O'Toole v Ellis
2017 NY Slip Op 31835(U)
August 28, 2017
Supreme Court, New York County
Docket Number: 159515/14
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MARIANNE T. O'TOOLE

INDEX NO. 159515/14

MOT. DATE

- v -

MOT. SEQ. NO. 004

CB RICHARD ELLIS, CBRE, INC. et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 76-112
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 132, 134-142
Replying Affidavits	NYSCEF DOC No(s). 144-147
2/8/17 Letter	NYSCEF DOC No(s). 151-152

This is a personal injury action. Defendants/third-party plaintiffs CB Richard Ellis CBRE, Inc. ("CBRE"), Pavarini Construction Co. ("Pavarini") and Alliance Bernstein, L.P. ("Alliance" and collectively "defendants") move for summary judgment dismissing plaintiff's complaint and all cross-claims as well as for contractual indemnification against the third-party defendant Techno Acoustics Holdings, LLC ("Techno"). Plaintiff opposes the motion and cross-moves for summary judgment on the issue of defendants' liability with respect to the Labor Law § 240 claim. Techno joins the motion-in-chief to the extent of dismissing plaintiff's complaint and otherwise opposes the motion. Issue has been joined and note of issue was filed 9/21/16. According to the preliminary conference order dated 4/23/15, the Honorable Joan Kenney ordered that motions for summary judgment must be made on or before 30 days after note of issue was filed.

The motion-in-chief was filed October 20, 2016, and is therefore timely. Plaintiff's cross-motion, however, was filed January 4, 2017, well after the deadline set forth in Justice Kenney's preliminary conference order. The parties' time to file motions for summary judgment was not extended by order of court. Plaintiff has not explained the late filing and therefore has not demonstrated a reasonable excuse for the delay. The court may consider an untimely cross-motion for summary judgment in the absence of good cause where a timely motion for summary judgment was made seeking "nearly identical" relief (*Filannino v. Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]). The reasoning behind this rule is that the court may search the record and grant summary judgment to any party without the necessity of a cross-motion. (*Id.*) The relief sought by plaintiff is related to the relief sought by the defendants and therefore the cross-motion will be considered on the merits.

Preliminarily, the court notes a letter dated February 8, 2017 from defendants' counsel regarding plaintiff's Reply to the Opposition of the Pavarini defendants and in further support of plaintiff's cross-motion (NYSCEF Doc No. 149). Although the letter was addressed to Justice Kenney, this case was

Dated: 8/28/17

HON. LYNN R. KOTLER, 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

subsequently reassigned to this court without the letter having been addressed by the court. The court will now address defendants' letter. Defendants contend that plaintiff's papers amount to a "second opposition to the motion for summary judgment" and therefore should be disregarded by the court. The court agrees. These papers were not permitted to be filed as per the CPLR and absent leave of court, their filing was procedurally improper. Therefore, these papers will not be considered by the court.

The court now turns to the motion-in-chief. At the outset, the court must address two procedural arguments: that plaintiff's complaint is time-barred and judicial estoppel. In this personal injury action, plaintiff-beneficiary Richard Giorgio claims he fell from a scaffold on September 9, 2010. On October 20, 2011, Giorgio filed a voluntary petition for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York, Case Number 11-37947. On July 24, 2013, Giorgio filed a complaint in his own name in the New York Supreme Court, Westchester County, entitled Richard Giorgio v. Gateway 1 Group, Inc. *et al*, Index Number 61068/13 (the "prior action"). That complaint was later refiled in Putnam County after a motion to change venue.

On December 19, 2013, Marianne T. O'Toole, Esq., was appointed trustee ("Trustee") of plaintiff's bankruptcy estate. On May 5, 2014, Giorgio's counsel consented to dismissal of the prior action without prejudice on the record (a copy of the court transcript has been provided). On September 29, 2014, the Trustee filed the instant action on behalf of Giorgio's bankruptcy estate. Issue was joined December 23, 2014, wherein defendants did not assert an affirmative defense based upon the statute of limitations.

Defendants now argue that plaintiff's complaint is time-barred. While defendants did not allege an affirmative defense based upon the statute of limitations in their answer, the court will treat the motion as one seeking leave to assert such an affirmative defense, insofar as the notice of motion makes it clear that defendants are seeking summary judgment on such ground and plaintiff does not argue that the motion is otherwise improper.

Ordinarily, a defense founded upon the statute of limitations is waived unless it is raised in an answer or pre-answer motion to dismiss (*Buckeye Retirement Co., LLC, LTD. v. Lee,* 41 AD3D 183 [1st Dept 2007]). However, leave to assert a "waived" defense should be permitted absent prejudice or surprise resulting from the delay (*Armstrong v. Peat, Marwick, Mitchell & Co.*, 150 AD2d 189 [1st Dept 1989]). Here, the court does not find that plaintiff will be "significantly prejudiced" (*cf. Cseh v. New York City Transit Authority*, 240 AD2d 270 [1st Dept 1997]). Indeed, plaintiff does not even raise an argument on such grounds.

The court now turns to the issue of whether plaintiff's claims are timely. There is no dispute that plaintiff's personal injury claim is governed by a three-year statute of limitations. Defendants contend that the complaint is untimely because it was commenced outside the three-year period after plaintiff's accident. Plaintiff, however, argues that the statute of limitations was tolled by CPLR § 205[a].

CPLR § 205[a] provides as follows:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Upon filing a voluntary bankruptcy petition, the debtor's title to causes of action which arose before and during the bankruptcy proceedings vests in the Trustee (11 USC 541[a][1] and [7]). Therefore, plaintiff did not have legal capacity to sue in his own name when he commenced the prior action. The Second Department has held that dismissal of an action due to a plaintiff's lack of capacity to sue be-

cause the causes of action vested in the bankruptcy trustee did indeed afford the trustee the benefit of the six-month toll contained in CPLR § 205[a] to commence a subsequent action in a representative capacity (see i.e. *Pinto v. Ancona*, 262 AD2d 472 [2d Dept 1999]; *Genova v. Madani*, 283 AD2d 860 [3d Dept 2001] ["the broad and liberal purpose of CPLR 205(a) is furthered by permitting the trustee in bankruptcy to pursue the action that was originally erroneously commenced in the name of the bankrupts" [internal citations omitted]; see also *Rivera v. Markowitz*, 71 AD3d 449 [1st Dept 2010] [citing *Pinto* and *Genova* with approval]). Defendants' argument in reply, that the prior action was a "nullity" and therefore cannot possibly trigger a CPLR § 205[a] toll, fails for the reasons that follow.

This court is bound by precedent. Implicit in the *Pinto* Court's holding is a finding that CPLR § 205[a] does indeed apply to an action that is dismissed because a plaintiff lacked standing to sue since his claim vested in a bankruptcy estate. This is the exact same situation that is present here, and while defendants may present different arguments then were advanced in *Pinto*, this court is nonetheless bound by precedent, which is that CPLR § 205[a] may toll plaintiff's claim. To the extent that defendants rely upon *Sotille v. Mullin* (917 NYS2d 812 [Sup Ct, Nass Co 2011]), that decision is from a court of co-ordinate jurisdiction and is without precedential value.

The cases which defendants rely upon, such as *Faison v. Lewis* (25 NY3d 220 [2015]) and *Goldberg v. Camp Mikan-Recro* (42 NY2d 1029 [1977]), are unavailing. These cases are not on point as they generally deal with standing issues rather than the application of CPLR § 205[a] to the unique case when a bankruptcy filer lacks standing because his or her claims vested in the estate. The court rejects defendants' argument that the real party in interest changed between the prior action and the instant one by the trustee. Both cases arise from the same operative set of claims and in both cases, the plaintiff is prosecuting the claims of the same injured person. Otherwise, defendants' argument that the prior action cannot be considered "timely commenced" within the meaning of CPLR § 205[a] is rejected as without merit or legal support.

Accordingly, defendants' argument that plaintiff's claims are time-barred is rejected.

Defendants next argue that plaintiff is judicially estopped from prosecuting claims not disclosed in a bankruptcy proceeding and is therefore limited to recovery in the amount of unsecured claims in the bankruptcy estate. This argument fails, since, as plaintiff's counsel points out, the Bankruptcy case is now reopened and includes the personal injury case, otherwise the Trustee would not be prosecuting this action.

The court now turns to the parties' substantive arguments. This motion has been made extraordinary difficult, in part, because the parties failed to provide an index for the deposition transcripts. Plaintiff's deposition is 571 pages long, and not providing an index for such a transcript is a complete and utter waste of the court's resources. At the least, defendants did annex complete copies of the transcripts it relied on, which is more than can be said for plaintiff. In any event, the court has attempted to parse the record as follows.

The following facts are [redacted] not in dispute. Plaintiff was employed by Techno working as a taper at the premises located at 1 North Lexington Avenue, White Plains, New York (the "premises"). A taper puts compound between two pieces of sheetrock, covers the seam with tape and thereafter finishes and sands the seam. Plaintiff's supervisor was Kevin Hayes, Techno's foreman. Hayes instructed plaintiff where to go and what to do. Hayes also provided plaintiff with his tools and equipment. Hayes reported to Kenny Popp, Techno's supervisor.

On September 9, 2010, plaintiff was on the tenth floor of the premises taping sheet rock in the elevator lobby when he claims that he fell from a scaffold. Plaintiff claims the scaffold was defective because it did not have wheel locks and/or had defective wheel locks. As a result, plaintiff sustained a double lumbar fusion, a complex tear within the posterior horn and body medial meniscus.

Plaintiff testified at his deposition that on the day of the accident, he was taping the ceiling and using a six-foot baker scaffold owned by Techno with four wheels that could be moved around. The baker

scaffold had an adjustable platform which could be raised and lowered between approximately two feet to six feet from the floor. After he finished taping the ceiling, plaintiff started working on the walls at a lower level, so plaintiff began using a "smaller rolling scaffold" from which he ultimately fell.

The rolling scaffold was four feet wide and two and a half feet deep. The rolling scaffold also had four wheels. Plaintiff claimed that two wheels were tied with wire, one wheel was locked and one wheel was not locked. About the wire around the two wheels, plaintiff claimed that it was used to hold pins in the tubing so the wheels wouldn't come out. Plaintiff first testified that he had never seen this particular scaffold before the day of his accident but later on during his deposition admitted that he used the rolling scaffold the day before and knew that wire was on two of the wheels and that three of the wheels did not work. Plaintiff further admitted that he did not notify anyone about the condition of the rolling scaffold or request a new one.

Immediately before his accident, plaintiff stated that he was standing on a step that was two feet above the floor, when the right side of the scaffold swung two feet to the left and plaintiff fell backwards, landing on the lobby floor. Plaintiff did not know what caused the scaffold to move.

Plaintiff did not receive any training regarding scaffold safety. Plaintiff admitted that Techno held safety meetings from time-to-time, but did not remember whether scaffold safety was discussed at those meetings. Plaintiff also testified that the rolling scaffold belonged to Techno and that a Techno employee removed the scaffold from the premises after his accident.

Pavarini, the general contractor for the project on the tenth floor, produced Liam Geoghegan for deposition. Geoghegan was the superintendent for Pavarini at the project. Geoghegan was responsible for coordinating the trades and ensuring the job was built to drawings. According to Geoghegan, Pavarini held weekly safety meetings about general safety. All subcontractors and their employees were required to attend these meetings. According to Geoghegan, Kenny Popp, Techno's superintendent, was required to provide all equipment and ensure that Techno's employees were using said equipment properly. Geoghegan further testified that he conducted inspections of the work site, and that if he had observed wire wrapped around the wheels of a scaffold, he would have said to the foreman "[t]ake it out of service." As to whether Geoghegan actually did take any scaffolds out of service at the premises, the answer is unknown since page 50 of Geoghegan's transcript provided by plaintiff is inexplicably missing.

Parties' arguments

In his complaint, plaintiff asserts claims for common-law negligence and violations of Labor Law §§ 200, 240, 241 and/or 241-a.

With respect to plaintiff's claims, defendants argue that plaintiff's claims against CB Richard Ellis and CBRE, Inc. must be dismissed because they were the real-estate broker for the premises and not the owner on the date of plaintiff's accident. Defendants further represent that CBRE was no longer the property manager for the premises after November 30, 2009.

The remaining defendants are Pavarini, the general contractor at the site, and Alliance, the lessee of the premises which hired Pavarini to perform the subject work. Defendants argue that plaintiff's common law negligence and Labor Law § 200 claims must be dismissed because the defendants did not supervise or control plaintiff's work. Defendants contend that the Labor Law § 240[1] claim must be dismissed because there were adequate safety devices, to wit, the baker scaffold, and that plaintiff chose to not use the baker scaffold. Finally, defendants argue that the Labor Law § 241[6] claim must be dismissed because the alleged violations of the Industrial Code are unavailing.

In turn, plaintiff contends that he is entitled to summary judgment on the Labor Law § 240[1] claim because the rolling scaffold was inadequate and plaintiff sustained an injury from the application of the force of gravity on his person. Plaintiff does not offer a substantive argument in opposition to plaintiff's motion with respect to the Labor Law § 241[6] claim. Finally, plaintiff argues that the Labor Law § 200

claim survives because notice of the defective/dangerous scaffold and the issue of defendant's control are triable questions of fact. Finally, plaintiff opposes the motion to dismiss the claims against CBRE and CB Richard Ellis because he claims defendants have not provided documentary evidence to support the claims made in the affidavits submitted in support of the motion.

In the third-party complaint, defendants assert two causes of action against Techno, contractual indemnification and breach of contract for failing to procure insurance. Defendants now seek summary judgment on the contractual indemnification claim only. Techno argues that the subject contract is not in admissible form.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 240[1]

Plaintiff's cross-motion for summary judgment on the issue of liability with respect to Labor Law § 241 claim must be granted. Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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."

Labor Law § 240 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "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 [1991].

Here, there is no dispute that plaintiff was provided with an inadequate scaffold for taping the ceiling and walls of the elevator lobby at the premises. There is no dispute that the subject scaffold had

wheels that were jerry-rigged to keep them in place and one of the other wheels did not lock at all. Therefore, plaintiff has established that an enumerated safety device failed to protect him from the dangers which Labor Law § 240(1) was designed to address. Further, defendants do not dispute how the accident occurred. The court rejects defendants' argument that plaintiff was the sole proximate cause of his accident because he used the rolling scaffold instead of the baker scaffold. Even if defendants could prove that plaintiff contributed to his accident, contributory negligence is not a defense to a *prima facie* showing of Section 240(1) liability (*Blake v. Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003]). In any event, there is no dispute that the rolling scaffold was also provided to plaintiff, and plaintiff established that it was reasonable and expected for him to use the rolling scaffold instead of the baker scaffold to reach lower areas of the walls in the elevator lobby at the premises.

In turn, the court finds that the defendants have failed to raise a material factual dispute as to their liability. Accordingly, plaintiff's cross motion for summary judgment on his Labor Law 240(1) claims as to the issue of liability is granted and defendants' motion for summary judgment on that claim is denied.

Labor Law § 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). According to his bill of particulars, plaintiff alleges the following violations: 12 NYCRR §§ 23-1.5, 23-1.5(a), 23-1.5(c)(1), (2) and (3), 23-1.7, 23-1.7(d), 23-1.7(e)(1) and (2), 23-1.16, 23-5.1, 23-5.1(a) – (h), and (j), 23-5.3, 23-5.3(e), (g) and (h).

12 NYCRR § 23-1.5 is too general to support a cause of action for violating Labor Law § 241[6] (*Kochman v. City of New York*, 110 AD3d 477 [1st Dept 2013]).

The subsections cited by plaintiff under 12 NYCRR § 23-1.7, entitled Protection from General Hazards, do not apply to the facts in this case. Section 23-1.7(d) concerns slipping hazards, and plaintiff does not claim that he slipped on the scaffold, but rather, that the scaffold shifted suddenly. Section 23-1.7(e) concerns tripping hazards in passageways and working areas. Plaintiff does not claim that he tripped.

12 NYCRR § 23-1.16 is entitled Safety belts, harnesses, tail lies and lifelines. This provision is inapplicable because plaintiff was not provided with a safety belt (see i.e. *Clavijo v. Universal Baptist Church*, 76 AD3d 990 [2d Dept 2010]).

12 NYCRR § 23-5.1 is entitled General provision for all scaffolds. The subsections plaintiff alleges were violated are either too general or inapplicable to the facts here, to wit: [1] 23-5.1(a) is general (see i.e. *Ayala v. 191-193 Avenue A Owner, LLC*, 2012 NY Slip Op 31775 [Sup Ct, Queens Co]); [2] 23-5.1(b) is inapplicable because plaintiff does not take issue with the ground upon which the scaffold was placed; [3] 23-5.1(c) is general (*Susko v. 337 Greenwich LLC,* 103 AD3d 434 [1st Dept 2013]); [4] 23-5.1(d) is inapplicable because plaintiff does not claim that the scaffold was overloaded or that it collapsed; [5] 23-5.1(e) is inapplicable since it concerns scaffold planking; [6] 23-5.1(f) is general (*Schiulaz v. Arnell Constr. Corp.*, 261 AD2d 247 [1st Dept 1999]; [7] 23-5.1(g) is inapplicable since plaintiff testified that the scaffold was made of metal, only; [8] 23-5.1(h) concerns erection and dismantling of scaf-

folds which is not at issue here; and [9] 23-5.1(j) applies to scaffolds with a platform higher than seven feet.

Finally, 12 NYCRR § 23-5.3 concerns stationary scaffolds and is inapplicable to the scaffold at issue here (cf. 12 NYCRR § 23-5.18).

Accordingly, defendants' motion for summary judgment dismissing the Labor Law § 241[6] claim is granted.

Labor Law § 200

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

However, where the dangerous or defective condition arises from the subcontractor's methods, and the owner exercised no supervisory control over the injury-producing work, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200 (*Comes v. New York State Elec. & Gas Corp.*, *supra*).

Here, defendants have met their burden by showing that: CBRE and CB Richard Ellis are not owners or general contractors and that Pavarini and Alliance did not supervise or control the manner in which plaintiff performed his work. Plaintiff testified that he received his instructions, tools and equipment from Hayes, Techno's foreman. Indeed, plaintiff never met another employee of Pavarini other than a laborer who cleaned up the premises.

Notice is not an issue here since plaintiff's injury arose from the methods and manner in which he performed the work which caused his injury. Indeed, a general contractor's exercise of general supervisory control for safety and the quality of work that is performed is insufficient to sustain liability under Section 200 (*Hughes v .Tishman Constr. Corp.*, 40 AD3d 305 [1st Dept 2006]; see also *Dalanna v. City of New York*, 308 AD2d 400 [1st Dept 2003] ["There is no evidence that defendant general contractor gave anything more than general instructions on what needed to be done, not how to do it."].

Accordingly, defendants motion dismissing the Labor Law § 200 and common law negligence claims is granted.

Contractual indemnification

The court now turns to defendants' motion for summary judgment on its third-party claim for contractual indemnification. Defendants argue that the indemnification provision contained in the subcontract between Pavarini and Techno was triggered even in the absence of negligence by Techno and cites *Brown v. Two Exchange Plaza Partners,* (76 NY2d 172 [1990]), claiming that the indemnification in that case is identical to the one here.

Techno, in opposition, raises a procedural argument that the motion must be denied because it is not supported by evidence in admissible form. Techno argues that the agreement annexed to the motion is unauthenticated and should therefore be rejected.

The agreement which have been annexed to the motion is entitled Subcontract #100174013 (the "subcontract"). It is on Pavarini's letterhead and is marked as Defendant's Exhibit "B". It is addressed to Techno and references job number 30100174, job name Alliance Bernstein 10th Floor Reno and lists the address as 1 North Lexington Ave, White Plains, NY. The subcontract further provides that Techno is "hereby authorized to proceed with all labor and materials to complete the Gypsum Board EA00001 work at the above noted project,..."

Techno's deposition witness, Richard J. Esteves, a Senior Estimator for Techno, was shown the subcontract at his deposition and identified it as the contract that Techno was working pursuant to at the premises. The court finds that this testimony is sufficient to authenticate the document, since Esteves has personal knowledge of the project and Techno's records. Therefore, the subcontract is in admissible form. In turn, Techno has failed to raise a triable issue of fact as to whether the subcontract was signed by Techno's Vice President, William Fox. Accordingly, Techno's

The agreement between Pavarini and Techno provides in pertinent part as follows:

> To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless Pavarini [] and Owner... from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor..., in connection with the performance of any Work by Subcontractor pursuant to this Purchase Order and/or a related Processed Order. Subcontractor will defend and hear all costs of defending any action or proceedings brought against [Pavarini] and/or Owner... arising in whole or in part out of any such acts, omission, breach of default.

Defendants have established that they are entitled to contractual indemnification from Techno. Plaintiff's claim arose from his performance of Techno's work. Indeed, Techno does not offer a substantive argument against enforcement of the indemnification claim. Accordingly, defendants' motion for summary judgment on its third-party claim for contractual indemnification is also granted.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion for summary judgment is granted to the following extent: [1] plaintiff's Labor Law §§ 200, 241[6] and common law negligence claims are severed and dismissed; and [3] Pavarini Construction Co. and Alliance Bernstein, L.P's are entitled to summary judgment on their third-party claim for contractual indemnification against Techno Acoustics Holdings, LLC; and it is further

ORDERED that the motion-in-chief is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of defendants' liability for the Labor Law § 240[1] claim is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/28/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.