At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 17th day of September 2020.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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JONATHAN C. NOETH,

Plaintiff,

Against

JAMES E. FITZGERALD, INC and 1-10 BUSH TERMINAL OWNER, LP and ORCA MECHANICAL INC.,

Defendants.

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Index No. 510893/2017
Cal. No. 27, 28, 29
MS 7, 8, 9

DECISION AND ORDER

Papers	Numbered
MS 7	Docs. # 151-171, 289-290, 298, 350-351
MS 8	Docs. # 184-213, 292-294, 296-297, 299-308, 319-321, 342-344
MS 9	Docs. # 221-250, 287-288, 291, 309-318, 322-323, 339-341, 348-349

Upon the foregoing cited papers, the decision and order on the above-cited motions is as follows:

Plaintiff commenced this action to recover for crush injuries to his ankle and foot he allegedly sustained on a jobsite located at 237 37th Street, Brooklyn, New York on December 5, 2015, when a 2000-pound dry cooler/HVAC unit fell from rigging as it was being hoisted. Plaintiff was employed by third-party defendant Skylift Contractor Corp. (Skylift) as a rigger at the time of the accident. The building, which was being renovated, was owned by 1-10 Bush Terminal Owner, LLP (Bush). Bush hired James E. Fitzgerald, Inc. (Fitzgerald) as the general contractor for the renovation. Fitzgerald subcontracted with Orca Mechanical Inc. (Orca), a mechanical contractor, to install HVAC units, and Orca contracted with Skylift to hoist the HVAC units.

Plaintiff sought summary judgment (MS 7), pursuant to Labor Law § 240 (1), holding defendants Fitzgerald, Bush, Skylift, and Orca strictly liable. Plaintiff argued that he was engaged in a covered activity under the statute at the time his accident occurred, which gave rise to a nondelegable duty entitling him to summary judgment. Plaintiff further argued that the rigging of the drycooler/HVAC was insufficient to hold the weight and failed to comply with safe rigging practices to prevent the unit from falling.

Orca opposed on the grounds that it was not the owner, the general contractor, or agent for the work the plaintiff was performing when the incident occurred. Orca argued it had no obligation to control the means, methods or equipment related to plaintiff's work, and it did not employ, supervise or instruct plaintiff. Orca argued it was retained by Fitzgerald merely to install the HVAC units and was not involved in the day-to-day management of the construction site at the subject premises. It argued that Fitzgerald purchased the HVAC units, Skylift's foreman was responsible for overseeing the lifting of the HVAC unit that fell and caused plaintiff's injuries, and Skylift provided the slings and cables to lift the HVAC units.

Plaintiff argued in rebuttal that Orca had the authority to supervise or control the activity which brought about plaintiff's injury. Specifically, plaintiff argued Orca was hired by Fitzgerald to install the HVAC units, OCRA had sub-contracted the hoisting of the units onto the roof to Skylift, and OCRA's principle, Edward Kulic, "was present on the roof at the time of plaintiff's injury to oversee the operation and was waiting for the units to be hoisted onto the roof when the units fell on plaintiff."

Labor Law § 240 (1) provides that "[a]ll 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." The statute "imposes a nondelegable duty [on owners, contractors and their agents] to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*Carlton v City of New York*, 161 AD3d 930, 931 [2d Dept 2018], quoting *Vasquez-Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828, 829 [2d Dept 2015]; *see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]).

To hold Orca liable as contractors or agents for violations of Labor Law § 240 (1), plaintiff must be a show that Orca had the authority to supervise and control the work (*Johnsen v City of New York*, 149 AD3d 822, 822 [2d Dept 2017], citing *see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 696-697 [2d Dept 2016]; *Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]; *Bakhtadze v Riddle*, 56 AD3d 589, 590 [2d Dept 2008]). The determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right" (*Johnsen*, 149 AD3d at 822, citing *Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000]; *see Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013]).

Here, plaintiff argued Orca had the authority to supervise and control the activity which brought about plaintiff's accident, but presented no proof of Orca's activities or contractual agreement to substantiate such. Rather, the testimony of Ferdinand Medalla, Skylift's foreperson, established that Skylift was hired to hoist the dry coolers. Skylift provided riggers and hoisting equipment, determined how the hoisting would be undertaken, oversaw the hoisting, and supervised its staff including plaintiff. Accordingly, plaintiff failed to establish its entitlement to summary judgment on its Labor Law § 240 (1) claim against Orca.

Skylift also opposed plaintiff's motion, pursuant to Labor Law § 240 (1), for summary judgment against it. Skylift argued the rigging eyes on the dry cooler unit failed and not a safety device of the kind enumerated in Labor Law § 240, which included the shackles, cables/slings or crane used to hoist the dry cooler.

"[T]he protections of Labor Law § 240 (1) 'do not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Carlton*, 161 AD3d at 931, quoting *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Liability under Labor Law § 240 (1) depends on whether the injured worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (*Carlton*, 161 AD3d at 931-932, citing *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *see Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 20 [2d Dept 2016]). "The single decisive question in determining whether Labor Law § 240 (1) is applicable is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Carlton*, 161 AD3d at 932, quoting *Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Labor Law § 240 (1) "does not automatically apply simply because an object fell and injured a worker; 'a plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute'" (*Carlton*, 161 AD3d at 932, quoting *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] [emphasis added]; *Maldonado v AMMM Props. Co.*, 107 AD3d 954, 955 [2d Dept 2013]). "To prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard

contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Fabrizi*, 22 NY3d at 662, quoting *Narducci*, 96 NY2d at 267 [2001], citing *Ross*, 81 NY2d at 501).

Here, Skylift raised a triable issue of fact. Mr. Medalla, on behalf of Skylift, testified that two of four rigging eyes were shackled to cables that were connected to a crane to hoist the dry cooler. He further testified that this was done properly. It is well-settled that "[a]n expert opinion is beneficial where it would 'help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror'" (*Green v Iacovangelo*, 184 AD3d 1198, 1201 [4th Dept 2020], quoting *De Long v County of Erie*, 60 NY2d 296, 307 [1983]). This Court lacks the technical knowledge to determine whether the subject dry cooler was hoisted properly as Mr. Medalla averred or whether plaintiff's injuries resulted because of the absence or inadequacy of a safety device as plaintiff averred. Accordingly, plaintiff's motion for summary judgment, pursuant to Labor Law § 240 (1), against Skylift is denied. For the same reason, plaintiff's motion for summary judgment, pursuant to Labor Law § 240 (1), against Bush and Fitzgerald is also denied.

Ocra moved for summary judgment (MS 8) seeking dismissal of plaintiff's causes of action pursuant to Labor Law §§ 200, 240 (1) and 241 (6), and for contractual indemnification and breach of contact based on failure to procure insurance against Skylift. Fitzgerald opposed the motion on the grounds that Ocra is liable as a "statutory agent," arguing the evidence demonstrates Orca retained authority to supervise and control the work which caused the incident and plaintiff's alleged injuries. For the reasons previously stated, Ocra is granted summary judgment on plaintiff's cause of action pursuant to Labor Law § 240 (1). For the same reasons, Ocra is granted summary judgment on plaintiff's cause of action pursuant to Labor Law § 241 (6) (see *Johnsen*,

149 AD3d at 822, citing *see Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 696-697 [2d Dept 2016]; *Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]; *Bakhtadze v Riddle*, 56 AD3d 589, 590 [2d Dept 2008]).

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 971 [2d Dept 2009], citing see *Ross*, 81 NY2d at 501-502; *Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). Where, as here, a claim arises out of the manner in which work is performed, based on alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that they directed or controlled the means and methods of the performance of the work that caused injury (*LaGiudice*, 67 AD3d at 972, citing *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204 [2d Dept 2007]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Liability for injuries arising from the manner in which work is performed arises under Labor Law § 200 when a defendant had the authority to exercise supervision and control over the work (*Johnsen*, 149 AD3d at 822, citing *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 698 [internal quotation marks omitted], quoting *Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept 2010]).

Here, movants averred and the record established that Skylift, and not movants, directed and controlled the means and methods of the work that caused plaintiff's injuries. Having met their prima facie burden, and without opposition to this branch of the motion, Orca is granted summary judgment on plaintiff's Labor Law § 200 claim against it (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Skylift opposed Orca's motion for summary judgment seeking contractual indemnification and breach of contract against it. Ocra proffered an agreement executed on July 28, 2014, wherein Skylift agreed to indemnify and hold Ocra harmless. Skylift averred this agreement applied to Edward Kulic, Orca's owner, individually and not to Orca because Mr. Kulic placed his signature on the line that indicated, "Contractor Name." The Court finds this argument unavailing and insufficient to raise a triable issue. The language of the agreement clearly indicated the parties' intention Skylift would indemnify Orca and add it as an additional insured on its policy. Having failed to raise a triable issue or provide proof of insurance, Orca is granted summary judgment on its claims for contractual indemnification and breach of contract against Skylift.

Bush and Fitzgerald moved for dismissal (MS 9) of plaintiff's Labor Law § 200 and common law negligence claims against them, and summary judgment on its claims for contractual indemnity against Orca and Skylift, deeming their claims against Skylift resolved pursuant to CPLR 3126 (1), and precluding Skylift, pursuant to CPLR 3126 (2), from producing evidence with regard to issue of contractual indemnity. Orca opposed the portion of the motion seeking summary judgment against it. To the extent the complaint against Orca was dismissed on summary judgment, Fitzgerald's motion for summary judgment on its contractual claims against Orca is denied.

Movants averred they are entitled to summary judgment on plaintiff's Labor Law § 200 because they neither exercised the requisite authority to supervise or control the manner in which plaintiff's work was performed nor provided the materials used by Skylift when the accident occurred. Where, as here, a claim arises out of the manner in which work is performed, based on alleged defects or dangers in the methods or materials of the work, recovery

against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that they directed or controlled the means and methods of the performance of the work that caused injury (*LaGiudice*, 67 AD3d at 972, citing *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204 [2d Dept 2007]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

Here, movants averred and the record established that Skylift, and not movants, directed and controlled the means and methods of the work that caused plaintiff's injuries or had the authority to exercise supervision and control over the work. Having met their prima facie burden, and without opposition to this branch of their motion, Bush and Fitzgerald are granted summary judgment on plaintiff's Labor Law § 200 and common law negligence claims against them (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Johnsen*, 149 AD3d at 822, citing *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d at 698 [internal quotation marks omitted], quoting *Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept 2010]).

Bush and Fitzgerald also sought summary judgment on their claims for contractual indemnity against Skylift, and to deem their claims against Skylift resolved pursuant to CPLR 3126 (1), and preclude Skylift, pursuant to CPLR 3126 (2), from producing evidence with regard to the issue of contractual indemnity. Movants aver the July 2014 agreement between Orca and Skylift obligated Skylift to indemnify and hold them harmless. The agreement indicated Skylift agreed to indemnify and hold harmless the "Owner, and the Contractor and all of their agents and employees." The contractor was identified as Orca.

Skylift opposed. It proffered the affidavits of Francis Crowley and Melissa Calabrese which denied that it received, executed and returned the July 2014 agreement and challenged the

veracity of the signature executing the agreement. Ms. Calabrese also averred she was not aware of the agreement until after the accident. Mr. Crowley, admittedly, had little familiarity with Orca in 2014. Skylift also averred Frank Allecia, Skylift's owner, was the only person who was authorized to and did negotiate and sign contract documents on behalf of Skylift.

Mr. Allecia failed to appear for examination under oath and was precluded by the order of the Honorable Lizette Colon on February 3, 2020, for failing to comply with court-ordered discovery. Reargument of Justice Colon's February 3 order was denied on August 4, 2020, and "Skylift [was] precluded from offering evidence, affidavit and/or testimony of Frank Allecia on motion or at trial." To the extent the affidavits of Mr. Crawley and Ms. Calabrese assert testimony Mr. Allecia is precluded from proffering directly, Skylift may not circumvent Justice Colon's preclusion order (*see* CPLR 3126).

Nevertheless, upon the plain reading of the contract, and movants having failed to show they are agents of Orca, this branch of the motion is denied (*see Remet Corp v Pyne*, 26 NY3d 58, 63 [2015], citing *see generally Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]) and the sufficiency of Skylift's opposition need not be considered (*see Winegrad*, 64 NY2d at 853).

As to the branch of the motion to deem movants' claims against Skylift resolved pursuant to CPLR 3126 (1), and preclude Skylift, pursuant to CPLR 3126 (2), from producing evidence with regard to the issue of contractual indemnity, the motion is denied without prejudice to seeking relief in the Discovery Part or before the presiding trial judge.

It is, therefore, ordered:

Plaintiff's motion for summary judgment (MS 7) is denied.

Orca's motion for summary judgment (MS 8) is granted.

Bush and Fitzgerald's motion for summary judgment (MS 9) is granted to the extent plaintiff's claims, pursuant to Labor Law § 200 and common law negligence, against it are dismissed; the remainder of the motion is denied.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Honorable Reginald A. Boddie
Justice, Supreme Court

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