NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

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CHRISTIAN OLMEDO VASQUEZ,

Plaintiff,

- against -

MANHATTAN COLLEGE, and PAVARINI NORTH EAST CONSTRUCTION CO., LLC,

Defendants.

----------X

MANHATTAN COLLEGE,

Third-Party Plaintiff,

- against -

ENVIRONMENTAL MAINTENANCE CONTRACTORS, INC.,

Third-Party Defendant.

----------X

Index №. 28636/2019E

Hon. **Lucindo Suarez**
Justice Supreme Court

The following papers numbered as reflected in NYSCEF were read on these motion **(NYSCEF Seq. Nos. 1, 2** ) noticed on _____and duly submitted as **Nos.** __ on the Motion Calendar of _____

| **Sequence 1, 2** | AS INDICATED IN NYSCEF |
|---|---|

Upon the foregoing papers, the foregoing motions are decided in accordance with the annexed decision and order.

Dated: **9/3/2021**

LUCINDO SUAREZ, J.S.C.

Hon. _____
**Lucindo Suarez, J.S.C.**

| | | | | |
|---|---|---|---|---|
| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☐ CASE STILL ACTIVE | | |
| 2. MOTION IS..... | ☐ GRANTED | ☐ DENIED | ☐ GRANTED IN PART | ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER | | |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

----------X

CHRISTIAN OLMEDO VASQUEZ,

Plaintiff,

DECISION and ORDER
Index No. 28636/2019E

- against -

MANHATTAN COLLEGE, and PAVARINI NORTH EAST CONSTRUCTION CO., LLC,

Defendants.

----------X

MANHATTAN COLLEGE,

Third-Party Plaintiff,

- against -

ENVIRONMENTAL MAINTENANCE CONTRACTORS, INC.,

Third-Party Defendant.

----------X

Hon. Lucindo Suarez

In NYSCEF Motion Sequence No. 1, third-party defendant Environmental Maintenance Contractors, Inc. (hereinafter, "Environmental") moves for an Order pursuant to CPLR §3212 dismissing the claims of defendants/third party plaintiff Pavarini North East Construction Co., LLC (hereinafter, "Pavarini") against it for common law indemnification and contribution.

In NYSCEF Motion Sequence No. 2, defendant Pavarini North East Construction Co., LLC (hereinafter, "Pavarini") moves pursuant to CPLR §3212 for an Order dismissing all claims asserted against it.

Plaintiff commenced this action to recover damages for injuries that he allegedly sustained on June 1, 2019, when he fell from a ladder. Plaintiff alleges violations of Labor Law §§200, 240, 241(6) and common law negligence.

By contract dated March 16, 2018, owner-defendant Manhattan College and Pavarini entered into a contract by which Pavarini was to perform certain work on the campus, including work in the Leo Hall facility. That work did not involve asbestos remediation or asbestos work. Pursuant to that contract, Manhattan College reserved to itself the right to retain other contractors to perform other work at the location. Such other work was not a part of the Manhattan – Pavarini contract. That

contract specifically defined "The Work" means the construction and services required by the contract documents...." Those documents did not involve any asbestos removal work.

By proposal/agreement dated May 31, 2019, Manhattan College and Environmental agreed that Environmental would provide the removal/clean up and disposal of a minor quantity of pipe insulation from within the Concrete Lab Closet and flooring materials from within Room 140 cluster. According to the incident report prepared by plaintiff's foreman, plaintiff was working in an asbestos removal area, which was closed off and restricted to authorized employees only so as to limit asbestos contamination, when he fell from an unsecured ladder.

Environmental argues that common law indemnity is not available to Manhattan College because plaintiff did not sustain a "grave injury" as defined in the statue. In addition, Environmental argues that Manhattan College is not entitled to contractual indemnification as the contract between Manhattan College and Environmental did not provide indemnity to Manhattan College.

Pavarini maintains that the contractor by whom the plaintiff was employed was hired directly by the owner, under a provision in the contract between Pavarini and the owner under which the owner could hire contractors directly. Pavarini maintains that it thus had no duty to plaintiff stemming from or arising out of the work plaintiff was performing at the time of the accident. Pavarini argues that because it was not involved with that work, and because it did not supervise plaintiff's work, Pavarini had no duty or responsibility to plaintiff or plaintiff's employer.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Labor Law §240(1) applies where elevation-related risks are at involved in the work. (*Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267 [2001]; *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 [1st Dept. 2011] ["Labor Law §240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was unaware, and therefore over which it exercised no supervision or control.") The fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law §240(1). (*O'Brien v. Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33, 74 N.E.3d 307, 310, 52 N.Y.S.3d 68, 71 [2017].) To recover under Labor Law §240(1) for injuries sustained in a falling object case, a plaintiff must

establish both: (1) that the object was being hoisted or secured, or that it required securing for the purposes of the undertaking; and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential. (*Flowers v. Harborcenter Dev.,* LLC, 2017 N.Y. App. Div. LEXIS 8146, 1, 2017 NY Slip Op 08117, 1 [4th Dept. 2017].)

Labor Law §240(1) "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, 959 N.E.2d 488, 935 N.Y.S.2d 551).

Labor Law §241(6) imposes on owners and contractors a nondelegable duty 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 sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident. (*Yaucan v. Hawthorne Vil., LLC,* 2017 N.Y. App. Div. LEXIS 8088, 2017 NY Slip Op 08035 [2d Dept. 2017].) "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York*, 88 AD3d 951, 953, 931 N.Y.S.2d 662 [2d Dept. 2011]). As a prerequisite to a Section 241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. (*DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241[6].)

With respect to the Labor Law claims raised herein, Pavarini argues that the plaintiff was injured as a result of work performed under a separate contract with the owner as to which Pavarini was a stranger. Co-defendant Manhattan College does not oppose the motion. In construing Sections 240 and 241, it has been held that, "Although the statutes appear to impose liability unequivocally on "[all] contractors and owners and their agents" (Labor Law, §240, subd 1; §241 [emphasis added]), this language must be interpreted in light of the historical development of these provisions." (*Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 807, 445 N.Y.S.2d 127, 129 [1981] [prime contractors not liable for injury to general contractor's employee].) In *Wong v. New York Times Co.* (297 AD2d 544, 747 N.Y.S.2d 213 [1st Dept. 2002]), the First Department considered whether a general contractor was liable under the Labor Law for injuries sustained by an individual

who was supervised by a different general contractor. In *Wong*, the plaintiff, an employee of a subcontractor who was engaged to install a printing press, was injured when he fell while dismantling a crane. The plaintiff sued the general contractor responsible for the general construction at the worksite, even though there was a different general contractor responsible for the installation of the printing presses. The First Department dismissed plaintiff's claim, reasoning that the general contractor for the construction was not strictly liable for an injury suffered by a worker who was supervised and hired by the prime contractor for the printing press installations.

Here, the moving defendant has shown that the work performed by plaintiff was governed by a separate contract with the owner. Moreover, the work did not involve supervision by the movant as to worksite safety. In effect, the movant was akin to a prime contractor with respect to the separate contract entered into by the owner. "Generally speaking, the prime contractor for general construction . . . has no authority over other prime contractors unless the prime contractor is delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work." (*Walsh v. Sweet Assoc*, 172 AD2d 111, 113, 577 N.Y.S.2d 324 [3d Dept. 1991] [citations omitted]). "There is no question that 'the absolute liability imposed upon owners and general contractors pursuant to Labor Law §240 (1) and §241(6) does not apply to prime contractors having no authority to supervise or control the work being performed at the time of the injury" (*Morris v. C & F Bldrs., Inc.*, 87 A.D.3d 792, 793, 928 N.Y.S.2d 154 [3d Dept. 2011], quoting *Hornicek v. William H. Lane, Inc.*, 265 AD2d 631, 631-632, 696 N.Y.S.2d 557 [3d Dept. 1999]; *see Villanueva v. 80-81 & First Assoc.*, 141 AD3d 433, 434, 33 N.Y.S.3d 895 [1st Dept. 2016] [prime contractor not liable under Labor Law §240 (1) or §241 for injuries caused to the employees of other contractors with which it was no in privity of contract, since it had not been delegated the authority to supervise and control plaintiff's work]). Under the circumstances herein, the movant had no duty under the Labor Law with respect to the separate work undertaken by the asbestos removal contractor.

An owner or contractor may be liable under the common law or under Labor Law §200 for a dangerous condition arising from either the condition of the premises or the means and methods of the work. (*See Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143-144, 950 N.Y.S.2d 35 [1st Dept. 2012]). Liability only attaches for an injury arising from the means and methods of the work if the defendant exercised supervisory control over the work (*id.* at 144). Defendant Pavarini has shown that it had no control over the manner in which plaintiff performed his work.

As to Motion Sequence No. 1, as noted above, Environmental argues that common law indemnity is not available to Manhattan College because the plaintiff did not sustain a "grave injury"

as defined in the statue. Workers' Compensation Law §11 bars employer liability to third parties based upon liability for injuries sustained by employees in the scope of employment, "unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'" (*Rubeis v. Aqua Club, Inc*., 3 N.Y.3d 408, 418, 821 N.E.2d 530, 788 N.Y.S.2d 292 [2004]). Although defendant Manhattan College argues that it did not have sufficient time to engage in meaningful review of the medical reports, it is clear from the allegations raised by plaintiff that no "grave injury" exists. In addition, Manhattan College is not entitled to contractual indemnification as the contract between Manhattan College and Environmental did not provide indemnity to Manhattan College. The contract in fact provides indemnity only by Manhattan College to Environmental.

Accordingly, based upon the foregoing, it is hereby

OREDERD that the separate motions are granted; and it is

ORDERED that all claims for common law and contractual indemnity against third party defendant Environmental Maintenance Contractors, Inc. are dismissed; and it is further

ORDERED that all claims against defendant/third-party plaintiff Pavarini North East Construction Co., LLC are dismissed; and it is further

ORDERED that all other relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of the court.

Dated: September 3, 2021

Hon. Lucindo Suarez, J.S.C

LUCINDO SUAREZ, J.S.C.