SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

JOSE M. SAAVEDRA

INDEX NO. 161750/15

MOT. DATE

- v -

MOT. SEQ. NO. 003, 004 and 005

111 JOHN REALTY CORP ET AL.

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

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

In this personal injury action, plaintiff seeks to recover for damages he sustained while performing construction work at 111 John Street, New York, New York on November 2, 2015. In motion sequence number 003, third-party defendant The Daniel Mathews Group USA, Inc. ("DMGU") moves for summary judgment dismissing the third-party complaint against it. Defendants/third-party plaintiffs 111 John Realty Corp. and Braun Management Inc. (collectively "defendants") oppose the motion.

In motion sequence number 004, plaintiff moves for partial summary judgment on the issue of defendants' liability for violation of Labor Law § 240[1]. DMGU opposes plaintiff's motion and the defendants' cross-move for summary judgment in their favor. Plaintiff opposes defendants' cross-motion.

In motion sequence number 005, defendants move for summary judgment on their contractual indemnification claim and "dismissing any such counter claims by The Daniel Mathews Group Ltd. ("DMGL") and [DMGU] against moving defendants..." DMGU opposes that motion.

DMGL has not taken a position with respect to any of the prior motions. The court notes that counsel for DMGL previously moved to be relieved (motion sequence number 002). That motion was denied by short form order dated February 8, 2018.

Summary judgment relief is available since issue has been joined and the motions were timely brought after note of issue was filed. Defendants' cross-motion, however, was brought more than 60 days after note of issue was filed, which is beyond the time period provided for in the court's so-ordered stipulation dated March 27, 2018. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

Plaintiff claims that he fell when a scaffold he was standing on collapsed. At his deposition, plaintiff testified with the aid of a Spanish language interpreter as follows. Plaintiff was employed as a painter by a company called "the Daniel Matthews Group" (sometimes "DMG"). Plaintiff's accident occurred on

Dated: 11/20/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (004) ☒ DENIED (003 + 005) ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

November 2, 2015 on the fifth floor at 111 John Street (the "building"). When plaintiff reported to work that day, he went to the fifth floor with his boss, Joey, and another coworker Mario. Plaintiff explained that Mario translated for Joey because Joey did not speak Spanish and plaintiff did not speak English. Joey told plaintiff to get rid of some hooks in the cement ceiling and put primer to cover the holes and then paint. The room plaintiff worked in was approximately 40L x 40W x 13H.

Plaintiff used a scaffold that was already "there" to reach the ceiling. Plaintiff stated that no one trained him how to use a scaffold beyond what he had learned on the job. According to plaintiff, Joey and Mario said plaintiff could use the scaffold. The scaffold's wooden platform was approximately six to eight feet above the ground. Plaintiff could not recall what the scaffold looked like or whether there was any writing on it.

Plaintiff was removing the hooks when the scaffold's platform "sunk" and he fell to the floor below. Plaintiff landed on top of a board. There was another trade in the room performing sheetrock work, but plaintiff was the only other Daniel Matthews Group employee working on the fifth floor.

Plaintiff has provided the affidavit of Mario Mayorga. Mayorga states that he was employed as a foreman by the Daniel Matthews Group, that his supervisor was "Joey" and that he worked in the same room where plaintiff's accident occurred. Mayorga admits that he would translate Joey's instructions to other workers about their assignments. As to the scaffold which plaintiff fell from, Mayorga claims that it belonged to "the drywall contractor". Mayorga states that "[n]o one from DMG ever told me that I should not use another company's equipment in general or another company's scaffold in particular." Mayorga admits that because plaintiff needed a scaffold to do his work on the date of his accident, he told plaintiff to use the subject scaffold. Further, Mayorga states that:

> Neither I nor Joey, who only spoke to Jose through me, ever told Jose he should not use that scaffold and no one ever told Jose that he should get anything else to stand on or use anything else to stand on.
>
> After about five minutes, Joey and I left the fifth floor space and then left the building to work at another location. Later that day, I learned from Joey that the platform of the scaffold Jose had been working collapsed, causing him to fall to the floor below and become injured.

A photograph of the scaffold which plaintiff fell from has been provided to the court. After plaintiff's accident, he was taken to the hospital.

The building owner, defendant 111 John Realty Corp. ("111 John") and the managing agent for the building, Braun Management ("Braun") produced Abraham Tesser and Mark Ryfkogel for deposition. Tesser, Braun's building manager, testified that he hired contractors, including DMG, to make vacated tenant spaces at 111 John Street ready for rental. Tesser did not know the full name of DMG but when work was needed, he would contact Steven Tanen or "Joey" DeMichele at DMG for an estimate. Tesser further admitted that 111 John Realty and Braun Management had no safety personnel on the site.

Ryfkogel testified that he is a chief engineer employed by Braun to maintain the building's mechanical equipment. His testimony mostly conformed with Tesser's. He observed plaintiff on the ground after his accident. He did not know who owned the scaffolding plaintiff fell from. After a few minutes, he observed plaintiff taken away by EMS. Ryfkogel stated that he normally would take down information and generate an accident report, but he didn't in connection with plaintiff's accident "because of the lack of English. I walked in, he was taken out with an ambulance, everything happened so quickly. He didn't look – I said, Okay. My main thing was to get him to the ambulance." Ryfkogel stated that he observed the plaintiff on the ground after his accident as was depicted in a photograph which has been provided to the court. Rykogel further testified that he observed at least one other scaffold in the room in which plaintiff fell.

DMGU produced Steven Tanen and Joseph DeMichele for deposition. Tanen is the sole owner of DMGU. Previously, Tanen claims that he was employed by DMGL as managing director. Tanen testified that Chris Hasell owned DMGL. Hasell is a British citizen. According to Tanen, DMGL was also in the business of painting, and in 2014, DMGL ceased doing business and Tanen disposed of DMGL's property at that time. DMGL previously did work for the defendants, and after DMGL ceased operations, DMGU began taking estimates for work and performing work at the building.

Tanen admitted that plaintiff was employed by DMGU as a painter and began working for DMGU in the beginning of 2015. In November 2015, Tanen recalled that three DMGU employees worked at the building. Tanen testified that none of the three employees present at the building on the date of plaintiff's accident were "supervisory personnel" and DMGU did not conduct an investigation as to how plaintiff's accident occurred. According to Tanen, plaintiff's accident occurred on the first day of DMGU's work at the building.

Tanen further testified that DMGU had a storage room at the building on the 17th floor "which contain[ed] all the supplied necessary to perform the work that [wa]s required", including ladders and scaffolds. Tanen stated that he would "periodically h[old] toolbox safety meetings" where "[a] discussion of safety issues" would take place. Tanen could not recall whether plaintiff ever participated in such a meeting. Tanen further testified that DMGU had a policy "that our equipment is to be used by our employees. Nobody else is allowed to use any of our equipment, and we are not permitted to use anybody else's equipment." According to Tanen, this message was conveyed to plaintiff "[o]n a regular basis."

When shown a photograph of plaintiff lying at the bottom of a scaffold after his accident, Tanen stated that the scaffold from which plaintiff fell did not belong to DMGU because it was not yellow and DMGU did not use the type of scaffold depicted in the picture.

DMGU also produced Joseph DeMichele for a deposition. DeMichele was employed as a manager by DMGU at the time of plaintiff's accident and is the same person as "Joey" who plaintiff referred to in his deposition. DeMichele testified that he "explain[ed] safety to the guys" and was the only person that did that. He denied that he ever had formal "toolbox talks".

On the date of plaintiff's accident, DeMichele met plaintiff in the lobby and went up to the fifth floor where plaintiff's accident occurred. Prior to his accident in the room where plaintiff worked, DeMichele observed DMG's equipment in the room, including a yellow DMGU scaffold. According to DeMichele, DMGU's scaffold would have a "DMG" marking "on all metal surfaces and also on the platform." DeMichele recalled giving plaintiff general instructions about the nature of the work and then left the room. DeMichele did not know who owned the scaffold which plaintiff fell from.

Discussion

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

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

Plaintiff argues that he is entitled to partial summary judgment on his Labor Law § 240[1] claim because the defendants are owners of the building, Braun had the ability to control the injury-producing work, and the undisputed testimony is that plaintiff was injured when a scaffold he was using collapsed.

Defendants, in turn, argue that they are entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim because "[a]ll of the deposition testimony overwhelmingly confirms that the cross-moving defendants did not supervise or control he performance of plaintiff's work at the time of the subject accident." They contend that the common law negligence claim must be dismissed because the defendants did not have notice of the condition that caused plaintiff's accident, nor did they cause/create it. As for the Labor Law § 240 claim, defendants contend that plaintiff's accident does not fall within its protections, and that plaintiff was the sole proximate cause of his accident.

DMGU argues that plaintiff's motion should be denied and its motion granted because it was "plaintiff's choice to use the black scaffold that was owned by another company, rather than use the yellow Baker's scaffold owned by his employer and which was located in the same room."

Labor Law § 240[1]

Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

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

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

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991].

Here, plaintiff's motion must be granted. There can be no dispute that defendants are subject to liability under Labor Law § 240[1]. 111 John owns the building and Braun acted as general contractor for the injury-producing work. Further, plaintiff has established *prima facie* defendants' liability under Labor Law § 240[1] (see i.e. *Rroku v. West Rac Contracting Corp.*, 164 AD3d 1176 [1st Dept Sept 2018]). That there was another scaffold in the room belonging to plaintiff's employer does not require a different result, since it is undisputed that defendants are absolutely liable for an injury caused by the failure to provide an adequate safety device and the scaffold from which plaintiff fell was an inadequate safety device.

Nor can defendants raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident. If plaintiff is solely to blame for his injury, there can be no liability under Labor Law §

240[1] (*Barreto v. Metropolitan Transp. Authority*, 25 NY3d 426 [2015]). However, whether plaintiff was told to use the black scaffold or not, there are no facts on this record from which the jury could conclude that plaintiff should not have used the black scaffold. For example, had DeMichele testified that he observed the black scaffold in the room and instructed plaintiff not to use it given its condition, age, type, etc, there likely would have been a triable issue of fact as to whether plaintiff was the sole proximate cause of his accident (see i.e. *Fazeka v. Time Warner Cable, Inc.*, 132 AD3d 1401 [4th Dept 2015]; *Beamon v. Agar Truck Sales, Inc.*, 24 AD3d 481 [2d Dept 2005]). DeMichele could not even recall whether the black scaffold was in the room prior to plaintiff's accident, and certainly did not instruct plaintiff not to use the black scaffold.

Finally, the court rejects defendants' argument that plaintiff's accident does not fall within the ambit of Labor Law § 240, since plaintiff certainly sustained injuries arising from a height differential due to the failure of an enumerated safety device.

Accordingly, plaintiff's motion for partial summary judgment against defendants on the issue of liability as to Labor Law § 240[1] is granted.

Labor Law § 200 and common law negligence

The court next turns to the balance of defendants' cross-motion, which is to dismiss plaintiff's common law negligence and Labor Law § 200 claims. There is no dispute that the cross-motion is untimely, since it was served more than 60 days after note of issue was filed. The court does not have "discretion to entertain nonprejudicial, meritorious post-note of issue motions made after a court-imposed deadline but within the statutory maximum 120-day period in CPLR 3212(a)" (*Glasser v. Abramovitz*, 37 AD3d 194 [1st Dept 2007]). Nor has the defendant established good cause for failing to timely file the motion (see i.e. *Giordano v. CSC Holdings, Inc.*, 29 AD3d 948 [2d Dept 2006]; see generally *Brill v. City of New York*, 2 NY3d 648 [2004]).

While the court may consider an untimely cross motion for summary judgment in the absence of good cause where a timely motion for summary judgment was made seeking "nearly identical" relief (*Filannino v. Triborough Bridge and Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]), insofar as defendants seek summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims, the motion cannot be considered "nearly identical". Accordingly, the balance of defendants' cross-motion is denied.

Contractual indemnification

The court finally turns to defendants' cross-motion for summary judgment on their contractual indemnification claim and "dismissing any such counter claims by [DMGL] and [DMGU] against moving defendants." Relatedly, the court will consider DMGU's motion for summary judgment dismissing the third-party complaint.

Essentially, Braun entered into an agreement with just DMG which required DMG to indemnify and hold defendants harmless:

> from and against any claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, cause [sic] in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claims, damage, loss or expenses is caused in part by a party indemnified hereunder.

That agreement is dated September 20, 2011 and is signed by both Braun and DMG, with Tanen signing on behalf of DMG as "Vice President". The Agreement identifies DMG as having an address at 201 South Dean Street, Englewood, NJ 07631, which is the same address listed on DMGU's Certificate of Incorporation filed with the New Jersey Department of the Treasury on August 27, 2014. Tesser maintains that he never knew there was a distinction between DMG, DMGL and DMGU, that he only every dealt with Tanen and DeMichele and that he assumed that the entity which was performing work in the building was the same entity who was obligated to provide "proper insurances" and a "hold harmless agreement".

Meanwhile, DMGU points to a document entitled Insurance Rider, which is dated January 2, 2015between Braun and itself. The document which DMGU has provided to the court is only signed by Tanen as President of DMGU, but points to the affidavit of Tesser, who states:

> As I testified, there is a contractor I know as Daniel Mathews Group that Braun uses on a routine basis.
>
> Also as I testified, Daniel Mathews Group was performing work in suite 510 at 111 John Street, New York, NY, on the day of Mr. Saavedra's accident.
>
> Each year when Daniel Mathews Group would get a new insurance policy, they would send us a certificate of insurance as proof of same. The attached certificate of liability is the policy I understood to be in effect on the date of loss.
>
> Our insurance broker provides our office with agreements with respect to insurance and indemnification that Sara Goldenberg then provides to contractors to execute.
>
> The February 20, 2011 agreement is such an agreement that was provided to us by our insurance broker that our office then prepared to send to Daniel Mathews Group for its execution.
>
> The January 2, 2015 agreement is also such an agreement that was provided to us by our insurance broker that our office then prepared to send to Daniel Mathews Group for its execution.

The 1/2/15 insurance rider provides in pertinent part that Braun would indemnify and hold DMGU harmless

> from and against any and all claims (whether valid or invalid), damages losses and expenses of every kind and nature, including without limitation, litigation expenses and attorney's fees, arising out of or related to the performance of the contract, provided such claim, damage loss or expenses is 1) attributable to bodily injury... and 2) is caused in whole or in part by any negligent, careless or willful act or omission or liability attributable to [Braun] or any of its subcontractors or vendors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, regardless whether caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce any right or obligation or indemnity which would otherwise exist apart from this part of the agreement.

DMGU maintains that there is no contractual indemnification provision obligating it to indemnify the defendants and it is therefore entitled to summary judgment dismissing the third-party complaint. Meanwhile, defendants argue that they are entitled for contractual indemnification pursuant to the 2011

Agreement against both DMGL and DMGU. They dispute DMGU's claims that DMGL ceased operations. Further, defendants point to documents which Tanen identified at his deposition which provided job estimates and are dated October 26, 2015 and December 3, 2015. Both documents identify the contractor as "Daniel Mathews Group" with nothing after "Group" and have an address of 201 S. Dean Street, Englewood, NJ 07631.

Defendants maintain that the course of conduct between the parties "demonstrates the intention of Daniel Mathews Group to indemnify and insure [defendants] and no intention to enter into a new agreement." Further, defendants contend that there was no novation of the 2011 agreement.

As for the insurance rider, defendants contend it is ambiguous and that there is no evidence that Braun accepted and executed same.

By way of background, DMGL answered the complaint and moved for summary judgment. That motion was denied as premature (motion sequence number 001). Counsel for DMGL then moved to be relieved as counsel. That motion was also denied, due to movant's failure to effectuate personal service on DMGL.

"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]).

Here, the court finds that there is a triable issue of fact as to whether DMGL d/b/a DMG assigned the 2011 Agreement to DMGU. There is no dispute that the 2011 Agreement was not cancelled. As defendants repeatedly point out, the record is murky at best as to DMGL's status. Indeed, DMGL remains a party in this action and is represented by counsel.

A contract can be freely assigned absent an express provision to the contrary. Moreover, "an assigned contractual relationship may be established by conduct of the parties, as well as by express agreement" (*Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926 [Sup Ct NY Co] [J. Fried, B.] quoting *Giuntoli v. Garvin Guybutler Corp.*, 726 FSupp 601 [SDNY 1971]).

On this record, defendants have presented evidence that they were unaware of the change in legal entities from DMGL to DMGU in 2014 and continued to do business with the same operative persons, including Tanen, throughout the relevant time period, all under the assumption that the 2011 Agreement remained in effect. The 1/2/15 insurance rider, however, would permit a jury to conclude to the contrary, since the 1/2/15 insurance rider clearly identifies DMGU and further, required Braun to indemnify DMGU. There is a further issue of fact as to whether Braun executed the 1/2/15 insurance rider. According to Tesser's affidavit, Braun only "prepared to send to Daniel Mathews Group for its execution", the meaning of which is unclear to the court.

Finally, as for defendants' motion against DMGL, there is at least a triable issue of fact as to whether DMGL did in fact cease operations prior to plaintiff's accident, and whether DMGL had any role in said accident. Therefore, defendants are not entitled to summary judgment on their contractual indemnification claim against DMGL, either.

Accordingly, DMGU's motion sequence number 003 and defendants' motion sequence number 005 are both denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of defendants' liability for violation of Labor Law § 240[1] (motion sequence number 004) is granted; and it is further

ORDERED that defendants' cross-motion (motion sequence number 004), and motion sequence number 003 and 005 are all denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 11/20/18
New York, New York

So Ordered:

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