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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY *Justice*

PART 9

Index Number : 105471/2011
GONZALEZ, MOISES
vs.
VANGUARD CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 105471/11
MOTION DATE 6/24/13
MOTION SEQ. NO. 002

The following papers, numbered 1 to 18, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1-15

Answering Affidavits — Exhibits ____ No(s). 16

Replying Affidavits ____ No(s). 17-18

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/7/13

JOAN M. KENNEY 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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MOISES GONZALEZ,

Plaintiff,

-against-

VANGUARD CONSTRUCTION AND DEVELOPMENT COMPANY, INC.,

Defendant.

Index No. 105471/11

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VANGUARD CONSTRUCTION AND DEVELOPMENT COMPANY, INC.,

Third-Party Plaintiff,

-against-

PHASE 1 REMOVALS, INC.,

Third-Party Defendant.

Third-Party Index No. 590002/12

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Joan M. Kenney, J.:

Motions with sequence numbers 002 and 003 are consolidated for disposition.

This action arises out of injuries plaintiff Moises Gonzalez suffered when he was struck by a piece of wood as it came out of a chute being used to discard construction debris. In motion sequence number 002, Vanguard Construction and Development Company, Inc. (Vanguard) moves for summary judgment (1) dismissing plaintiff's Labor Law §§ 200 and 241 (6) and common-law negligence claims, and (2) on its third-party claims against Phase 1 Removals, Inc. (Phase 1). In his motion, motion sequence number 003, plaintiff seeks summary judgment on the issue of Vanguard's liability under Labor Law § 240 (1).

BACKGROUND

On February 17, 2011, plaintiff was a laborer employed by Phase 1, performing demolition work at 283 West Broadway, a property owned by nonparty Hazeldon/New York. The project was one of conversion of a mixed commercial/residential building to one that was solely residential. Vanguard was the general contractor for the project, and Phase 1 was the interior demolition subcontractor.

As part of the project, Phase 1 employees on the sixth-floor roof used a chute to transport wood and sheetrock to their counterparts on the first floor. The chute was a modified internal trash chute which was round, and approximately 24 inches in diameter (the modification was cutting off the bottom at the first floor). At the bottom of the chute, there was a one-yard dumpster which was surrounded by a plywood barricade. The barricade bore the designation "CAUTION."

There were two different methods used in getting the wood and debris from the sixth-floor laborers to those on the ground. One was that the people at the ground level would yell up to the people on the roof to throw down the wood and other debris, and then the first-floor people would yell up to tell the sixth-floor people to stop. During that stop, the first-floor people would open the barricade and remove the debris. Then the first-floor people would yell up to the roof people to drop down more debris, and the cycle

continued.

The second method was that the roof people would send down four pieces of wood at a time, and stop until the ground-floor people emptied the dumpster. Plaintiff was injured when a fifth piece of wood was sent down after plaintiff had begun to empty the dumpster.

Plaintiff alleges that the pieces of wood were eight feet long, two inches thick, and four inches wide. Bobbie Berrios, Phase 1's labor foreman, attests that the pieces of wood were small, no greater than two feet long, and that there is no way that an eight-foot-long plank would have been thrown down a chute. Brian Doxey, Phase 1's estimator, testifies that Vanguard was charged an additional fee for the use of the pre-existing chute because it required that debris be cut into smaller pieces. Berrios attests that heavier debris was not sent down the chute. Rather, heavier material was carried down the stairs.

THE PLEADINGS

Plaintiff's complaint alleges four causes of action, sounding in common-law negligence, and violations of Labor Law § 200, 240, and 241 (6). Vanguard's answer does not assert any counterclaims. Vanguard brings a third-party action against Phase 1, for contractual indemnity and breach of contract by failure to procure insurance. Phase 1's third-party answer alleges a cross claim against Vanguard for common-law indemnification or contribution.

DISCUSSION

The motions will be considered out of sequence.

Summary Judgment

> "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial [citations omitted]"

(*Ostrov v Rozbruch,* 91 AD3d 147, 152 [1st Dept 2012]; *see also VisionChina Media Inc. v Shareholder Representative Servs., LLC,* 109 AD3d 49, 58 [1st Dept 2013] ["Summary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law ... and the opponent fails to rebut that showing (internal quotation marks and citation omitted)"]; *Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] ["the movant bears the burden to dispel any question of fact that would preclude summary judgment"]). The court must determine whether that standard has been met based "on the evidence before the court and drawing all reasonable inferences in plaintiff's favor" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]). However, "[t]he court's function on a motion for summary judgment is merely to

determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

Plaintiff's Motion for Summary Judgment (motion sequence number 003)

Labor Law § 240 (1) provides, in pertinent part:

> "All contractors and owners and their agents ... in the ... demolition ... 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."

Labor Law § 240 (1) provides "exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level where materials or load are being hoisted or secured [internal quotation marks and citation omitted]" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011]) or where a falling object "'required securing for the purposes of the undertaking'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 605 [2d Dept 2013], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,

7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). Under Labor Law § 240 (1), "owners, general contractors and their agents have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites [internal quotation marks and citation omitted]" (*Naughton v City of New York*, 94 AD3d 1, 7 [1st Dept 2012]). To establish liability under the statute, "a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mech. of NY Corp.*, 80 AD3d 564, 565 [2d Dept 2011]).

Plaintiff cites two Appellate Division cases involving debris chutes at construction sites. These two cases granted summary judgment in plaintiff's favor: *Henningham v Highbridge Community Hous. Dev. Fund Corp.* (91 AD3d 521, 522 [1st Dept 2012] [plaintiff injured by cinderblock while clearing chute]), and *La Veglia v St. Francis Hosp.* (78 AD3d 1123, 1127 [2d Dept 2010] [plaintiff was injured by metal stud thrown down a chute; "plaintiff's injuries were caused either by the inadequacy of the chute in protecting him from the elevation-related risk resulting from the disposal of the debris down that chute, or the failure to employ hoists, pulleys, or scaffolds for the removal of the debris, which might have provided the necessary protection"]).

Phase 1 attempts to distinguish these cases from the present one by saying that *Henningham* and *La Veglia* involved heavy,

cumbersome materials like cement blocks and metal studs, whereas this case involves small pieces of wood (no longer than two feet, assuming that plaintiff erred in testifying that the wood was eight feet long) and sheetrock.

The court declines to adopt this reasoning. How long is long, and how heavy is heavy?

When all is said and done, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). In this matter, as in *Henningham* and *La Veglia*, plaintiff was injured by construction debris falling from a height through a chute, because he was not provided with adequate protection or safety devices which would have prevented the accident and injuries.

Vanguard urges that plaintiff was the sole proximate cause of his injuries. This court has already determined that Vanguard's failure to provide adequate protection to plaintiff was a cause of his injuries. Thus, the suggestion that plaintiff was the sole proximate cause of the accident must be discarded (*see e.g. Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means

that there has been no statutory violation"]).

Accordingly, plaintiff's motion for summary judgment on the issue of Vanguard's liability under Labor Law § 240 (1) is granted.

Vanguard's Motion for Summary Judgment (motion sequence number 002)

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

In interpreting this statute, the Appellate Division, First Department, has held:

> "Section 200 (1) of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work. Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed [internal citations omitted]"

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

This case involves the means and methods by which the work was performed, i.e., the manner in which debris was disposed of.

Supervision and control are preconditions to liability under Labor Law § 200 when the accident arises from the contractor's means and methods of performing the work. "In other words, the party against whom liability is sought must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [interior quotation marks and citation omitted]" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48 [1st Dept 2012]). "'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when the defendant bears the responsibility for the manner in which the work is performed' [citation omitted]" (*Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012]). "[G]eneral supervision and coordination of the worksite [are] insufficient to trigger liability" (*Vasiliades v Lehrer McGovern & Bovis, Inc.*, 3 AD3d 400, 401-402 [1st Dept 2004]; *see also Haider v Davis*, 35 AD3d 363, 364 [2nd Dept 2006]).

Vanguard's evidence makes it clear that it did not control or supervise plaintiff's work. Vanguard did not tell plaintiff how to do his job, nor did it provide plaintiff with tools or equipment. Instead, plaintiff received his orders from Phase 1's foreman, Bobby Berrios, who supervised Phase 1's employees' work. At most, Vanguard's authority to stop work that was not being performed safely was general supervision, insufficient to impose liability.

Therefore, the part of Vanguard's motion which seeks summary

judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> "6. 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

With respect to this statute, the First Department has stated that:

> "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under section 241 (6) a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications' [internal citations omitted]"

(*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept

2012]). The Industrial Code provision relied upon must be applicable, as well as specific and concrete (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1047 [2d Dept 2012]). "To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska US Bldg. Inc.*, 99 AD3d at 146).

The Industrial Code is found at 12 NYCRR Part 23. The provision on which plaintiff relies is 12 NYCRR 23-1.20, "Chutes." This provision has been found to be sufficient to support a section 241 (6) claim (*see e.g. Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2d Dept 2008]).

The chute at issue here was metal, round, and approximately 24 inches in diameter. It ran straight down, with no bends, and emptied its contents into a one-yard dumpster which was surrounded by a plywood barricade labeled "CAUTION."

Industrial Code § 23-1.20 (a) ("Chute enclosures") requires that

> "[w]ooden or metal chutes used for the removal of material and debris from elevated levels of a building or other structure and which are at an angle of more than 45 degrees from the horizontal shall be entirely enclosed on all sides and the top, except for openings used for the receiving and discharging of material and debris. Such necessary openings shall not exceed 48 inches in height, measured along the wall of the chute, and all openings shall be covered when not in use. ..."

There is no evidence that this provision was violated, and even if it had been, there is no evidence that such a violation was a causative factor in plaintiff's injuries.

Sections (b) and (c) of section 23-1.20, pertaining to chute construction and protection at chute openings, are also inapplicable. Plaintiff's contention that using a pre-existing residential trash chute instead of a construction debris chute is "inherently dangerous" and a violation of section 23-1.20 (b), is unsupported, and thus, is disregarded.

Section 23-1.20 (d) ("Danger signs") is inapplicable. The barricade around the dumpster in this case was labeled "CAUTION" rather than "DANGER," but there is no evidence that any alleged violation of this provision was a contributing factor in causing plaintiff's injuries.

The part of Vanguard's motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted.

Contractual Indemnity

> "A party's right to contractual indemnification depends upon the specific language of the contract. Where there is no legal duty to indemnify, a contractual indemnification provision must be strictly construed to avoid reading into it a duty which the parties did not intend to be

> assumed. The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]"

(*Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 807-808 [2d Dept 2012]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor [internal quotation marks and citation omitted]" (*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]; *see also De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] ["(i)n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant [internal quotation marks and citation omitted]").

Paragraph 3 of the Vanguard/Phase 1 Purchase Order Agreement sets forth the indemnification provision of the contract. It provides, in relevant part:

> To the fullest extent permitted by law, Subcontractor [Phase 1] will indemnify and hold harmless Contractor [Vanguard] ... from and against any and all claims, suits, liens, judgments, damages, losses and expenses, including but not limited to legal fees and

> all court costs and liability (including statutory liability) arising in whole or in part and in any manner from injury ... of person ... resulting from the acts, omissions, breach or default of subcontractor, its ... employees ... in connection with the performance of any work by or for subcontractor pursuant to any contract, purchase order and/or related proceed order, except those claims, suits, liens, judgments, damages, losses and expenses caused by the negligence of the party indemnified hereunder. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against Contractor ... arising in whole or in part out of any such acts, omissions, breach or default

(Schlesinger 4/17/13 Affirm., Ex. F). In addition, Vanguard and Phase 1 entered into a Hold Harmless Agreement which sets forth the same language and obligations as in the Vanguard/Phase 1 Purchase Order Agreement (*id.*, Ex. M).

This court has dismissed plaintiff's Labor Law §§ 200 and 241 (6) and common-law negligence claims against Vanguard. On the other hand, Vanguard has been found liable to plaintiff under Labor Law § 240 (1). However, section 240 (1) liability

> is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence. A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence [internal citations omitted]

(*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *see also Aviles v Port Auth. of N.Y. & N.J.*, 202 AD2d 45, 52 [1st Dept 1994], quoting *Brown*]).

The agreement provides that Phase 1 must defend and indemnify Vanguard, except for any liability arising from Vanguard's own negligence. The court has not determined that Vanguard was negligent. Thus, the contract must be enforced according to its terms.

The part of Vanguard's motion which seeks summary judgment on its contractual indemnification claim against Phase 1 is granted, on condition that Vanguard become liable to plaintiff for money damages.

Breach of Contract

Vanguard's third cause of action in its third-party complaint alleges that Phase 1 breached its contract with Vanguard by failing to procure insurance in Vanguard's behalf. Phase 1 has provided a copy of the policy it procured from Scottsdale Insurance Company, number BCS0021955, covering the period April 21, 2010 to October 29, 2011. Although there are provisions in the policy relating to additional insureds (CG 20 33 [07-04], CG 20 37 [07-04], and GLS-294S [04-08]), the location where plaintiff was injured (283 West Broadway, in Manhattan) is not listed in the Schedule of Locations (UTS-SP-3 [8-96]) which are covered under the policy. Thus, Phase 1 failed to procure the insurance required under the contract entered into by Vanguard and Phase 1. Summary judgment on Vanguard's claim for breach of contract against Phase 1 must be granted.

Accordingly, it is

ORDERED that the part of Vanguard Construction and Development Company, Inc.'s motion (motion sequence number 002) which seeks summary judgment dismissing plaintiff Moises Gonzalez's Labor Law §§ 200 and 241 (6), and common-law negligence claims is granted; and it is further

ORDERED that the part of Vanguard Construction and Development Company, Inc.'s motion which seeks summary judgment on its breach of contract claims against Phase 1 Removals, Inc. is granted; and it is further

ORDERED that the part of Vanguard Construction and Development Company, Inc.'s which seeks summary judgment on its claim for contractual indemnification against Phase 1 Removals, Inc. is granted, upon the condition that Vanguard Construction and Development Company, Inc. become liable to plaintiff Moises Gonzalez for money damages; and it is further

ORDERED that plaintiff Moises Gonzalez's motion (motion sequence number 003) for summary judgment on the issue of Vanguard Construction and Development Company, Inc.'s liability under Labor Law § 240 (1) is granted; and it is further

ORDERED that the parties proceed to mediation/trial forthwith.

October 7, 2013

ENTER:

JOAN M. KENNEY