SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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JOSE SERRANO,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 150695/2014

MOTION DATE 11/21/2018

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245

were read on this motion to/for JUDGMENT - SUMMARY.

On September 27, 2013, plaintiff Jose Serrano, a laborer employed by third-party defendant Gem Quality Corp., was injured at a construction site located at 1115 FDR Drive, in the county, city and state of New York, when he was struck twice by a power-operated lift-scaffold. Plaintiff commenced an action against defendants, the City of New York[1] and New York City Housing Authority (NYCHA), alleging claims pursuant to Labor Law §§ 200/common law negligence, 240(1), and 241(6) predicated on various sections[2] of the Industrial Code of the State of New York, OSHA[3] and the Code of Federal Regulations[4], and 29 USC 654. NYCHA (defendant) moves pursuant to CPLR 3212 for: 1) summary dismissal of the complaint; and 2) summary judgment against the third-party defendant Gem-Quality Corporation (Gem) for contractual indemnification and breach of contract for failure to procure insurance, Plaintiff cross-moves pursuant to CPLR 3212 for summary judgment on its claim under Labor Law § 240(1) against NYCHA. The parties oppose the other's motion/cross-motion as against them.

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[1] Plaintiff's claims against the City of New York were dismissed in the September 19, 2014 order (NYSCEF # 33).
[2] Plaintiff's alleged Industrial Code violations: NYCRR §§ 23-1.2, 23-1.3, 23-1.4(12), 23-1.4(17), 23-1.5(a), 23-1.5(b), 23-1.5, 23-1.15, 23-1.16, 23-5.1(c)(2), 23-5.1(f), 23-5.1(h), 23-5.8, 23-5.8(c)(1), 23-5.10, 23-7.1.
[3] Plaintiff's alleged OSHA violations: §§ 5(a)(1), 5(a)(2) and 5(b).
[4] Plaintiff's alleged Code of Federal Regulations violations: 29 CFR 1926.20, 1926.32, Subpart C 1926.21, Subpart L 1926.451, 1926.452, and 1926.454.

FACTS

NYCHA contracted with Gem to perform repairs at NYCHA's Riis Houses complex (Contract). Plaintiff was employed by Gem at the time of his accident. According to plaintiff, on the date of his accident, his job was to transport, via a bobcat loader, cement and bricks from one area within the construction site to Gem workers working at a lift-scaffold (NYSCEF # 220 – Serrano tr at 38:21-25, 40:21-23). The scaffold was located approximately five feet from the building. When plaintiff arrived at the unloading area, he observed that one end of the scaffold was elevated and resting on the railing of the adjacent building, situated approximately three- to three-and-one-half feet above the ground; the other end was on the ground (*id.* at 34:20-35:21). Plaintiff also observed that two workers were standing on the scaffold, one on the raised end; the other on the end situated on the ground (*id.* at 36:14-37:13).

Plaintiff then unloaded the materials to the workers on the scaffold (*id.* at 42:11-16). After he finished unloading the materials, plaintiff began to reverse the bobcat away from the scaffold when one of the workers requested that plaintiff help move the scaffold (*id.* at 43:16-44:5). The worker requested that plaintiff hold the end of the scaffold on the ground while the workers raised the scaffold in order to prevent the scaffold from contacting the façade of the building (*id.* at 51:24-52:10). Plaintiff parked the bobcat approximately four feet from the scaffold with the bucket of the bobcat facing the scaffold and alighted from the bobcat to help with the scaffold. (*id.* at 46:10-14).

As plaintiff held the end of the scaffold on the ground with his hands, the worker closest to plaintiff raised the scaffold approximately four inches from the ground (*id.* at 59:3-10). As the scaffold was being raised from the ground, the worker at the other end of the scaffold also raised the scaffold approximately four inches from the railing (*id.* at 59:15-19). The end of the scaffold resting on the railing was being held in place by the railing (*id.* at 59:20-60:5; NYSCEF # 221 at 214: 4-13). Upon raising the scaffold from the railing, the scaffold swung toward plaintiff "like a swing," and hit him, causing him to fall backward into the bucket of the bobcat (NYSCEF # 221 at 208:17-23). The scaffold then swung in the opposite direction from plaintiff, made contact with the building, then swung back in plaintiff's direction striking him a second time while he was in the bucket of the bobcat (NYSCEF # 220 at 59:24-60:5).

Plaintiff submits the expert affidavit of Herbert Heller, P.E., who averred that "due to the force of gravity, when the worker that was at the higher elevation of the scaffold hit the ascend button following the worker that was on the ground, the unsecured scaffold, swung in an arc and into [plaintiff] causing his injury" (NYSCEF 226 at ¶14). Heller opined that defendants' failure to properly brace or support the scaffold resulted in the sudden movement of the scaffold toward

plaintiff (*id.*). Heller also indicated that "[d]efendants failed to furnish or erect ropes, tag lines and other devices that were so constructed, placed and operated as to give proper protection to [plaintiff]" (*id.* at ¶15).

Defendant offers the testimony of Aleem Tariq, plaintiff's supervisor, who testified that he never saw the scaffold where one end of the scaffold rested on the railing and the other end on the ground (NYSCEF # 202 at 70:17-71:22). Defendant also points out that plaintiff was not permitted to operate the Bobcat at the premises because he was not trained by the company that provided the machine.

DISCUSSION

CPLR 3212

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Sokolowsky*, 101 AD3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]). Courts view the evidence in the light most favorable to the non-moving party and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1)

Plaintiff contends that defendant failed to provide plaintiff with adequate safety devices, such as a secured scaffold and tag lines, to afford him protection while he was performing his work at the premises. Defendant argues that plaintiff's testimony demonstrates that plaintiff did not sustain a gravity-related injury in that the scaffold was moving in a horizontal direction the both times it contacted plaintiff. Defendant also argues that plaintiff did not have permission to perform the work that resulted in his injury.

Labor Law § 240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a

worker who sustains injuries proximately caused by that failure (*Ernish v City of New York,* 2 AD3d 256 [1st Dept 2003], citing *Bland v Manocherian,* 66 NY2d 452 [1985]). Labor Law § 240(1) "was designed to prevent those types of 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*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] [emphasis in original]).

"For section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001]).

As demonstrated by plaintiff's testimony and the expert's affidavit, plaintiff's injury was a direct consequence of the application of the force of gravity to the scaffold being raised. Plaintiff's undisputed testimony demonstrates that when the end of the scaffold situated on the railing was raised, the other end of the scaffold that was no longer on the ground so that it swung and hit plaintiff twice. Plaintiff's description of the scaffold's motion as "like a swing" after it was raised demonstrates that the scaffold moved in an arc-motion toward plaintiff. Heller's affidavit confirms that plaintiff's injuries were caused by a gravitational shift in the scaffold toward plaintiff when the scaffold was raised from the railing. Further, Heller's affidavit demonstrates that defendant failed to provide plaintiff with safety devices to sufficiently protect plaintiff from the gravity related risk created by the scaffold.

Defendant's opposition to plaintiff's cross-motion fails to raise an issue of fact. There is no evidentiary support for defendant's argument that the scaffold was solely moving in a horizontal direction (NYSCEF # 195 at 25). Further, the testimony of Aleem Tariq , plaintiff's supervisor, that he never observed the position of the scaffold as plaintiff described fails to rebut plaintiff's testimony regarding the condition of the subject scaffold at the time of plaintiff's accident (NYSCEF # 202 at 70:17-71:22). Moreover, defendant's argument that plaintiff was not permitted to operate the Bobcat at the premises because he was not trained by the company that provided the machine is irrelevant, since plaintiff was not operating the machine at the time of his injury.

Accordingly, defendant's motion for summary dismissal of plaintiff's claim under Labor Law § 240(1) is denied and plaintiff's cross-motion for summary judgment of his claim under section 240(1) is granted.

Labor Law § 241(6)

Labor Law § 241(6) "requires owners and contractors 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" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). This section imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). In order to recover, the claimant must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 NY2d at 502-504; *Coyago v Mapa Props., Inc.*, 73 AD3d 664 [1st Dept 2010] ["A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard"]).

At the outset, plaintiff's Labor Law 241(6) claim premised on 23-1.2, 23-1.3, 23-1.4(12), 23-1.4(17), 23-1.5(a), 23-1.5(b), 23-1.5, 23-1.15, 23-1.16, 23-5.1(c)(2), 23-5.1(f), 23-5.8, 23-5.10, 23-7.1, OSHA regulations and Code of Federal Regulations are dismissed as abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

The remaining two Industrial Code sections plaintiff relies on as part of his Labor Law § 241(6) claim are inapplicable: Industrial Code § 23-5.1(h) deals with scaffold erection and removal; and Industrial Code § 23-5.8(c)(1) relates to the installation and use of a scaffold. As discussed above in plaintiff's Labor Law § 240(1) claim, plaintiff's accident was a result of a gravitational shift while the lift-scaffold was being vertically raised, not building or taking down a scaffold or a horizontal change in where the subject scaffold was positioned.

Labor Law § 200/Common Law Negligence

Defendant contends that plaintiff's claims under Labor Law § 200/common law negligence should also be dismissed since defendant did not direct the means or methods of plaintiff's work, nor did it cause or create the alleged condition that caused plaintiff's injury, nor did it have notice of the alleged condition. In opposition, plaintiff contends that defendant had supervisory control and authority to control plaintiff's work.

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.* [emphasis in original]).

Here, there is no evidence demonstrating that defendant controlled the means of plaintiff's work. Defendant submits the deposition testimony of plaintiff's supervisor who testified that plaintiff's work at the premises was directed and controlled by a Gem supervisor or project manager (NYSCEF # 202 at 40:2-41:10).

In opposition, plaintiff fails to raise an issue of fact. Plaintiff submits the testimony of Peter Granelle, a Project Manager employed by defendant, who testified that he was on-site to ensure that Gem abided by the Contract. Granelle testified that he issued warnings to Gem for lapses in worksite-safety and stopped work at the site on more than one occasion (NYSCEF #225 at 17:24-18:25; 58:20-59:10; 65:13-65:18; 69:12-69:22). However, "[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48 [1st Dept 2012]). Thus, Granelle's authority to halt Gem's work at the premises is insufficient to demonstrate that defendant retained control over the means and methods of plaintiff's work. Accordingly, plaintiff's claim under Labor Law 200/common law negligence is dismissed.

Indemnification

Defendant argues that it is entitled to contractual indemnification from Gem because plaintiff's accident arose out of work pursuant to the Contract. In opposition, Gem contends that the issue of whether defendant was negligent precludes summary judgment of defendant's claim for indemnification. Gem further contends that the indemnification provision does not provide for attorneys' fees or defense costs.

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl*

B. Feiden, Inc., 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]).

The indemnification clause at issue states in relevant part that:

> "If any person sustains injury or death, or loss or damage to property occurs, resulting directly or indirectly from the Work of [Gem] . . . , in their performance of this Contract, . . . or for any other reason whatsoever, [Gem] shall indemnify and hold [NYCHA] harmless from any and all claims and judgments for damages and from costs and expenses to which [NYCHA] may be subjected or which it may suffer or incur by reason thereof"

(NYSCEF # 204 at §16[c]).

For the indemnification provision to be triggered, plaintiff must have been injured while performing work pursuant to the Contract. As discussed at length in the section addressing plaintiff's Labor Law § 240(1) claim, the evidence demonstrates that plaintiff was employed by Gem and that plaintiff was performing work pursuant to the Contract at the time of his injury.

Gem's contention that summary judgment of defendant's contractual indemnification claim is premature is without merit since the court has determined that defendant was not negligent. Accordingly, defendant is entitled to summary judgment on its claim against Gem for contractual indemnification.

Failure to Procure Insurance

Defendant contends that Gem breached its contractual obligation to provide defendant with liability insurance, including defense and indemnification insurance. Gem argues that defendant fails to present evidence demonstrating that Gem failed to procure the required insurance.

The Contract requires that Gem procure Commercial General Liability Insurance, and that the insurance "must provide unlimited defense and indemnification of the New York City Housing Authority . . . ." (NYSCEF # 204 at § 18(c)(2), Attachment A).

Defendant fails to make its *prima facie* showing entitling it to summary judgment of its claim against Gem for failure to procure insurance. Counsel for defendant's conclusory statement that Gem breached its obligation to provide insurance is insufficient to meet its burden. Further, defendant fails to submit any evidence as part of their moving papers demonstrating that Gem failed to comply

with section 18(c)(2) of the Contract. Defendant's submission of coverage disclaimer letters for the first time in their reply papers are not considered by the court (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] [holding that a deficiency of proof in moving papers may not be cured by submitting evidentiary material in reply]).

Thus, the branch of defendant's motion for summary judgment of its third-party claim against Gem for failure to procure insurance is denied, without prejudice.

Accordingly, it is hereby

ORDERED that the branch of defendant NYCHA's motion pursuant to CPLR 3212 for summary dismissal of plaintiff's complaint is granted to the extent that plaintiff's claims under Labor Law §§ 200/common law negligence and 241(6) are dismissed; it is further

ORDERED that the branch of defendant NYCHA's motion pursuant to CPLR 3212 for summary judgment on its third-party claim against third-party Gem is granted to the extent on defendant NYCHA's contractual indemnification claim; it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 3212 is granted to the extent as to plaintiff's claim under Labor Law § 240(1) only; it is further

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

ORDERED that counsel for defendants shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

This constitutes the Decision and Order of the court.

10/21/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE