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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 21

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Kleber Tobar,

Plaintiff,

-against-

EPSJ Construction Corp., Rose Hill Apartment, L.P., Rosehill Housing Management Corp., Nayda C. Alejandro, Notias Construction, Inc., Maemo Iron Works Corp., and EWJ Iron Work Corp.,

Defendants.

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DECISION and ORDER
Index No. 307464/2010

Rose Hill Apartment, L.P., Rosehill Housing Management Corp., Nayda C. Alejandro

Third-Party Plaintiffs,

-against-

Maemo Iron Works Corp., and Notias Construction, Inc.,
Third-Party Defendants.

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First Third-Party
Index No. 83904/2011

EPSJ Construction Corp.,

Third-Party Plaintiff,

-against-

Manuel E. Moran and Maemo Iron Works Corp,

Third-Party Defendants.

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Second Third-Party
Index No. 83972/2011

Plaintiff commenced this action against defendants EPSJ Construction Corp. (EPSJ), Rose Hill Apartments, LP. and Rosehill Management (collectively Rosehill), Nayda C.

Alejandro,[1] Notias Construction, Inc. (Notias), Maemo Iron Works Corp. (Maemo) and EWJ Iron Work Corp.,[2] alleging common-law negligence and violations of Labor Law §§200, 240(1), and 241(6). Rosehill commenced a third-party action against Maemo and Notias. EPSJ commenced a second third-party action against Maemo and Manuel E. Moran.

On May 8, 2009, plaintiff, employed by Maemo, was injured when he was struck by 12,000 pounds of wrought iron fence panels that fell on top of him while he was riding in the box compartment of a truck owned by EPSJ. Maemo was hired by Notias, the general contractor, to install the new wrought iron fencing on the perimeters of the property, which was owned by Rosehill, who had hired Notias for renovation work at its property.

Rosehill, Notias and plaintiff separately move for summary judgment. Rosehill seeks summary judgment dismissing plaintiff's complaint and any cross claims against them and for summary judgment in their favor on their claims for contractual indemnification against Notias. Notias moves for summary judgment dismissing plaintiff's complaint. Plaintiff moves for summary judgment against Rosehill and Notias on his Labor Law §§ 240(1) and 241(6) claims, and for summary judgment against EPSJ. The motions are consolidated and considered together herein for purposes of this decision and order.

***Rosehill's and Notias' Motions for Summary Judgment Dismissing the Labor Law §§ 240(1) and 241(6) Claims***

Labor Law § 240(1) provides that "[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,

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[1]On April 15, 2013, the parties stipulated to discontinue the action against defendant Nayda C. Alejandro.

[2]By decision and order dated March 3, 2014, Judge Mark Friedlander granted plaintiff's motion for a default judgment against defendants EWJ Iron Work and Maemo for failing to submit an answer to the complaint.

ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287 [2003]; *Vasquez–Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828, 829 [2nd Dept 2015]).

Rosehill and Notias assert that plaintiff's injury did not arise from a physically significant elevation differential at the time the iron fence panels fell and that plaintiff's failure to use the standard straps to secure the iron fences was the sole proximate cause of his injuries. Notias further claims that plaintiff was not engaged in a statutorily protected activity at the time of the accident.

" 'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... 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' " (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "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). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on Labor Law § 240(1) claim, plaintiff must show that the absence of a protective device, or the presence of a defective one, of the type enumerated in the statute,

was a proximate cause of the injuries alleged *(Felker v Corning Inc.*, 90 NY2d 219 [1997]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995]). In other words, "Labor Law § 240(1) was designed to prevent those types of 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" (*Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). In the present case, the differing accounts of the manner in which plaintiff's accident occurred and the conflicting expert affidavits as to the adequacy of the standard straps located in the back of the truck raise triable issues of fact as to whether the defendant provided satisfactory safety devices (*Weber v 1111 Park Ave. Realty*, 253 AD2d 376 [1st Dept 1998]).

Furthermore, Rosehill and Notias' assertion that, as a matter of law, plaintiff was the sole proximate cause of his injuries is also unavailing. To show that plaintiff was the sole proximate cause of an injury, the defendant must demonstrate that plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Again, the conflicting expert affidavits regarding the effectiveness and adequacy of the straps available in the truck and the conflicting testimony as to whether plaintiff was following instructions from his supervisor.

As to Notias' argument that plaintiff was not, as a matter of law, engaged in a statutorily protected activity at the time of the accident, triable issues of fact exist as to whether plaintiff was performing work integral or necessary to the completion of the construction project, or a "member of a team that undertook an enumerated activity under a construction contract" or employed by a "company engaged under a contract to carry out an enumerated activity" *(Prats v Port Authority of N.Y. & N.J.*, 100 NY2d 878 [2003]).

Those branches of Rosehill's and Notias' motions for summary judgment under

Labor Law § 241(6) are also denied. " '[T]o establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant's violation of a specific [Industrial Code] rule or regulation was a proximate cause of the accident' " (*Creese v Long Is. Light. Co.*, 98 AD3d 708, 710 [2nd Dept 2012], quoting *Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2nd Dept 2009]). A finding that a party has violated Labor Law § 241(6) is only some evidence of negligence, however; it does not result in absolute liability or a finding of negligence as a matter of law (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Mulhern v Manhasset Bay Yacht Club*, 22 AD3d 470, 471 [2d Dept 2005]). Although plaintiff alleges in his bill of particulars numerous violations, only two are argued in his opposition to the instant motion: 12 NYCRR 23–9.7(c) and (e), which regulate, respectively, the securing of heavy loads during transit, and seating for workers permitted to ride on the exterior of trucks or similar vehicles.[3]

Rosehill argue that §§ 23-9.7(c) and (e) are inapplicable because the accident occurred while the truck was stopped and not in transit. This Court disagrees, as there is nothing in the language of these sections or in the case cited by Rosehill (*Vargas v State*, 273 AD2d 460 [2nd Dept 2000]) to support the claim that the sections only apply to trucks that are in transit. Here, there are questions of fact that preclude summary judgment, among which concern whether (1) the truck was overloaded, (2) the load was not trimmed, (3) the load was not securely lashed, and (4) the truck was not equipped with properly constructed seats. As triable issues of fact exist as to whether these provisions were violated and such violations were a proximate cause of plaintiff's injury, that aspect of Rosehill's motion seeking

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[3]12 NYCRR 23–9.7(c) provides: "Loading. Trucks shall not be loaded beyond their rated capacities and all loads shall be trimmed before the trucks are moved. Loads that are apt to become dislodged in transit shall be securely lashed in place."

12 NYCRR 23–9.7(e) provides: "Riding. No person shall be suffered or permitted to ride on running boards, fenders or elsewhere on a truck or similar vehicle except where a properly constructed and installed seat or platform is provided."

summary judgment dismissing the § 241(6) cause of action is denied

Notias also argues that the above industrial code sections are inapplicable since plaintiff's work was not a covered activity; however, issues of facts exist regarding whether plaintiff was involved in a protected activity under the statute. Specifically, a triable issue of fact exists regarding whether plaintiff's work was necessary and incidental to the erection of the fences at the subject building site. Thus, that aspect of Notias' motion seeking summary judgment dismissing the § 241(6) cause of action is denied.

Turning to those aspects of defendants Rosehill's and Notias' motions seeking summary judgment dismissing the common law negligence and Labor Law § 200 claims, this court finds that defendants have established prima facie entitlement for summary judgment dismissing those claims *(see Scott v American Museum of Natural History*, 3 AD3d 442, 443 [1st Dept 2004]). Plaintiff has not opposed those aspects of Rosehill's and Notias' motions. Thus, Rosehill and Notias are entitled to summary judgment dismissing the common law negligence and Labor Law § 200 claims.

***Plaintiff's Motion for Summary Judgment***

With respect to plaintiff's motion for summary judgment against Rosehill and Notias on his Labor Law §§ 240(1) and 241(6) claims, the motion is denied for the reasons set forth above. To reiterate, the differing accounts of the manner in which plaintiff's accident occurred, and the conflicting expert affidavits as to the adequacy of the standard straps located in the back of the truck raise triable issues of fact warranting denial of the motion.

Plaintiff's motion for summary judgment against EPSJ on the issue of vicarious liability under Vehicle and Traffic Law (VTL) § 388(1) and for negligence per se under VTL § 377 is also denied.

In order to succeed on a motion for summary judgment it is necessary that the movant tender evidentiary proof in admissible form, sufficient to establish his or her cause of action so as to warrant the court, as a matter of law, directing judgment in his or her favor (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]; CPLR 3212). Failure to make such a

showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the opponent is required to lay bare its proof in admissible form and to demonstrate the existence of a triable issue of fact (*Zuckerman,* 49 NY2d at 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (id.).

The unexcused violation of a provision of the VTL constitutes negligence per se (*McLeod v Taccone*, 122 AD3d 1410, 1411[4th Dept 2014]; *Hazelton v D.A. Lajeunesse Bldg. & Remodeling, Inc.*, 38 AD3d 1071, 1072 [3rd Dept 2007]). Here, plaintiff alleged that defendants Maemo and EPSJ (vicariously) violated VTL § 377(1).[4] Plaintiff argues that the defendants violated VTL § 377 by failing to properly secure the beams at the rear of the truck; however, as it has been previously determined there are differing accounts of the manner in which plaintiff's accident occurred, conflicting testimony as to whether plaintiff was following instructions from his supervisor and the conflicting expert affidavits as to the adequacy of the standard straps located in the back of the truck, which raise triable issues warranting denial of plaintiff's motion.

***Rosehill's Motion for Summary Judgment on Their Claim for Contractual Indemnification***

Rosehill also seek an order for contractual indemnification based upon the language of the April 1, 2008 contract between Rosehill and Notias.

Paragraph 3.18.1 of the contract reads:

"To the fullest extent permitted by law, the Contractor shall indemnify and

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[4]VTL 377(1) provides that "No vehicle which is designed or used for the purpose of hauling logs or other materials which by their very nature may shift or roll so as to be likely to fall from such vehicle, shall be operated or moved over any highway unless its load is securely fastened by such safety chains, . . . as will effectively prevent the shifting or falling of such load or any part thereof, from the vehicle."

> hold harmless the Owner . . . and its agents . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of the work, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death . . . caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder."

Any right that defendants may have on their cross-claims for contractual indemnification will depend upon the specific language of the indemnification provisions contained in each of the contracts (*see Zastenchik v Knollwood Country Club*, 101 AD3d 861, 864 [2nd Dept 2012]). "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). "However, a 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" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2nd Dept 2009]).

Here, under the Rosehill contract, Notias must indemnify Rosehill if plaintiff's injuries arose out of "negligent acts or omissions" of the contractor or subcontractor (*see Naughton v City of New York*, 94 AD3d 1 [1st Dept 2012] [indemnification provision provided coverage for claims, but only to the extent caused by the contractor and its direct or indirect employees negligent acts or omissions]). Rosehill is thus entitled to contractual indemnification if plaintiff's injuries resulted from Notias' or Maemo's negligence. Therefore, Rosehill is granted summary judgment against Notias for contractual indemnification, on the condition that a jury finds Maemo or Notias negligent at trial.

For the reasons stated above, it is hereby ordered that the respective motions of Rosehill, Notias and plaintiff are denied; and it is further,

ORDERED that Rosehill's motion for summary judgment against Notias for contractual indemnification is granted on the condition that a jury or other fact finder determines that Maemo or Notias is negligent.

This constitutes the decision and order of this Court.

Dated: January 23, 2018

Bronx, New York

HON. Ben R. Barbato
Justice, Supreme Court