015 N.Y. Slip Op. 09658 [2015], quoting *Cava Constr. Co, Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; *Bleich v Metropolitan Management, LLC*, 132 AD3d 933 [2015]). In the case at bar, Talisen has tendered sufficient evidence to demonstrate, *prima facie*, its lack of control over the work site, or any negligence on its part. Premier has failed to raise a triable issue of fact in rebuttal. However, Talisen has failed to demonstrate that this action arose from an act, omission or negligence on the part of Premier (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204; *Lawson v R & L Carriers, Inc.*, 126 AD3d 944), or that Talisen lacked the authority, under its contract with Premier, to supervise and control the renovation work (*see Gikas v 42-51 Hunter Street, LLC*, 2015 N.Y. Slip Op. 09403 [2015]), thereby failing to establish its *prima facie* entitlement to judgment as a matter of law, and warranting the denial of this branch of its motion as being premature (*see Sawicki v GameStop Corp.*, 106 AD3d 979 [2013]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]). For the same reasons, the branch of Premier's motion seeking to dismiss the third-party claims for contractual indemnification and failure to procure insurance are denied as premature.

As Premier is not an insurer, its duty to defend is no broader than its duty to indemnify (*see Sawicki v GameStop Corp.*, 106 AD3d 979; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807). As Talisen is not entitled to indemnification at this juncture, it is, likewise, not entitled to a defense, and the branch of its cross-motion seeking same is denied.

All remaining contentions and arguments of the parties are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the branch of the motion by third-party defendant, Premier Woodcraft, Ltd., for summary judgment dismissing the third-party claims for common law indemnity and for contribution are granted. The branch of Premier's motion seeking dismissal of plaintiff's Labor Law § 240 claim, and of the third-party claims for contractual indemnification and for failure to procure insurance, are denied. The branch of Premier's motion seeking dismissal of plaintiff's Labor Law § 241 claim is denied as moot. The cross-motion by defendant, Talisen Construction Corporation, seeking summary judgment against Premier on its claim for contractual indemnity, and for legal fees, costs and expenses, is denied. Plaintiff's cross-motion for summary judgment against defendants on his Labor Law § 240 claim is denied.

Dated: January 8, 2016

JANICE A. TAYLOR, J.S.C.

FILED
JAN 11 2016
COUNTY CLERK
QUEENS COUNTY