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SHORT FORM ORDER

INDEX No. 14-7263
CAL. No. 17-00377OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-28-17 (001)
MOTION DATE 7-31-17 (002)
ADJ. DATE 9-8-17
Mot. Seq. # 001 - MG
002 - MotD

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JOSEPH FILARDO and EILEEN FILARDO,

Plaintiffs,

- against -

VERIZON COMMUNICATIONS, INC., VERIZON NEW YORK, INC., TISHMAN CONSTRUCTION CORPORATION and ABC COMPANY ONE Through ABC COMPANY TEN (Fictitious names meant to describe one or more entities responsible for the care, control and management of the premises where Plaintiff was injured),

Defendants.

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VERIZON COMMUNICATIONS, INC., VERIZON NEW YORK, INC., TISHMAN CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

- against -

ALLAN BRIGHTWAY ELECTRICAL CONTRACTORS, INC,

Third-Party Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notices of Motion/Order to Show Cause by the third-party defendant, dated June 28, 2017, and supporting papers (including Memorandum of Law dated ____), and by the defendants/third-party plaintiffs, dated June 230, 2017; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated August 24, 2017, by the defendants/third-party plaintiffs, dated August 28, 2017, and by the third-party defendant, dated August 30, 2017, and supporting papers; (4) Reply Affirmation by the third-party defendant, dated September 7, 2017, and by the defendants/third-party plaintiffs, dated September 5, 2017, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the pending motions (001 and 002) are combined herein for disposition; and

ORDERED that the motion (001) by third-party defendant Allan Briteway Electrical Contractors, Inc. for summary judgment is granted, and the third-party complaint is hereby severed and dismissed; and it is further

ORDERED that the motion (002) by defendants/third-party plaintiffs Verizon Communications, Inc., Verizon New York Inc. and Tishman Construction Corp. for summary judgment dismissing plaintiff's complaint and any cross claims asserted against them, and for summary judgment on the first cause of action in their third-party complaint/claim against Allan Briteway Electrical Contractors, Inc. for contractual indemnification, including attorney's fees, is decided as set forth herein.

Plaintiff, and his wife asserting derivative claims, commenced this action seeking damages for personal injuries he sustained on February 6, 2013, when he slipped on a wet substance on the floor as he stepped off a ladder while working in the building at 104 Broad Street in New York, New York (the "Building"). The Building was undergoing renovations as a result of damages incurred from Hurricane Sandy in 2012. Defendant Tishman Construction, Inc. ("Tishman") was the general contractor on the Hurricane Sandy Recovery project and hired third-party defendant Allan Briteway Electrical Contractors, Inc. ("Allan Briteway") to perform certain electrical work in the Building. At the time of the accident, plaintiff was employed as an electrician by Allan Briteway.

In his complaint, as amplified by his bill of particulars, plaintiff alleges that defendants Verizon Communications, Inc. and Verizon New York, Inc. (hereinafter the "Verizon defendants" when referred to collectively) owned, controlled, maintained and/or managed the Building and had a principal place of business thereat. Plaintiff also alleges that the Verizon defendants and Tishman were negligent in allowing the floor to remain in a dangerous wet, slippery condition and in failing to provide him with a safe place to work in violation of Labor Law §§ 240, 241 and 200. Plaintiff further alleges these defendants are liable for common-law negligence as they had actual or constructive notice of the dangerous condition. In their answer, the Verizon defendants and Tishman deny liability and assert plaintiff's culpable conduct as an affirmative defense. The Verizon defendants and Tishman also have commenced a third-party action against Allan Briteway for contractual and common-law

indemnification, and contribution and breach of contract in failing to procure insurance for their protection. Issue has been joined in the impleader action.

Discovery has been completed and the note of issue filed. Allan Briteway now moves for summary judgment dismissing the third-party complaint. The Verizon defendants and Tishman move for summary judgment dismissing plaintiff's complaint, and for summary judgment on the first cause of action in their third-party claim against Allan Briteway for contractual indemnification, including attorney's fees.

The Verizon defendants argue that Verizon Communications, Inc. is entitled to summary judgment as it is not an owner or contractor. Proffered in support of this argument is a copy of the record from the Office of the City Register which purports to establish that the Building is owned by Verizon New York, Inc. This record, however, does not constitute admissible evidence as it neither bears, nor is accompanied by a proper certification, authentication or attestation (*see* CPLR 4518, 4520, 4540). No other evidence has been submitted on the issue of ownership. Thus, summary judgment on this ground is denied.

The Verizon defendants and Tishman, however, have established their prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 240 (1) claim. "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass *any and all perils* that may be connected in some tangential way with the effects of gravity" (***Nieves v Five Boro A.C. & Refrig. Corp.***, 93 NY2d 914, 915–916, 690 NYS2d 852 [1999], quoting ***Ross v Curtis–Palmer Hydro–Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993] [emphasis in original]; ***Palumbo v Transit Technologies, LLC***, 144 AD3d773, 774, 41NYS3d 773 [2d Dept 2016]). The objective of the statute in requiring protective devices for persons working at heights is, in part, to prevent them from falling (*see* ***Nieves v Five Boro A.C. & Refrig. Corp.***, *supra*; ***Tsatsakos v Citicorp***, 295 AD2d 500, 744 NYS2d 475 [2d Dept 2002]). "Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists" (***Nieves v Five Boro A.C. & Refrig. Corp.***, *supra* at 915, citing ***Melber v 6333 Main St.***, 91 N.2d 759, 763–764, 676 NYS2d 104 [1998]; ***Meng Sing Chang v Homewell Owner's Corp.***, 38 AD3d 626, 627, 831 NYS2d 547 [2d Dept 2007]; *see* ***Nicometi v Vineyards of Fredonia, LLC***, 25 NY3d 90, 7 NYS3d 263 [2015]).

Here, plaintiff's accident was plainly caused by a separate hazard unrelated to any elevation risk which brought about the need for the ladder. Plaintiff was working in the sub-basement on Level A of the Building in the turbine room, which had been flooded with water and thousands of gallons of diesel fuel from ruptured tanks as a result of Hurricane Sandy. Plaintiff testified he was using a ladder provided by his employer, Allan Briteway, which was appropriate for the type of work he was undertaking to reach the electrical conduit pipes at the ceiling. Plaintiff's testimony further established that a slippery condition, not a malfunction or inadequacy of the ladder, caused his accident. Plaintiff explained that as he stepped down from the bottom rung of the ladder onto the concrete floor, he slipped on a wet substance which he surmised was diesel fuel residue. He further testified that he twisted his foot and sustained an injury to his left knee, but did not fall as he held onto the ladder for support.

Based on plaintiff's own testimony, he does not have a viable claim for a Labor Law § 240 violation (*see* ***Nicometi v Vineyards of Fredonia, LLC***, *supra*; ***Nieves v Five Boro A.C. & Refrig. Corp.***, *supra*; ***Meng Sing Chang v Homewell Owner's Corp.***, *supra*; ***Palumbo v Transit Technologies, LLC***, *supra*). In opposition, plaintiff failed to raise an issue of fact. Therefore, the Verizon defendants and Tishman are entitled to summary judgment dismissing plaintiff's Labor Law § 240 claims.

Plaintiff's Labor Law § 241 (6) claim remains viable. "Labor Law § 241 (6) 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" (***Tamarez De Jesus v Metro-North Commuter R.R.***, 159 AD3d 951, 953, —NYS3d— [2d Dept 2018]; *see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Jock v Fein***, 80 NY2d 965, 590 NYS2d 898 [1992]). To sustain a cause of action under Labor Law § 241 (6), a plaintiff must allege a breach of an Industrial Code (12 NYCRR) regulation which sets forth specific safety standards applicable to the circumstances of the accident (*see* ***Ross v Curtis–Palmer Hydro–Elec. Co.***, *supra*; ***Keener v Cinalta Constr. Corp.***, 146 AD3d 867, 45 NYS3d 179 [2d Dept 2017]). Here, plaintiff's Labor Law § 241(6) claim is premised upon violations of 12 NYCRR 23-1.7(d), 1.7(e)(1) and 23-1.21(b)(4)(ii).

12 NYCRR 23-1.7(d) is sufficient to serve as a predicate for liability under Labor Law § 241 (6) (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis–Palmer Hydro–Elec. Co.***, *supra*). Moreover, this regulation is applicable to plaintiff's accident, as it unequivocally directs employers not to "suffer or permit any employee" to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that any "foreign substance which may cause slippery footing shall be removed...to provide safe footing" (12 NYCRR 23–1.7[d]; ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 350-351).

However, while 12 NYCRR 1.7(e)(1), which requires passageways to be kept free from accumulations of dirt, debris and other tripping hazards, and 1.21(b)(4)(ii), which provides, "[a]ll ladder footings shall be firm" may also serve as predicates for liability under Labor Law § 241(6) (*see* ***Jara v New York Racing Assn., Inc.***, 85 AD3d 1121, 927 NYS2d 87 [2d Dept 2011] [12 NYCRR 23-1.7[e][1]]; ***Przyborowsky v A & M Cook, LLC***, 120 AD3d 651, 992 NYS2d 56 [2014] [12 NYCRR 23-1.21[b][4][ii]]), these regulations are inapplicable to the facts herein (*see* ***Keener v Cinalta Constr. Corp.***, *supra* [plaintiff did not trip]; ***Campos v 68 E. 86th St. Owners Corp.***, 117 AD3d 593, 988 NYS2d 1 [1st Dept 2014] [no evidence that the ladder footings were not firm, unable to sustain plaintiff's weight or not in good condition]).

The arguments in support of the motion disputing that plaintiff was engaged in work entitled to the protections of Labor Law § 241(6), are unpersuasive. Plaintiff's accident occurred in an area where demolition, repair and construction work were being performed, thereby placing plaintiff's alleged injury within the context anticipated under Labor Law § 241 (6) (12 NYCRR 23–1.4[b][13], [b][16]; ***McCraw v United Parcel Service***, 263 AD2d 499, 692 NYS2d 937 [2d Dept 1999]; ***Chavious v Friends Academy***, 213 AD2d 509, 624 NYS2d 180 [2d Dept 1995]). Plaintiff's assigned task of surveying and

testing the electrical conduits in preparation for their future removal was work incidental and ancillary to the demolition of the conduit pipes and thus falls under the purview of Labor Law § 241 (6) (*see* ***Tamarez De Jesus v Metro-North Commuter R.R.***, *supra*; ***Moreira v Ponzo***, 131 AD3d 1025, 16 NYS3d 813 [2d Dept 2015]; ***Pino v Robert Martin Co.***, 22 AD3d 549, 802 NYS2d 501 [2d Dept 2005]).

Therefore, as one of the Industrial Code regulations cited by plaintiff is both sufficiently specific and applicable, the Verizon defendants and Tishman are not entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim. Because the defendants have failed to meet their prima facie burden on this issue, it is not necessary to examine whether triable issues of fact were raised in opposition (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Plaintiff's Labor Law § 200 claim also remains viable. Labor Law § 200 is a codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work (***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Comes v New York State Elec. & Gas Corp.***, *supra*; ***Keener v Cinalta Constr. Corp.***, *supra*; ***Banscher v Actus Lend Lease, LLC***, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]). "Where, as here, the plaintiff's injuries arose not from the manner in which the work was being performed but, rather, from an allegedly dangerous condition on the property, a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, 'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (***Bridges v Wyandanch Community Dev. Corp.***, 66 AD3d 938, 940, 888 NYS2d 142 [2d Dept 2009], quoting ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008] [2008]; *see* ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). Tishman, "as the general contractor, may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition" (***Bridges v Wyandanch Community Dev. Corp.***, *supra* at 940; *see* ***Keener v Cinalta Constr. Corp.***, *supra*; ***Mikelatos v Theofilaktidis***, 105 AD3d 822, 962 NYS2d 693 [2d Dept 2013]).

Here, John Turco, the representative deposed on behalf of the Verizon defendants, and Charles Vitchers, a senior superintendent deposed on behalf of Tishman, testified that Tishman was responsible for inspecting the Building, remediating the water, oil and kerosene on the floors and ensuring that the sub-levels were clean and safe. Turco also testified, and in his affidavit asserts, he was at the Building daily after the flood water was remediated and work commenced to remove damaged equipment, including the damaged conduits. Turco acknowledges that the equipment removal caused water, diesel fuel and oil to fall to the ground, which became an ongoing problem during the Sandy Hurricane Recovery project, but denies that he knew of the alleged hazardous floor condition on the day plaintiff's accident occurred. Nevertheless, daily work records introduced during his deposition indicate that Tishman was on the sub-level floors on the day of the subject accident, supervising the subcontractor retained to perform the remediation.

Based on this testimony, the Verizon defendants failed to demonstrate that they did not have actual or constructive notice of the dangerous condition in the sub-level of the Building. Similarly,

Tishman failed to demonstrate that it did not have control over the work site or notice of the dangerous condition. Thus, the Verizon defendants and Tishman have failed to establish prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 200 claim (*see* ***Bridges v Wyandanch Community Dev. Corp.***, *supra*; ***Keener v Cinalta Constr. Corp.***, *supra*; ***Mikelatos v Theofilaktidis***, *supra*).

The court will now address the branch of the motion by the Verizon defendants and Tishman for summary judgment on their third-party complaint for contractual indemnification against Allan Briteway and the motion by Allan Briteway for summary judgment dismissing the third party-complaint. Under Workers' Compensation Law § 11, an employer may not be held liable for contribution or indemnity unless the third-party plaintiff proves that the injured employee has sustained a "grave injury" or there is a written contract by which the employer expressly agreed to do so (***New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.***, 22 NY3d 501, 982 NYS2d 830 [2014]; ***Cano v Mid-Valley Oil Co., Inc.***, 151 AD3d 685, 57 NYS3d 494 [2d Dept 2017]). "A party's right to contractual indemnification depends upon the specific language of the relevant contract" (***Tolpa v One Astoria Square, LLC***, 125 AD3d 755, 756, 4 NYS3d 230 [2d Dept 2015]; *see also* ***Cano v Mid-Valley Oil Co., Inc.***, *supra*).

Here, Allan Briteway's contractual indemnification obligation is limited to claims, damages, losses and expenses, including attorneys' fees, arising out of or resulting from its negligent acts or omissions. Thus, Allan Briteway has established its prima facie entitlement to judgment as a matter of law dismissing the contractual claim by demonstrating that plaintiff's injuries were not caused by any negligence on its part, and that, accordingly, the indemnification clause was not triggered (*see* ***Tolpa v One Astoria Square, LLC***, *supra*; ***Mikelatos v Theofilaktidis***, *supra*). Additionally, plaintiff did not sustain a grave injury; therefore, the claims for common-law indemnity and contribution are barred (*see* Workers' Compensation Law § 11; ***Cano v Mid-Valley Oil Co., Inc.***, *supra*). In opposition to Allan Briteway's prima facie showing, the defendants have failed to raise an issue of fact. Therefore, Allan Briteway is entitled to summary judgment dismissing the first cause of action for contractual indemnification and the second cause of action for common-law indemnification and contribution set forth in the third-party complaint. *A fortiori*, that the branch of the Verizon defendants' and Tishman's motion for summary judgment on the contractual indemnification cause of action, including attorney's fees, is denied as moot.

Finally, the Insurance Rider to the written electrical trade contract required Allan Briteway, prior to the commencement of any work, to maintain commercial general liability insurance on its own behalf, reflecting the inclusion of the interests of the Verizon defendants and Tishman, and to furnish certificates of insurance evidencing same. Allan Briteway has proffered a Certificate of Liability Insurance which covers its work performed at the Building for the Hurricane Sandy Recovery project and lists the Verizon defendants and Tishman as additional insureds. Thus, Allan Briteway has established a prima facie case that it satisfied its contractual obligation (*see* ***Ramcharan v Beach 20th Realty, LLC***, 94 AD3d 964, 942 NYS2d 593 [2d Dept 2012]). Although not required to provide the insurance policy, Allan Briteway has attached the policy to its motion papers. In opposition, the defendants have failed to raise an issue of fact. Thus, Allan Briteway is entitled to summary dismissing the cause of action in the third-party complaint for breach of contract in failing to procure insurance.

Accordingly, the motion (001) by Allan Briteway for summary judgment is granted and the third-party complaint is hereby severed and dismissed. The motion (002) by the Verizon defendants and Tishman for summary judgment is granted only to the extent of severing and dismissing plaintiff's Labor Law § 240 claims.

Dated: July 27, 2018

PETER H. MAYER, J.S.C.