SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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STEPHEN HEALD and BARBARA HEALD,

Plaintiff,

-against-

NEWTON CONSTRUCTION CORP. and THE UNIVERSAL CHURCH, INC.,

Defendants.

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NEWTON CONSTRUCTION CORP.,

Third-party Plaintiff,

-against-

NCP RESTORATION LTD,

Third-party Defendant.

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THE UNIVERSAL CHURCH, INC.,

Second Third-party Plaintiff,

-against-

NCP RESTORATION LTD,

Second Third-party Defendant.

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Index No. 150779/14
Motion Seq. Nos. 003, 004, 005

DECISION AND ORDER

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NEWTON CONSTRUCTION CORP.,

Third Third-party Plaintiff,

-against-

MASPETH STEEL ERECTORS, INC. and
MASPETH STEEL FABRICATORS, INC.,

Third Third-party Defendant.

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CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendant/second third-party plaintiff The Universal Church, Inc. (Universal Church) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it and granting it partial summary judgment as to liability on its cross claims against defendant/third-party plaintiff/third third-party plaintiff Newton Construction Corp. (Newton), as well as its claims against third-party defendant/second third-party defendant NCP Restoration LTD (NCP) (motion seq. No. 003). Newton moves for summary judgment dismissing all claims as against it and granting it partial summary judgment as to liability on its claims against NCP (motion seq. No. 004). NCP moves for summary judgment dismissing the third-party complaint and the second third-party complaint.

BACKGROUND

Plaintiff Stephen Heald (Plaintiff or Heald) alleges that, on July 23, 2013, he was injured on the job while working on a renovation project as a carpenter for NCP. Universal Church owned the property, which is located at 92-94 Merrick Boulevard in Jamaica, Queens. Newton served as the general contractor on the renovation project. Plaintiff's accident involved him slipping on a folded plastic bag on the second floor of the building. More specifically, Plaintiff

testified that he was walking toward the NCP's gangbox on the second floor, when he "turned around" to get a key he had left in his jacket on a table, "[s]o I turned around to get the key and I slipped on a bag (NYSCEF doc No. 115 at 81). Plaintiff described the bag as a "black construction bag still folded up" (*id.* at 82).

Plaintiff filed the complaint in this action on January 28, 2014. It alleges that defendants Newton and Universal are liable for his injuries under Labor Law § 241 (6), as well as common-law negligence and Labor Law § 200. Additionally, Plaintiff Barbara Heald alleges that defendants are liable to her for loss of her husband's services.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of

Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiff must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Here, Plaintiff alleges violation of three Industrial Code provisions: 12 NYCRR 23-1.7 (d), 12 NYCRR 1.7 (e) (2), and 12 NYCRR 23-2.1 (a) (1).

12 NYCRR 23-1.7 (d)

12 NYCRR 23-1.7 is entitled "Protection from general hazards" and its subsection d is entitled "Slipping hazards." That subsection provides:

> "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing"

Courts have held that this regulation is sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g. Tronolone v New York State Dept. of Transp.*, 71 AD3d 1488 [4th Dept 2010]). Universal Church and Newton each argue that this section is inapplicable, as Plaintiff's accident did not involve a slipping hazard.

Plaintiff argues briefly that the regulation is applicable, referring to his own testimony

that he "slipped" on the folded construction bag (*see* NYSCEF doc No. 115 at 81). Additionally, Plaintiff contends that defendants' application to dismiss this application should be denied, as Newton fails to cite to any caselaw.

Plaintiff fails to mention that Universal Church does cite to caselaw pertinent to this regulation. Specifically, Universal Church cites to *Stier v One Bryant Park LLC* (113 AD3d 551 [1st Dept 2014]), in which the First Department held that an unsecured piece of masonite "is not a slipping hazard contemplated by 12 NYCRR 23-1.7 (d)" (*id.* at 552, citing *Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]). In *Crousett*, the Court dismissed allegations under this regulation as the plaintiff failed to make a showing of "a foreign substance that caused a slippery footing" (102 AD3d at 448).

Here, the circumstances of Plaintiff's fall, rather than the verb which he used at his deposition to describe it, is dispositive. That is, Plaintiff's use of the word "slip" at his deposition does not necessarily convert a plastic bag into a slipping hazard. Applying *Croussett* and *Stier* to the present facts, it is clear that a folded trash bag is not "a foreign substance that caused a slippery footing." The principle of *ejusdem generis* makes this inapplicability even clearer: a bag is not similar in nature to the foreign substance listed in the regulation -- ice, snow, water, grease (*see generally* 532 US 105, 114-115 [invoking *ejusdem generis* and noting that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"] [internal quotation marks and citation omitted]). As the regulation is not applicable, the applications of Universal Church and Newton to dismiss Plaintiff's allegations that it was violated are granted.

12 NYCRR 1.7 (e) (2)

Subsection (e) (2) of 12 NYCRR 23-1.7 is entitled "Tripping and other hazards; Working areas." It provides: "The parts of floors, platforms, and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." This section is sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g. O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225-226 [1st Dept 2006]).

Universal Church does not specifically address 12 NYCRR 1.7 (e) (2). Thus, it does not make a *prima facie* showing of entitlement to its dismissal. Newton argues that the regulation should be dismissed as plaintiff described himself slipping rather than tripping. Just as this choice of verb was not dispositive in Plaintiff's favor in the 12 NYCRR 23-1.7 (d) context, it is not dispositive in defendants' favor here (*Pereira v New Sch.*, 148 AD3d 410, 412 [1st Dept 2017] [holding that 12 NYCRR 23-1.7 (e) applies "whether plaintiff slipped and fell or tripped and fell"]).

Newton also argues that the folded bag does not fall under the catchall of "dirt and debris and scattered tools and materials." Plaintiff, in opposition, argues that the bag is debris or a scattered material. In support, Plaintiff cites to *Canning v Barneys N.Y.* (289 AD2d 32 [1st Dept 2001]), where the First Department held that "a coil of tie wire, which formed a loop projecting about 18 inches from the wheel of a dumpster" was debris under the regulation (*id.* at 35).

Here, similarly, the folded bag can be considered either debris or a work material, in that it was an object used to do work on the project, *i.e.*, clean up, and it was left out in a working area. Thus, there is, at least, a question of fact as to whether a violation of 12 NYCRR 1.7 (e) (2) was a proximate cause of Plaintiff's injuries. As such, defendants' application for dismissal of it

as an alleged predicate to section 241 (6) liability must be denied.

12 NYCRR 23-2.1 (a) (1)

12 NYCRR 23-2.1 is entitled "Maintenance and housekeeping; Storage of material or equipment" and its first subsection provides: "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." Courts have held that this regulation is sufficiently specific to serve as a predicate to section 241 (6) liability (*see Pereira v New Sch.*, 148 AD3d 410).

Universal Church and Newton each argue that the regulation is inapplicable, as Plaintiff fell on a single bag rather than a "material pile" and as Plaintiff accident took place in an open area. As to the absence of a material pile, Universal Church cites to *Castillo v Starrett City* (4 AD3d 320 [2d Dept 2004]), which held that, under the regulation, a "single, small piece of insulation" was not a material pile (*id.* at 321). As to open areas, defendants cite, among others, to *Waitkus v Metropolitan Hous. Partners* (50 AD3d 260 [1st Dept 2008]) which noted that the regulation was inapplicable for several reasons, including that the "plaintiff was in a work area, not a passageway" (*id.* at 260).

Plaintiff argues that the regulation provides a clear mandate to safely store materials on the jobsite and defendants have failed to do so. Plaintiff does not contend that his accident took place in a passageway, walkway, stairway or thoroughfare. Instead, Plaintiff contends that this is immaterial, as the garbage bag was not safely stored. In support, Plaintiff cites to *Rodriguez v DRLD Dev., Corp.* (109 AD3d 409 [1st Dept 2013]), in which the plaintiff, by tripping on a metal cable, dislodged a "pile of sheetrock boards," which then fell on her (*id.* at 409). As to 12 NYCRR 23-2.1 (a) (1), *Rodriguez* held that "although defendant correctly argues that there has

been no testimony that the sheetrock boards blocked a passageway, walkway, stairway or thoroughfare, the fact that the sheetrock fell on plaintiff raises an issue of fact as to whether the boards were stored in a 'safe and orderly manner'" (*id.* at 410, citing *Castillo v 3440 LLC*, 46 AD3d 382 [1st Dept 2007]).[1]

Here, defendants make a *prima facie* showing of entitlement of judgment by submitting evidence showing that Plaintiff's accident did not involve a material pile, and that it happened in an open area. Plaintiff fails to rebut this *prima facie* showing on either issue. Plaintiff's reliance on *Rodriguez* is misplaced. That case involved a pile of sheetrock boards, which is self-evidently a material pile. Just as evidently, a single trash bag is not a material pile.

Accordingly, Plaintiff's allegations that defendants violated 12 NYCRR 23-2.1 (a) (1) must be dismissed and the branches of Universal Church and Newton's motions seeking this relief must be granted. Moreover, all Industrial Code provisions that Plaintiff did not defend in its opposition are dismissed as abandoned (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address a claim indicates an intention to abandon it as a basis of liability]). However, as there is a question of fact as to 12 NYCRR 1.7 (e) (2), the applications of Universal Church and Newton for dismissal of Plaintiff's section 241 (6) claim must be denied.

[1] In *Castillo*, the First Department found that there was a question of fact as to violation of 12 NYCRR 23-2.1 (a) (1) where the plaintiff submitted an expert affidavit stating that boards had been unsafely stored (46 AD3d at 383).

III. Labor Law § 200 and Common-Law Negligence

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 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant]

controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Initially, the Court notes that Plaintiff only addresses its Labor Law § 200 and common-law negligence claims against Newton. Thus, Plaintiff has abandoned his section 200 and common-law negligence claims as against Universal Church and Universal's application for dismissal of these claims must be granted.

Newton, however, fails to make a *prima facie* showing of entitlement to dismissal of Plaintiff's section 200 and common-law negligence claims. Here, Plaintiff alleges that there was dangerous condition on the premises -- the garbage bag. Thus, Newton's argument that it did not have supervisory control over Plaintiff's work is immaterial.

Newton also argues that it did not create the alleged dangerous condition, submitting the deposition testimony of Timothy Devlin (Devlin), its project manager. Devlin testified that while he observed other trades using plastic garbage bags on the jobsite, Newton did not use them (NYSCEF doc 117 at 18, 40). But while Newton makes a showing as to not having created the alleged defect, it makes no showing that it had no constructive notice of it. Instead, Newton argues that there is no evidence that it had notice of the alleged defect.

This argument confuses the issue of burden of proof. It is axiomatic that a general contractor has a statutory duty under section 200 to maintain a safe jobsite. Thus, Newton has a duty to address any dangerous conditions that it has actual or constructive notice. To show a lack of constructive notice, it is Newton's burden to submit evidence as to when it last cleaned or inspected the premises (*see Pereira*, 148 AD3d at 412-413 [holding that the defendants were not entitled to summary judgment dismissing the plaintiff's section 200 and common-law negligence claims, as "defendants failed to establish that they lacked constructive notice … since they

submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident"]). Here, similarly, Newton failed to make a showing as to constructive notice as it submitted no evidence as to when it last cleaned or inspected the jobsite.

As Newton has failed to make a *prima facie* showing as to constructive notice, the branch of its motion seeking dismissal of Plaintiff's section 200 and common-law negligence must be denied.

IV. Universal Church's Cross Claims Against Newton

Newton moves for summary dismissal of Universal Church's cross claims against it, while Universal Church seeks summary judgment against Newton on its cross claim for contractual indemnification.

Contractual Indemnification

The agreement between Universal Church and Newton contains the following indemnification provision:

> "To the fullest extent permitted by law, [Newton] shall indemnify and hold harmless [Universal Church] … from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, but only to the extent caused by the breach of Contract or 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. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section"

(NYSCEF doc No. 119 at § 9.15.1).

In order for the obligation to indemnify to be triggered, this provision clearly requires a showing that Newton breached its agreement with Universal Church, or that that the subject injuries were caused by the negligence of either Newton or one of its subcontractor's. As there has been no finding that Newton breached the agreement, or a showing that it or one of its

subcontractors was negligent, Universal Church is not entitled to summary judgment on its contractual indemnification claim against Newton. However, as discussed above, there remains an issue of fact as to Newton's negligence. Moreover, the provision contains the saving language ("To the fullest extent permitted by law") that prevents a violation of General Obligation Law 5-322.1 (*see generally Brook v Judlau*, 11 NY3d 204, 209 [2008]). Thus, Newton is not entitled to dismissal of Universal Church's contractual negligence claim against it. Accordingly, the applications of both Universal Church and Newton regarding Universal's Church's contractual indemnification claims must be denied.

Contribution and Common-Law Indemnification

Newton seeks dismissal of Universal Church's cross claims for contribution and common-law negligence. It is, however, not entitled to such relief as there remains a question of fact as to whether Newton was negligent (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution requires a showing of active negligence]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law negligence requires a showing of common-law negligence]). Accordingly, the branch of Newton's motion seeking dismissal of Universal Church's cross claims for contribution and common-law indemnification must be denied.

Breach of Contract for Failure to Procure Insurance

The agreement between Universal Church and Newton required Newton to obtain insurance on Universal's Church's behalf (NYSCEF doc No. 119). In support of its application for summary dismissal of Universal's Church's cross claim for breach of contract for failure to procure insurance, Newton submits proof that it did obtain the required insurance protection on behalf of Universal Church (NYSCEF doc No. 122). Accordingly, the branch of Newton's motion seeking dismissal of Universal Church's cross claim for the breach of contract for failure

to procure insurance must be granted (*see Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011] [dismissing breach claim where the subject insurance policy listed the claimant as an additional insured]).

V. NCP's Motion

NCP dismissal of all claims against it. Universal Church and Newton have claims against NCP for contribution, common-law negligence, contractual indemnification, and breach of contract for failure to procure insurance.

Contribution and Common-law Negligence

NCP is entitled to dismissal of all contribution and common-law negligence claims against it for two reasons: Worker's Compensation Law § 11 and its unrebutted showing that it was not negligent.

First, no party alleges that Plaintiff's accident involved a grave injury. Thus, in these circumstances, under Worker's Compensation Law § 11, NCP, Plaintiff's employer, is not liable for contribution or common-law negligence (*see Reinoso v Ornstein Layton Mgt, Inc.*, 34 AD3d 437 [2d Dept 2006]).

As to the absence of negligence, NCP submits Plaintiff's deposition transcript, at which Plaintiff testified that NCP placed debris in rolling containers rather than plastic bags (NYSCEF doc. No. 115 at 184). In opposing NCP's motion, neither Universal Church nor Newton submits any evidence that NCP was negligent in creating the allegedly negligent condition. Without a showing of negligence against NCP, all contribution and common-law indemnification claims must be dismissed as against NCP. Accordingly, the branch of NCP's motion seeking dismissal of these claims must be granted.

Contractual Indemnification

The agreement between NCP and Newton contains an indemnification provision that it is coterminous with the one between Newton and Universal Church (NYSCEF doc No. 120, § 4.6.1). As such, it requires a showing of breach of contract or negligence to trigger the obligation to indemnify. As NCP has made a showing that it neither breached its contract, nor was negligent, it is entitled to dismissal of all contractual indemnification claims against it.

Breach of Contract for Failure to Procure Insurance

The agreement between NCP and Newton required NCP to obtain insurance on behalf of Newton and Universal Church (NYSCEF doc No. 120). As neither Newton nor Universal Church oppose the branch of NCP's motion that seeks dismissal of their claims for breach of contract for failure to procure insurance, these claims must be dismissed as abandoned.

CONCLUSION

Accordingly, it is

ORDERED that defendant/second third-party plaintiff The Universal Church, Inc.'s motion for summary judgment (motion seq. No. 003) is granted only to the following extent: plaintiff's Labor Law § 200 and common-law negligence claims against Universal Church are dismissed; and all of plaintiff's allegations of Industrial Code violations, except for those relating to 12 NYCRR 1.7 (e) (2), are dismissed; and it is further

ORDERED defendant/third-party plaintiff/third third-party plaintiff Newton Construction Corp.'s motion for summary judgment (motion seq. No. 004) is granted only to the extent that plaintiff's allegations of Industrial Code violations, except for those relating to 12 NYCRR 1.7 (e) (2), are dismissed; and it is further

ORDERED that third-party defendant/second third-party defendant NCP Restoration

LTD.'s motion for summary judgment dismissing the third-party complaint and the second third-party complaint (motion seq. No. 005) is granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that counsel for Universal Church is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: February 2, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.