SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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CARLOS SAQUICARAY,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

- v -

CLEAN UP SERVICES, INC.,

Third-Party Defendant.

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INDEX NO. 161299/2013

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 147-166 were read on this application to/for Reargument.

This is an action to recover damages for personal injuries sustained by a truck driver when he was struck in the leg by a metal plate weighing approximately two tons on January 13, 2013.

By decision/order of October 25, 2017 (the Prior Order), the court granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim (mot. seq. 001) and

denied third-party defendant Clean Up Services, Inc.'s (Clean Up) motion for summary judgment seeking dismissal of the third-party complaint and complaint (mot. seq. 002).

Third-Party Defendant Clean Up now moves pursuant to CPLR 2221 and 3212, for an order granting it leave to reargue plaintiff's motion for partial summary judgment and Clean Up's motion for summary judgment seeking dismissal of the third-party complaint by Consolidated Edison Company of New York, Inc. (Con Edison) alleging breach of contract, contractual indemnification, and common law indemnification; and the complaint with respect to plaintiff's Labor Law §§ 240(1), 241(6), 200, and common law negligence causes of action.

Con Edison filed an affirmation in support of the branch of Clean Up's motion which seeks reargument of the portion of Clean Up's summary judgment motion seeking summary judgment dismissal of plaintiff's Labor Law §§ 240(1), 241(6), 200, and common law negligence causes of action. Plaintiff opposes.

DISCUSSION

CPLR 2221 (d) states, in pertinent part:
"(d) A motion for leave to reargue:

* * *

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 27 (1st Dep't 1992) citing *Schneider v. Solowey,* 141 A.D.2d 813 (2d Dep't 1988). Reargument does not "serve to provide

a party an opportunity to advance arguments different from those tendered on the original application." *Foley v Roche*, 68 AD2d 558, 567-68 (1st Dep't 1979).

Reargument of Plaintiff's Motion for Partial Summary Judgment & Clean Up's Motion for Summary Judgment Dismissing the Complaint

Clean Up argues that in the Prior Order the court erred in granting plaintiff partial summary judgment on his Labor Law § 240(1) claim and denying Clean Up's motion for summary judgment seeking dismissal of plaintiff's common law negligence and Labor Law §§ 200, 240(1), 241(6) claims against defendant/third-party plaintiff Con Edison and therefore against Clean Up.

In its motion to reargue, Clean Up contends that the court did not properly consider whether plaintiff was engaged in an enumerated activity and whether he was working at a construction site at the time of the accident so as to trigger application of Labor Law § 240 (1). This branch of the motion is denied. Clean Up has not demonstrated that the court overlooked or misinterpreted facts or controlling law in making its determination on plaintiff's Labor Law § 240 (1) claim. Accordingly, the court adheres to its prior decision that defendant is liable for plaintiff's injuries under Labor Law § 240 (1).

As plaintiff is entitled to summary judgment as to liability on his section 240(1) claim, the court need not address Clean Up's arguments seeking dismissal of the remaining claims in that "the plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic." *Auriemma v. Biltmore Theatre, LLC*, 82 AD3d 1, 12 (1st Dep't 2011). *See also Jerez v. Tishman Const. Corp. of N.Y.*, 118 AD3d 617, 617 (1st Dep't 2014).

However, upon review of record, the court shall revisit plaintiff's Labor Law § 200 claim. Clean Up argued in its summary judgment motion and motion for leave to reargue that the Labor Law § 200 claim against Con Edison should be dismissed. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]." *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep't 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to Labor Law § 200 cases, depending whether the accident is the result of the means and methods used by the contractor to do its work, or the result of a dangerous condition. *See McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797-798 (2d Dep't 2007).

In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (199) (no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to moved); *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep't 2008).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed." *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 311 (1st Dep't 2007); *Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 381 (1st Dep't 2007) (no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work); *Smith v. 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 (2d Dep't 2007); *Natale v. City of New York*, 33 AD3d 772, 773 (2d Dep't 2006).

When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident, and the plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed. *See Murphy v. Columbia Univ.*, 4 AD3d 200, 202 (1st Dep't 2004) (to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over the plaintiff's work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work).

A review of the facts reveals that this is an action invoking a "means and methods" analysis. As Con Edison did not control the means and methods of the hoisting work, the court grants Clean Up reargument as to the branch of Labor Law § 200 claim, and upon reargument, dismisses the Labor Law § 200 claim as against Con Edison. The court dismisses plaintiff's common law negligence claim against Con Edison for the same reason. *See Ortega v. Puccia*, 57 AD3d 54, 61 (2d Dep't 2008).

The court will not reach the Labor Law § 241(6) claim, but if it were to do so, it would find that the claim would survive summary judgment. Clean Up again asserts that Labor Law § 241(6) is inapplicable here as plaintiff was not working on an enumerated activity and was not working at a construction site at the time of the accident. However, those points were addressed and properly determined in the Prior Order and said claim should not have been dismissed on these grounds. To the extent that Clean Up raises new arguments on this issue in its reply, they are not considered.

Reargument of Third-Party Defendant Clean Up's Motion for Summary Judgment Dismissing the Third-Party Complaint

Clean Up asserts that the court erred in denying Clean Up's motion for summary judgment on the third-party complaint seeking common law and contractual indemnification. The court grants Clean Up's motion for leave to reargue its motion for summary judgment on the third-party complaint, and after reargument, adheres to its prior determination.

On the contractual indemnity claim, Clean Up argues that Con Edison's claim must be dismissed because there is no signed contract between the parties, and even if there were, the indemnity provision is unenforceable under NY GBL § 398-e which covers "Indemnity provision in motor carrier transportation contracts."

"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], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). "...[T]he one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of

the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also, Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

As the court noted in the Prior Order, Clean Up performed its work for Con Edison under purchase order number 135802 and the Standard Terms And Conditions of Service Contracts which was in effect on the date of the accident, January 13, 2013.[1] Pursuant to the purchase order, Clean Up was to, among other things, furnish supervision, labor, equipment, and facilities for the loading, removal, transport, and disposal of excavated debris from Con Edison transfer stations located in Westchester County and at various street excavation sites in Manhattan, Bronx, Brooklyn, and Queens (October 13, 2011 purchase order, p. 1). Clean Up was also to pick up and deliver steel plates to various locations (*id.* at p. 5, 7). Here, the purchase order covered much more than transportation, unloading, and storage of property, and accordingly, the court declines to apply GBL § 398-e here. The indemnification provision in the purchase order is triggered where the "claims, damage, loss and liability" "resulting in whole or in part, from, or connected with, the performance of the Purchase Order by the Contractor, any subcontractor, their agents, servants or employees…" Plaintiff, employed by Clean Up, was injured while performing work that fell within the terms of the Purchase Order and the accident arose out of

[1] In Con Edison's verified reply to plaintiff's notice to admit, Con Edison admits that the purchase order number 135802 and the Standard Terms and Conditions of Service Contracts were in effect on January 13, 2013.

Clean Up's work. Accordingly, the court declines to grant summary judgment dismissing the contractual indemnity claim.

Clean Up also moves for reargument on the branch of its motion seeking dismissal of the common-law indemnification claim asserted against it. "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]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, there remains a question of fact as to whether Clean Up's negligence caused the accident in that it was responsible for hoisting metal plates off the truck, thus precluding the grant of summary judgment dismissing the commonlaw indemnity claim. The court reviewed the remainder of Clean Up's arguments in support of dismissal and found them insufficient.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of Third-Party Defendant Clean Up Services, Inc. for an order: (i) granting it leave to reargue its motion for summary judgment which was denied by decision and order of the court, dated October 25, 2017 (the Prior Order), and plaintiff's motion for partial summary judgment which the court granted in the Prior Order and (ii) granting Clean

Up's motion for leave to reargue its motion for summary judgment relating to Third-Party Plaintiff Con Edison's claims for breach of contract, contractual indemnification, and common law indemnification/negligence is granted only to the extent that plaintiff's Labor Law § 200 and common law negligence claims against Consolidated Edison Company of New York, Inc. is dismissed and is otherwise denied.

This constitutes the decision and order of the court.

July 6, 2018
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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