Conroy v Archdiocese of N.Y.
2018 NY Slip Op 30081(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 151047/2013
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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THOMAS CONROY AND STACY CONROY,

Plaintiffs,

-against-

Index No.:151047/2013

ARCHDIOCESE OF NEW YORK, CHURCH OF OUR LADY OF LORETO, FULTON J. SHEEN CENTER FOR THOUGHT AND CULTURE, and ALL STATE DISMANTLING CORP.,

Motion Sequence Numbers: 003, 005, 006 & 007

Defendants.

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ALLSTATE DISMANTLING CORP.,

Third-Party Plaintiff,

-against-

COMMODORE CONSTRUCTION CORP.,

Third-Party Defendant.

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LING-COHAN, J.:

In motion sequence 005, plaintiffs Thomas Conroy and Stacy Conroy move, pursuant to CPLR 3212, for an order granting summary judgment against defendants the Archdiocese of New York (the Archdiocese), the Church of Our Lady of Loreto (the Church), and the Fulton J. Sheen Center for Thought and Culture (the Sheen Center), as to their claims made pursuant to Labor Law §§ 240 (1) and 241 (6). In motion sequence 003, defendants the Archdiocese, the Church, and the Sheen Center, move, pursuant to CPLR 3212, dismissing plaintiffs claims alleging common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), and granting the cross claims against defendant/third-party plaintiff Allstate Dismantling Corp. (Allstate) and third-party defendant Commodore Construction Company (Commodore) for

common law and contractual indemnification. In motion sequence 006, Allstate moves, pursuant to CPLR 3212, granting summary judgment as to plaintiffs' claims for violations of Labor Law §§ 200, 240 (1) (2) (3), 241 (6), and for common law negligence. Allstate also seeks summary judgment dismissing the cross claims of defendants the Archdiocese, the Church, and the Sheen Center; granting summary judgment for its claims of common law indemnification and contribution against third-party defendant Commodore; and dismissing all of Commodore's counterclaims. In motion sequence 007, Commodore, moves, pursuant to CPLR 3212, granting summary judgment and dismissing Allstate's third-party complaint, as well as the cross claims of the Archdiocese, the Church, and the Sheen Center.

FACTUAL ALLEGATIONS

Plaintiff alleges that he suffered personal injuries on Sunday, May 20, 2012, between 6:15 p.m. and 7:00 p.m., while working at a construction site located at 309 Elizabeth Street/18 Bleecker Street, New York, New York (the Bleecker Street project). Plaintiff testified that at the time of his accident, he worked for Structure Tone as a lead laborer. He maintains that Derrick Hamilton (Hamilton) was the project manager and Structure Tone's superintendent was Warren Snedeker (Snedeker). Plaintiff testified that the owner of the building where he was injured was the Archdiocese, and that the Church was being gutted and renovated. Plaintiff maintains that Allstate was hired by Structure Tone for demolition work, that Commodore was hired as a carpenter, and that Allstate had placed a sidewalk bridge in the area.

While plaintiff was working at the Bleecker Street project, he was also working at a job at New York University (NYU) at West 3rd Street and Laguardia Place. Plaintiff testified that before his accident, Snedeker instructed plaintiff to work at both locations during the

approaching weekend. At the Bleecker Street project, plaintiff was to take down wire, pipes and recyclable materials. Snedeker had previously told plaintiff to separate the materials and provided him with a phone number to schedule pick ups for materials which could be resold.

On the day of his accident, plaintiff first worked at NYU, monitoring the weather stripping work which was taking place. When that work was complete, plaintiff returned to the Bleecker Street project and proceeded to remove and separate pipes and wiring, and place the materials into a pile. Plaintiff testified that the work which he was performing at the Bleecker Street project was at the direction of Snedeker, who was not present.

When plaintiff's friend, Robert Martini (Martini), arrived at the site to drive plaintiff home, plaintiff let him in and proceeded to run up the staircase to the mezzanine level of the auditorium to lock the field office. About 20 feet from the field office door, plaintiff noticed a piece of wood and a black garbage wire next to the staircase. Plaintiff placed his hand on a mezzanine guard railing located in an archway above the auditorium in order to lean and pick up the wire. He maintains that, as he did this, he proceeded to fall backwards, as the railing became unsecured. Plaintiff fell off the mezzanine level and landed on a garbage container and then the concrete ground below. Plaintiff testified that Martini witnessed plaintiff fall, and assisted him out of the building.

Plaintiff testified:

> "Q. At the time of the accident, where within the building were you working?
> A. I wasn't working. I was - - Rob came. I was sweeping up the area where my gang box. I through [sic] some stuff away."

Plaintiff's 5/15/15 EBT, at 90-91.

Plaintiff maintains that prior to his accident, and during the demolition work, Allstate

removed guard rails which were affixed to the wall on the mezzanine level located between archways and installed a plastic garbage shoot. Plaintiff recalls speaking to the foreman for Allstate, as well as to his boss, and informing them the railings were not secured in the mezzanine area. Plaintiff testified that following his accident, he spoke with Snedeker. At that time, Snedeker asked if plaintiff could state that his accident occurred on the Saturday of the weekend because Snedeker was not working on Sunday. Plaintiff understood that Structure Tone would have expected that the project superintendent, be present when work was ongoing.

Martini, a friend of plaintiff, testified that he drove plaintiff into New York City on the date of the accident. He maintains that they first stopped at the NYU site, and then proceeded to the Bleecker Street project. After taking plaintiff's car and leaving for several hours, Martini returned to the Bleecker Street project. Martini was let into the site by plaintiff and they walked into a large open room with a balcony and several garbage containers.

Martini testified that plaintiff walked up a staircase, while he proceeded to throw something out. Upon hearing a crash, Martini turned around, and saw plaintiff falling from the level above and then strike a container on the ground level. After finding plaintiff in great distress, Martini assisted plaintiff out of the building. Martini did not notice if there were railings on the balcony level. Following the accident, plaintiff told Martini that an unsecured railing caused him to fall and that laborers did not place the railing correctly.

Snedeker, the project superintendent for Structure Tone, testified that the Bleecker Street project was a renovation of a structure, that the project manager and his supervisor was Hamilton, and that the project manager at NYU was Allen Topel. Snedeker recalls demolition work taking place at the Bleecker Street project during the time in which he was project

superintendent. Snedeker testified that he did not recall whether Commodore was involved at the Bleecker Street project, but knew that it provided dry wall work at NYU.

Snedeker maintains that he supervised plaintiff who was working at both NYU and the Bleecker Street project. He testified that at the NYU project, plaintiff was assisting with the "punch list" tasks to finish up the project. At the Bleecker Street project, plaintiff was assisting subcontractors, helping set up the field office, assisting the demolition contractor, and helping probe and clean the location. Snedeker maintains that the Friday before plaintiff's accident, he explained to plaintiff what work was to be completed at NYU during the approaching weekend. He did not have any conversation with plaintiff that he was to perform work at the Bleecker Street project.

Snedeker testified:

"Q. Did you explain to the project manager about any work that you expected Tom to perform at the Bleecker Street project that weekend?
A. There was no work at the Bleecker Street project that weekend.
Q. Now, in the week leading up to the weekend of Tom's accident, you had conversations with Tom Conroy about work you wanted him to perform at the Bleecker Street project, correct?
A. I cannot recall where we were at with the structural engineering and probing and initiating the start of demolition or what have you. I well could have. I don't recall.
Q. And you had specific conversations with Tom Conroy, did you not, in the weekend leading up to his accident, concerning removal of metal from the Bleecker Street project?
MR. PEPLINSKI: Objection to the form of the question. You can answer.
A. No.
Q. You never had that conversation?
A. No.
MR. BOUTIN: Can you read back the question, please? (Whereupon, requested testimony was read back.)
Q. Now, so your testimony then, Mr. Snedeker, is on that Friday you didn't have knowledge, nor did you request that Tom Conroy would be working at Bleecker Street?

A. That is correct."

Snedeker 4/26/16 EBT, at 160-162.

Snedeker further testified that plaintiff's overtime was for the NYU project and that his expectation was that plaintiff would spend the entire weekend at NYU with a window contractor. Snedeker did not recall plaintiff expressing concerns about a railing which was removed.

Hamilton, a project manager at Structure Tone for the Bleecker Street project, testified that he did not have involvement at the NYU project, but that Allstate was the demolition contractor for the Bleecker Street project, that Structure Tone provided estimates, and that an architectural firm drew up plans to determine what would be demolished. Hamilton maintains that Commodore contracted to provide safety barriers and placed plywood and rails over existing holes which were created by the work. Hamilton assumed that Commodore's work in covering holes was instructed by Snedeker or plaintiff. He did not have any information as to whether Commodore performed any railing work and would not expect Commodore to erect railings without being instructed by Snedeker or someone from Structure Tone. He maintains that the estimator for the Church was Nick Dibiosi who would have made the determination as to where safety railings and OSHA railings would be installed.

Hamilton testified that plaintiff "had no reason to be at the church" on the subject date. Hamilton's 5/17/16 EBT, at 185. He maintains that the area by the mezzanine archways got demolished before plaintiff's accident, and that there may have been a construction chute on the ground level of the auditorium, but that he did not recall seeing it by the archways. Hamilton did not recall seeing the metal guard rails in the archways missing.

Hamilton maintains that although Snedeker testified that he spoke to Hamilton on the

Monday after the accident, he found out about the accident on a Wednesday. Snedeker told Hamilton that plaintiff was working at the NYU project that weekend. Hamilton filled out an accident report on May 23, 2012, with information provided by Snedeker. In the report, Hamilton wrote that "18 Bleecker Street was not open, locked and nobody had authorization." He did not expect plaintiff to be working at the Bleecker Street project on the subject weekend.

Donnel Hatter (Hatter), vice president for Allstate, testified that he worked on the bid for the Bleecker Street project and that the work included removing walls and floors of an auditorium. The auditorium had a mezzanine level with three archways which he believed had railings. He did not remember seeing chutes in the auditorium, however the archways were open to the floor below with the fall protection of a metal railing already in place. Hatter had not noticed that the railings in the archway were removed and did not see any wooden barricades near the archways. He did not believe it was necessary to remove the railing in order to place a construction chute. Hatter testified that a blueprint showed a railing was to be removed on the mezzanine level near an opening, however he was not sure what or where the opening was.

Persico, also vice president of Allstate, testified that in 2012 he served as the comptroller overseeing office operations and accounting. He did not have any familiarity with the layout of the work being done at the Bleecker Street project and was not sure if railings in the archways were removed.

Oscar Nacimba (Nacimba), an Allstate torcher and laborer, testified that he worked at the Bleecker Street project. He maintains that Allstate provided him with his instructions. While he disposed of railings made of beams and pipe, he did not demolish any of the railings on the mezzanine level, nor did he see anyone from Allstate demolishing them. He maintains that an

archway on the mezzanine level had tubing or pipe railing, while another had a construction chute with vertical pipes. After the chute was removed from the archway, handrails were installed. Nacimba testified that the chute was not set up before the subject accident.

Jimi Galarza (Galarza), an Allstate foreman at the Bleecker Street project, testified that there were two or three archways in the auditorium, four or five feet wide, and that each archway had a separate railing. Allstate workers were cleaning up, chipping and removing parts, and conducting beam opening on the balcony level. Galarza saw a plastic chute belonging to Allstate in an archway closest to the stage area.

About two or three days after he started working at the site, and at the instruction of his boss, Galarza directed two workers to remove the chute in the archway. Before the chute was removed, Galarza testified that he noticed that the left side of a railing was broken because it was old and rusted. He did not touch the railing, but warned workers including two Allstate employees and plaintiff's boss, that the railing was broken.

Kenneth McLaughlin (McLaughlin), construction foreman for Commodore, testified that he was responsible for delegating work and ordering materials. When determining where to install fall protection, he maintains that it was a combination of walking through a job site and speaking to a general contractor. He testified that when performing an interior renovation, Commodore is responsible for general carpentry work. McLaughlin visited the Bleecker Street project for two consecutive days in May or June of 2012. When he arrived at the site, his work was on the roof. He recalls seeing wrought iron railing in the mezzanine level of the building.

McLaughlin reviewed Commodore's proposal for work at the Bleecker Street project. In the scope of work section of the proposal, it states "[p]rovide labor and material to install 60 LF

OSHA full protection." McLaughlin testified that "LF" stands for linear feet and that he was unsure if the provision mistakenly used "full" instead of "fall" protection. He did not know if this work was conducted at the Bleecker Street project.

McLaughlin also reviewed a document entitled "Proposal, May, 2012" which states, under a heading, "Temporary protection", "provide labor and material to furnish and install temporary protection as directed by your field personnel Warren Snedeker." He did not know if this work was performed by Commodore. McLaughlin testified that he did not have any discussion with Snedeker or anyone at Structure Tone about the placement of OSHA protection, barricades, or barriers. He maintains that if Commodore had contracts to install protection at the site, it would be instructed by the general contractor.

Kenneth Badree (Badree), a division manager for Commodore, testified that he sent two workers from Commodore in April of 2012 to commence work on the Bleecker Street project. Badree did not know what was meant by the April 9, 2012 proposal which discusses "60 LF OSHA full protection" and did not know where it was to be placed. He also testified that he did not know if Commodore installed fall protection at the site.

Sister Eileen Clifford (Clifford),Vice Chancellor of the Archdiocese, testified that 309 Elizabeth Street/18 Bleecker Street is known as the Sheen Center and is located on the property of the Church.

DISCUSSION

"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 issues of fact . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Plaintiffs contend that summary judgment must be granted as against the Archdiocese, the Church, and the Sheen Center, as to their claim of a violation of Labor Law § 240 (1). Labor Law § 240 (1) provides, in relevant part:

> "[a]ll contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Plaintiffs argue that plaintiff Thomas Conroy fell off of an elevated platform due to a lack of a sufficient railing and suffered harm directly from the application of the force of gravity.

Plaintiffs also argue that they are entitled to summary judgment with regard to the claim made pursuant to Labor Law § 241 (6), as against the Archdiocese, the Church, and the Sheen Center. Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) 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 . . . ."

In opposition to plaintiffs' motion for summary judgment, and in support of their own motion, the Archdiocese, the Church, and the Sheen Center argue that summary judgment must

be granted in their favor dismissing the claims for Labor Law §§ 200, 240 (1), and 241 (6). They contend that when a worker is injured while working without the permission or consent of the owner, as they allege plaintiff Thomas Conroy was doing at the time of his accident, he or she cannot avail himself of the protections afforded by the Labor Law. The cross-moving defendants argue that plaintiff Thomas Conroy was not permitted to be at the Bleecker Street project on the weekend of his accident, that, instead, he was to be working at NYU, that the accident report indicates that the Bleecker Street project was not open on the day of the accident, and that no one had authorization to enter the site. The Archdiocese, the Church, and the Sheen Center also argue that if plaintiff was in fact at the Bleecker Street project at the time of the accident, he was engaged in the activity of removing work materials for private sale, and, as such, these defendants cannot be held liable under the Labor Law.

In support of its own motion for summary judgment, and in opposition to plaintiffs' motion for summary judgment, Allstate contends that plaintiffs' Labor Law claims should be dismissed because plaintiff is not a member of the class of persons protected by the Labor Law. Allstate maintains that plaintiff was performing a personal favor for his foreman when he allegedly fell, specifically selling scrap metal from other debris so that Snedeker could sell it for his personal gain. Allstate agrees that, pursuant to Snedeker's testimony, plaintiff was not to be located at the Bleecker Street project on the date of his accident.

The Court of Appeals has held that, "[t]o come within the special class for whose benefit absolute liability is imposed upon contractors, owners and their agents to furnish safe equipment for employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it

owner, contractor or their agent" *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 (1979); *see also Haque v Crown Hgts. NRP Assocs., LP*, 33 AD3d 864, 864 (2d Dept 2006) (holding "[t]o receive the benefits of Labor Law §§ 240 and 241, a worker must show that he or she was permitted or suffered to work on a building or structure and was hired by someone to do so" and "the plaintiff, through his coworker's affidavit, raised a triable issue of fact as to whether he had permission to perform work on the date in question"); *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 (1998) ("Labor Law § 241 (6), by its very terms, imposes a *nondelegable duty* of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed"). Furthermore, it has been held that the Legislature's primary purpose in enacting Labor Law §§ 200, 240 and 241 was to provide for the health and safety of employees. *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573 (1990). As such, these enactments extend special protections to employees or workers who are *hired* by someone—either an owner, contractor or an agent—to perform work on a building or structure. *Stringer v. Musacchia*, 11 NY3d 212 (2008). Thus, a plaintiff who seeks to recover under the Labor Law must show that he or she was both permitted or suffered to work on a building or structure and was hired by someone to do so. *Ahmed v. Momart Discount Store, Ltd.*, 31 AD3d 307 (1st Dept 2006).

Here, issues of fact exist which warrant a denial of summary judgment, due to, *inter alia*, disputed testimony as to whether plaintiff was permitted and authorized to be at the alleged site on the day and time of his accident, and whether he was performing work in furtherance of the project. Plaintiff testified that the work which he was performing at the Bleecker Street project

was at the direction of Snedeker, his supervisor and the project's superintendent, that he was working on the weekend of his accident because Snedeker had requested that work be done at both NYU and the Bleecker Street project, and that Snedeker had told him that he wanted him to clean at the Bleecker Street project and take down wire, pipes and recyclable materials. Plaintiff testified that the recyclable materials were sold to an unidentified man that picked up the materials at the job and that Snedeker was going to personally profit from the sale of the recyclable materials.

Plaintiff Thomas Conroy's testimony conflicts with that of Snedeker and Hamilton. Snedeker testified that the Friday before plaintiff's accident, Snedeker met with plaintiff Thomas Conroy and explained the work to be done that weekend at NYU. Snedeker claims he did not have any conversations with plaintiff Thomas Conroy or knowledge that plaintiff was performing work at the Bleecker Street project that weekend. According to Snedeker, plaintiff Thomas Conroy's overtime was for the NYU project and that his expectation was that Thomas Conroy would spend the entire weekend at NYU. Snedeker also testified that he did not have any conversations with plaintiff Thomas Conroy during the weekend leading up to his accident concerning removal of metal from the Bleecker Street project.

Hamilton also testified that plaintiff Thomas Conroy was only assigned to the NYU project and that plaintiff did not have any reason to be at the Bleecker Street project. In his accident report, Hamilton wrote that the Bleecker Street project was locked and that nobody had authorization to be at that location on the date of plaintiff Thomas Conroy's alleged accident.

Along with the disputed testimony, the various accident reports which were submitted also raise a question of fact as to whether plaintiff was authorized to be at the Bleecker Street

project at the time of his accident. The "Injury/Accident Report" created by Hamilton on May 23, 2012 states that, "[f]or some reason, he came to 18 Bleecker St at the end of the day on Sunday. 18 Bleecker St was not open, locked and no one had authorization to enter the building." Joyce Affirmation, Exhibit I.

The "Injury/Accident Report" drafted by Snedeker on May 31, 2012 states "Amended Report. Tom was working at 58 Washington Square South on Saturday and Sunday. Tom is also assigned to 18 Bleecker St. Tom went to 18 Bleecker St at the end of the day on Sunday, where his current gang boxes are located. While doing so, he injured himself at this location and wound up at the hospital." *Id.*, exhibit J. The report entitled "Employer's Report of Work Related Injury/Illness states that "[f]rom what we are being told by his wife today, 4 days later- Tom was working at 58 Washington Square South, another job site entirely, Saturday and Sunday. For some reason, he came to Bleecker Street . . . ." *Id.*, Exhibit K.

Allstate submits a copy of an emergency room report which also raises a question of fact. The report dated May 20, 2012, which Allstate indicates was for plaintiff and which is in complete conflict with plaintiff's testimony of how the accident occurred, states that the individual was admitted to the hospital after a "fall from a parked SUV." Benessere Affirmation, Exhibit Y.

"On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also Medrano v Port Auth. of N.Y. & N.J.* (2017 NY Slip Op 07216) (holding the assistant foreman's affidavit contradicted the injured plaintiff's account of the accident raising a question of credibility); *Psihogios v Stavropoulos*, 269

AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact).

Here, the credibility of the deposed witnesses is at issue as their testimony conflicts as to, *inter alia*, whether or not plaintiff was permitted to be working at the Bleecker Street project on the Sunday when his accident occurred and whether plaintiff was performing work which was in furtherance of the project. Therefore, as there are questions of fact, the credibility of the witnesses is at issue, and it is unclear as to whether the Labor Law applies, the section of plaintiffs' motion and the section of the Archdiocese, the Church, the Sheen Center and Allstate's motions seeking summary judgment as to sections 200, 240 (1), and 241 (6) of the Labor Law must be denied.

With regard to the portion of Allstate's motion for summary judgment pursuant to Labor Law §§ 240 (2) and (3), Allstate contends that these sections of the Labor Law are inapplicable to the facts of plaintiff's accident.

Labor Law §§ 240 (2) and (3) provide:

> 2. Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.
>
> 3. All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use.

Plaintiffs argue that in *Saint v Syracuse Supply Co.*, 25 NY3d 117 (2015), the Court of

Appeals recently held that Labor Law § 240 (2) applied to an accident in which plaintiff fell from catwalks connected to an exterior billboard. Plaintiff's accident is distinguishable. Here, plaintiff testified that he fell from the fixed interior mezzanine level of the auditorium through an open archway and that he was not standing on scaffolding or staging equipment.

Therefore, because plaintiffs fail to meet their burden and produce evidence which demonstrates that plaintiff fell from scaffolding or staging equipment, plaintiffs' causes of action alleging a violation of Labor Law §§ 240 (2) and (3) must be dismissed.

Allstate also argues that plaintiffs' claims as against it must be dismissed because Allstate was not the general contractor, the owner, or an agent, and had no authority over plaintiff's work. Allstate contends that it did not control the area where the accident occurred and that on the subject date, Allstate was not working at the jobsite as it was waiting for a permit. Allstate contends that even if there was an agency relationship between Structure Tone and Allstate, the agency relationship discontinued once Allstate left the jobsite. Allstate argues that although plaintiff testified that Allstate removed or replaced the railing, the record is devoid of any evidence that it removed the railing to install a trash chute or reinstalled a railing. Allstate maintains that it was Structure Tone's responsibility to replace the railing as it had been alerted by plaintiff of the alleged issue with the railing.

In opposition to Allstate's argument, plaintiffs contend that there exists a question of fact as to whether Allstate caused or contributed to the accident. Plaintiff testified that Allstate was the only contractor working in the area, and that plaintiff, in the presence of Allstate employees, complained to Snedeker about the alleged issue with the railing and was assured that the railing would be reinstalled by Allstate when their work was completed.

Despite Allstate's argument that it was not working at the site at the time of plaintiff's accident as it was awaiting a permit, a question of fact exists as to whether the work which Allstate had previously conducted caused or contributed to plaintiff's injuries. Plaintiff Thomas Conroy testified that Allstate was hired by Structure Tone for demolition. Plaintiff Thomas Conroy also testified that prior to his accident, and during demolition work, Allstate removed the guard rails which were affixed to the wall and installed a plastic garbage chute. Plaintiff Thomas Conroy further testified that prior to his accident, plaintiff spoke to the foreman for Allstate as well as his boss, and told them that the railings were not secured in that area. Furthermore, Galarza, an Allstate foreman at the Bleecker Street project, testified that a plastic chute owned by Allstate was located in an archway closest to the stage area. Therefore, because questions of fact exist as to Allstate's work at the subject site, plaintiffs' causes of action as against Allstate must not be dismissed.

The Archdiocese, the Church, and the Sheen Center also contend that they are entitled to summary judgment on their cross claims against Allstate and Commodore for common-law and contractual indemnification. These defendants maintain that Allstate was the only contractor at the site working with chisels and pry bars, that Allstate installed a garbage chute at the location of the alleged accident, and that Allstate removed the railing as part of its work. They also contend that Commodore acted in a manner to be bound by the terms of its subcontract, by performing the outlined work and procuring insurance as mandated by the language of the document.

Allstate argues that the Archdiocese's cross claims, as well as Commodore's counter claims, for common-law indemnification and contribution must be dismissed. Allstate contends

that it was not working at the site at the time of plaintiff's accident. Allstate argues that should the court find that there is an issue of fact regarding whether Allstate is liable, Allstate is entitled to a conditional order granting common-law indemnification and contribution against Commodore because Commodore was contractually responsible for the fall protection at the site.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident . . . .'" *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 (2d Dept 2005) *quoting Correia v Professional Data Mgt*, 259 AD2d 60, 65 (1st Dept 1999). A determination regarding common-law indemnification would be premature prior to the determination as to which party, if any, is liable. *See Brockman v Cipriani Wall St.*, 96 AD3d 576, 577 (1st Dept 2012) (holding that the part of defendant's cross motion seeking summary judgment on the claim for common-law indemnification was denied as being premature because there was no finding regarding who was responsible for plaintiff's accident); *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 429 (1st Dept 2006) (holding that "[s]ince it has not yet been determined whether any party's negligence contributed to the accident, a finding of common-law indemnity is premature").

Here, there has been no conclusive determination regarding whether Allstate or Commodore were negligent and may be held liable for plaintiff's injuries. As it remains undetermined whether Allstate or Commodore were liable for plaintiff's injuries, the part of the Archdiocese, the Church, and the Sheen Center's motion seeking summary judgment for its cross claims for common law indemnification and contribution is premature and must be denied.

The Archdiocese, the Church, and the Sheen Center also argue that summary judgment must be granted as against Allstate and Commodore for contractual indemnification. They contend that Allstate and Commodore agreed to assume the defense and indemnification of the Archdiocese, the Church, and the Sheen Center. They also argue that the certificate of insurance names the Archdiocese, the Church, and Sheen Center as additional insureds.

The Archdiocese, the Church, and the Sheen Center reference the indemnification agreement with Allstate dated October 26, 2009, which states that Allstate would hold the Archdiocese, the Church, and the Sheen Center harmless against any claims which arise out of, are in connection with, or as a consequence of the performance of the work under the agreement. The Archdiocese, the Church, and the Sheen Center also reference its Master Subcontract with Commodore dated August 1, 2011, which states that Commodore will indemnify and hold harmless the Archdiocese, the Church, and the Sheen Center from and against any and all claims in connection with the work performed under the agreement.

Here, as there exists an issue of fact as to which party's work, if any, contributed to or caused plaintiff's accident, and if plaintiff was conducting work in furtherance of the project at the time in which he was injured, the part of the Archdiocese, the Church, and the Sheen Center's motion seeking summary judgment as against Allstate and Commodore for contractual indemnification must be denied.

With regard to Commodore's motion, Commodore moves for an order granting summary judgment dismissing Allstate's third-party complaint and dismissing all cross claims against it. Commodore argues that it did not have a duty to build or place a railing, barricade, or other protective device in the area of the archway where plaintiff fell and that it was brought to the

project as the carpentry and masonry subcontractor.

Commodore argues that while its subcontract with Structure Tone includes a proposal for work dated April 9, 2012 which states "labor and material to install 60 [linear feet] OSHA full protection," the proposal does not indicate where at the site this protection was to be placed. Commodore maintains that there is no evidence which shows that the entire sixty feet of fall protection was built. Commodore also argues that Hamilton, who was Structure Tone's project manager for the Sheen Center, testified that it was Structure Tone's responsibility to make determinations as to where and when to place safety barriers and that Structure Tone requested that Commodore place additional rails where plaintiff Thomas Conroy allegedly fell, only after the accident.

In opposition to Commodore's motion, Allstate contends that it is undisputed that Commodore was contractually responsible for fall protection pursuant to its proposal and contract with Structure Tone. Allstate argues that Commodore's proposal to Structure Tone demonstrates that Commodore was responsible for providing labor and materials to install "60 LF OSHA fall protection" at the Bleecker Street project. Allstate maintains that the testimony of McLaughlin and Badree, who testified on behalf of Commodore, fail to support Commodore's motion, as they both testified that they had no knowledge of the fall protection work at the site.

Upon the within submissions, Commodore fails to meet its burden to demonstrate entitlement to summary judgment of dismissal. Commodore's witnesses could not clarify what work it conducted at the subject site. While McLaughlin could not explain if work to install fall protection was completed by Commodore at the Bleecker Street project, Badree testified that he did not know what was meant by a proposal which discussed "60 LF OSHA" fall protection, did

not know where it was to be placed, and did not know if Commodore installed such fall protection at the site. Therefore, because a question of fact exists as to whether or not fall protection was installed by Commodore at the location of plaintiff's accident, Commodore's motion for summary judgment must be denied.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that plaintiffs Thomas Conroy and Stacy Conroy's motion for summary judgment (sequence 005 is denied; and it is further

ORDERED that Archdiocese of New York, Church of Our Lady of Loreto, and Fulton J. Sheen Center for Thought and Culture's motion for summary judgment (sequence 003 is denied; and it is further

ORDERED that Allstate's motion for summary judgement (sequence 006) is denied with the exception of the part of the motion dismissing the part of plaintiff's complaint alleging a violation of Labor Law §§ 240 (2) and (3), which is granted; and it is further

ORDERED that Commodore's motion for summary judgment (sequence 007) is denied; and it is further

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

Dated: January 12, 2018

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

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