SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

KEVIN ARASIM, SANDRA ARASIM,

Plaintiffs,

- v -

38 COMPANY LLC, CB RICHARD ELLIS REAL ESTATE, LLC, VII 444 MADISON LESSEE LLC, ALL-SAFE, LLC, RESIDENTIAL MANAGEMENT GROUP, LLC D/B/A DOUGLAS ELLIMAN PROPERTY MANAGEMENT, THE LAUREL CONDOMINIUM,

Defendants.

----------X

INDEX NO. 108427/2010

MOTION DATE 03/26/2019, 04/18/2019

MOTION SEQ. NO. 014 015

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 382, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404

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

The following e-filed documents, listed by NYSCEF document number (Motion 015) 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392

were read on this motion to/for REARGUMENT/RECONSIDERATION.

This Decision and Order addresses two motions in this Labor Law case: Motion Sequence (MS) 014 is All Safe's CPLR 3212 motion for summary dismissal of plaintiff's Labor Law claims and co-defendants' cross-claims for indemnification and contribution, among other claims. In MS 015, plaintiffs move pursuant to CPLR § 2221 for leave to re-argue that portion of this court's Decision and Order dated April 1, 2019 (April Decision), dismissing plaintiff's claim pursuant to Labor Law § 241(6) premised under Industrial Code 23-1.7(f), and upon the granting of reargument, denying defendants' summary judgment motion and reinstating plaintiff Kevin Arasim's Labor Law § 241(6) claim and Sandra Arasim's consortium claim and granting plaintiff summary judgment on his Labor Law § 241(6) claim premised under Industrial Code 23-1.7(f). Co-defendants, 38 Company LLC, CB Richard Ellis Real Estate LLC, VII, and 444 Madison Lessee Inc (Owner defendants) and All Safe, LLC (All Safe) oppose plaintiffs' motion.

Plaintiff's motion (MS 015) for reargument will be addressed first.

CPLR § 2221

A motion for leave to reargue is directed to the trial court's discretion. To warrant reargument, the moving party must demonstrate that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law (*see* CPLR 2221 [d]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2015]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2014]). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted" (*Setters v AI Properties & Developments (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016) [internal citations omitted]).

The court grants reargument and upon reargument, the branch of the Owner defendants' motion for summary dismissal of plaintiff's Labor Law § 241(6) claim premised under Industrial Code 23-1.7(f) is denied.

In order to establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of the accident (*see Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501–502 [1993]). In relevant part, 12 NYCRR 23–1.7(f) requires that stairways, ramps or runways shall be provided as the means of access to working levels above or below ground.

In the prior decision, this court found that plaintiff was injured while he was traversing between the concrete slab located on the second floor of the building and a wooden scaffold that was two-and-a-half feet to four feet below the second floor and that the Owner defendants failed to provide a ramp in that specific location to traverse between the two levels (April Decision at 6). The court also found that plaintiff was injured when he stepped from the concrete slab down onto uneven planking located on the wooden scaffold (*id.*).

However, plaintiff's testimony that a stairway at the worksite provided access from the wooden scaffold to the ground level (NYSCEF # 277, plaintiff's tr at 49:11-13), combined with a co-defendant's project manager's testimony that an interior stairway and elevator provided access from the ground level to the second floor (NYSCEF # 294, CB Richard Ellis Real Estate LLC's Lester tr at 496:13-500:4), demonstrate that an issue of fact exists as to whether the Owner defendants failed to provide an alternative means of access for plaintiff to traverse between the concrete slab on the second floor and the wooden scaffold two-and-one-half-feet to four-feet below the second floor.

On this record, the court should have found that an issue of fact exists as to whether the Owner defendants failed to provide a reasonable alternative means to traverse between the second floor and wooden scaffold and, if not, whether

defendant's failure to provide such equipment was a proximate cause of plaintiff's injury (*see Seepersaud v City of New York*, 38 AD3d 753, 755 [2d Dept 2007] [holding that a triable issue of fact as to whether defendants violated 12 NYCRR 23-1.7(f) where there were alternate means to access the roof]; *McGovern v. Gleason Builders, Inc.*, 41 AD3d 1295, 1296 385 [4th Dept 2007]; *see Channer v ABAX Inc.*, 169 AD3d 758, 760 [2d Dept 2019]).

Defendants contend that plaintiff was the individual authorized to determine whether a ramp was necessary to traverse between the scaffold and second floor. However, the Owner defendants fail to provide a basis that their non-delegable duty under Labor Law § 241(6) was inapplicable (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 348 [1998]).

The Owner defendants' argument that Labor Law § 241(6) does not support plaintiff's wife's derivative claim was made for the first time in opposition to plaintiff's motion to reargue and is not considered by this court.

Since plaintiff's Labor Law § 241(6) claim is reinstated, defendants are entitled to further deposition of plaintiff regarding his Labor Law § 241(6) claim premised under 12 NYCRR 23–1.7(f). The parties shall appear for an in-court conference to address plaintiff's continued deposition as to the remaining Labor Law § 241(6) claim.

CPLR 3212

Labor Law §§ 240(1), 241(6), and 200/Common Law Negligence

Initially, the court notes that All Safe's application for summary judgment dismissing Plaintiff's Labor Law §§ 240(1), and 241(6), and 200/common law negligence claims as against it is granted. As for plaintiff's Labor Law § 240(1) claim, the court already determined in the April Decision that plaintiffs' injury was not a consequence of a height differential (April Decision at 4).

Both plaintiff and the Owner defendants also fail to rebut All Safe's prima facie showing that All Safe is not a proper Labor Law defendant. That is, All Safe was a subcontractor at the not an owner or a general contractor, and did not have the authority to supervise and control plaintiff's work (*see Johnson v City of New York*, 120 AD3d 405, 406 [1st Dept 2014]).

All Safe further establishes its entitlement to a dismissal of the Labor Law §200/common law negligence claim against it by demonstrating that it did not create or have notice of the alleged defective condition (*Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012). All Safe's foreman at the worksite testified that the wooden scaffold planks were installed correctly and pursuant to industry standards

(NYSCEF # 399, McCaroll tr at 45:43-46). The foreman further testified that All Safe left the worksite after the installation, and that Hunter Roberts, plaintiff's employer, assumed responsibility of inspection of the worksite, but that All Safe would return for repairs upon request (*id.* at 25:9-15; 65:21-25; 96:25-98:10). Moreover, CB Richard Ellis Real Estate's Project Manager testified that Hunter Roberts was responsible for worksite safety and that All Safe's installation of the wooden scaffold planks were performed pursuant to proper industry practice (NYSCEF # 278, Lester tr at 182:18-9; 73-76:4).

Accordingly, plaintiff's Labor Law §§ 240 (1), and 241 (6), and 200/common law negligence claims are dismissed as against All Safe.

Common Law Indemnification and Contribution

The branch of All Safe's motion to dismiss the Owner defendants' cross-claim for common law indemnification and contribution is also granted. Plaintiff's claims against All Safe have been dismissed and thus, the Owner defendants are unable to rebut All Safe's showing that it was not negligent (*see McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378 [1st Dept 2011]; *Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003]).

The Owner defendants' contention that plaintiff's injury was due to All Safe's negligence is without merit. As discussed in the previous section, there is no indication that All Safe's construction of the scaffold was negligent. Notably, the Owner defendants fail to cite to any evidence suggesting that All Safe was negligent.

Contractual Indemnification

All Safe contends that that Owner defendants are not beneficiaries to the contract between Hunter Roberts and All Safe (Contract), as none of the Owner defendants are parties to the contract. All Safe further contends that the indemnification provision was not triggered, since plaintiff's accident did not arise from All Safe's work, act or omission at the worksite. The Owner defendants argue that the indemnification provision

The indemnification provision contained in the Contract states that:

> "To the extent permitted by law, and to the extent not caused in whole or in part by an Indemnitee's own negligence, the Subcontractor [All Safe] shall indemnify, defend and hold harmless Hunter Roberts, the Owner . . . from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which

> arise out of or are connected with or claimed to arise out of or be connected with the performance of Work by the Subcontractor [All Safe], or any act or omission of the Subcontractor [All Safe]."

(NYSCEF # 354 at ¶11).

The indemnification provision here clearly states that All Safe is required to indemnify the Owner defendants from any claims arising out of the All Safe's work. In order for a claim to "arise out of" a party's work, there must be a "showing of a particular act or omission in the performance of such work causally related to the incident" (*Brown v Two Exch. Plaza Partners*, 146 AD2d 129, 136 [1st Dept 1989], *aff'd*, 76 NY2d 172 [1990]). "Generally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations (*Worth Const. Co. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]).

Dismissal of the Owner defendants' cross-claim for contractual indemnification is unwarranted. In light of the fact that All Safe was contracted to construct the subject scaffold, and plaintiff's unrefuted testimony that he was injured when he stepped down onto the uneven scaffold planking constructed by All Safe, All Safe fails to demonstrate that plaintiff's claims did not arise out of the contracted work. Accordingly, the branch of All Safe's motion for summary dismissal of the Owner defendants' claim for contractual indemnification is denied.

Breach of Contract for Failure to Procure Insurance

All Safe contends that the Owner defendants' breach of the requirement to procure must be dismissed because it procured the appropriate insurance pursuant to the contract. Counsel for All Safe affirms that All Safe obtained a commercial general liability policy from National Interstate Ins. Co., Policy No. NGL002****, effective February 14, 2009 through February 14, 2010, with Limits of $1 million general aggregate (NI policy).The NI policy also contained blanket additional insured amount, which covered any person or organization All Safe was required to provide coverage to by written construction contract. Additionally, counsel for All Safe states that it procured an Excess Liability Policy from Colony Insurance Company, Policy No AR346****, effective February 14, 2009 to February 14, 2010, with additional limits of $5 million per occurrence and general aggregate.

The Owner defendants, in turn, fail to oppose the branch of All Safe's motion for summary dismissal of the cross-claim for breach of contract for failure to procure insurance, and that claim is dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's motion seeking leave to reargue is granted; and it is further

ORDERED that, upon reargument, the court vacates so much of its prior Decision and Order dated April 1, 2019, which granted the Owner defendants' motion to dismiss plaintiffs' Labor Law 241(6) claim premised under Industrial Code 23-1.7(f) and dismissed plaintiff's spouse's derivative claim, and upon reargument, Owner defendants' motion for summary dismissal of the aforesaid Labor Law 241(6) claim is denied, and plaintiff's Labor Law § 241(6) claim premised under Industrial Code 23-1.7(f) and plaintiff's spouse's derivative claim are reinstated; it is further

ORDERED that the parties shall discuss with each other to address plaintiff's continued deposition; the parties shall apprise the court by telephone conference no later than December 6, 2019, at 10:00 a.m. regarding the date for plaintiff's continued deposition.

ORDERED that the branch of All Safe's motion for summary dismissal of the complaint is granted; it is further

ORDERED that the branch of All Safe's motion pursuant to CPLR 3212 for summary dismissal of the cross-claims of the Owner defendants is granted to the extent that the cross-claims for common law indemnification, contribution, and breach of contract for failure to procure insurance claims are dismissed.

11/19/2019
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