SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

SAVIN S. ROMILLIE

INDEX NO. 161969/15

MOT. DATE

- v -

MOT. SEQ. NO. 004 and 005

ACC CONSTRUCTION CORPORATION et al.

The following papers were read on this motion to/for sj

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)._____

This is a personal injury arising from a construction site accident. Plaintiff has asserted claims for violation of Labor Law §§ 240, 241[6], 200 and common law negligence. There are two motions for summary judgment pending before the court. In motion sequence 004, defendant ACC Construction Corporation ("ACC") moves for summary judgment dismissing plaintiff's complaint and all cross-claims and counterclaims against it. Plaintiff opposes that motion. In motion sequence 005, 125 Park Owner, LLC ("125 Park") moves for summary judgment in its favor dismissing plaintiff's complaint as well as against ACC on its cross-claim for contractual indemnification. Plaintiff and ACC oppose that motion. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

Plaintiff was injured on October 30, 2015 while working as a taper for non-party Gotham General Carpentry, Inc. ("Gotham"). Specifically, plaintiff fell from a a-frame ladder which was placed on top of a baker scaffold in the closed position at the premises located at 125 Park Avenue, New York, New York (the "building"). Plaintiff was alone at the time of his accident and he did not know what caused the scaffolding to fall over.

125 Park owns the building, which was undergoing a buildout for a Blink Fitness space (the "project") at the time of plaintiff's accident. ACC was the general contractor for the project. Plaintiff had worked at the building for approximately a month and a half before his accident. There is no dispute that plaintiff did not receive any training nor was he provided with any safety equipment.

The court will first consider the parties' arguments with respect to plaintiff's claims. Movants argue that: [1] plaintiff was the sole proximate cause of his accident, precluding their liability under Labor Law §240[1] and 241[6]; [2] ACC had sole exclusive control over the means and methods of plaintiff's work, precluding liability under labor Law § 200 and for common law negligence against 125 Park; and [3] ACC did not direct, control or supervise plaintiff's work.

Dated: 10/7/19

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

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

2. Check as appropriate: Motion is ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

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

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Meanwhile, plaintiff maintains that defendants have not met their burden on their motions, that triable issues of fact preclude summary judgment, and that the alleged violations of the Industrial Code are sufficiently specific. Plaintiff has submitted to the court the affidavit of Dr. William Marletta, who opines that the defendants violated the Labor Law.

On reply, defendants urge the court not to consider the expert affidavit because plaintiff's expert was not previously disclosed. The court rejects this application, as there is no prejudice to the late notice nor a showing that plaintiff willfully failed to disclose (see *Handwerker v. City of New York*, 90 AD3d 409 [1st Dept 2011]).

Discussion

At the outset, plaintiff has not opposed dismissal of the Labor Law § 240[2] claim nor 125 Park's motion with respect to the Labor Law § 200 and common law negligence claims. Therefore, those claims are dismissed.

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 New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). 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]). 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:

Labor Law § 240[1]

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

Defendants argue that plaintiff's own conduct of placing a ladder in the closed position on top of a baker scaffold was improper and the sole cause of his accident. Defendants point to plaintiff's testimony that the proper way to use the baker scaffold would have been to place one on top of another, rather than putting a ladder on top. Further, plaintiff admitted that there were three other baker scaffolds at the project. The court rejects defendants' argument.

Contrary to defendants' contention, plaintiff could not just put another scaffold on top of the scaffold he was already using, since he testified that the other scaffolds at the project were in use. Further, plaintiff testified that he did not even know if two baker scaffolds stacked on top of each other would have fit in the area he was working.

Even if plaintiff was negligent in placing the ladder on top of the scaffold, defendants have failed to establish as a matter of law that his conduct was the sole proximate cause of his injuries. Assuming *arguendo* that they had, plaintiff has raised a triable issue of fact on this point, since he clearly testified that the scaffold collapsed (see i.e. *Chlebowski v. Esber*, 58 AD3d 662 [2d Dept 2009]; see generally *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]; *cf. Montgomery v. Federal Express Corp.*, 4 NY3d 805 [2005] [plaintiff sole proximate cause of his accident because he used a bucket instead of ladders that were readily accessible]; *Daley v. 250 Park Ave., LLC,* 126 AD3d 747 [2d Dept 2015] [triable issue of fact as to whether plaintiff mispositioned ladder he fell from and therefore sole proximate cause of his accident]).

Indeed, plaintiff testified that he had put a ladder on top of a scaffold at the project on previous occasions and that no one told him not to do that. He further stated that there the other two baker scaffolds were frequently in use by other trades at the project. Plaintiff could not reach the area he needed to tape with just one baker scaffold or one ladder. This left plaintiff with no choice other than to use both to perform his work.

Absent any appropriate safety devices to protect plaintiff from the risk of force of gravity, defendants are not entitled to summary judgment. Defendants have failed to come forward with admissible proof that the scaffold did not collapse as plaintiff testified, but rather, fell over due to plaintiff's improper placement of the ladder. It is of no moment that plaintiff did not observe any issues with the scaffold immediately prior to his accident.

Accordingly, defendants' motions for summary judgment as to the Labor Law § 240[1] claim is denied.

Labor Law § 240[3]

Labor Law § 240(3), which states in part that "[a]ll scaffolding shall be constructed as to bear four times the maximum weight..." For the reasons already stated, defendants have failed to establish that they are entitled to judgment as a matter of law on this claim.

Labor Law § 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll 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.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343

[1998]). Plaintiff asserts that Industrial Code § 23-1.5[c][1], [2] and [3] and § 23-5.1[b] were violated as a matter of law. Plaintiff has implicitly withdrawn the balance of the Industrial Code provisions he previously alleged were violated.

Industrial Code § 23-1.5[c] provides in pertinent part:

> (c) Condition of equipment and safeguards.
>
> (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.
>
> (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.
>
> (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Industrial Code § 23-5.1[b] provides:

> Scaffold footing or anchorage. The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used.

The Industrial Code provisions plaintiff relies upon are applicable and sufficiently specific to survive defendants' motion for summary judgment on these facts. Otherwise, defendants have failed to establish *prima facie* that these provisions were not violated as a matter of law. Accordingly, their motions are granted only to the extent that plaintiff's Labor Law § 241[6] claim premised on all Industrial Code violations except § 23-1.5[c][1], [2] and [3] and § 23-5.1[b] are severed and dismissed.

Labor Law § 200 and common-law negligence

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Plaintiff argues that ACC has not demonstrated that the scaffold was not defective. The court agrees. There is no proof that the scaffold was inspected prior to plaintiff's accident. Contrary to ACC's contention, there is sufficient evidence on this record that the scaffold was defective since plaintiff testified that it collapsed. It is of no moment that plaintiff was able to put the brakes on the scaffold and ascend/descend several ties prior to his accident.

Accordingly, ACC"s motion to dismiss this cause of action is denied.

Contractual indemnification

As for the cross-claim for contractual indemnification, pursuant to Section 9, entitled "Indemnification", ACC Construction was obligated to defend and indemnify 125 Park. The contract states in relevant part as follows:

> To the fullest extent permitted by law, Contractor shall indemnify and hold harmless (i) Owner and the Owner Parties, (ii) the owner and tenant of each Building where Work is to be performed hereunder, and the respective directors, officers, shareholders, partners, members, managers, employees and agents of each such owner and tenant and (iii) such other parties in interest as Owner may designate in writing from time to time (collectively the "Owner Indemnified Parties") from and against all losses, liabilities, damages, judgments, costs, fines, penalties, actions or proceeding and attorneys' fees, and shall defend the Owner Indemnified Parties in any action proceeding, including appeals, for personal injury to or death of any person, for loss or damage to property or for damage to the environment as a result of the (i) acts, omissions or other conduct of Contractor, or any acts, omissions or other conduct of its officers, directors, employees, subcontractors or agents, in connection with Contractor's performance of the Work and its other obligations under this Agreement or (ii) Contractor's performance or failure to perform under this Agreement, or any breach of any warranty or representation of Contractor made under this Agreement.

125 Park argues that in the event that the plaintiff's injuries exceed the primary policy limits of the insurance policy issued to ACC, then 125 Park is entitled to contractual indemnification. 125 Park explains that it is being afforded coverage under the primary general liability policy issued to ACC by Arch Insurance Company.

Meanwhile, ACC contends that 125 Park is not entitled to contractual indemnification until there has been a finding that plaintiff's accident occurred as a result of its conduct or its subcontractor's conduct in connection with the contractor's performance of work or ACC's performance or failure to perform. Further, ACC argues that 125 Park's motion as to the cross-claim should also be denied because it has not established that it is free from negligence.

"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]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

The court agrees with ACC as to its argument that 125 Park is not yet entitled to contractual indemnification absent a finding that plaintiff's accident was "a result of the (i) acts, omissions or other conduct of [ACC], or any acts, omissions or other conduct of its... subcontractors... or (ii) [ACC's] performance or failure to perform..." Absent such a finding, the indemnification provision has not yet been triggered.

Accordingly, 125 Park's motion as to the cross-claim is also denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendants' motions are granted to the following extent: [1] plaintiff's Labor Law § 240[2] claim is severed and dismissed; [2] plaintiff's Labor Law § 200 and common law negligence claims against 125 Park are severed and dismissed; [3] plaintiff's Labor Law § 241[6] claim premised

on all Industrial Code violations except § 23-1.5[c][1], [2] and [3] and § 23-5.1[b] are severed and dismissed; and it is further

ORDERED that defendant's motions are otherwise 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: 10/7/19
New York, New York

So Ordered:

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